

RESOLUTION 6-06-2002

DIGEST

Donative Transfers: Prohibition of Transfer to Caregiver’s Relatives or Employees

Amends Probate Code section 21350 to prohibit donative transfers to those related to, or employed by, care custodians of dependent adults.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

Reasons:

This resolution amends Probate Code section 21350 to prohibit donative transfers to those related to, or employed by, care custodians of dependent adults. This resolution should be approved in principle because it closes a loophole in the statute.

Currently, under Probate Code section 21350, a donative transfer (by will or other instrument) is invalid if it is made to the person who drafted the instrument or to one of the drafter’s relatives, business partners or employees. Nor is it valid if made to a person in a fiduciary relationship with the transferor, including a care custodian for a dependent adult. The intent of this statute is to prevent the exercise of undue influence over the donative actions of certain vulnerable persons by those in a clear position to take advantage of such vulnerability. Although it prohibits transfers to care custodians, the statute does not prohibit transfers to the care custodian’s relatives or employees.

Case law allows a court to invalidate gifts to relatives or employees of care custodians if the protesting party shows such transfer was made as a result of undue influence. By adding gifts to relatives of care custodians to the list of those gifts that are invalid per se, this resolution would simplify those proceedings by making proof of undue influence unnecessary.

SECTION/COMMITTEE REPORT

TRUST AND ESTATE SECTION

Recommends: Support

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates recommends that legislation be sponsored to amend Probate Code section 21350 to read as follows:

- 1 §21350
- 2 (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid
- 3 to make any donative transfer to any of the following:
- 4 (1) The person who drafted the instrument.
- 5 (2) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of, the
- 6 person who drafted the instrument.
- 7 (3) Any partner or shareholder of any law partnership or law corporation in which the person
- 8 described in paragraph (1) has an ownership interest, and any employee of any such law partnership or law
- 9 corporation.
- 10 (4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a
- 11 conservator or trustee, who transcribes the instrument or
- 12 causes it to be transcribed.
- 13 (5) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of a
- 14 person who is described in paragraph (4).
- 15 (6) A care custodian of a dependent adult.
- 16 (7) A person who is related by blood or marriage to, is a cohabitant with, or is an employee of, a
- 17 person who is described in paragraph (6).
- 18 (b) For purposes of this section, “a person who is related by blood or
- 19 marriage” to a person means all of the following:

- 20 (1) The person’s spouse or predeceased spouse.
21 (2) Relatives within the third degree of the person and of the person’s spouse.
22 (3) The spouse of any person described in paragraph (2).
23 In determining any relationship under this subdivision, Sections 6406, 6407, and Chapter 2
24 (commencing with Section 6450) of Part 2 of Division 6 shall be applicable.
25 (c) For purposes of this section, the term “dependent adult” has the meaning set forth in Section
26 15610.23 of Welfare and Institutions Code and also includes those persons who are (1) older than age 64 and
27 (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18
28 and 64. The term “care custodian” has the meaning set forth in Section 15610.17 of Welfare and Institutions
29 Code.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: Probate Code section 21350 was enacted to protect elderly persons and other dependent adults from financial abuse by unscrupulous persons. Under the current section 21350, gifts made by will or trust, or by other form of donative transfer (such as a deed), are invalid if the recipient falls into certain categories. Included in the categories of “disqualified” persons are the person who drafted the instrument and a fiduciary who transcribed the instrument or caused it to be transcribed.

Another category of “disqualified” person is the “care custodian of a dependent adult.” This reflects a legislative recognition that a care custodian is in a unique position to exercise undue influence or perpetrate a fraud on an elder or dependent adult, and thereby obtain improper benefits.

Also disqualified by section 21350 are the spouse, relatives, cohabitants, and employees of the drafter and fiduciary, so that “disqualified” persons cannot avoid the operation of the statute by simply causing the tainted gift to be given indirectly. *However, the statute is silent as to the spouse, relatives, cohabitants, and employees of a “care custodian of a dependent adult”.*

This Resolution: Amends Probate Code section 21350 subdivision (a) to add a new subsection (7). This new language would provide that the spouse, relatives, cohabitants, and employees of a care custodian of a dependent adult are also disqualified.

The Problem: Many wills and trusts have been observed wherein a substantial gift was left by a dependent elder to a care custodian under suspicious circumstances, with the alternate recipient being the care custodian’s spouse or other relatives. In other reported cases, real property has been transferred by a dependent elder into joint tenancy with a care custodian and the care custodian’s spouse. If challenged under section 21350, these gifts to the care custodian would likely fail, but the tainted gifts would then pass to the disqualified person’s spouse or relative, giving the care custodian the benefit of the gift indirectly. This thwarts the intent of section 21350 to protect vulnerable members of society.

IMPACT STATEMENT: This proposed resolution does not affect any other law, statute, or rule.

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RESPONSIBLE FLOOR DELEGATE: