

AMENDED IN ASSEMBLY AUGUST 2, 2010

AMENDED IN ASSEMBLY JUNE 22, 2010

**SENATE BILL**

**No. 105**

---

---

**Introduced by Senator Harman**

January 27, 2009

---

---

An act to amend Section 6103.6 of the Business and Professions Code, and to amend Sections 2583, 15642, 16062, and 21310 of, to add Part 3.5 (commencing with Section 21360) to Division 11 of, and to repeal Part 3.5 (commencing with Section 21350) of Division 11 of, the Probate Code, relating to donative transfers.

LEGISLATIVE COUNSEL'S DIGEST

SB 105, as amended, Harman. Donative transfers: restrictions.

Existing law generally prohibits an instrument from making a donative transfer to the person who drafted or transcribed the instrument and certain other disqualified persons. This provision is subject to specified exceptions, including when the instrument is reviewed by an independent attorney who counsels the client about the nature and consequences of the intended transfer, attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and signs and delivers to the transferor a certificate of independent review.

This bill would revise and recast these provisions to establish an express presumption of fraud or undue influence when a donative instrument makes a gift to the person who drafted or transcribed the instrument, and certain other disqualified persons. The bill would define relevant terms for purposes of these provisions and make other technical and conforming changes.

Vote: majority. Appropriation: no. Fiscal committee: no.  
State-mandated local program: no.

*The people of the State of California do enact as follows:*

1 SECTION 1. Section 6103.6 of the Business and Professions  
2 Code is amended to read:

3 6103.6. Violation of Section 15687 of the Probate Code, or of  
4 Part 3.5 (commencing with Section 21360) of Division 11 of the  
5 Probate Code, shall be grounds for discipline, if the attorney knew  
6 or should have known of the facts leading to the violation. This  
7 section shall only apply to violations that occur on or after January  
8 1, 1994.

9 SEC. 2. Section 2583 of the Probate Code is amended to read:

10 2583. In determining whether to authorize or require a proposed  
11 action under this article, the court shall take into consideration all  
12 the relevant circumstances, which may include, but are not limited  
13 to, the following:

14 (a) Whether the conservatee has legal capacity for the proposed  
15 transaction and, if not, the probability of the conservatee's recovery  
16 of legal capacity.

17 (b) The past donative declarations, practices, and conduct of  
18 the conservatee.

19 (c) The traits of the conservatee.

20 (d) The relationship and intimacy of the prospective donees  
21 with the conservatee, their standards of living, and the extent to  
22 which they would be natural objects of the conservatee's bounty  
23 by any objective test based on such relationship, intimacy, and  
24 standards of living.

25 (e) The wishes of the conservatee.

26 (f) Any known estate plan of the conservatee (including, but  
27 not limited to, the conservatee's will, any trust of which the  
28 conservatee is the settlor or beneficiary, any power of appointment  
29 created by or exercisable by the conservatee, and any contract,  
30 transfer, or joint ownership arrangement with provisions for  
31 payment or transfer of benefits or interests at the conservatee's  
32 death to another or others which the conservatee may have  
33 originated).

34 (g) The manner in which the estate would devolve upon the  
35 conservatee's death, giving consideration to the age and the mental  
36 and physical condition of the conservatee, the prospective devisees  
37 or heirs of the conservatee, and the prospective donees.

38 (h) The value, liquidity, and productiveness of the estate.

1 (i) The minimization of current or prospective income, estate,  
2 inheritance, or other taxes or expenses of administration.

3 (j) Changes of tax laws and other laws which would likely have  
4 motivated the conservatee to alter the conservatee's estate plan.

5 (k) The likelihood from all the circumstances that the  
6 conservatee as a reasonably prudent person would take the  
7 proposed action if the conservatee had the capacity to do so.

8 (l) Whether any beneficiary is the spouse or domestic partner  
9 of the conservatee.

10 (m) Whether a beneficiary has committed physical abuse,  
11 neglect, false imprisonment, or fiduciary abuse against the  
12 conservatee after the conservatee was substantially unable to  
13 manage his or her financial resources, or resist fraud or undue  
14 influence, and the conservatee's disability persisted throughout  
15 the time of the hearing on the proposed substituted judgment.

16 SEC. 3. Section 15642 of the Probate Code is amended to read:

17 15642. (a) A trustee may be removed in accordance with the  
18 trust instrument, by the court on its own motion, or on petition of  
19 a settlor, cotrustee, or beneficiary under Section 17200.

20 (b) The grounds for removal of a trustee by the court include  
21 the following:

22 (1) Where the trustee has committed a breach of the trust.

23 (2) Where the trustee is insolvent or otherwise unfit to administer  
24 the trust.

25 (3) Where hostility or lack of cooperation among cotrustees  
26 impairs the administration of the trust.

27 (4) Where the trustee fails or declines to act.

28 (5) Where the trustee's compensation is excessive under the  
29 circumstances.

30 (6) Where the sole trustee is a person described in subdivision  
31 (a) of Section 21380, whether or not the person is the transferee  
32 of a donative transfer by the transferor, unless, based upon any  
33 evidence of the intent of the settlor and all other facts and  
34 circumstances, which shall be made known to the court, the court  
35 finds that it is consistent with the settlor's intent that the trustee  
36 continue to serve and that this intent was not the product of fraud  
37 or undue influence. Any waiver by the settlor of this provision is  
38 against public policy and shall be void. This paragraph shall not  
39 apply to instruments that became irrevocable on or before January

1 1, 1994. This paragraph shall not apply if any of the following  
2 conditions are met:

3 (A) The settlor is related by blood or marriage to, or is a  
4 cohabitant with, any one or more of the trustees, the person who  
5 drafted or transcribed the instrument, or the person who caused  
6 the instrument to be transcribed.

7 (B) The instrument is reviewed by an independent attorney who  
8 (1) counsels the settlor about the nature of his or her intended  
9 trustee designation and (2) signs and delivers to the settlor and the  
10 designated trustee a certificate in substantially the following form:

11  
12 "CERTIFICATE OF INDEPENDENT REVIEW  
13 I, \_\_\_\_\_, have reviewed  
14 (attorney's name)  
15 \_\_\_\_\_ and have counseled my client,  
16 (name of instrument)  
17 \_\_\_\_\_, fully and privately on the nature and  
18 (name of client)  
19 legal effect of the designation as trustee of \_\_\_\_\_  
20 (name of trustee)

21  
22 contained in that instrument. I am so disassociated from the interest of the  
23 person named as trustee as to be in a position to advise my client impartially  
24 and confidentially as to the consequences of the designation. On the basis of  
25 this counsel, I conclude that the designation of a person who would otherwise  
26 be subject to removal under paragraph (6) of subdivision (b) of Section 15642  
27 of the Probate Code is clearly the settlor's intent and that intent is not the  
28 product of fraud or undue influence.

29  
30 \_\_\_\_\_"  
31 (Name of Attorney) (Date)

32  
33 This independent review and certification may occur either before  
34 or after the instrument has been executed, and if it occurs after the  
35 date of execution, the named trustee shall not be subject to removal  
36 under this paragraph. Any attorney whose written engagement  
37 signed by the client is expressly limited to the preparation of a  
38 certificate under this subdivision, including the prior counseling,  
39 shall not be considered to otherwise represent the client.

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

5 (7) If, as determined under Part 17 (commencing with Section  
6 810) of Division 2, the trustee is substantially unable to manage  
7 the trust’s financial resources or is otherwise substantially unable  
8 to execute properly the duties of the office. When the trustee holds  
9 the power to revoke the trust, substantial inability to manage the  
10 trust’s financial resources or otherwise execute properly the duties  
11 of the office may not be proved solely by isolated incidents of  
12 negligence or improvidence.

13 (8) If the trustee is substantially unable to resist fraud or undue  
14 influence. When the trustee holds the power to revoke the trust,  
15 substantial inability to resist fraud or undue influence may not be  
16 proved solely by isolated incidents of negligence or improvidence.

17 (9) For other good cause.

18 (c) If, pursuant to paragraph (6) of subdivision (b), the court  
19 finds that the designation of the trustee was not consistent with  
20 the intent of the settlor or was the product of fraud or undue  
21 influence, the person being removed as trustee shall bear all costs  
22 of the proceeding, including reasonable attorney’s fees.

23 (d) If the court finds that the petition for removal of the trustee  
24 was filed in bad faith and that removal would be contrary to the  
25 settlor’s intent, the court may order that the person or persons  
26 seeking the removal of the trustee bear all or any part of the costs  
27 of the proceeding, including reasonable attorney’s fees.

28 (e) If it appears to the court that trust property or the interests  
29 of a beneficiary may suffer loss or injury pending a decision on a  
30 petition for removal of a trustee and any appellate review, the court  
31 may, on its own motion or on petition of a cotrustee or beneficiary,  
32 compel the trustee whose removal is sought to surrender trust  
33 property to a cotrustee or to a receiver or temporary trustee. The  
34 court may also suspend the powers of the trustee to the extent the  
35 court deems necessary.

36 (f) For purposes of this section, the term “related by blood or  
37 marriage” shall include persons within the seventh degree.

38 SEC. 4. Section 16062 of the Probate Code is amended to read:

39 16062. (a) Except as otherwise provided in this section and  
40 in Section 16064, the trustee shall account at least annually, at the

1 termination of the trust, and upon a change of trustee, to each  
2 beneficiary to whom income or principal is required or authorized  
3 in the trustee's discretion to be currently distributed.

4 (b) A trustee of a living trust created by an instrument executed  
5 before July 1, 1987, is not subject to the duty to account provided  
6 by subdivision (a).

7 (c) A trustee of a trust created by a will executed before July 1,  
8 1987, is not subject to the duty to account provided by subdivision  
9 (a), except that if the trust is removed from continuing court  
10 jurisdiction pursuant to Article 2 (commencing with Section 17350)  
11 of Chapter 4 of Part 5, the duty to account provided by subdivision  
12 (a) applies to the trustee.

13 (d) Except as provided in Section 16064, the duty of a trustee  
14 to account pursuant to former Section 1120.1a of the Probate Code  
15 (as repealed by Chapter 820 of the Statutes of 1986), under a trust  
16 created by a will executed before July 1, 1977, which has been  
17 removed from continuing court jurisdiction pursuant to former  
18 Section 1120.1a, continues to apply after July 1, 1987. The duty  
19 to account under former Section 1120.1a may be satisfied by  
20 furnishing an account that satisfies the requirements of Section  
21 16063.

22 (e) Any limitation or waiver in a trust instrument of the  
23 obligation to account is against public policy and shall be void as  
24 to any sole trustee who is described in subdivision (a) of Section  
25 21380 and is not described in Section 21382.

26 SEC. 5. Section 21310 of the Probate Code is amended to read:  
27 21310. As used in this part:

28 (a) "Contest" means a pleading filed with the court by a  
29 beneficiary that would result in a penalty under a no contest clause,  
30 if the no contest clause is enforced.

31 (b) "Direct contest" means a contest that alleges the invalidity  
32 of a protected instrument or one or more of its terms, based on one  
33 or more of the following grounds:

- 34 (1) Forgery.
- 35 (2) Lack of due execution.
- 36 (3) Lack of capacity.
- 37 (4) Menace, duress, fraud, or undue influence.
- 38 (5) Revocation of a will pursuant to Section 6120, revocation  
39 of a trust pursuant to Section 15401, or revocation of an instrument

1 other than a will or trust pursuant to the procedure for revocation  
2 that is provided by statute or by the instrument.

3 (6) Disqualification of a beneficiary under Section 6112 or  
4 21380.

5 (c) “No contest clause” means a provision in an otherwise valid  
6 instrument that, if enforced, would penalize a beneficiary for filing  
7 a pleading in any court.

8 (d) “Pleading” means a petition, complaint, cross-complaint,  
9 objection, answer, response, or claim.

10 (e) “Protected instrument” means all of the following  
11 instruments:

12 (1) The instrument that contains the no contest clause.

13 (2) An instrument that is in existence on the date that the  
14 instrument containing the no contest clause is executed and is  
15 expressly identified in the no contest clause, either individually or  
16 as part of an identifiable class of instruments, as being governed  
17 by the no contest clause.

18 SEC. 6. Part 3.5 (commencing with Section 21350) of Division  
19 11 of the Probate Code is repealed.

20 SEC. 7. Part 3.5 (commencing with Section 21360) is added  
21 to Division 11 of the Probate Code, to read:

22

23 PART 3.5. PRESUMPTION OF FRAUD OR UNDUE  
24 INFLUENCE

25

26 CHAPTER 1. DEFINITIONS

27

28 21360. The definitions in this chapter govern the construction  
29 of this part.

30 21362. (a) “Care custodian” means a person who provides  
31 health or social services to a dependent adult, except that “care  
32 custodian” does not include a person who provided services without  
33 remuneration if the person had a personal relationship with the  
34 dependent adult (1) at least 90 days before providing those services,  
35 (2) at least six months before the dependent adult’s death, and (3)  
36 before the dependant adult was admitted to hospice care, if the  
37 dependent adult was admitted to hospice care. As used in this  
38 subdivision, “remuneration” does not include the donative transfer  
39 at issue under this chapter or the reimbursement of expenses.

1 (b) For the purposes of this section, “health and social services”  
2 means services provided to a dependent adult because of the  
3 person’s dependent condition, including, but not limited to, the  
4 administration of medicine, medical testing, wound care, assistance  
5 with hygiene, companionship, housekeeping, shopping, cooking,  
6 and assistance with finances.

7 21364. “Cohabitant” has the meaning provided in Section  
8 13700 of the Penal Code.

9 21366. “Dependent adult” means a person who, at the time of  
10 executing the instrument at issue under this part, was

11 a person described in either of the following:

12 (a) The person was 65 years of age or older and satisfied one  
13 or both of the following criteria:

14 (1) The person was unable to provide properly for his or her  
15 personal needs for physical health, food, clothing, or shelter.

16 (2) Due to one or more deficits in the mental functions listed in  
17 paragraphs (1) to (4), inclusive, of subdivision (a) of Section 811,  
18 the person had difficulty managing his or her own financial  
19 resources or resisting fraud or undue influence.

20 (b) The person was 18 years of age or older and satisfied one  
21 or both of the following criteria:

22 (1) The person was unable to provide properly for his or her  
23 personal needs for physical health, food, clothing, or shelter.

24 (2) Due to one or more deficits in the mental functions listed in  
25 paragraphs (1) to (4), inclusive, of subdivision (a) of Section 811,  
26 the person had substantial difficulty managing his or her own  
27 financial resources or resisting fraud or undue influence.

28 21368. “Domestic partner” has the meaning provided in Section  
29 297 of the Family Code.

30 21370. “Independent attorney” means an attorney who has no  
31 legal, business, financial, professional, or personal relationship  
32 with the beneficiary of a donative transfer at issue under this part,  
33 and who would not be appointed as a fiduciary or receive any  
34 pecuniary benefit as a result of the operation of the instrument  
35 containing the donative transfer at issue under this part.

36 21374. (a) A person who is “related by blood or affinity” to  
37 a specified person means any of the following persons:

38 (1) A spouse or domestic partner of the specified person.

1 (2) A relative within a specified degree of kinship to the  
2 specified person or within a specified degree of kinship to the  
3 spouse or domestic partner of the specified person.

4 (3) The spouse or domestic partner of a person described in  
5 paragraph (2).

6 (b) For the purposes of this section, “spouse or domestic partner”  
7 includes a predeceased spouse or predeceased domestic partner.

8 (c) In determining a relationship under this section, Sections  
9 6406 and 6407, and Chapter 2 (commencing with Section 6450)  
10 of Part 2 of Division 6, are applicable.

11  
12 CHAPTER 2. OPERATION AND EFFECT OF PRESUMPTION  
13

14 21380. (a) A provision of an instrument making a donative  
15 transfer to any of the following persons is presumed to be the  
16 product of fraud or undue influence:

17 (1) The person who drafted the instrument.

18 (2) A person in a fiduciary relationship with the transferor who  
19 transcribed the instrument or caused it to be transcribed.

20 (3) A care custodian of a transferor who is a dependent adult,  
21 but only if the instrument was executed during the period in which  
22 the care custodian provided services to the transferor, or within  
23 90 days before or after that period.

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

27 (5) A cohabitant or employee of any person described in  
28 paragraphs (1) to ~~(4)~~ (3), inclusive.

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

31 (b) The presumption created by this section is a presumption  
32 affecting the burden of proof. The presumption may be rebutted  
33 by proving, by clear and convincing evidence, that the donative  
34 transfer was not the product of fraud or undue influence.

35 (c) Notwithstanding subdivision (b), with respect to a donative  
36 transfer to the person who drafted the donative instrument, or to  
37 a person who is related to, or associated with, the drafter as  
38 described in paragraph (4), (5), or (6) of subdivision (a), the  
39 presumption created by this section is conclusive.

1 (d) If a beneficiary is unsuccessful in rebutting the presumption,  
2 the beneficiary shall bear all costs of the proceeding, including  
3 reasonable attorney’s fees.

4 21382. Section 21380 does not apply to any of the following  
5 instruments or transfers:

6 (a) A donative transfer to a person who is related by blood or  
7 affinity, within the fourth degree, to the transferor or is the  
8 cohabitant of the transferor.

9 (b) An instrument that is drafted or transcribed by a person who  
10 is related by blood or affinity, within the fourth degree, to the  
11 transferor or is the cohabitant of the transferor.

12 (c) An instrument that is approved pursuant to an order under  
13 Article 10 (commencing with Section 2580) of Chapter 6 of Part  
14 4 of Division 4, after full disclosure of the relationships of the  
15 persons involved.

16 (d) A donative transfer to a federal, state, or local public entity,  
17 an entity that qualifies for an exemption from taxation under  
18 Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or  
19 a trust holding the transferred property for the entity.

20 (e) A donative transfer of property valued at five thousand  
21 dollars (\$5,000) or less, if the total value of the transferor’s estate  
22 equals or exceeds the amount stated in Section 13100.

23 (f) An instrument executed outside of California by a transferor  
24 who was not a resident of California when the instrument was  
25 executed.

26 21384. (a) A gift is not subject to Section 21380 if the  
27 instrument is reviewed by an independent attorney who counsels  
28 the transferor, out of the presence of any heir or proposed  
29 beneficiary, about the nature and consequences of the intended  
30 transfer, including the effect of the intended transfer on the  
31 transferor’s heirs and on any beneficiary of a prior donative  
32 instrument, attempts to determine if the intended transfer is the  
33 result of fraud or undue influence, and signs and delivers to the  
34 transferor an original certificate in substantially the following form:

35 “CERTIFICATE OF INDEPENDENT REVIEW

36 I, \_\_\_\_\_, have reviewed  
37 (attorney’s name)

38 \_\_\_\_\_ and have counseled the transferor,  
39 (name of instrument)

40

1 \_\_\_\_\_, on the nature and consequences of any  
 2 (name of transferor)  
 3 transfers of property to \_\_\_\_\_  
 4 (name of person described in Section 21380 of the Probate Code)  
 5 that would be made by the instrument.

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

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

13 \_\_\_\_\_”  
 14 \_\_\_\_\_  
 15 (Name of Attorney) (Date)

16  
 17 (b) An attorney whose written engagement, signed by the  
 18 transferor, is expressly limited solely to compliance with the  
 19 requirements of this section, shall not be considered to otherwise  
 20 represent the transferor as a client.

21 (c) An attorney who drafts an instrument can review and certify  
 22 the same instrument pursuant to this section, but only as to a gift  
 23 to a care custodian. In all other circumstances, an attorney who  
 24 drafts an instrument may not review and certify the instrument.

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

28 21386. If a gift fails under this part, the instrument making the  
 29 gift shall operate as if the beneficiary had predeceased the  
 30 transferor without spouse, domestic partner, or issue.

31 21388. (a) A person is not liable for transferring property  
 32 pursuant to an instrument that is subject to the presumption created  
 33 under this part, unless the person is served with notice, prior to  
 34 transferring the property, that the instrument has been contested  
 35 under this part.

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

1 21390. This part applies notwithstanding a contrary provision  
2 in an instrument.

3 21392. (a) This part shall apply to instruments that become  
4 irrevocable on or after September 1, 1993. For the purposes of this  
5 section, an instrument that is otherwise revocable or amendable  
6 shall be deemed to be irrevocable if, on September 1, 1993, the  
7 transferor by reason of incapacity was unable to change the  
8 disposition of the transferor's property and did not regain capacity  
9 before the date of the transferor's death.

10 (b) It is the intent of the Legislature that this part supplement  
11 the common law on undue influence, without superseding or  
12 interfering in the operation of that law. Nothing in this part  
13 precludes an action to contest a donative transfer under the common  
14 law or under any other applicable law. This subdivision is  
15 declarative of existing law.