Legis. Prog., Study L-622 July 12, 2010

Memorandum 2010-31

2010 Legislative Program: Status of SB 105 (Harman)

Senate Bill 105 (Harman) was introduced in 2009 to implement the Commission's recommendation on *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008). The bill was approved by the Senate on May 14, 2009.

The bill was then taken off calendar in the Assembly and made into a two-year bill, in order to provide more time to address concerns raised by the California Judges Association ("CJA").

The staff worked with the interested groups and with Senator Harman's staff to discuss the concerns raised by CJA. Over time, those discussions expanded to include consideration of issues raised by other groups and individuals, including Disability Rights California ("DRC"), California Advocates for Nursing Home Reform ("CANHR"), the Executive Committee of the Trusts and Estates Section of the California Bar ("TEXCOM"), and two individual attorneys, Daniel Murphy and Andrew Wolfberg.

After consideration of all of the issues raised in those discussions, Senator Harman amended SB 105 on June 22, 2010. The amended bill was unanimously approved by the Assembly Committee on Judiciary on June 29, 2010.

This memorandum begins by providing background on the Commission's study of Probate Code Section 21350 *et seq.* It summarizes (1) existing law, (2) the Legislature's direction to the Commission, and (3) the main elements of the Commission's recommendation.

It then describes the recent amendments to SB 105 and presents a draft report (attached), setting out revised Commission Comments for the sections of the bill that were amended. **The Commission needs to decide whether to approve that report, with or without changes.**

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.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting.

BACKGROUND

Existing Law

Probate Code Sections 21350-21356 establish a statutory presumption of menace, duress, fraud, or undue influence when a donative transfer is made to a person who stands in a specified relationship to the transferor. The statute covers the following types of "disqualified persons":

(1) **The drafter of the donative instrument.** In addition, certain associates of the drafter are also disqualified persons, including a spouse, domestic partner, cohabitant, or relative within the specified degree of kinship of the drafter, as well as a partner, shareholder, or employee of a law partnership or corporation in which the drafter has an ownership interest. Prob. Code § 21350(a)(1)-(3).

(2) **A fiduciary of the transferor who transcribed the donative instrument or caused it to be transcribed.** Again, some associates of the disqualified person are also subject to the presumption, including the spouse, domestic partner, cohabitant, or relative within the specified degree of kinship of the transcriber. An "employee" of the transcriber is also a disqualified person. Prob. Code § 21350(a)(4)-(5).

(3) **The "care custodian" of a transferor who is a "dependent adult."** As before, the spouse, domestic partner, cohabitant, or specified relative of the care custodian is also a disqualified person. Prob. Code § 21350(a)(6)-(7). Note that "care custodian" and "dependent adult" are defined terms.

There are some important exceptions to the application of the statutory presumption. It does not apply to a spouse, domestic partner, cohabitant, or specified family member of the transferor, or to an instrument drafted by such a person. Prob. Code § 21351(a). There is also an exception that applies if the transferor is counseled by an "independent attorney" who then certifies that the proposed transfer is not the product of menace, duress, fraud, or undue influence. Prob. Code § 21351(b).

As a general rule, the presumption may be rebutted. However, to do so the proponent of the gift must produce "clear and convincing" rebuttal evidence. Prob. Code § 21351(d). The evidence must include at least some evidence other than the testimony of the beneficiary. *Id.*

However, in the case of a gift to the *drafter* of the donative instrument, the presumption is conclusive. Prob. Code § 21351(e)(1).

A beneficiary who tries unsuccessfully to rebut the presumption bears the cost of the proceeding, including reasonable attorney's fees. Prob. Code § 21351(d).

If a gift is invalidated pursuant to the statutory presumption, the donative transfer operates "as if the disqualified person predeceased the transferor without spouse or issue…." Prob. Code § 21353. In other words, the invalidation of one gift in a will or trust would not affect the remaining provisions of the instrument. Presumably the property that would have been transferred under the invalidated provision would fall into the residue of the estate.

Finally, it is worth noting that the statutory presumption of menace, duress, fraud, or undue influence *supplements* the common law. It does not displace it. See Bernard v. Foley, 39 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); Rice v. Clark, 28 Cal. 4th 89, 96-97, 47 P.3d 300, 120 Cal. Rptr. 2d 522, (2002); Estate of Winans, ___ Cal. Rptr. 3d. ___, WL 1078001 (2010). Thus, even if a gift could not be challenged under the statutory presumption, it could still be challenged under the common law.

Legislative Direction to the Commission

The Legislature directed the Commission to study the statutory presumption of undue influence and recommend improvements. In doing so, the Commission was to consider the effectiveness of the statute in protecting transferors from fraud and undue influence, "while still ensuring the freedom of transferors to dispose of their estates as they desire and reward true 'good Samaritans'…." See 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).

The Legislature also directed the Commission to examine a number of specific issues, including whether the definition of "care custodian" should have an exception for a friend of the transferor, whether the attorney who prepares a donative instrument should be able to certify its validity, and whether an existing restriction on rebuttal of the statutory presumption makes sense. *Id*.

Summary of Recommendation

The principal reforms that were recommended by the Commission and included in SB 105 are as follows:

- Limit the statutory presumption to cover only fraud and undue influence (eliminating any presumption of menace or duress).
- Limit the definition of "care custodian" to a person who provides health or social services for remuneration, as a profession or

occupation. This would effectively create an exception for gifts to personal friends and other volunteers.

- Change the definition of "dependent adult," which currently applies to all persons with disabilities, to instead use an individualized functional test, based on whether a person is able to provide for personal needs, manage finances, and resist fraud or undue influence.
- Limit the application of the care custodian presumption to donative instruments executed during the time in which care services are provided.
- Harmonize the statutory presumption with the similar presumption that arises under Probate Code Section 6112.
- Eliminate special evidentiary restrictions on rebutting the statutory presumption.
- Allow a drafting attorney to conduct an "independent attorney" review of a gift to a care custodian, provided that the attorney has no interest in the beneficiary.
- Eliminate the special statute of limitations for actions under the statute.
- Add a provision making clear that the statute does not preclude any other available remedy, including the common law on undue influence.

The proposed law would also make numerous technical changes that are necessary to eliminate confusing or inconsistent language in the existing statute.

BILL AMENDMENTS AND CONFORMING COMMENT REVISIONS

This section of the memorandum describes the recent amendments to SB 105, in the order in which they first appear in the bill. Where an amendment requires a conforming change to the Commission's Comment language, a proposed Comment revision has been set out for Commission review.

Please note that, in some cases, more than one amendment affects the same section. In those cases, the proposed Comment revision language set out for review only relates to the bill amendment under discussion. For the aggregate affect of related revisions, see the version of the Comment set out in the attached draft report.

Cleanup Amendments

Some of the provisions in SB 105 were enacted last year as part of another bill (SB 308 (Harman)): Code Civ. Proc. §§ 366.2, 366.3; Prob. Code §§ 13, 1303, 1304.

Those provisions no longer need to be included in SB 105 and were deleted. No Comment revisions are required as a result of these amendments.

Will Witness

Although the primary focus of the Commission's study was on Probate Code Section 21350 *et seq.*, the Legislative directive to the Commission referred more broadly to "provisions of the Probate Code restricting donative transfers to certain classes of individuals." That reference also encompasses Probate Code Section 6112, which establishes a statutory presumption of menace, duress, fraud, or undue influence when a will makes a devise to a necessary witness.

The Commission saw an opportunity to modernize Section 6112 and increase uniformity in the law governing substantively similar matters, by integrating Section 6112 into the more fully developed scheme provided under Probate Code Section 21350. The recommendation included proposed changes to do so.

That proposed reform was strongly opposed by CJA, which felt that Section 6112 was operating without problems and should be left undisturbed. In response to CJA's objection, Senator Harman amended SB 105 to remove the will-related language. See Prob. Code §§ 6112, 21310(b)(6); proposed Prob. Code §§ 21372, 21380(a)(4).

This change does no injury to the provisions that remain in the bill. The deleted will provisions were fully severable and were secondary to the main thrust of the recommendation.

The staff recommends that the Comment to proposed Section 21380 be revised as follows, to conform to the amendment described above:

> **Comment.** Subdivision (a) of Section 21380 restates the substance of former Section 21350(a), with ~~four~~ three exceptions:
>
> (1) Subdivision (a)(3) limits the care custodian presumption to gifts made during the period in which the care custodian provided services to the transferor.
>
> (2) ~~Subdivision (a)(4) is new. It harmonizes former Section 6112(c) with the more detailed approach taken in this part.~~
>
> ~~(3)~~ Subdivision (a)~~(7)~~(6) generalizes the reference to a "law partnership or law corporation" in former Section 21350(a)(3), to include any law firm, regardless of how it is organized.
>
> ~~(4)~~ (3) Subdivision (a)~~(7)~~(6) generalizes the rule creating a presumption of fraud or undue influence when a gift is made to the law firm of the drafter of a donative instrument, so that it also applies to a fiduciary of the transferor who transcribes an instrument or causes it to be transcribed.
>
> …

Definition of "Care Custodian"

The definition of the term "care custodian" is pivotal in establishing the scope of application of the statutory presumption that applies when a dependent adult makes a gift to a care custodian.

The existing definition is overbroad, in two ways:

(1) It incorporates a definition of "care custodian" that is used in another statute to describe the class of persons who must report elder abuse. That list of persons makes sense in its original context, but is overbroad in defining the class of persons who are likely to exert undue influence over a dependent adult (e.g., it includes firefighters and animal control officers). See Welf. & Inst. Code § 15619.17(a)-(x).

(2) It includes a broad catch-all provision that applies to "any … person providing health services or social services to … dependent adults." Welf. & Inst. Code § 15619.17(y). That broad provision makes no exception for the personal friends of a dependent adult.

The Commission recommended replacing the existing definition with a more narrowly tailored one:

> 21362. (a) "Care custodian" means a person who provides health or social services to a dependent adult for remuneration, as a profession or occupation. The remuneration need not be paid by the dependent adult.
>
> (b) For the purposes of this section, "health and social services" include, but are not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.

The proposed language limiting the definition to a person who provided care services "for remuneration" was intended to create an exception for personal friends and Good Samaritans.

CJA accepted the general concept of providing an exception for friends of a dependent adult, but strongly preferred a different approach. CJA suggested amending the definition to provide an exception for a person who provides care services without remuneration *and who had a personal relationship with the dependent adult at least 90 days before providing care services*. The 90-day period was intended to avoid game playing by abusers who might strike up a "personal relationship" on first meeting a vulnerable elder, just prior to providing care services. A personal relationship that pre-dates the provision of services by at least 90 days is more likely to be genuine.

CANHR felt that the 90-day period was still insufficient to protect vulnerable elders from sophisticated abusers. They argued that the personal relationship should also (1) precede the transferor's admission to hospice care, and (2) exist at least six months prior to the transferor's death. This would protect against wrongdoers who monitor admissions to hospice, cynically strike up "personal relationships" with the dying, and then pressure them to make a change to their estate plans prior to death.

After hearing these concerns, Senator Harman agreed to amend the bill to change the definition of "care custodian" as follows:

> 21362. (a) "Care custodian" means a person who provides health or social services to a dependent adult for remuneration~~, as a profession or occupation. The remuneration need not be paid by the dependent adult~~ , except that "care custodian" does not include a person who provided services without remuneration if the person had a personal relationship with the dependent adult (1) at least 90 days before providing those services, (2) at least six months before the dependent adult's death, and (3) before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care. As used in this subdivision, "remuneration" does not include the donative transfer at issue under this chapter or the reimbursement of expenses.

The resulting standard is somewhat complex, but in practice shouldn't be too difficult to apply.

With the move to an exception based on a pre-existing personal relationship, TEXCOM was concerned that there might be instances where it would be difficult to determine when the provision of service commenced. In particular, TEXCOM was concerned that some types of health or social services (e.g., food preparation, companionship) might be difficult to distinguish from routine social activity between friends.

To address that concern, Senator Harman amended proposed Section 21362(b) as follows:

> 21362. …
> (b) For the purposes of this section, "health and social services" ~~include, but are~~ means services provided to a dependent adult because of that person's dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.

That change should help to distinguish between routine social relations between friends, and the special sort of social services provided to dependent adults as a result of their dependent condition.

The Comment to proposed Section 21362 should be revised to reflect those changes, as follows

> **Comment.** Section 21362 is similar to the last sentence of former Section 21350(c), with two substantive exceptions:
>
> (1) The definition of "care custodian" ~~is now limited to a person who provides services for remuneration, as a profession or occupation~~ does not include a person who provides health and social services without remuneration and who had a personal relationship with the dependent adult a specified period of time prior to the provision of services, the death of the dependent adult, and the admission of the dependent adult to hospice care~~, and (2) the~~.
> (2) The definition of "care custodian" does not incorporate the list of persons from Welfare and Institutions Code Section 15610.17.
>
> Subdivision (b) provides an illustrative list of the sorts of services that are included in the term "health and social services." See also Section 56 ("person" defined).

Definition of "Dependent adult"

The definition of "dependent adult" is also critical to defining the scope of the care custodian presumption, which only applies when a dependent adult makes a gift to a care custodian. Under existing law, "dependent adult" includes any adult who has a disability. See Prob. Code § 21350(c); Welf. & Inst. Code § 15610.23.

The Commission concluded that the categorical rule based on disability was overbroad, and could impair the testamentary freedom of a person with a disability who is not specially vulnerable to undue influence and has no need of statutory protection.

The Commission recommended that the categorical definition be replaced with an individual assessment, based on the standard for appointment of a conservator (drawn from Probate Code Section 1801). The proposed definition would require an assessment of whether a transferor was able to provide for the necessities of life, manage finances, and resist fraud and undue influence. See proposed Prob. Code § 21366.

There was no opposition to the general thrust of this proposed reform. However, there were strong concerns about whether use of the standard for appointment of a conservator would set the bar too high, effectively limiting the definition to transferors who lack decisionmaking capacity. It was felt that this would make the statutory presumption largely redundant, since lack of capacity is already grounds for invalidation of a gift.

Discussions focused on one specific element of the proposed definition, which would provide that "dependent adult" includes an adult who is "*substantially unable* to manage the person's own financial resources or resist fraud or undue influence." Proposed Section 21366(b) (emphasis added).

Those who were primarily concerned that the statute provide strong protection against elder abuse felt that "substantial inability" described too narrow a group. They proposed replacing that term with "difficulty." The definition would then include an adult who had "*difficulty* managing his or her own financial resources or resisting fraud or undue influence."

Those who were primarily concerned that the statute not unduly limit the testamentary freedom of persons with disabilities, felt that the proposed alternative would be too broad. They preferred the language recommended by the Commission, or failing that, use of the term "substantial difficulty." The definition would then include an adult who had "*substantial difficulty* managing his or her own financial resources or resisting fraud or undue influence."

This policy difference could easily have resulted in an impasse. However, it became apparent that the concerns underlying the two positions involved the interests of substantially non-overlapping groups: seniors and non-senior adults with disabilities. Because of that, the two positions could be reconciled by bifurcating the definition, with the "difficulty" standard applying to seniors and the "substantial difficulty" standard applying to non-seniors. Although somewhat awkward, that compromise was acceptable to the interested groups. Senator Harman amended the bill to implement that approach.

The shift from "substantial inability" to some degree of "difficulty" raised a new concern. Some of the interested groups wondered whether a reference to "difficulty managing one's finances" might encompass difficulties that arise from extrinsic circumstances (such as an economic downturn or loss of a job) rather than from the sort of intrinsic factors (such as dementia) that should properly be the basis for treating a person as a dependent adult under the statute.

To address that concern, the definition was amended to make clear that the "difficulty" described in the statute was difficulty resulting from a deficit in mental function. (The new language borrows the definition of "deficit in mental function" from Probate Code Section 811, which is the key provision in existing law addressing decisionmaking incapacity.)

Proposed Section 21366 was amended to implement the compromise described above, as follows:

> 21366. "Dependent adult" means a person who, at the time of executing the instrument at issue under this part, was ~~18 years old or older and satisfied one or both of the following conditions:~~
>
> ~~(a) The person was unable to provide properly for the person's personal needs for physical health, food, clothing, or shelter.~~
>
> ~~(b) The person was substantially unable to manage the person's own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.~~ a person described in either of the following:
>
> (a) The person was 65 years of age or older and satisfied one or both of the following criteria:
>
> (1) The person was unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.
>
> (2) Due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 811, the person had difficulty managing his or her own financial resources or resisting fraud or undue influence.
>
> (b) The person was 18 years of age or older and satisfied one or both of the following criteria:
>
> (1) The person was unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.
>
> (2) Due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 811, the person had substantial difficulty managing his or her own financial resources or resisting fraud or undue influence.

Although the amended provision uses different and more complex language than the Commission recommended, the overall effect would be fundamentally similar. The categorical definition that includes every person with a disability would be replaced with an individualized functional assessment.

To reflect the amendments, the Comment to proposed Section 21366 should be revised as follows:

> **Comment.** Section 21366 is new. ~~The standard used in this section is drawn from the criteria for appointment of a conservator. See Prob. Code § 1801(a)-(b).~~

See also Section 45 ("instrument").

Definition of "Independent Attorney"

Existing law provides a procedure that can be used to save a gift from the operation of the statutory presumption. The procedure requires that an "independent attorney" review the donative instrument at issue, counsel the transferor, and then certify that the gift is not the product of menace, duress, fraud, or undue influence. Prob. Code § 21351(b).

The existing statute does not define the term "independent attorney." The only guidance it provides is in the certification form language, which requires that the attorney attest to being "so disassociated from the interest of the transferee as to be in a position to advise [the transferor] independently, impartially, and confidentially as to the consequences of the transfer." *Id*.

In a prior memorandum, the staff discussed a recently decided case that considered the meaning of "independent attorney." See Memorandum 2010-14; Estate of Winans, 183 Cal. App. 4th 102, 107 Cal. Rptr. 3d 167 (2010). One of the questions raised in that case was whether an attorney named as executor by a will had too much of a pecuniary interest in the will's operation to "independently" evaluate the validity of a gift made by the will. The same general issue was raised again during discussion with the interested groups.

In order to avoid any possibility of a conflict of interest arising from a pecuniary interest in the donative instrument under review, Senator Harman amended proposed Section 21370 as follows:

> 21370. "Independent attorney" means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue under this part, and who would not be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue under this part.

That is stricter than the language proposed by the Commission, but not at odds with the general concept behind the proposed section. **The staff recommends that the Comment to Section 21370 be revised as follows:**

> **Comment.** Section 21370 is new. The standard provided in this section is similar to California Rules of Professional Conduct 3-310(B)(1) and (3) , except that there is an exclusion for an attorney who would be appointed as fiduciary or receive a pecuniary benefit by operation of the instrument to be reviewed. See also Section 21384 (independent attorney review).

Timing of Care Custodian Presumption

Existing law does not address the timing of the care custodian presumption. That is, the statute does not specify any temporal connection between the existence of the care-giving relationship and the execution of the donative instrument at issue.

The proposed law would plug that gap in the law by expressly stating that the presumption applies to a donative instrument that is executed *during* the care-giving relationship. See proposed Prob. Code § 21380(a)(3).

CJA expressed concern that the proposed rule might create new opportunities for gamesmanship by sophisticated abusers. An abuser might manipulate the timing of care, in order to ensure that the donative instrument is not executed "during" the care-giving relationship. CJA suggested that this problem could be largely avoided by adding a 90-day application period before and after giving care.

Senator Harman agreed to make this change and proposed Section 21380(a)(3) was amended as follows:

> 21380. (a) A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:
>
> …
>
> (3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor , or within 90 days before or after that period.

The staff understands the concern raised by CJA and believes that the amendment is a reasonable way to address the problem, without imposing too great a burden on testamentary freedom. **The Comment to proposed Section 21380(a)(3) should be revised to reflect the change, as follows:**

> **Comment.** Subdivision (a) of Section 21380 restates the substance of former Section 21350(a), with four exceptions:
>
> (1) Subdivision (a)(3) limits the care custodian presumption to gifts made during the period in which the care custodian provided services to the transferor , or within 90 days before or after that period.

Rebuttal of the Statutory Presumption

Existing law imposes special evidentiary restrictions on rebuttal of the statutory presumption. With respect to a gift to the drafter of a donative

instrument, the presumption is conclusive. In all other cases, the beneficiary of a presumptively invalid gift must prove the validity of the gift by clear and convincing evidence (rather than by a preponderance of the evidence) and may not rely exclusively on the testimony of the beneficiary. See Prob. Code § 21351(d)-(e)(1).

The Commission recommended that the special burdens on rebuttal be removed, in favor of the common law rule requiring only a preponderance of the evidence. CJA and others strongly objected to the proposed changes, on the grounds that a strict presumption is required to protect vulnerable elders from financial abuse.

Senator Harman agreed to amend the bill to preserve existing law (1) making the presumption conclusive with respect to gifts to drafters, and (2) requiring clear and convincing rebuttal evidence in all other cases.

Proposed Section 21380(b) and (c) were amended as follows:

> 21380. … (b) The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by ~~a preponderance of the~~ clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence.
>
> (c) Notwithstanding subdivision (b), with respect to a donative transfer to the person who drafted the donative instrument, or to a person who is related to or associated with the drafter as described in paragraph (4), (5), or (6) of subdivision (a), the presumption created by this section is conclusive.
>
> (d) If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.

The staff recommends that the Comment to proposed Section 21380(b)-(d) be revised to conform to the amendments, as follows:

> **Comment**. …
>
> Subdivision (b) restates the substance of the first sentence of former Section 21351(d), with ~~three~~ two exceptions:
>
> (1) ~~The standard of proof has been changed to a preponderance of the evidence.~~
>
> ~~(2)~~ The former limitation on proof by the testimony of the beneficiary is not continued.
>
> ~~(3)~~ (2) The presumption of menace and duress is not continued.
>
> Subdivision (c) continues the substance of former Section 21351(e)(1), and expands the rule to apply to gifts to specified relatives and associates of the drafter of a donative instrument.

Subdivision ~~(c)~~ (d) restates the substance of the second sentence of former Section 21351(d).

Scope of Family Member Exemptions

Under existing law, the statutory presumption of menace, duress, fraud, or undue influence does not apply to a gift to a person who is related to the transferor, by blood or affinity, within the fifth degree. Prob. Code § 21351(a), (g). Nor does the presumption apply to a donative instrument that is drafted by a relative within the fifth degree. *Id*.

The Commission's recommendation would continue those exemptions. See proposed Section 21382(a)-(b).

One of the interested groups expressed concern that the family exemption is too broad. The fifth degree of kinship includes relations as remote as a grand-niece or the child of a first cousin. See Prob. Code § 13.

In response to this concern, Senator Harman amended proposed Section 21382 to limit the family exemptions to relations within the *fourth* degree of kinship (e.g., a niece or first cousin).

The staff recommends that the Comment to proposed Section 21382(a)-(b) be revised to reflect the amendment, as follows:

> **Comment.** Subdivisions (a) and (b) of Section 21382 restate the substance of former Section 21351(a) and (g), ~~except that "heirs~~ with the following exceptions:
>
> (1) The scope of the exemption is narrowed from the fifth degree of relation to the fourth.
> (2) "Heirs of the transferor" are no longer included in the ~~exception, and the~~ exemption.
> (3) The former exemption of an instrument drafted by an exempt person has been generalized to include an instrument that is transcribed by an exempt person.

Nature of Independent Attorney Counseling

As noted above, Memorandum 2010-14 discussed a recent case involving Probate Code Section 21350 *et seq*. See Estate of Winans, 183 Cal. App. 4th 102, 107 Cal. Rptr. 3d 167 (2010). Amongst other things, *Winans* considered the character of the counseling that must be provided to a transferor before an independent attorney may certify that a presumptively invalid gift was not the product of menace, duress, fraud, or undue influence. Specifically, the case examined the required *content* of the counseling and the *degree of confidentiality* required. See Memorandum 2010-14, pp. 5-6.

In Memorandum 2010-14, the staff discussed possible refinements to the counseling language, to address the issues raised in *Winans*. The Commission authorized the staff to suggest those changes to Senator Harman. Minutes (April 2010), p. 3. Further refinements of the language were suggested by TEXCOM.

Senator Harman amended proposed Section 21384(a) to implement those improvements, as follows:

> 21384. (a) A gift is not subject to Section 21380 if the instrument is reviewed by an independent attorney who counsels the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate in substantially the following form:
>
> …

The staff recommends that the Comment to proposed Section 21384 be revised to reflect those amendments, as follows:

> **Comment.** Section 21384 restates the substance of former Section 21351(b)~~, except that a~~ with the following exceptions:
>
> (1) The counseling must be conducted out of the presence of any heir or proposed beneficiary.
> (2) The counseling must address the effect of the intended transfer on the transferor's heirs and other beneficiaries.
> (3) A drafting attorney may conduct the review and certification of a gift to a care custodian.
>
> …

Relationship to Common Law

The existing statute does not state the relationship between the statutory presumption and the common law on fraud, or undue influence (including the common law presumption of undue influence that can arise in certain circumstances).

The California Supreme Court has directly addressed this issue, declaring that the statute "supplements" the common law and does not supersede it. See Bernard v. Foley, 39 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); Rice v. Clark, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

The Commission's recommendation includes language to state that principle expressly: "Nothing in this part precludes an action to contest a donative transfer under other applicable law." Proposed Section 21392(b).

Notwithstanding that authority, attorney Daniel Murphy has expressed concern that the statutory presumption might be understood to preempt the common law. That would be a problem, because the statute is narrower in its application than the common law.

In order to avoid any possibility of a misunderstanding on this point, Senator Harman amended proposed Section 21392 to make the statement of non-preemption stronger:

> 21392. …
> (b) It is the intent of the Legislature that this part supplement the common law on undue influence, without superseding or interfering in the operation of that law. Nothing in this part precludes an action to contest a donative transfer under the common law or under any other applicable law. This subdivision is declarative of existing law.

There is no need to revise the Comment to proposed Section 21392.

CONCLUSION

In the staff's view, the amendments made to SB 105 are compatible with the overall policy goals of the Commission's recommendation. Where the amendments differ from the Commission's recommended language, the amendments either make minor improvements or address concerns that had not been raised during the Commission's deliberations. In the few instances where an amendment directly reverses a reform recommended by the Commission, the amendment restores the substance of existing law, on points that are both secondary to the main thrust of the Commission's recommendation and severable (e.g., deletion of the provisions relating to will witnesses, preservation of the clear and convincing evidence standard for rebuttal of the statutory presumption).

The staff recommends that the Commission assent to the amendments and approve the attached draft of revised Comments, with or without changes.

Respectfully submitted,

Brian Hebert
Executive Secretary

July 12, 2010

DRAFT REPORT OF THE CALIFORNIA LAW REVISION COMMISSION ON CHAPTER ___ OF THE STATUTES OF 2010

Chapter ___ of the Statutes of 2010 was introduced as Senate Bill 105, authored by Senator Tom Harman. The measure implements the California Law Revision Commission recommendation on *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008). The revised Comments set out below supersede the comparable Comments in the recommendation and reflect amendments made to Senate Bill 105 in the legislative process.

§ 21362. "Care custodian"

Comment. Section 21362 is similar to the last sentence of former Section 21350(c), with two substantive exceptions:

(1) The definition of "care custodian" does not include a person who provides health and social services without remuneration and who had a personal relationship with the dependent adult a specified period of time prior to the provision of services, the death of the dependent adult, and the admission of the dependent adult to hospice care.
(2) The definition of "care custodian" does not incorporate the list of persons from Welfare and Institutions Code Section 15610.17.

Subdivision (b) provides an illustrative list of the sorts of services that are included in the term "health and social services."

See also Section 56 ("person" defined).

§ 21366. "Dependent adult"

Comment. Section 21366 is new.

See also Section 45 ("instrument").

§ 21370. "Independent attorney"

Comment. Section 21370 is new. The standard provided in this section is similar to California Rules of Professional Conduct 3-310(B)(1) and (3), except that there is an exclusion for an attorney who would be appointed as fiduciary or receive a pecuniary benefit by operation of the instrument to be reviewed. See also Section 21384 (independent attorney review).

§ 21380. Presumption of fraud or undue influence

Comment. Subdivision (a) of Section 21380 restates the substance of former Section 21350(a), with three exceptions:

(1) Subdivision (a)(3) limits the care custodian presumption to gifts made during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.
(2) Subdivision (a)(6) generalizes the reference to a "law partnership or law corporation" in former Section 21350(a)(3), to include any law firm, regardless of how it is organized.
(3) Subdivision (a)(6) generalizes the rule creating a presumption of fraud or undue influence when a gift is made to the law firm of the drafter of a donative instrument, so that it also applies to a fiduciary of the transferor who transcribes an instrument or causes it to be transcribed.

Subdivision (b) restates the substance of the first sentence of former Section 21351(d), with two exceptions:

(1) The former limitation on proof by the testimony of the beneficiary is not continued.
(2) The presumption of menace and duress is not continued.

Subdivision (c) continues the substance of former Section 21351(e)(1), and expands the rule to apply to gifts to specified relatives and associates of the drafter of a donative instrument.

Subdivision (d) restates the substance of the second sentence of former Section 21351(d).

The burden of establishing the facts that give rise to the presumption under subdivision (a) is borne by the person who contests the validity of a donative transfer under this section. See Evid. Code § 500 (general rule on burden of proof).

See also Sections 45 ("instrument"), 21362 ("care custodian"), 21364 ("cohabitant"), 21366 ("dependent adult"), 21368 ("domestic partner"), 21372 ("interested witness"), 21374 ("related by blood or affinity").

§ 21382. Exceptions

Comment. Subdivisions (a) and (b) of Section 21382 restate the substance of former Section 21351(a) and (g), with the following exceptions:

(1) The scope of the exemption is narrowed from the fifth degree of relation to the fourth.
(2) "Heirs of the transferor" are no longer included in the exemption.
(3) The former exemption of an instrument drafted by an exempt person has been generalized to include an instrument that is transcribed by an exempt person.

Subdivision (c) continues former Section 21351(c) without substantive change.

Subdivision (d) continues former Section 21351(f) without substantive change.

Subdivision (e) continues former Section 21351(h) without substantive change, except that the $3,000 amount for a small gift has been increased to $5,000.

Subdivision (f) continues former Section 21351(i) without substantive change.

See also Sections 45 ("instrument"), 21364 ("cohabitant"), 21374 ("related by blood or affinity").

§ 21384. Attorney certification

Comment. Section 21384 restates the substance of former Section 21351(b), with the following exceptions:

(1) The counseling must be conducted out of the presence of any heir or proposed beneficiary.
(2) The counseling must address the effect of the intended transfer on the transferor's heirs and other beneficiaries.
(3) A drafting attorney may conduct the review and certification of a gift to a care custodian.

See also Sections 45 ("instrument"), 21362 ("care custodian"), 21370 ("independent attorney").
