

## RESOLUTION 3-04-03

### DIGEST

#### Donative Transfers: Limitations on Transfers

Amends Probate Code section 21351 to require independent review before a donative transfer may be made to a spouse, cohabitant or domestic partner who previously served as the donor's care custodian.

### RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

#### History:

None known.

#### Reasons:

This resolution amends Probate Code section 21351 to require independent review before a donative transfer may be made to a spouse, cohabitant or domestic partner who previously served as the donor's care custodian. This resolution should be approved in principle because it provides protection to the ill and elderly against diversion of assets through opportunistic marriages or other relationships.

Probate Code section 21350 prohibits donative transfers by written instrument to certain categories of individuals, including care custodians, without court approval or review by an independent attorney. Section 21351 exempts from this prohibition such transfers made to persons who are related by blood or marriage to, cohabitant with, or are the registered domestic partner of, the transferor. The intent of these statutes 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. (Cal. Trust and Probate Litigation (Cont. Ed. Bar), § 6A.2, p. 148.) However, the exemption in section 21351 does not consider the unscrupulous care custodian who marries, cohabitates with, or becomes a registered domestic partner of the dependent adult, perhaps in whole or in part to acquire assets without others' scrutiny.

The family court may annul or set aside the care custodian's actions if a conservator or other protesting party proves the relationship was a result of undue influence, fraud or other factors specified in the Family Code. Unfortunately, this is costly and time consuming, and the elements may be difficult to prove. By requiring independent review of a donative transfer before it takes effect, this resolution would discourage such acts by care custodians and help to prevent this form of abuse.

### SECTION/COMITEE REPORT

#### TRUSTS AND ESTATES SECTION EXECUTIVE COMMITTEE

Recommendation: **DISAPPROVE**

#### Reasons:

This resolution is too broad. The legislation would interfere unduly with the right to marry, and undue influence and lack of capacity provide adequate remedies under existing law.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 21351 to read as follows:

1 §21351

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

3 (a) The transferor is related by blood or marriage to, is a cohabitant with, or is the registered  
4 domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the Family Code, of  
5 the transferee or the person who drafted the instrument excepting any marriage, cohabitation or  
6 registered domestic partnership that the transferor enters into with a Care Custodian as defined in  
7 Welfare and Institutions Code Section 15610.17. For purposes of this section, "cohabitant" has the  
8 meaning set forth in Section 13700 of the Penal Code. This subdivision shall retroactively apply to  
9 an instrument that becomes irrevocable on or after July 1, 1993.

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

15 "CERTIFICATE OF INDEPENDENT REVIEW

17 I, \_\_\_\_\_, have reviewed (attorney's  
18 name) \_\_\_\_\_ and counseled my client, (name of  
19 instrument) \_\_\_\_\_, on the nature and consequences of the (name of  
20 client) transfer, or transfers, of property to \_\_\_\_\_ (name  
21 of potentially disqualified person) contained in the instrument. I am so disassociated from the  
22 interest of the transferee as to be in a position to advise my client independently, impartially, and  
23 confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the  
24 transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the  
25 Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace,  
26 duress, or undue influence.

27 \_\_\_\_\_  
28 (Name of Attorney) (Date)"

29  
30 Any attorney whose written engagement signed by the client is expressly limited solely to  
31 the preparation of a certificate under this subdivision, including the prior counseling, shall not be  
32 considered to otherwise represent the client.

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

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

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

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

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

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

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

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

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

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

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

PROPONENT: Orange County Bar Association

#### STATEMENT OF REASONS

Existing Law: Probate Code section 21350 prohibits donative transfers to certain categories of individuals, including, but not limited to, care custodians. Section 21351, however, exempts from that prohibition spouses, registered domestic partners and cohabitants.

This Resolution: Amends section 21351 to provide that spouses, registered domestic partners and cohabitants of the transferor would be prohibited from receiving any donative transfer if they were the care custodian of the transferor prior to becoming a spouse, registered domestic partner or cohabitant.

The Problem: One of the most frustrating forms of elder financial abuse is the unscrupulous care custodian who marries their elderly patient. With the advent of domestic partnerships, the opportunity to engage in abusive financial conduct is even greater. All that is required is the signature of both parties, the notarization of those signatures and registering the document with Sacramento. The elder's family may never know of the change in status until after the elder's death. If the marriage, registered domestic partnership or cohabitation with a former care custodian is, in fact, appropriate and in the best interests of the elder and not for an improper purpose, then the former care custodian should not object to meeting the remaining provisions of this section in order to receive a donative transfer from their former patient.

#### IMPACT STATEMENT

This resolution not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Kim R. Hubbard

#### COUNTERARGUMENT

#### SAN DIEGO COUNTY BAR ASSOCIATION

An ATM card is more likely to be a debit card than a credit card. The use of a debit card is analogous to the writing of a check by the Administrator on the estate account. Such use of ATM cards as alternatives to checks is normal, convenient, and proper. This proposal unduly restricts the representative from reasonable use of a convenient banking tool to protect against the "felonious fiduciary." Such a committed felon will find other ways to defraud an estate, and this attempted remedy will cause far more unreasonable interference than it will protect estates.