Study L-622 April 3, 2008

First Supplement to Memorandum 2008-15

Donative Transfer Restrictions: Exceptions to Disqualification

The staff has new information about the operation of the Donative Transfer Restriction Statute that is worth noting.

Exception for Nonprofit Entities

As discussed in Memorandum 2008-15, existing law exempts gifts to nonprofit entities from the operation of the Donative Transfer Restriction Statute. See Prob. Code § 21351(f).

The staff has been told informally that the exemption was specifically added during the legislative process to address concerns about obstacles to charitable giving.

Inclusion of Institutional Caregivers

The definition of "care custodian" is not entirely clear as to whether or not a non-natural person can be a disqualified person under the care custodian provision. For example, would a gift to a nursing home, by a tenant of that nursing home, be a gift to a care custodian of a dependent adult? **The Commission should state the rule clearly, one way or another.**

If the Commission concludes that institutional caregivers should be subject to the Donative Transfer Restriction Statute as "care custodians," **the Commission should consider whether a distinction needs to be drawn between for-profit and nonprofit institutions.**

Finally, the Commission should be aware that Health and Safety Code Section 1289 already imposes some restrictions on gifts to long-term health care facilities:

> 1289. (a) No owner, employee, agent, or consultant of a long-term health care facility, as defined in Section 1418, or member of his or her immediate family, or representative of a public agency or organization operating within the long-term health care facility with state, county, or city authority, or member of his or her

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

immediate family, shall purchase or receive any item or property with a fair market value of more than one hundred dollars ($100) from a resident in the long-term health care facility, unless the purchase or receipt is made or conducted in the presence of a representative of the Office of the State Long-Term Care Ombudsman, as defined in subdivision (c) of Section 9701 of the Welfare and Institutions Code. The role of the ombudsman is to witness the transaction and to question the resident and others as appropriate, about the transaction. The ombudsman may submit written comments pertaining to the transaction into the health records of the resident. The Office of the State Long-Term Care Ombudsman shall establish guidelines concerning activities of ombudsmen pursuant to this section. Additionally, the transaction described in this subdivision shall be recorded by the facility in the health records of the resident. The record of the transaction shall include the name and address of the purchaser, date and location of the transaction, description of property sold, and purchase price. The instrument shall include signatures of the resident, the purchaser, and the witnessing ombudsman.

> (b) Any owner, employee, agent, or consultant of a long-term health care facility, or member of his or her immediate family, or representative of a public agency or organization operating within the long-term health care facility with state, county, or city authority, or member of his or her immediate family, who violates subdivision (a) shall be required to return the item or property he or she purchased to the person from whom it was purchased, if he or she still possesses it. If the employee no longer possesses the item or property, he or she shall pay the person who sold the item or property the fair market value at the time he or she would otherwise be required to return the property.

> (c) Craft items, which are those items made by residents of a long-term health care facility, are exempt from the provisions of this section.

> (d) Any violation of this section shall be subject to a civil penalty not to exceed one thousand dollars ($1,000) which shall be enforced by the Department of Aging. The Department of Aging may bring a cause of action in a court of competent jurisdiction to enforce the provisions of this subdivision.

> (e) Notwithstanding Section 1290, any person who violates this section is guilty of an infraction and shall be punished by a fine of not more than one hundred dollars ($100).

It is not entirely clear whether that provision applies to transfers on death. There is no reported appellate decision on that issue. One unreported case held that Section 1289 does not apply to transfers on death. See *Estate of Richter*, 2006 WL 2074738.

The staff will investigate this issue further, to determine whether there is any need to coordinate the Donative Transfer Restriction Statute with Section 1289.

Respectfully submitted,

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