



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

REVISIONS TO REMEDY INCONSISTENCIES IN PROBATE CODE RESULTING FROM RECENT CASE LAW, ELIMINATE AMBIGUITY, AND CORRECT AN OMISSION

LEGISLATIVE PROPOSAL (T&E 2017-02)

To: Office of Governmental Affairs

From: Patrick Kohlmann, Chair, Trusts and Estates Section Executive Committee
Gina Lera, Vice Chair, Trusts and Estates Section Executive Committee
Howard Horwitz, Member, Trusts and Estates Section Executive Committee

Date: January 15, 2016

Re: Proposal to Amend Probate Code Section 21380 et seq.

SECTION ACTION AND CONTACT(S):

Date of Approval by Section Executive Committee: January 15, 2016

Approval vote: Yes 26, No 0, Abstain 0

Section Members:	Section Legislative Co-Chairs:
Matthew P. Matiasevich Evans Latham & Campisi 415-421-0288 mmatiasevich@elc-law.com	Yvonne Annette Ascher Law Office of Yvonne A. Ascher 831-641-9019 yascher@ascherlaw.com
Howard L. Horwitz Kibre & Horwitz LLP 310-557-1213 HHorwitz@kandhlaw.net	Jana Ellerman Guthrie & Ellerman 530-677-1693 jana@guthrieandellerman.com

PURPOSE:

This legislative proposal would remedy inconsistencies that have arisen in the statutory scheme at Probate Code Section 21380 et seq. as the result of recent case law. This scheme protects vulnerable members of society by creating a presumption of fraud or undue influence for “donative transfers” to certain people who might exercise improper authority over the transferor. As currently worded, this scheme uses the terms “donative transfer” and “gift” interchangeably. Recent case law, however, has held that the Legislature intended the term “donative transfer” in a more expansive sense to include transfers for inadequate or unfair consideration as well as outright gifts, creating a potentially harmful discrepancy every time this statutory scheme uses the term gift instead of donative transfer. This proposal would eliminate harm to victims and prevent confusion by changing the statutes so they use the term “donative transfer” throughout, rather than switching between two terms that might be perceived as having different meanings.

In addition, this proposal would eliminate the ambiguity with regard to Probate Code Section 21380(a)(2), which imposes a presumption of fraud and undue influence for a donative transfer to a fiduciary who transcribed the instrument in question or caused it to be transcribed. As written, this statute contains an ambiguity that can be construed as imposing the presumption when the fiduciary had no role in transcribing the instrument at all, which appears to be inconsistent with the Legislature’s intent for this statute. This proposal would eliminate the ambiguity and clarify that the presumption of fraud and undue influence arises when the fiduciary either transcribed the instrument in question or caused it to be transcribed.

Finally, this proposal would correct an omission in Probate Code Section 21392(b), which neglects to provide that this statutory scheme does not interfere with the common law of fraud. This provision confirms that the scheme does not supersede or interfere with the common law of undue influence, but since this scheme also imposes a presumption of fraud, it should refer to that aspect of the common law as well.

PROPOSAL AND REASONS FOR PROPOSAL:

Existing Law: The statutory scheme at Probate Code Section 21380 et seq. imposes a presumption of fraud or undue influence for “donative transfers” to various people who are in a position to exercise improper sway over the transferor. This scheme describes the circumstances that render the presumption inapplicable (for example, when the transferor obtains a certificate of independent review under Probate Code Section 21384) and also describes the effect of a failure to rebut the presumption (that is, that the instrument will operate as if the disqualified transferee had predeceased the transferor without spouse, domestic partner, or issue under Probate Code Section 21386). Recent case law holds that the statutory term “donative transfer” includes not just gifts, but also transfers for inadequate or unfair consideration. (*Jenkins v. Teegarden* (2014))

230 Cal.App.4th 1128, 1142 [interpreting the term “donative transfer” as used in former Probate Code Section 21350)].¹

The Problem: There are several difficulties with the wording of the statutory scheme at Probate Code Section 21380 et seq., the most important being inconsistencies that have arisen in light of recent case law and that might cause harm unless they are promptly rectified. This statutory scheme applies to “donative transfers.” However, two of the statutes in this scheme are triggered by a “donative transfer” (i.e., Probate Code Sections 21380 and 21382) while two others are triggered by a “gift” (i.e., Probate Code Sections 21384 and 21386), which now creates confusion about whether the “gift” statutes were meant to be more restrictive.

The difficulties to be remedied are as follows:

Confusion Regarding the Application of Probate Code Sections 21384 and 21386:

As currently worded, the statutory scheme uses the terms “donative transfer” and “gift” interchangeably, which does not appear to reflect the Legislature’s actual intent. Under *Jenkins v. Teegarden* the statutory term “donative transfer” includes more than a mere gift and also encompasses transfers for inadequate or unfair consideration. This expansive reading of the term “donative transfer” also seems consistent with the Legislature’s attempt to protect vulnerable members of the public, i.e., under this reading the statute is broader because there is a presumption of fraud and undue influence whenever an individual listed in section 21380 receives either a gift or a transfer for inadequate or unfair consideration.

As currently phrased, however, the statutory scheme appears to be partially inconsistent with the holding of *Jenkins v. Teegarden* because it uses the terms “donative transfer” and “gift” interchangeably, which does not appear to reflect the Legislature’s intent as discussed in that case and which could lead to strange and unintended results. As currently worded, sections 21380 and 21382 are triggered by any “donative transfer,” whereas sections 21384 and 21386 are only triggered by a “gift.” This creates the mistaken impression that the Legislature intended sections 21384 and 21386 to be more restrictive. Thus, in the wake of *Jenkins v. Teegarden*, at least two significant inconsistencies have now appeared in the statutory scheme, each arising from the apparent distinction between “donative transfer” and “gift” that the public will now see in the statutory language.

First, the distinction will undermine some certificates of independent review. While a transfer for inadequate or unfair consideration is now a “donative transfer” under section 21380 and hence is subject to the presumption of fraud or undue influence, the transferor cannot remove that presumption with a certificate of independent review because, as worded, section 21384 only allows the transferor to do that for a “gift.” This would thwart the intent of transferors and

¹ Though *Jenkins v. Teegarden* was interpreting the term “donative transfer” as used in former section 21350, it seems apparent that the Legislature’s intent regarding that term did not change when it replaced former section 21350 with the current statutory scheme. (See Law Revision Commission Comment to Probate Code Section 21380 [noting that section 21380 restates the substance of former section 21350 with only three exceptions, none of which impacts the definition of “donative transfer”]).

harm transferees who should fall outside the statutory scheme, i.e., those who are confirmed by a certificate of independent review.

Second, the distinction might allow certain instances of fraud and undue influence to pass without remedy. While a transfer for inadequate or unfair consideration is now a “donative transfer” under section 21380 and hence should fail if the transferee does not rebut the presumption of fraud or undue influence, the improper transfer might nonetheless avoid the scheme’s intended effect because section 21386 (i.e., stating that the instrument shall operate as if the transferee predeceased the transferor without spouse, domestic partner, or issue) only applies to a “gift.” This inconsistency could harm victims and those who claim under them by negating the presumption altogether or allowing assets to pass to the undue influencer’s spouse or children even though the entire transfer should fail.

These potentially harmful consequences can be eliminated by using the term “donative transfer” throughout the statutory scheme rather interchanging between “donative transfer” and “gift.”

Ambiguity Regarding Probate Code Section 21380(a)(2): Section 21380(a)(2) states that a donative transfer is presumed to be the result of fraud or undue influence when the recipient is a fiduciary “who transcribed the instrument or caused it to be transcribed.” However, a reader can interpret section 21380(a)(2) as imposing that presumption on the fiduciary when the fiduciary had no role whatsoever in transcribing the instrument, which does not seem consistent with the Legislature’s intent. This statute is ambiguous because a reader can interpret the dependent clause in question (i.e., “who transcribed the instrument or caused it to be transcribed”) as referring to the nearest antecedent rather than to the antecedent that the Legislature intended (i.e., as referring to the “transferor” and not the “fiduciary”). In pertinent part, Section 21380 reads as follows, with emphasis to illustrate the ambiguity:

“(a) A provision of any instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:

- (1) The person who drafted the instrument.
- (2) A person in a fiduciary relationship with *the transferor who transcribed the instrument or caused it to be transcribed.*” (emphasis supplied).

It seems clear that the Legislature wanted to impose a presumption of fraud and undue influence when the *fiduciary* transcribed the instrument, and hence this ambiguity should be eliminated. This statute was preceded by former Probate Code Section 21350(a)(4), which was the same in substance and which the comments interpreted in a manner consistent with this proposal.

Omitted Reference To The Common Law of Fraud: The Legislature intended that this scheme supplement the common law of fraud and undue influence rather than replace or interfere with that law. Probate Code Section 21392(b) expressly states that this scheme does not interfere with the common law of undue influence, but it neglects to mention the common law of fraud,

which creates the mistaken impression that the Legislature intended to supersede the common law in that respect.

HISTORY:

The Trusts and Estates Section Executive Committee is not aware of any similar bill that has been introduced.

PENDING LITIGATION:

None known.

LIKELY SUPPORT & OPPOSITION:

Probate practitioners will likely support this proposal because it will prevent future confusion and harm. We are unaware of any opposition to this proposal.

FISCAL IMPACT:

There is no anticipated fiscal impact.

GERMANENESS:

The members of the Trusts and Estates Section Executive Committee have an interest in these issues and have expertise concerning them given that they represent clients in connection with Probate Code Section 21380 and related matters.

DISCLAIMER

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Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

TEXT OF PROPOSAL:

Note Regarding Text of Proposal: The following proposal does not edit the relevant section headings, which, as noted in Probate Code Section 4, do not affect the meaning of the provisions themselves. Current section headings from one publisher are quoted in the text of the proposal merely for the reader's ease of reference.

§21380. Presumption of Fraud or Undue Influence; Costs and Attorney's Fees.

(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:

(1) The person who drafted the instrument.

(2) ~~A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.~~ A person who transcribed the instrument or caused it to be transcribed and who was in a fiduciary relationship with the transferor when the instrument was transcribed.

(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.

(4) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive.

(5) A cohabitant or employee of any person described in paragraphs (1) to (3), inclusive.

(6) A partner, shareholder, or employee of a law firm in which a person described in paragraph (1) or (2) has an ownership interest.

(b) The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by 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.

§ 21382. Exclusion from presumption for certain documents or transfers.

Section 21380 does not apply to any of the following instruments or transfers:

- (a) A donative transfer to a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.
- (b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fourth degree, to the transferor or is the cohabitant of the transferor.
- (c) An instrument that is approved pursuant to an order under Article 10 (commencing with Section 2580) of Chapter 6 of Part 4 of Division 4, after full disclosure of the relationships of the persons involved.
- (d) A donative transfer to 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 the transferred property for the entity.
- (e) A donative transfer of property valued at five thousand dollars (\$5,000) or less, if the total value of the transferor's estate equals or exceeds the amount stated in Section 13100.
- (f) An instrument executed outside of California by a transferor who was not a resident of California when the instrument was executed.

§ 21384. Gifts excluded from presumption; certificate of independent review.

- (a) A ~~gift~~ donative transfer 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:

“CERTIFICATE OF INDEPENDENT REVIEW”

I, _____, (attorney's name), have reviewed _____ (name of instrument) and have counseled the transferor, _____ (name of transferor), on the nature and consequences of any transfers of property to _____ (name of person described in Section 21380 of the Probate Code) that would be made by the instrument.

I am an “independent attorney” as defined in Section 21370 of the Probate Code and am in a position to advise the transferor independently, impartially, and confidentially as to the consequences of the transfer.

On the basis of this counsel, I conclude that the transfers to _____
(name of person described in Section 21380 of the Probate Code) that would be made by the
instrument are not the product of fraud or undue influence.

(Name of Attorney) (Date) _____”

(b) An attorney whose written engagement, signed by the transferor, is expressly limited solely to compliance with the requirements of this section, shall not be considered to otherwise represent the transferor as a client.

(c) An attorney who drafts an instrument can review and certify the same instrument pursuant to this section, but only as to a ~~gift~~ [donative transfer](#) to a care custodian. In all other circumstances, an attorney who drafts an instrument may not review and certify the instrument.

(d) If the certificate is prepared by an attorney other than the attorney who drafted the instrument that is under review, a copy of the signed certification shall be provided to the drafting attorney.

§ 21386. Presumption for gifts that failed under this part.

If a ~~gift~~ [donative transfer](#) fails under this part, the instrument making the ~~gift~~ [donative transfer](#) shall operate as if the beneficiary had predeceased the transferor without spouse, domestic partner, or issue.

§ 21388. Personal liability for certain property transfers.

(a) A person is not liable for transferring property pursuant to an instrument that is subject to the presumption created under this part, unless the person is served with notice, prior to transferring the property, that the instrument has been contested under this part.

(b) A person who is served with notice that an instrument has been contested under this part is not liable for failing to transfer property pursuant to the instrument, unless the person is served with notice that the validity of the transfer has been conclusively determined by a court.

§ 21390. Contrary provision in instrument; application of part.

This part applies notwithstanding a contrary provision in an instrument.

§ 21392. Application of part; application of common law.

(a) This part shall apply to instruments that become irrevocable on or after January 1, 2011. For the purposes of this section, an instrument that is otherwise revocable or amendable shall be deemed to be irrevocable if, on or after January 1, 2011, the transferor by reason of

incapacity was unable to change the disposition of the transferor's property and did not regain capacity before the date of the transferor's death.

(b) It is the intent of the Legislature that this part supplement the common law on [fraud and](#) 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.