



TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

LEGISLATIVE PROPOSAL (T&E-2006-11): CERTIFICATE OF INDEPENDENT REVIEW: DEFINITION OF INDEPENDENT ATTORNEY

TO: State Bar Office of Governmental Affairs

FROM: Margaret Anne Payne, Chair, Trusts & Estates Section Estate Planning Committee
(Probate Code §21351(b) Subcommittee)

DATE: August 1, 2005

RE: Proposed revisions to Probate Code §21351(b)

SECTION CONTACTS:

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DATES OF APPROVAL:

DIGEST:

Probate Code §21350(a) provides that except as provided in §21351, no provision or provisions of any instrument shall be valid to make any donative transfer to certain disqualified persons. Section 21351(b) provides that §21350(a) does not apply if a Certificate of Independent Review is prepared by an "independent attorney." This proposal clarifies Probate Code §21351(b) to make it clear that the Certificate of Independent review may be prepared by the same attorney who drafted the instrument.

This proposal revises Probate Code §21351(b) to make it clear that the transferor's independent drafting attorney, as well as an "independent attorney," may prepare a Certificate of Independent Review.

This proposal would become effective January 1, 2007 and would apply to all situations and/or transactions arising after its effective date.

ILLUSTRATIONS:

Absent the enactment of this proposal, it is arguably unclear whether a drafting lawyer who is independent of the transferee, who counsels the client about the nature and consequences of the intended transfer and attempts to determine if the intended consequence is the result of fraud, menace, duress or undue influence, must still refer the client to another lawyer for the preparation of a Certificate of Independent Review under Probate Code Section 21351(b). We believe that clients, if referred to another lawyer in order to obtain a Certificate of Independent Review, far more often than not refuse to see another lawyer to obtain a Certificate of Independent Review. The existence of a Certificate of Independent Review shifts the burden of proof to the objecting party, and validates the gift in the instrument signed by the transferor. We believe it is important for the integrity of the instrument preparation process, and the litigation which may follow, to make it easier rather than more difficult for a Certificate of Independent Review to be prepared. It is sensible and appropriate to confirm that a drafting attorney who is independent of the transferee may prepare a Certificate of Independent Review. The drafting attorney frequently knows the client well and is in the best position to issue a Certificate of Independent Review.

DOCUMENTATION:

The subcommittee is not aware of any specific studies, reports, statistics or documentation

HISTORY:

Probate Code §21351 was added in 1993 (A.B.21, Chapter 293), and was substantially rewritten in 2002 (S.B.1575, Chapter 412). No prior legislation has addressed the issue which is the concern of this legislation.

PENDING LITIGATION:

None known.

FISCAL IMPACT:

None anticipated.

LIKELY SUPPORT/OPPOSITION:

The subcommittee believes this proposal will be supported by lawyers who practice in the trusts and estates area. The subcommittee believes this proposal will not be opposed by anyone.

GERMANENESS:

This proposal is directly related to the practice of the members of the Trusts and Estates Section. This proposal will reduce and/or eliminate issues which would otherwise arise under the Probate Code as a result of the enactment of Probate Code Section 21350(a) and Probate Code Section 21351(b).

TEXT AND COMMENTS:

SECTION 1. Section 21351 of the Probate Code is amended to read:

21351. Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the Family Code, of the transferee or the person who drafted the instrument. For purposes of this section, "cohabitant" has the meaning set forth in Section 13700 of the Penal Code. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(b) The instrument is reviewed by an ~~independent~~ attorney who *is independent of the transferee and who* (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter *if the drafter is not the attorney who issues the certificate*:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and counseled my client,
(name of instrument)

_____, on the nature and consequences of the
(name of client)

transfer, or transfers, of property to _____
(name of potentially disqualified person)

contained in the instrument. I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

(Name of Attorney)

(Date)

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

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

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

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

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

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

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

(f) The transferee is 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 an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

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

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

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