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How to Properly Prepare a Certificate of Independent Review

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Marin County Bar Association
101 Lucas Valley Rd # 326
San Rafael, CA

09/19/18

Program Overview

- The What, When, and Why a Certificate of Independent Review (CIR) is Required
- Developing a Comprehensive Certificate of Independent Review
- Weighing Preparation and Execution of a Certificate of Independent Review Against the Prospect of Future Litigation

What is a Certificate of Independent Review?

- A CIR usually comes in the form of an affidavit by an attorney used to qualify a donative transfer to a transferee who would otherwise be a "disqualified person" as defined under the Probate Code.
- The document is evidence that the Transferor has been interviewed by an independent attorney who certifies that the donative transfer was not the product of fraud or undue influence.

Why Do You Need a Certificate Of Independent Review?

- Eliminate the presumption of undue influence. Donative transfer **not** subject to § Prob. Code, § 21380 if CIR is obtained.
- Failure to Get CIR Can Constitute Malpractice *Osornio v. Weingarten*, (2004) 124 Cal.App.4th 304, 313–315

Presumption of Fraud or Undue Influence: Probate Code Section 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 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.

Care Custodians

- A person who provides health or social services to a “dependent adult”
- Examples:*
- A nurse or in-house care person dedicated to the physical needs of the testator
 - A non-family person, whether a professional or not, involved in the caretaking and social well-being of the testator

Dependent Adult

- Probate Code Section 21366.
- Elderly person over the age of 64 or unable to provide for their personal needs as a result of mental or physical deficits

Example of a Template Certificate of Independent Review

I, _____ (attorneys name), have reviewed the _____ (name of Instrument), and counseled my client, _____ (name of client), on the nature of the transfer, or transfers, of the property to _____ (name of beneficiary/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 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 Probate Code Section 21350 are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

Date Name of Attorney

$(6 \times 4) / (2 \times 2) = \underline{\hspace{2cm}}$

$$(6 \times 4) / (2 \times 2) = \underline{\quad 6 \quad}$$

$$(6 \times 4) / (2 \times 2) = \underline{\quad 6 \quad}$$

Show Your Work:

$6 \times 4 = 24$

$2 \times 2 = 4$

$24 / 4 = 6$

$$(6 \times 4) / (2 \times 2) = \underline{\quad 6 \quad}$$

Do as Much work as possible and Show ALL Your Work, the More Detailed the Better:

$6 \times 4 = 6 + 6 + 6 + 6 = 24$

$2 \times 2 = 2 + 2 = 4$

$24 / 4$ reduced to $12 / 2$

$12 / 2$ reduced to $6 / 1$

$6 / 1 = 6$

Statutory Requirements of Certificate of Independent Review

1. Independent Attorney

Independent Attorney

•Prob. Code, § 21370: "Independent attorney" means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue under this part, and who would not be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue under this part."

•*In re Estate of Winans*, (2010) 183 Cal. App. 4th 102.

Statutory Requirements of Certificate of Independent Review

1. Independent Attorney

2. Privacy In All Counseling Sessions with the Transferor

Privacy in Counseling Sessions

- The text of the Code requires the Transferor be counseled outside of the presence of any heir or proposed beneficiary.
- Best Practices:
 - Eliminate any other lawyers, family members, caregivers, or even physicians from being present when you are counseling the Transferor on the Certificate of Independent Review.
- Beck v. Rogers, No. G044119, 2011 WL 4091498, at *13 (Cal. Ct. App. Sept. 15, 2011), as modified on denial of reh'g (Oct. 6, 2011)

Statutory Requirements of Certificate of Independent Review

1. Independent Attorney
2. Privacy In All Counseling Session with the Transferor
3. Counsel the Transferor about the Nature and Consequences of the Intended Transfer

Counseling About the Nature and Consequences of Transfer

- The statute requires that the Transferor understand the effect the transfer will have the Transferor's heirs and other beneficiaries under any prior instruments.
- Make sure the Transferor understands the nature of the property bequeathed, that an ordinarily disqualified person will receive the property, and the natural objects of the Transferor's property will not receive the property.
- Stress who will not receive the property

Counseling About the Nature and Consequences of Transfer (continued)

- Best Practices: go through, by line item, the differences between the new instrument you are certifying and any prior instruments, who is receiving the property per the new instrument, who is no longer receiving the property, and if the new document accurately reflects the Transferor’s testamentary intent
- Ascertaining **why** the changes in testamentary intent are being made just as important; evidence of capacity and reasonable decision for revision, counters undue influence argument

Statutory Requirements of Certificate of Independent Review

1. Independent Attorney
2. Privacy In All Counseling Session with the Transferor
3. Counsel the Transferor about the Nature and Consequences of the Intended Transfer
4. Conduct a Thorough Investigation that Goes Well Beyond a Single In-Person Interview

Thorough Investigation

- This is the most important part of the Certificate of Intendent Review process.
- Attorneys are not trained to recognize the complex, subtle psychological and physiological changes related to aging, but this is part of what you’re asked to do when preparing a Certificate of Intendent Review.

Thorough Investigation (continued)

How to Determine Competency in Elderly:

- Interviewing the Transferor can provide substantial information regarding their mental competency.
- Utilizing psychological tests or assessments. Assessments can be quite useful in helping someone determine whether or not a competency issue exists and how far it has progressed.
- Evaluating current functioning and comparing it to prior functioning.
- Requesting a complete mental evaluation. A competency mental health evaluation is commonly referred to as a mental status exam, and it evaluates the mental capacity of a patient based on self-report, observation of behavior and speech, evaluation of mood, and testing memory.

Discuss Transferor with Professionals and Other People in Client’s Life

- Interview doctors, accountants, neighbors, friends, family members, caregivers, etc. regarding:
 1. Transferor’s capacity and whether any of her conduct raised concerns about mental deficits; and
 2. Transferor’s relationship with the displaced beneficiaries and the new beneficiary.

Statutory Requirements of Certificate of Independent Review

1. Independent Attorney
2. Privacy In All Counseling Session with the Transferor
3. Counsel the Transferor about the Nature and Consequences of the Intended Transfer
4. Conduct a Thorough Investigation that Goes Well Beyond a Single In-Person Interview
5. Document, Document, Document

Documentation is Key

Contemporaneously taken notes should account for each and every portion of the CIR process including:

1. The scope of the investigation into any fraud or undue influence exerted on the transferor;
2. The review of the prior donative instruments and the proposed new amendments paying particular attention to any changes in the transferor's estate plan;
3. Conversations with any beneficiaries, spouse, family members, caregivers, professionals, or close friends who can give insight into the transferor's testamentary capacity and intent; and

Documentation is Key (Cont'd)

4. The contents and context of the certifying attorney's counsel to the transferor.

Cases

- *Conservatorship of Pers. & Estate of Anderson*, No. A132474, 2013 WL 2145195 (Cal. Ct. App. May 17, 2013)
- *In re Estate of Winans*, (2010) 183 Cal. App. 4th 102
- *In re Estate of Walters*, No. B199241, 2009 WL 737709 (Cal. Ct. App. Mar. 23, 2009)

Executing the Certificate of Independent Review comes With Inherent, Unavoidable Risks

- If the Certificate of Independent Review fails, you **will** be sued.
- If the Certificate of Independent Review succeeds, you **still may** be sued.
- You will **almost certainly** be deposed in conjunction with a displaced beneficiary contesting the instrument and related Certificate of Independent Review.

Analysis of Whether to Execute the Certificate of Independent Review

- Do not treat this as a half-day, 4-hour assignment.
- If **any** portion of the process makes you uncertain, do **not** execute the Certificate of Independent Review.

Questions?

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