

# Daily Journal

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PERSPECTIVE

## Preparing a proper certificate of independent review

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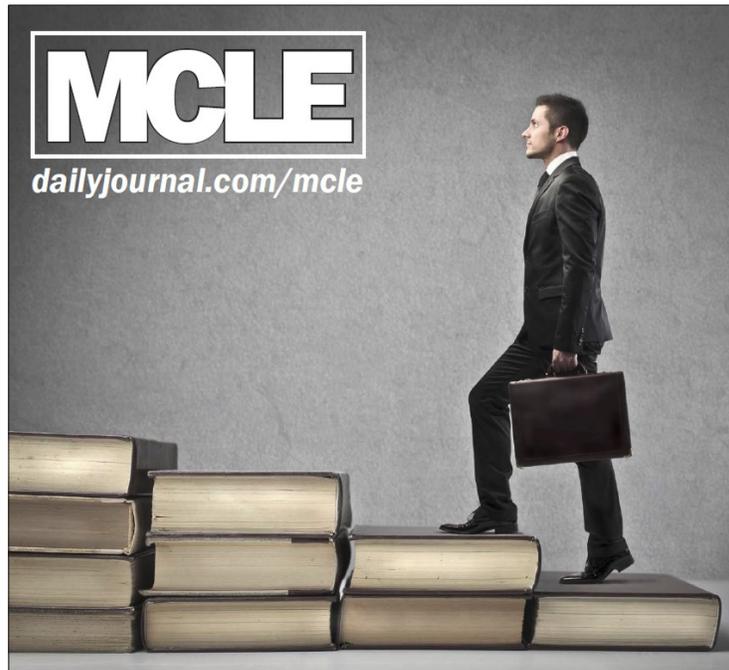
When confronted by an elderly transferor wishing to make a disposition of assets to a caregiver or new companion, every competent estate attorney must reflexively obtain a California certificate of independent review. See *Butler v. LeBouef*, 248 Cal. App. 4th 198, 210 (2016). The CIR is considered a simple solution to a problem with big consequences. Indeed, failure to obtain a CIR when circumstances warrant one will likely lead to a malpractice action. *Osornio v. Weingarten*, 124 Cal. App. 4th 304, 313-15 (2004).

However, the virtually undefined CIR process is fraught with risks for the practitioner retained to draft and execute the CIR. Legal challenges to the CIR should all but be expected from disappointed beneficiaries. If they succeed, the certifying attorney may find themselves exposed to a malpractice clam. See *In re Estate of Winans*, 183 Cal. App. 4th 102, 116 (2010).

It is critical for the certifying attorney to apply the utmost care in properly developing a CIR from initial retention, to drafting and execution of the instrument with a notary and independent witnesses. The Probate Code sets forth the generic requirements for an independent attorney's execution of a CIR (Cal. Prob. Code Section 21384), but in practice other pitfalls exist beyond the text of the Probate Code. Below are five potential liability traps not readily apparent in the text of the Probate Code that certifying attorneys should be wary of when executing a CIR.

### Inadequate Privacy in Counseling Session

The simplest step in the CIR process is ensuring that all of your



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interactions with the transferor are completely private. A CIR can fail if the confidentiality of the counseling session is at all compromised. The text of the Probate Code requires the transferor be counseled outside of the presence of any heir or proposed beneficiary, but this should not imply a limitation to the privacy required for the counseling session. The best practice is to eliminate any other lawyers, family members, caregivers or even physicians from being present when you are counseling the transferor on the CIR.

The task of the certifying attorney is to ensure that the transferor understands the implications of the transfer, requiring absolute frankness from the transferor. *Winans*, 183 Cal. App. 4th at 179. Complete privacy is expected to attain forthright responses from a transferor. California case law has found that even the presence of neighbors in an adjacent room who could potentially overhear the conversation

could cause the CIR to fail. *Beck v. Rogers*, G044119 (Cal. Ct. App. Sept. 15, 2011), as modified on denial of reh'g (Oct. 6, 2011). Therefore, absolute precaution should be taken to preserve the confidentiality of your client meetings in order to protect the sanctity of the transferor counseling sessions.

### Failing to Document

A CIR alone is inadequate to defeat a challenge to its sufficiency. *Conservatorship of Pers. & Estate of Anderson*, A132474 (Cal. Ct. App. May 17, 2013). Documenting the certification process is an implied requirement for executing a valid CIR. See *id.* (CIR fails in part because "there is not evidence of what counseling Husband received before [attorney] executed the certificate); see *Winans*, 183 Cal. App. 4th at 117 (CIR fails in part because "There is no evidence, for example, [the certifying attorney] discussed with [transferor] his decision to exclude appellants").

Given the likelihood of a challenge, estate planning attorneys should construct a detailed evidentiary record of all of their investigation efforts in anticipation of a dispute over the validity and enforceability of the CIR. Detailed, contemporaneously taken notes should account for 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, other family members, care givers, or close friends who can give insight into the transferor's testamentary capacity and intent, (4) conversations with other professionals working with the transferor including any attorneys drafting the amendment the CIR is intended to support and any medical professionals interviewed to gain insight into the transferor's mental state, and (5) the contents and context of the certifying attorney's counsel to the transferor. See *Estate of Anderson*. In reality, copious comprehensive note taking in conjunction with the development of a CIR has moved beyond simply reasonable prudence, but is a necessary component of enforcing a CIR in a later probate action. See *In re Estate of Walters*, B199241 (Cal. Ct. App. Mar. 23, 2009).

### Inadequate Counseling of the Nature and Consequences of the Transfer

While not a difficult step if done properly, ensuring the transferor understands the "nature and consequences" can be a challenge as the Probate Code provides little guidance. At a minimum, the code requires that the transferor

understand the effect the transfer will have the transferor's heirs and other beneficiaries under a prior instrument. But the certifying attorney must also ensure that the transferor understands the nature of the property bequeathed, that an ordinarily disqualified person will receive the property, and the natural objects of the testator's bounty will not receive the property. *Winans*, 183 Cal. App. 4th at 178. Attorneys should stress to the transferor or the parties that *will not* receive the property so that they fully understand they are eliminating a bequest that was part of a prior estate plan. *Id.*

Again, it is imperative that the certifying attorney document all discussions with the transferor regarding the proposed changes in their estate plan and how it will impact their beneficiaries because the certifying attorney's notes will essentially speak for the transferor and their intent after their death in any future probate actions.

#### **Relying Solely on a Single In-Person Meeting with the Transferor**

Attempting to determine whether a transfer is the result of undue influence is probably the most difficult portion of the CIR process. Courts have held that a sufficient attempt requires doing what is reasonable under the circumstances. *Estate of Anderson*. But an independent attorney hired to execute a CIR will not have any prior knowledge of the transferor's background and, unfortunately, many cases of CIR invalidation show the executing attorney failed to sufficiently investigate the transferor's background to make a knowledgeable

statement about the transferor's capacity to contract. In reality, attorneys are not trained to recognize the complex, subtle psychological and physiological changes related to aging. Yet, these changes are central to increased geriatric susceptibility and vulnerability to undue influence and coercion that a CIR is intended to protect against. *Id.*

The best practice evaluation may require attorneys to do more than simply look for capacity indicators in a meeting or two because the transferor who appears lucid to the laymen attorney may still be the subject of undue influence. An investigation should search for signs such as unexplained withdrawal from normal activities, unusual depression, changes in financial condition, belittling or threatening behavior by companions, and recently strained relationships with family members. Conducting this type of investigation would include interviewing the transferor's family members, friends, and caregivers and evaluating them for their impact on the transferor's change in testamentary intent. Further, a best practices investigation might also require an examination of the transferor's medical records and discussions with her physicians regarding any conditions or diseases the transferor suffers from that may impact her mental state. *Id.*

The point: The best practices evaluation process may go far beyond two or three meetings with the transferor in order for the certifying attorney to obtain a well-rounded picture of the transferor's capacity and ensure that no outside influences are impacting their testamentary intent.

#### **Not Engaging With Other Professionals**

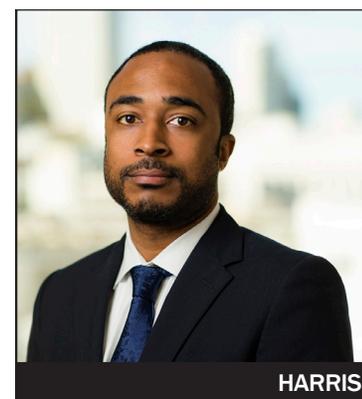
The Probate Code does not include a requirement that a certifying attorney engage with other professionals as part of developing and executing a CIR. However, it is becoming more apparent that the best practice CIR evaluation process includes engaging with the transferor's physicians to gain their insight into the transferor's current mental state. As the medical and psychological reasons which make an elderly transferor susceptible to undue influence and fraud are not intuitively discernible to lawyers, a certifying attorney using best practices would not rely solely on the findings of his or her own investigation. Receiving and documenting the opinions of medical professionals who work with the transferor would be helpful in the certifying attorney's evaluation process. These opinions provide strong evidentiary support as to the reasonableness of the investigation and support the ultimate determination that the CIR is valid and enforceable. *See generally id.*

#### **Conclusion**

Best practices aside, here is the inescapable truth: No matter how thorough your CIR evaluation process, unhappy displaced beneficiaries will contest the change in donative transfer, which means future litigation over the CIR is virtually unavoidable. Therefore, not only should you cultivate a comprehensive CIR development plan, but you should also weigh your execution of a CIR against involvement in future litigation where your previous representation will be challenged regardless of the numerous steps

taken to ensure that the transferor's testamentary intent was met. The reality is that not all representations are created equal and CIRs, fraught with their abundance of pitfalls and only limited guidance available in the Probate Code, have the ability to expose attorneys to a higher level of malpractice claims than other representations, a detriment that should be thoroughly considered when evaluating whether to execute a CIR in the first place.

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1. Any competent estate attorney would think to obtain a certificate of independent review when confronted by an elderly transferor wishing to make a disposition of assets.

True  False

2. Failure to obtain a certificate of independent review when circumstances warrant it may lead to a malpractice action.

True  False

3. The Probate Code sets forth the specific requirements that must be followed when obtaining a certificate of independent review.

True  False

4. The simplest step in the independent review process to ensure that all of your transactions with the transferor are public and not made in secret.

True  False

5. The Probate Code requires that during the independent review process, the transferor be counseled in the presence of any heir or proposed beneficiary.

True  False

6. The task of the certifying attorney is to ensure that the named beneficiaries understand the implications of the transfer, requiring absolute frankness from the transferor.

True  False

7. The presence of neighbors in an adjacent room who could potentially overhear the conversation could cause the independent review process to fail.

True  False

8. Documenting the certification process is an explicit requirement for executing a valid certificate of review.

True  False

9. Estate planning attorneys should construct a detailed evidentiary record of all of their investigation efforts in anticipation

of a dispute over the validity and enforceability of the certificate of independent review.

True  False

10. Notes of the independent review process should include (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, other family members, care givers, or close friends who can give insight into the transferor's testamentary capacity and intent, (4) conversations with other professionals working with the transferor including any attorneys drafting the amendment the CIR is intended to support and any medical professionals interviewed to gain insight into the transferor's mental state, and (5) the contents and context of the certifying attorney's counsel to the transferor.

True  False

11. Contemporaneous note taking in conjunction with the development of a certificate of independent review is now required by the Probate Code.

True  False

12. The Probate Code provides specific guidance on how to ensure that the transferor understands the nature and consequences of the transfer.

True  False

13. The certifying attorney must ensure that the beneficiary understands the nature of the property bequeathed, that an ordinarily disqualified person will receive the property, and the natural objects of the testator's bounty will not receive the property.

True  False

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14. Attorneys should stress to the transferor the parties who will not receive the property so that they fully understand they are eliminating a bequest that was part of a prior estate plan.

True  False

15. An attorney hired to execute a certificate of independent review generally will have prior knowledge of the transferor's background.

True  False

16. The complex, subtle psychological and physiological changes related to aging are central to increased geriatric susceptibility and vulnerability to undue influence and coercion that a CIR is intended to protect against.

True  False

17. A best practice for attorneys when evaluating an elderly

transferor is to simply look for capacity indicators in a meeting or two.

True  False

18. The Probate Code requires a certifying attorney to engage with other professionals as part of developing and executing a certificate of independent review.

True  False

19. A best practices investigation might involve an examination of the transferor's medical records and discussions with her physicians regarding any conditions or diseases the transferor suffers from that may impact her mental state.

True  False

20. A properly executed and documented certificate of independent review will preclude the possibility of any future litigation.

True  False