

## RESOLUTION 01-02-2011

### DIGEST

#### Wills and Trusts: Specific Gifts of Property Encumbered or Sold

Amends Probate Code section 21134 to add trustees acting for an incapacitated settlor as a protected class of donors for the sale or encumbrance of specifically gifted property.

### RESOLUTIONS COMMITTEE RECOMMENDATION

#### APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Probate Code section 21134 to add trustees acting for an incapacitated settlor as a protected class of donors for the sale or encumbrance of specifically gifted property. This resolution should be approved in principle because trustees acting on behalf of an incapacitated settlor are not protected donors and should be.

Under current law, a trustee acting on behalf of an incapacitated settlor is not specifically identified in the Probate Code as a protected donor; however, in practice, they have been treated as such. This resolution would clarify the current law by specifying that trustees acting on behalf of an incapacitated settlor in managing the incapacitated settlor's assets, such as investments or the sale or encumbrance of real property, are protected donors.

This resolution also clarifies the exact benefit a devisee is to receive if the specifically gifted property is later sold or encumbered. The incapacitated settlor of a trust may have specifically gifted property in his or her trust which later may be encumbered or sold to pay for costs of care or other living expenses of the settlor. If this happens, the settlor's intent may be frustrated and the property, or the remaining proceeds from the sale of the property, may not be distributed as the settlor intended. This resolution would allow a trustee to honor the settlor's intent and a devisee to receive the gift the settlor intended to give.

### TEXT OF RESOLUTION

RESOLVED, that the Conference of California Bar Associations recommends that legislation be sponsored to amend Probate Code section 21134 to read as follows:

1 § 21134

2 (a) Except as otherwise provided in this section, if after the execution of the instrument of  
3 gift specifically given property is sold, ~~or mortgaged-encumbered by a deed of trust, mortgage, or~~  
4 ~~other instrument,~~ by a conservator ~~or,~~ by an agent acting within the authority of a durable power  
5 of attorney for an incapacitated principal, or by a trustee acting for an incapacitated settlor of a  
6 trust, the transferee of the specific gift has the right to a general pecuniary gift equal to the net  
7 sale price of the property without regard to the payoff of any encumbrance placed on the

8 property after the execution of the instrument of gift, or the amount of the unpaid loan  
9 encumbrance on; the property as well as the property itself.

10 (b) Except as otherwise provided in this section, if an eminent domain award for the  
11 taking of specifically given property is paid to a conservator ~~or~~ to an agent acting within the  
12 authority of a durable power of attorney for an incapacitated principal, or to a trustee acting for  
13 an incapacitated settlor of a trust, or if the proceeds on fire or casualty insurance on, or recovery  
14 for injury to, specifically gifted property are paid to a conservator ~~or~~ to an agent acting within  
15 the authority of a durable power of attorney for an incapacitated principal, or to a trustee acting  
16 for an incapacitated settlor of a trust, the recipient of the specific gift has the right to a general  
17 pecuniary gift equal to the eminent domain award or the insurance proceeds or recovery, without  
18 regard to the payoff of any encumbrance placed on the property after the execution of the  
19 instrument of gift.

20 (c) For the purpose of the references in this section to a conservator, this section does not  
21 apply if, after the sale, mortgage, condemnation, fire, or casualty, or recovery, the  
22 conservatorship is terminated and the transferor survives the termination by one year.

23 (d) For the purpose of the references in this section to an agent acting with the authority  
24 of a durable power of attorney for an incapacitated principal, ~~or to a trustee acting for an~~  
25 incapacitated settlor of a trust (1) "incapacitated principal" or "incapacitated settlor" means a  
26 principal or settlor who is an incapacitated person, (2) no adjudication of incapacity before death  
27 is necessary, and (3) the acts of an agent within the authority of a durable power of attorney are  
28 presumed to be for an incapacitated principal.

29 (e) The right of the transferee of the specific gift under this section shall be reduced by  
30 any right the transferee has under Section 21133.

(Proposed new language underlined, language to be deleted stricken.)

**PROPONENT:** Sacramento County Bar Association

## **STATEMENT OF REASONS**

Existing Law: Existing law provides that when property that is specifically devised in a testamentary instrument is sold or mortgaged by a conservator of the estate of a conservatee, or by an agent under a power of attorney for an incapacitated principal, the intended devisee will receive the net proceeds of sale of the property or the amount of the unpaid loan against the property. It does not include sales or mortgages by a trustee acting for an incapacitated trustor. Moreover, in California the "mortgage" is not the usual vehicle to secure loans against real property, and the exact benefit to be received by the devisee in the event of such sale or mortgage is unclear.

This Resolution: This resolution would change the language of the section to use the word "encumbrances" of any type, would add trustees for an incapacitated trustor to the protected class of donors, and would clarify the exact benefits to be received by the intended devisee in the event of a sale or encumbrance in the specified situations.

The Problem: A testator or trustor of a trust makes a gift of property in his or her testamentary instrument, and then becomes incapacitated. A conservator of the estate, agent under a power of

attorney, or trustor under a trust, sells or encumbers the specifically given property. The testator or trustor dies. The property is gone, or its net value has been reduced, thus frustrating the testator's or trustor's intent. The section protects the testator in such situations, but not a trustor. It should be changed to add that protection. Also, the language used in the section needs to be changed to delete the word "mortgage", which is not used in California, and replace it with "encumbrance." Also, the benefit to be received by the intended devisee in such situations should be clarified.

**IMPACT STATEMENT**

This resolution does not impact any other law, statute or rule.

**AUTHOR AND/OR PERMANENT CONTACT:** Borden D. Webb, Webb & Tapella Law Corporation, 7311 Greenhaven Drive, Suite 273, Sacramento, CA 95831, phone: (916) 447-1675; fax (916) 447-8009; e-mail: [bwebb@probateattorneys.com](mailto:bwebb@probateattorneys.com)

**RESPONSIBLE FLOOR DELEGATE:** Borden D. Webb