Study L-622 March 27, 2008

Memorandum 2008-18

Donative Transfer Restrictions: Independent Attorney Certification and Rebuttal of Presumption

The Commission has been charged with studying the operation and effectiveness of Probate Code Section 21350 *et seq* (hereafter the "Donative Transfer Restriction Statute"). See 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).

That statute operates to presumptively invalidate a gift to specified types of "disqualified persons":

- A person who drafts the donative instrument.
- A person who is a fiduciary of the donor and who transcribes the donative instrument or causes it to be transcribed.
- The care custodian of a dependent adult.
- A specified family member or business associate of any of the preceding persons.

Memorandum 2008-14 discusses the possibility of including an interested witness of a will as an additional type of disqualified person.

This memorandum discusses two mechanisms that can be used to save a gift that is subject to the statutory presumption of fraud or undue influence: (1) independent attorney certification that the gift is not the product of fraud or undue influence, (2) rebuttal of the presumption.

An exhibit to this memorandum includes the following:

Exhibit p.

- Neil Horton, Trusts and Estates Section of California State Bar ("TEXCOM") (5/16/07) 1
- Thomas Stindt, Los Angeles (9/14/07) 3
- Probate Code Sections 21350-21356 6

Except as otherwise indicated, all statutory references in this memorandum are to the Probate Code.

INDEPENDENT ATTORNEY CERTIFICATION

Section 21351(b) provides that a gift is not subject to Section 21350 if an "independent attorney" counsels the transferor about the intended transfer and certifies that it was not the product of menace, duress, fraud, or undue influence. The certification must occur as follows:

> The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter:
>
> "CERTIFICATE OF INDEPENDENT REVIEW
>
> I, _____, have reviewed
> (attorney's name)
>
> _____ and counseled my client,
> (name of instrument)
>
> _____on the nature
> (name of client)
>
> and consequences of the transfer, or transfers, of property to:
>
> _____contained in the instrument.
> (name of potentially disqualified person)
>
> I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.
>
> _____"
> (Name of Attorney) (Date)
>
> Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

It is clear from the statutory form language that an attorney who conducts an independent review and certification must be disassociated from the interests of the *beneficiary* of the donative instrument at issue. Consequently, an attorney

who is a beneficiary of a donative instrument would be precluded from conducting the independent review and certification of that instrument. An attorney who is a close relative or business associate of a beneficiary would also be precluded. **That is good policy.**

Suggestions for how to refine the independence requirement are discussed below.

Review by the Same Attorney Who Drafts the Donative Instrument

One important question is whether an attorney who *drafts* a donative instrument may also conduct the independent review.

Existing Law

Existing law is not clear on this point. There is no express rule. However, Section 21351(b) requires that the reviewing attorney deliver a copy of the certification form to the drafter. That implies legislative intent that the reviewing attorney be someone other than the drafter.

The staff found only one reported case that touched on this issue. In *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 328, 21 Cal. Rptr. 3d 246 (2004), the court stated, without explanation, that "the drafter of the instrument is not the person who *supplies* the certificate as part of his or her duties to the transferor." (Emphasis in original.) A recent article in the *California Trusts and Estates Quarterly* reaches a similar conclusion: "[It] is likely that the courts will hold that the drafting attorney can not issue a valid certificate of independent review." Horton, *Sleepless Nights for Estate Planning Attorneys: What to do About the Care Custodian Statute?*, Cal. Tr. & Est. Q., Spring 2007, at 25.

In fact, it was this specific question that eventually led to the Commission's study of the Donative Transfer Restriction Statute. As originally introduced, AB 2034 (Spitzer) (2006) would have made only one change to the Donative Transfer Restriction Statute. It would have made clear that the drafting attorney can conduct the independent review, so long as that attorney has no interest in any of the beneficiaries. The bill was sponsored by TEXCOM.

Before the first policy committee hearing, the bill was amended to remove its substance and replace it with language requiring the Commission to study the Donative Transfer Restriction Statute. As eventually enacted, the bill specifically required the Commission to consider:

> Whether it should be necessary to have a second attorney, rather than the drafting attorney, sign a certificate of independent

> review in cases in which the drafting attorney is independent of the transferee.

See 2006 Cal. Stat. ch. 215.

Malpractice Liability

Why did TEXCOM sponsor a bill to allow a drafting attorney to conduct the independent review required under Section 21351? The answer appears to lie in a recent decision on attorney malpractice.

In *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 21 Cal. Rptr. 3d 246 (2004), the court held, as a matter of first impression, that a drafting attorney owes a duty of care to a care custodian beneficiary of an instrument drafted by the attorney. The attorney can be sued for malpractice if the gift to the care custodian fails pursuant to Section 21350 and the attorney did not take steps to secure an independent attorney certification to save the gift. *Id.* This was an extension of the principle that, in some circumstances, an estate planning attorney may be liable to an intended beneficiary for malpractice in preparing an estate plan, notwithstanding a lack of privity between the attorney and the intended beneficiary. See generally *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

In *Osornio*, an attorney drafted a will for an elderly client, which named the client's care custodian as sole beneficiary. The attorney knew that the beneficiary was his client's care custodian, but failed to advise the client of the effect of Section 21350 or the need for an independent attorney certification. After the client's death, the beneficiary of a prior will contested the gift to the care custodian, under Section 21350. The care custodian failed to prove by clear and convincing evidence that the gift was not the product of menace, duress, fraud, or undue influence. Consequently, the gift was invalidated and the prior will was revived. *Osornio*, 124 Cal. App. 4th at 313-16.

The care custodian sued the drafting attorney for malpractice. The court of appeal held that an estate planning attorney owes a duty to a care custodian beneficiary, based on the court's weighing of six factors cited in *Lucas v. Hamm*:

> [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury ... [5] the policy of preventing future harm (ibid.), and [6] whether the

> recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession.

Osornio, 124 Cal. App. 4th at 330.

TEXCOM criticized the *Osornio* decision, on both legal and policy grounds. See David W. Baer & Michele K. Trausch, *When is the Estate Planning Attorney Subject to a Malpractice Claim by a Nonclient Beneficiary?*, Cal. Tr. & Est. Q., Spring 2005, at 10-14.

Notably, that article also proposed a policy reform: the drafting attorney should be allowed to sign a certificate of independent review for the instrument drafted by that attorney. *Id.* at 13. The next year, TEXCOM sponsored AB 2034 to implement that proposal.

This memorandum does not consider whether *Osornio* was correctly decided. The case is discussed only to establish that a malpractice liability issue is relevant to the question of independent attorney certification.

Policy Considerations

The purpose of the independent attorney certification is to provide an independent expert perspective on whether a transferor is acting freely or is instead acting as a result of menace, duress, fraud, or undue influence. Independence from the beneficiary is required to make sure that the reviewing attorney's assessment is not colored by self-interest.

Plainly an attorney who is a beneficiary of a donative instrument or has a strong connection to a beneficiary lacks the detachment required to provide a reliable independent review of a donative instrument.

What about the attorney who drafts the donative instrument? Does that attorney have an interest, merely as a result of the transaction, that should disqualify the attorney from conducting the independent review?

Even if such an interest exists, is the risk of a conflict of interest outweighed by concerns about the additional cost, inconvenience, and delay that would result if the transferor is required to go to a second attorney for an independent review?

Finally, does the drafting attorney have special advantages that weigh in favor of allowing that attorney to conduct the independent review, notwithstanding any concerns about the attorney's interest in the transaction?

Those considerations are discussed below.

Drafting Attorney's Interest in the Transaction

If an attorney concludes that a client lacks the necessary capacity for a transaction, or is subject to undue influence, the attorney should decline to draft a donative instrument for the client, rather than help to effectuate an invalid instrument:

> An attorney should not prepare a will or other dispositive instrument for a client who the attorney believes lacks the requisite capacity….

Camp *et al*, *Capacity and Undue Influence: Assessing, Challenging, and Defending* § 5, at 8 (Cal. Cont. Ed. Bar, 2006).

That decision may not always be clear-cut. An attorney "may properly assist clients whose testamentary capacity appears to be borderline." *Id.*

A decision to decline a client's request for assistance carries an immediate pecuniary cost, loss of the fee that would have been paid for drafting the donative instrument. That financial interest in the transaction may color the perceptions of an attorney, causing the attorney to proceed with a transaction in a case where the same attorney might have reached a different conclusion in the absence of any stake in the outcome.

Where that happens, it seems certain that the attorney would reach the same conclusion in preparing a certificate of independent review. To do otherwise, would be to repudiate the attorney's own actions.

In fact, it is difficult to imagine a situation in which any drafting attorney would decline to certify an instrument that the attorney had drafted.

Attorney Thomas Stindt shares those concerns:

> The fact that the drafting attorney has an extra writing in his file does not seem to add anything to the bona fides of the gift. The draftsman already should have determined that his client intended to make the gift, when he prepared the donative transfer instrument and supervised its execution. The presence of an additional certificate does not add anything more of substance — it amounts to window dressing. There is in fact something more needed in these cases, but the Donor's draftsman cannot provide it.
>
> …
>
> Thus "independent" needs to be just that — someone not being paid to do the donative transfer instrument, for how could such person be independent, of course he wants the intended transfer to be validated, that is what he is hired to do.

See Exhibit pp. 3, 5.

The staff sees two other problems that could arise if drafting attorneys were allowed to certify the validity of their own work.

First, an unethical attorney who decides to proceed with the drafting of a donative instrument where it is plain that the transferor lacks capacity or is subject to undue influence would not hesitate to certify the donative instrument. Doing so would prevent a second, independent attorney from looking into the transaction and discovering any wrongdoing.

Second, concerns about malpractice may improperly influence an attorney's independent review of an instrument drafted by that attorney. *Osornio* established that an attorney may be liable in malpractice to a care custodian if the gift fails for lack of independent attorney certification.

That liability can probably be avoided through strong and well-documented advice to the client about the need to have a donative instrument reviewed by another attorney. But if the client still fails to have the instrument certified, the specter of liability may remain.

That specter can be exorcised completely, if the drafting attorney is allowed to prepare the independent attorney certification. If the attorney certifies the gift, it will not fail under Section 21350. Consequently there will be no compensable injury to the care custodian beneficiary, the only nonclient to whom the attorney owes a duty of care under *Osornio*. Those concerns may influence an attorney to issue a certification in close cases.

The staff does not mean to impugn the ethics of estate planning attorneys, the great majority of whom will undoubtedly behave ethically, competently, and in the best interests of their clients. However, there will be some attorneys whose ethics are weaker or whose financial needs are more desperate. Those attorneys should perhaps be disqualified from certifying the validity of their own work product.

Additional Transaction Costs

Even if a drafting attorney does have an interest in an instrument drafted by that attorney, there are countervailing considerations that may justify allowing the drafting attorney to conduct the independent review. The first is the issue of cost and convenience for the transferor. A transferor who must visit two different attorneys to complete an intended donative transfer will face additional cost, delay, and inconvenience. If those obstacles are great enough, the transferor may procrastinate.

Given the advanced age of some transferors, death may come before the transferor actually gets around to having a gift certified. Perfectly valid gifts may then fail as a result. That could occur in cases where the drafting attorney is entirely ethical and the gift could have been saved by the certification of the drafting attorney.

Person Best Qualified to Make Determination

It is likely that an attorney who drafts a donative instrument will be an estate planning specialist, and therefore better trained to evaluate capacity and undue influence.

The drafting attorney may also have an established relationship with the transferor and be able to compare the transferor's current wishes and behavior against past wishes and behavior. A significant and unexplained change in either might indicate that something is wrong and might prompt closer scrutiny.

By contrast, the attorney who conducts the independent review may have no special expertise in evaluating capacity or undue influence and may know nothing about the personality or wishes of the transferor. The transferor may not want to pay a large fee for the independent certification, and that may further limit the efficacy of the reviewing attorney's investigation. (By contrast, much of the work required for the drafting attorney to evaluate the question of capacity and undue influence will already have been completed in the context of preparing the donative instrument, allowing for a more thorough inquiry for little additional cost).

Discussion

The Commission should consider whether the personal interests that a drafting attorney may have in drafting an instrument for a client are significant enough to preclude the drafting attorney from also conducting the independent review required to save the gift from invalidation under Section 21350.

In making that decision, the Commission should bear in mind the extra cost, delay, and inconvenience that the transferor will bear, and the concomitant risk that the transferor will put the process off until it is too late. Finally, the Commission should also bear in mind the possibility that the drafting attorney may be best situated, for a number of reasons, to make the determination.

TEXCOM urges the Commission to approve language authorizing the drafting attorney to conduct the independent review. See Exhibit p. 2.

However, we received a letter from an attorney who disagrees with that proposal. Thomas Stindt has a number of criticisms of the independent attorney certification mechanism, but specifically opposes allowing the drafting attorney to conduct the review and certification. See Exhibit p. 3.

Further, the original version of AB 2034, which would have allowed a drafting attorney to act as the reviewing attorney, was rejected by the first policy committee without a hearing. That may indicate some legislative policy objection to making the proposed change.

Should the law be revised to allow a drafting attorney to review an instrument drafted by that attorney?

If the Commission decides that a drafting attorney should not be allowed to review an instrument drafted by that attorney, the statute should state that rule expressly. **If the Commission decides on that approach, it should also consider whether attorneys in the drafting attorney's firm should also be disqualified from performing the independent review.**

Other Possible Improvements

In addition to deciding whether the drafting attorney can act as the independent attorney, the commenters have suggested three other refinements of the certification process.

Standard of Independence

In order to more precisely define the degree of independence required of an attorney who conducts an independent review, TEXCOM suggests importing a standard from California Rules of Professional Conduct 3-310(b)(1) and (3), governing conflicts of interest. See Exhibit p. 2.

Those rules provide, in relevant part:

> 3-310. …
> (B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
> (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
> …
> (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by the resolution of the matter…

In the present context, this could be implemented by language providing that an "independent attorney" may not be a beneficiary of the donative instrument under review, or have a legal, business, financial, professional, or personal relationship with a beneficiary. Presumably, this language has the advantage of familiarity to attorneys and the courts. One possible disadvantage is its breadth, as it does not place any limits on the remoteness of a disqualifying relationship.

An alternative would be to preserve the existing standard, which is more subjective: "I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer."

Does the Commission wish to incorporate the standard from the Rules of Professional Conduct, as proposed by TEXCOM, or is the existing standard sufficient?

Capacity Certification

Thomas Stindt suggests that the attorney conducting the independent review should also certify whether the transferor has the required capacity to make the gift. He feels that this would add an important new benefit to the independent review process. See Exhibit p. 5.

The staff invites public input on this suggestion.

Special Expertise

Finally, Thomas Stindt suggests that an "independent attorney" be required to certify that the attorney qualifies, in the county in which the attorney practices, to volunteer on "the local probate department's Probate Volunteer panel for attorneys." The apparent intent is to require some verifiable level of relevant expertise.

The staff is unfamiliar with the standards required for such programs and invites public input on the details of such programs and the policy merit of the proposal.

REBUTTAL OF THE PRESUMPTION

Section 21351(d) provides for rebuttal of the presumption of menace, duress, fraud, or undue influence that is created by Section 21350. However, there are a number of significant constraints placed on the disqualified person's ability to rebut the presumption. They are discussed below.

Standard of Proof

Under Section 21351, the presumption of menace, duress, fraud, or undue influence must be rebutted by *clear and convincing evidence*.

By contrast, the common law presumption of undue influence need only be rebutted by a preponderance of the evidence. See *Sarabia v. Gibbs*, 221 Cal. App. 3d 599, 605, 270 Cal. Rptr. 560 (1990); 64 Cal. Jur. 3d *Wills* § 224 (2007).

This difference seems counter-intuitive, as it imposes a stricter burden of proof under the statute than under common law, even though the statutory presumption is easier to establish.

Thus, under Section 21350, the presumption arises if the beneficiary is the drafter of the donative instrument, a fiduciary who transcribes the instrument, or a care custodian of a dependent adult (or the relative or business associate of any of them). Clear and convincing evidence is required to rebut the presumption.

By contrast, the common law presumption requires the convergence of three different facts: (1) the existence of a confidential relationship between the transferor and the beneficiary, (2) the participation of the beneficiary in the creation of the donative instrument, and (3) an undue profit to the beneficiary. See *Rice v. Clark*, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002). A preponderance of the evidence can rebut the presumption.

It is clear that the Legislature intended a very strong response to the attorney misconduct that prompted enactment of the Donative Transfer Restriction Statute. **Nonetheless, the staff believes that the evidentiary burden may be too heavy.** If a disqualified person can prove, by a preponderance of the evidence, that the gift is not the product of menace, duress, fraud, or undue influence, why should the gift be invalidated?

TEXCOM raises the same concern and recommends that the standard of proof be revised downward, to a preponderance of the evidence standard. See Exhibit p. 2. **Is the Commission interested in this approach?**

Limitation on Use of Beneficiary Testimony

Section 21351 also provides that the rebuttal must include at least some evidence other than the testimony of the disqualified person. Again, this probably reflects the Legislature's intention to be very strict in policing against the sort of elder abuse that prompted enactment of the Donative Transfer Restriction Statute.

The staff has two concerns about this evidentiary restriction.

(1) In many cases it could be circumvented, simply by providing any other scrap of evidence. In that case, the court would not be deciding based "solely" on the testimony of the disqualified person.

If the limitation can be easily circumvented in some cases, then it is arguably unfair to those whose gifts fail simply because they cannot produce the extra scrap of evidence that would allow them to make their case. In very similar factual circumstances, one disqualified person would be allowed to present proof, while another would be barred from doing so.

(2) The staff sees no reason to treat the disqualified person's testimony as uniquely unreliable. Many litigants have an economic interest in the outcome of a case in which they offer testimony. Such a person is not disqualified from presenting a case simply because the evidence consists only of that person's testimony. The staff does not see why a disqualified person should be subject to such a strict limitation on presenting proof. A beneficiary rebutting the common law presumption of undue influence is under no such restriction.

The staff believes that the restriction on evidence based solely on the testimony of a disqualified person should be eliminated. The disqualified person should make the best case from the evidence available. The finder of fact can then decide whether the presumption has been rebutted.

Precluded Beneficiaries

Section 21351(e) precludes certain persons from being able to rebut the presumption at all. It is drafted in a confusing way:

> (e) Subdivision (d) shall apply only to the following instruments:
> (1) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.
> (2) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.
> (3) Any instrument executed by a resident of California who was not a resident at the time the instrument was executed.

Read literally, that language seems to preclude rebuttal of the presumption for an instrument that makes a gift to the drafter of the instrument, provided that one of the two following conditions is also met: (1) the instrument was executed on or before July 1, 1993, by a California resident, or (2) the instrument was

executed at any time by a California resident who was not a resident at the time of execution.

The staff cannot imagine that this was the intended meaning. It seems likely that the provision was meant to preclude rebuttal of the presumption by the drafter of the instrument and also preclude rebuttal with respect to any instrument that was executed before 1993 or out of state.

Regardless of the proper interpretation, the staff sees no policy justification for denying the opportunity to rebut the presumption to any class of beneficiary. The risk that the drafter of a donative instrument exercised undue influence may be seen as very high. Nonetheless, if the drafter can *prove* that the gift was not the product of menace, duress, fraud, or undue influence, there is no reason to invalidate the gift.

The staff is at a loss to understand the purpose served by the limitations on instruments drafted before 1993 or outside California. If Section 21350 applies to an instrument, there should be an opportunity to rebut it. **The limitation on rebuttal should not be continued.**

NEXT STEP

Once the Commission has made decisions on the issues presented in this memorandum and in Memorandums 2008-13, 2008-14, and 2008-15, the staff will prepare a draft tentative recommendation implementing the Commission's decisions. A handful of miscellaneous issues will also be discussed at that time.

If a tentative recommendation can be approved in June, public comment could be considered at the October meeting, and a recommendation finalized in December. That would allow the Commission to meet the statutory deadline of January 1, 2009.

Respectfully submitted,

Brian Hebert
Executive Secretary

EMAIL FROM NEIL HORTON, TRUSTS AND ESTATES SECTION OF THE CALIFORNIA STATE BAR (MAY 16, 2007)

Texcomm has been debating ways to improve Probate Code Section 21350's prohibition against donative transfers from "dependent adults" to "care custodians" for several years. A consensus exists that the current statute's definitions of "dependent adult" and "care custodian" are too broad and that the certificate of independent review procedure to validate these kinds of transfers is ill-suited for its purpose. Listed below are several suggestions that Texcomm asks CLRC to consider in response to AB 2034 as well as issues that Texcomm is still considering.

1. Re-define the protected class

Texcomm recommends substituting the term "protected person" for "dependent adult" and defining the "protected person" as a person for whom a conservator of the person or of the estate may be appointed pursuant to Section 1801. The intent is to include within the definition of "protected person" those persons for whom a conservator is not appointed because the person has an existing trustee or an agent under a financial or health care power, but who otherwise would be unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter or who is substantially unable to manage his or her own financial resources or resist fraud or undue influence.

2. Re-define care custodian

Texcomm recommends that the definition of "care custodian" be limited to persons who provide professional or occupational services to the transferor.

Texcomm has not yet taken a final position on whether those services should or should not be limited to health or social services. The terms "professional" or "occupational" attempt to distinguish two situations. The first is the Good Samaritan. Texcomm supports a Good Samaritan exception to the presumption of undue influence for gifts to care custodians. The second situation is that of payment. A Texcomm consensus exists that defining care custodians to include all those who receive payment would be too broad. For example, if payment were sufficient to disqualify a beneficiary and if a protected person tells the neighbor's child to keep the change from a $20 bill that the child used to buy sundries, the protected person could not later include a $5,000 gift to that child in her will.

3. Timing of transfer and status as care custodian

Texcomm approves the principle that a transfer under a donative instrument should be valid to a person who has a relationship with a transferor that does not involve providing care custodial services at the time that the transferor signs the donative instrument, even if the transferee later provides care custodial services.

4. Attorney's certificate

Texcomm agrees that the test for determining whether the person issuing the certificate is independent of the care custodian should be the same as that set out in Rules of Professional Conduct 3-310(b)(1) and (3), relating to when an attorney has an obligation to inform the client of a relationship. In other words, for an attorney to be independent, the attorney must have no legal, business, financial, professional, or personal relationship with the transferee.

Texcomm also agrees that, for the certificate to be valid, the attorney must be independent as defined above and must consult with the client about whether the donative instrument is the produce of fraud, menace, duress, or undue influence. Texcomm, however, has rejected the requirement that the consultation occur before the client signs the donative instrument. Texcomm has not yet decided whether to recommend any other time constraints on the attorney's ability to sign a certificate.

5. Overcoming presumption of undue influence

Texcomm recommends that the burden of proof required of a care custodian to overcome the presumption of undue influence be preponderance of the evidence rather than clear and convincing evidence.

6. De minimus transfers

Texcomm agrees that a de minimus rule should apply to transfers to care custodians, but has not yet determined what the de minimus amount should be.

7. Statute of limitations

What limitations period should apply to an action to invalidate a transfer under a trust instrument to a disqualified person if the trustee properly served the Section 16061.7 notice? Texcomm is not yet ready to suggest a resolution to the apparent conflict between Sections 21356 and 16061.8.

Under Probate Code Section 21356, an action to establish the invalidity of a transfer described in Section 21350, other than by will, may be brought within the later of three years after the transfer became irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer.

But under Probate Code Section 16061.8, in the case of a trust where notice is given under Section 16061.7, the period of a contest is shortened to 120 days after notice is served or 60 days after the trusts terms are mailed or personally delivered during the 120 day period, whichever is later. Should this shorter period of limitations apply to a transfer under a trust instrument to a disqualified person if the trustee gives the Section 16061.7 notice?

Thank you for your attention to this letter.

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TRUSTS AND ESTATES

September 14, 2007

Brian Hebert, Esq.
California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: *Calif. Prob. C. §21351(b)* "Certificate of Independent Review"

Dear Mr. Hebert:

It is my understanding that the Commission is currently conducting a study and analysis of the statutes concerning prohibited transfers to presumptively disqualified persons, including the consideration of whether the attorney draftsman of a donative transfer instrument should also be allowed to serve as the person who provides the Certificate of Independent Review.

Since the practice of this office involves the representation of corporate trustees in trust and estate administration matters, we frequently encounter disputed entitlement situations involving the claims of residuary beneficiaries *vs.* the claims of care-givers. I wanted to share some experiences with you and my comments, which I hope will be of assistance to you and your colleagues in your analysis and recommendations.

We have been assigned over two dozen matters in the recent three years by bank trust departments involving gifts to care-givers of the transferor. Those situations pit the residuary beneficiaries, generally charities or somewhat distant relatives such as nephews and nieces, against the care-giver. In several of these cases, the attorney who drafted the donative transfer instrument also has attempted to validate his own work by additionally providing the independent review certificate[1].

[1] The fact that the Donor's draftsman has an extra writing in his file, does not seem to add anything to the *bona fides* of the gift. The draftsman already should have determined that his client intended to make the gift, when he prepared the donative transfer instrument and supervised its execution. The presence of an additional certificate does not add anything more of substance--it amounts to window dressing. There is in fact something more needed in these cases, but the Donor's draftsman cannot provide it.

The facts in these cases sometimes presents the most egregious of any overreaching cases I have seen in thirty-eight years of practice in this subject area:

• estate planning of long standing, repeated in numerous trust amendments with minor changes, and over many years duration, is replaced by gift of substantially all of the trust estate to a hired care-giver, at a time when Trustor is ill, in a nursing home, and is over 95 years of age. Is a brief visitation by some third party attorney who prepares a certificate a sufficient acquittance for these changes? This could be some attorney from the Church or card club who does personal injury work, and who is doing the Certificate as a favor. There is simply too much responsibility involved for a simplistic approach to such certifications.

•Trustor in his nineties and in poor health, is "married" by his care-giver, and the trust is changed, whereupon presumably the marriage trumps the disqualified person status and validates the gift. The individual in question would have done anything his care-giver wanted, including marrying her--his dependence was absolute and unqualified. Why should a marriage status have any effect at all upon a disfavored gift to a controlling care custodian? The gift should stand or fall on its own, and not be tied to a status easily bootstrapped by the care-giver.

•Trustor's chosen charities who have been the beneficiaries of her largesse for a lifetime, with no family members living to take the trust estate, are replaced by a gift to the hired care-giver, who did not know Trustor before commencing to work for her as her hired care-giver.

•Donors who are completely and wholly dependent upon their care-givers for assistance with daily living chores, and seem to have become timid "yes men" willing to agree with whatever the care-giver recommends.

The problem with reliance upon the draftsman attorney's certification is that those persons are frequently not trusts and estates attorneys; are not trained in assessment of competency for testamentary purposes; and frequently seem to be over-accommodating of the client-transferor, and willing to validate whatever the client wishes done. What the ill and dependent 94 year-old in a home care environment says she wants done is in our experience, only a reflection of the dependance of such person upon the care-giver. Having the attorney-draftsman create his own independent review certificate does nothing to address this problem.

It is a truism that these gifts to care-givers are made by people in difficulty – they must have someone on hand to help them with living tasks, and they are entirely dependent upon such people, and this frequently happens at a point in life when most of us will see our mental abilities start to fade. These gifts should be disfavored and remain presumptively invalid, absent proper validation or redemption. The Independent Review Certificate is a means of validation, but to work properly, it needs to be refined as follows:

✓ The Donor's draftsman attorney cannot be the person to provide the certificate. Independent of the historical influence of the client upon counsel, or the well-intended efforts to

please or accommodate the client's wishes, there must be some fresh eyes and analysis brought to bear on such gifts. Thus "independent" needs to be just that – someone not being paid to do the donative transfer instrument, for how could such person be independent, of course he wants the intended transfer to be validated, that is what he was hired to do.

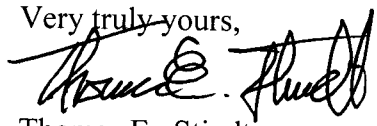
✓The person to provide the Certificate of Independent Review should certify in that certificate, that he or she meets the criteria in the county in which he or she practices, for membership on the local probate department's Probate Volunteer Panel for attorneys.

✓The Certificate's required language should be expanded to require the certification to recite that the certifying attorney engaged the prospective donor in sufficient conversation, including questions and answers, so that the certifying attorney, through the use of his or her own preferred approach to the rapid assessment of mental competency for estate planning decision-making, was able to conclude that the transferor was possessed at that time of the testamentary capacity necessary to execute the donative transfer instrument.

If the above were included in the certification requirements, there would truly be something added by the independent review certificate.

Thank your for your attention.

Very truly yours,



Thomas E. Stindt

PART 3.5. LIMITATIONS ON TRANSFERS TO DRAFTERS AND OTHERS (PROB. CODE §§ 21350-21356)

§ 21350. Invalid transfers

21350. (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation.

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in paragraph (4).

(6) A care custodian of a dependent adult who is the transferor.

(7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6).

(b) For purposes of this section, "a person who is related by blood or marriage" to a person means all of the following:

(1) The person's spouse or predeceased spouse.

(2) Relatives within the third degree of the person and of the person's spouse.

(3) The spouse of any person described in paragraph (2).

In determining any relationship under this subdivision, Sections 6406, 6407, and Chapter 2 (commencing with Section 6450) of Part 2 of Division 6 shall be applicable.

(c) For purposes of this section, the term "dependent adult" has the meaning as set forth in Section 15610.23 of the Welfare and Institutions Code and also includes those persons who (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64. The term "care custodian" has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code.

(d) For purposes of this section, "domestic partner" means a domestic partner as defined under Section 297 of the Family Code.

§ 21350.5. "Disqualified person" defined

21350.5. For purposes of this part, "disqualified person" means a person specified in subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply.

§ 21351. Exceptions

21351. Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the Family Code, of the transferee or the person who drafted the instrument. For purposes of this section, "cohabitant" has the meaning set forth in Section 13700 of the Penal Code. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(b) The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and counseled my client,
(name of instrument)

_____on the nature
(name of client)

and consequences of the transfer, or transfers, of property to:

_____contained in the instrument.
(name of potentially disqualified person)

I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

_____ _____"
(Name of Attorney) (Date)

Any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(c) After full disclosure of the relationships of the persons involved, the instrument is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4.

(d) The court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable attorney's fees.

(e) Subdivision (d) shall apply only to the following instruments:

(1) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.

(2) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.

(3) Any instrument executed by a resident of California who was not a resident at the time the instrument was executed.

(f) The transferee is a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(g) For purposes of this section, "related by blood or marriage" shall include persons within the fifth degree or heirs of the transferor.

(h) The transfer does not exceed the sum of three thousand dollars ($3,000). This subdivision shall not apply if the total value of the property in the estate of the transferor does not exceed the amount prescribed in Section 13100.

(i) The transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed within California.

§ 21352. Third party liability

21352. No person shall be liable for making any transfer pursuant to an instrument that is prohibited by this part unless that person has received actual notice of the possible invalidity of the transfer to the disqualified person under Section 21350 prior to making the transfer. A person who receives actual notice of the possible invalidity of a transfer prior to the transfer shall not be held liable for failing to make the transfer unless the validity of the transfer has been conclusively determined by a court.

§ 21353. Effect of invalid transfer

21353. If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue, but only to

the extent that the value of the transfer exceeds the intestate interest of the disqualified person.

§ 21354. Contrary provision in instrument

21354. This part applies notwithstanding a contrary provision in the instrument.

§ 21355. Application of part

21355. This part shall apply to instruments that become irrevocable on or after September 1, 1993. For the purposes of this section, an instrument which is otherwise revocable or amendable shall be deemed to be irrevocable if on September 1, 1993, the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.

§ 21356. Commencement of action

21356. An action to establish the invalidity of any transfer described in Section 21350 can only be commenced within the periods prescribed in this section as follows:

(a) In case of a transfer by will, at any time after letters are first issued to a general representative and before an order for final distribution is made.

(b) In case of any transfer other than by will, within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer.
