

RESOLUTION 11-04-2007

DIGEST

Probate: Limitation on Transfers to Care Custodians Under Certain Circumstances

Amends Probate Code section 21351 to add former care custodians to the class of persons to whom transfers are invalid unless approved by a certificate of independent review.

RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 21351 to add former care custodians to class of persons to whom transfers are invalid unless approved by a certificate of independent review. This resolution should be disapproved because it fails to consider significant aspects of the relationship between the parties, and because the Legislature is already reviewing the problem addressed by the proponent.

Existing law (Probate Code, section 21350) invalidates donative transfers to “care custodians” unless an independent attorney reviews the proposed donative transaction (will, gift, transfer, etc.) and certifies in writing that, in the independent attorney’s opinion, the transaction is free from fraud, duress or undue influence. Probate Code section 21351 contains an exception to this invalidity where the transferor is related by blood or marriage to, or is a cohabitant or registered domestic partner of the transferee. This resolution, however, would remove from the exception any spouse, cohabitant or registered domestic partner of the transferor who was formerly a “care custodian” of the transferor, without regard to other aspects of the relationship and the surrounding circumstances.

The resolution should be disapproved for the additional reason that the Legislature has already taken action on the issue. Assembly Bill No. 2034 (2005-2006 Reg. Sess.), which was adopted into law last year (Chapter 215 of Laws of 2006), mandates that a full and complete study and review of Probate Codes 21350 and 21351 be conducted by the Law Revision Commission. That review is presently underway, and is scheduled to be reported to the Legislature with proposed statutory revisions on this subject matter no later than January 1, 2009.

SECTION/COMMITTEE REPORT

TRUST & ESTATES SECTION

DISAPPROVE

The Trust & Estates Section observed that spouses and others similarly situated (domestic partner, etc) are frequently care custodians and the proposal would lead to unintended and detrimental societal consequences.

This position is only that of the TRUST & ESTATES SECTION of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUST & ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of the California Bar Association 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
4 registered domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the
5 Family Code, of the transferee or the person who drafted the instrument unless said
6 transferee was a Care Custodian, pursuant to Welfare & Institutions Code section 15610.17.
7 If the transferee was a care custodian of the transferor before the marriage, co-habitation or
8 registration of domestic partnership, then the provisions of subsection (b) must be met
9 before the transfer may be deemed effective. For purposes of this section, "cohabitant" has
10 the meaning set forth in Section 13700 of the Penal Code. This subdivision shall
11 retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.
12 b) The instrument is reviewed by an independent attorney who (1) counsels the client
13 (transferor) about the nature and consequences of the intended transfer, (2) attempts to
14 determine if the intended consequence is the result of fraud, menace, duress, or undue
15 influence, and (3) signs and delivers to the transferor an original certificate in substantially
16 the following form, with a copy delivered to the drafter:
17
18 "CERTIFICATE OF INDEPENDENT REVIEW"
19
20 I, _____, have reviewed
21 (attorney's name)
22 _____ and counseled my client,
23 (name of instrument)
24 _____, on the nature and consequences of the
25 (name of client)
26
27 transfer, or transfers, of property to _____
28 (name of potentially disqualified person)
29
30 contained in the instrument. I am so disassociated from the interest of the transferee as to be
31 in a position to advise my client independently, impartially, and confidentially as to the
32 consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or

33 transfers, in the instrument that otherwise might be invalid under Section 21350 of the
34 Probate Code are valid because the transfer, or transfers, are not the product of fraud,
35 menace, duress, or undue influence.

36
37

38 _____ " _____
39 (Name of Attorney) (Date)

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

43 (c) After full disclosure of the relationships of the persons involved, the instrument is
44 approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter
45 6 of Part 4 of Division 4.

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

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

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

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

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

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

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

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

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

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

PROPONENT: Orange County Bar Associaton

STATEMENT OF REASONS:

Existing law: Provides that care custodians may inherit or receive donative transfers if they are the spouse, domestic partner or co-habitant of the elder or dependent adult. Further provides that donative transfers cannot exceed \$3,000.

This Resolution: Would provide that if the spouse, domestic partner or co-habitor was, at any time, a care custodian of the elder or dependent adult it will be necessary to get a Certificate of Independent Review before the transfer will be effective and that transfers for less than \$3000 will be counted cumulatively.

The Problem: The problem of having care givers inherit or receive donative transfers is not solved by the prohibition under section 21350 if all they have to do is marry, form a domestic partnership or co-habit with their client, which they are doing. And while donative transfers are not to exceed \$3,000, it is not specifically stated that such transfers cumulatively cannot exceed \$3,000, providing the care giver with the opportunity of receiving numerous transfers at or just under that sum.

IMPACT STATEMENT

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

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RESPONSIBLE FLOOR DELEGATE: Kim R. Hubbard

COUNTERARGUMENT

SAN DIEGO COUNTY BAR ASSOCIATION

In seeking to protect certain individuals, a law may infringe excessively on others. This Resolution is a case in point: While it would ensure that care custodians do not circumvent the requirements of Probate section 21351 by marrying, cohabitating or becoming the domestic partner of elderly transferors who are in need of protection, it makes it more difficult for those elderly transferors who are not in need of protection to make donative transfers to their spouses, domestic partners or cohabitants if they happen to be the transferors' former care custodians. In sum, in enacting section 21351(a) to exclude spouses, domestic partners and cohabitants of transferors from the requirements of the other subsections of section 21351, the Legislature sought to balance fundamental rights with the need for protection. The line the Legislature drew appears balanced and well reasoned. It should not be disturbed.