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AB-328 Estates and trusts: undue influence. (2019-2020)

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Date Published: 06/27/2019 09:00 PM

Assembly Bill No. 328

CHAPTER 10

An act to amend Sections 21380, 21382, and 21611 of the Probate Code, relating to estates and trusts.

[Approved by Governor June 26, 2019. Filed with Secretary of State June 26, 2019.]

LEGISLATIVE COUNSEL'S DIGEST

AB 328, Maienschein. Estates and trusts: undue influence.

Existing law establishes an express presumption of fraud or undue influence when a donative instrument makes a gift to the person who drafted or transcribed the instrument or to the care custodian of a transferor who is a dependent adult, as specified. Existing law exempts, among others, spouses and cohabitants of the transferor, from the presumption of fraud or undue influence.

This bill would additionally subject to the above-described presumption a gift made to a care custodian who commenced a marriage, cohabitation, or domestic partnership with a transferor who is a dependent adult while providing services to that dependent adult, or within 90 days after those services were last provided to the dependent adult, if the donative transfer occurred, or the instrument was executed, less than 6 months after the marriage, cohabitation, or domestic partnership commenced.

Existing law provides that if a decedent fails to provide by testamentary instrument for the decedent's surviving spouse who married the decedent after the execution of all the decedent's testamentary instruments, the omitted spouse is required to receive $\frac{1}{2}$ of the decedent's community and quasi-community property and a share of the separate property, as specified. However, existing law prohibits a surviving spouse from receiving a share of the decedent's estate consistent with these provisions in certain circumstances, including, among others, when the spouse made a valid agreement waiving the right to share in the decedent's estate.

This bill would further prohibit a surviving spouse from receiving a share of the decedent's estate as described above if the spouse was a care custodian of the decedent who was a dependent adult and the marriage commenced while the care custodian provided services to the decedent, or within 90 days after those services were last provided to the decedent, and the decedent died less than 6 months after the marriage commenced, unless the spouse can prove by clear and convincing evidence that the marriage was not the product of fraud or undue influence.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 21380 of the Probate Code is amended to read:

21380. (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 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 care custodian who commenced a marriage, cohabitation, or domestic partnership with a transferor who is a dependent adult while providing services to that dependent adult, or within 90 days after those services were last provided to the dependent adult, if the donative transfer occurred, or the instrument was executed, less than six months after the marriage, cohabitation, or domestic partnership commenced.

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

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

(7) 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 (5), (6), or (7) 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.

SEC. 2. Section 21382 of the Probate Code is amended to read:

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

(a) Except as provided in paragraph (4) of subdivision (a) of Section 21380, 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.

SEC. 3. Section 21611 of the Probate Code is amended to read:

21611. The spouse shall not receive a share of the estate under Section 21610 if any of the following is established:

(a) The decedent's failure to provide for the spouse in the decedent's testamentary instruments was intentional and that intention appears from the testamentary instruments.

(b) The decedent provided for the spouse by transfer outside of the estate passing by the decedent's testamentary instruments and the intention that the transfer be in lieu of a provision in said instruments is shown by statements of the decedent or from the amount of the transfer or by other evidence.

(c) The spouse made a valid agreement waiving the right to share in the decedent's estate.

(d) (1) If both of the following apply:

(A) The spouse was a care custodian, as that term is defined in Section 21362, of the decedent who was a dependent adult, as that term is defined in Section 21366, and the marriage commenced while the care custodian provided services to the decedent, or within 90 days after those services were last provided to the decedent.

(B) The decedent died less than six months after the marriage commenced.

(2) Notwithstanding paragraph (1), a spouse described by this subdivision shall be entitled to receive a share of the estate pursuant to Section 21610 if the spouse proves by clear and convincing evidence that the marriage between the spouse and the decedent was not the product of fraud or undue influence.