

Memorandum 2008-13

Donative Transfer Restrictions: Care Custodian as Disqualified Person

The Commission has been charged with studying the operation and effectiveness of Probate Code Section 21350 *et seq* (hereafter the “Donative Transfer Restriction Statute”). See 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).

That statute operates to presumptively invalidate a gift to specified types of “disqualified persons.” Memorandum 2008-10 discussed the following types of disqualified persons:

- A person who drafts the donative instrument.
- A person who is a fiduciary of the donor and who transcribes the donative instrument or causes it to be transcribed.
- A specified family member or business associate of the drafter or fiduciary transcriber.

This memorandum discusses another class of disqualified person, the “care custodian” of a “dependent adult.”

An exhibit to this memorandum includes the following:

Exhibit p.

- Email from Neil Horton, Trusts and Estates Section of California State Bar (“TEXCOM”) (5/16/07)1
- Probate Code Sections 21350-213563
- Welfare and Institutions Code Sections 15610.17 & 15610.237

Except as otherwise indicated, all statutory references in this memorandum are to the Probate Code.

LEGISLATIVE HISTORY

As originally enacted, Section 21350 did not treat a care custodian as a disqualified person. See 1993 Cal. Stat. ch. 293.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The care custodian provision was added in 1997, as part of an omnibus bill sponsored by the Trusts and Estates Section of the State Bar. See 1997 Cal. Stat. ch. 724; AB 1172 (Kaloogian).

The Trusts and Estates Section provided the Legislature with background materials on all of the proposals included in the omnibus bill. The care custodian provision was explained as follows:

Digest: Under current law, there is a presumption of invalidity that applies to gifts made to lawyers or other fiduciaries. However, under current law, a “practical nurse” (or other caregiver hired to provide in-home care for an aging progressive dementia victim) might find it too easy to take advantage of the dependence and close working relationship to induce the demented elder to make testamentary gifts to the “practical nurse.” Unfortunately, it is not clear that the “practical nurse” would be within the ambit of Section 21350(a)(4). There is a growing “cottage industry” of people who seek out and target dementing elders.

This proposal would have the effect of bringing the “practical nurse” within the ambit of section 21350(a)(4).

Purpose: The purpose of this proposal is to prevent the growing “cottage industry” of “practical nurses” from successfully taking advantage of dementing elders.

...

Illustrations: Grandfather is diagnosed as having Alzheimer’s disease, and can not live alone safely. The family hires a “practical nurse” to provide in-home caregiver services to Grandfather. Grandfather signs a will devising a substantial portion of his estate to the “practical nurse.” This proposal would impose on the “practical nurse” the same burden as any fiduciary, with respect to proving the absence of undue influence.

Letter from Don Green and Marc B. Hankin to David Long, State Bar of California Director of Research (Oct. 16, 1996) (on file with Commission).

A similar explanation was provided in a Senate committee analysis of AB 1172:

Existing law provides a presumption of invalidity that applies to gifts made to lawyers or other fiduciaries, but not to practical nurses or other caregivers hired to provide in-home care.

This bill would include a “care custodian,” as defined, among those for which there is a presumption of invalidity as to testamentary gifts.

The sponsor contends that the care custodians are often working alone and in a position to take advantage of the person they are caring for. This bill would provide only a presumption of

invalidity, not a prohibition of any gift to the care custodian. If certain protections are followed (i.e., obtaining review by an independent attorney), such gifts would be valid.

Senate Committee on Judiciary Analysis of AB 1172 (July 23, 1997).

The staff searched the State Archives for any other relevant history on AB 1172 and found a letter from the California Judges Association, commenting on the various elements of the omnibus bill. The letter commented briefly on the proposed care custodian provision:

1. This section seems like overkill.
2. Is the determination of whether a person is a “care custodian of a dependant adult” to be made as of the time the instrument is executed? At the time the gift is effective?

Letter from Sam Crump to Jody Remke, California Judges Association (June 26, 1997) (on file with Commission).

The staff finds a number of aspects of this legislative history to be noteworthy:

- The stated concern is the manipulation of seniors with dementia. However, the scope of the care custodian provision is broader than is necessary to address that problem. It is not limited to seniors or to persons with failing mental capacity. A young, physically disabled person with a sound mind could also be a “dependent adult.”
- The care custodian provision does not impose “the same burden as [on] any fiduciary, with respect to proving the absence of undue influence.” Care custodians are uniquely burdened by Section 21350. They are the only class of persons who are disqualified solely on the basis of their relationship to the transferor. The other grounds for disqualification require active participation in the creation of the donative instrument. For example, the attorney of a transferor is not a disqualified person under Section 21350. The statutory presumption of invalidity would only arise if the attorney drafted or transcribed the donative instrument.
- Both the Bar and the Senate Committee on Judiciary speak in terms of a person “hired” to provide care services. One could argue that this language shows an intent to limit the care custodian provision to professional caregivers. See, e.g., K. Kwasneski, *The Danger of a Label: How the Legal Interpretation of “Care Custodian” Can Frustrate a Testator’s Wish to Make a Gift to a Personal Friend*, 36 Golden Gate U. L. Rev. 269, 284-88 (2006).
- The timing issue raised by the California Judges Association needs to be addressed.

JUDICIAL INTERPRETATION

Two fairly recent appellate decisions held that the care custodian provision does not apply to a person who provides care services as an unpaid volunteer, as the result of a pre-existing personal friendship. The first was *Conservatorship of Davidson*, 113 Cal. App. 4th 1035, 6 Cal. Rptr. 3d 702 (2004), which is discussed below. The second was *Conservatorship of McDowell*, 125 Cal. App. 4th 659, 23 Cal. Rptr. 3d 10 (2004), which adopted the reasoning of *Davidson* in deciding a somewhat similar case.

Those decisions were overruled in *Bernard v. Foley*, 39 Cal. 4th 794, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006), which found no personal friend or volunteer exceptions to the care custodian provision. A concurrence in *Bernard v. Foley*, written by Chief Justice George, invited the Legislature to revisit the care custodian provision and make adjustments to its scope of application. *Id.* at 816 (George, C.J., concurring).

Those opinions are discussed below.

Conservatorship of Davidson

Dolores Davidson died in 2000. Her trust at that time provided for certain small gifts, including a \$5,000 gift to Elaine Morken, Davidson's cousin. The remainder of the estate was to go to Davidson's long time friend and caregiver, Stephen Gungl. *Davidson*, 113 Cal. App. 4th at 1043.

Gungl met Davidson in 1962 and they developed a close friendship. Gungl and his life partner since 1966, Howard Holtz, were treated like family by Davidson, who referred to them as "her boys." The facts recited in the opinion suggest a close and lasting relationship. *Id.* at 1041.

Davidson became very sick in 1992 and required assistance from that date onward. Gungl and Holtz provided much of that care, which was credited as having allowed her to continue living independently in her home. They cooked, shopped, and drove her to appointments. Later, pursuant to a power of attorney, Gungl received her mail, paid her bills and took care of her banking. *Id.* at 1041-42.

Gungl was not directly involved in the preparation of Davidson's estate plan, though he did arrange for Davidson to meet with a representative of the "Alliance for Mature Americans" to discuss the benefits of a living trust. A planner from AMA assisted Davidson in preparing her estate plan. *Id.* at 1042-43.

After Davidson's death, Morken contested the trust under Section 21350, contending that Gungl was the care custodian of Davidson, a dependent adult. Morken argued that the definition of "care custodian," drawn from Welfare and Institutions Code Section 15610.17, broadly includes any "persons providing care or services for elders or dependent adults" and "any other ... private ... person providing health services or social services to elders or dependent adults." *Id.* at 1048.

The court rejected that broad interpretation of "care custodian":

Under appellant's reading of section 21350 and Welfare and Institutions Code section 15610.17, virtually any individual providing personal care to a dependent adult, no matter how intimately and personally connected they might be, would be disqualified from receiving a gift, bequest, devise, or other donative transfer from the dependent adult under a trust or will unless they were related to the dependent by blood or marriage. Appellant's interpretation of "care custodian" is so broad as to include not only the provision of health care or social services, but such acts as simply cooking for an elderly person, driving a house-bound individual to the bank or doctor, or going shopping for them. Indeed, appellant specifically cites Gungl's provision of just these services to Davidson as evidence that he was a "care custodian" under the statute.

In so doing, appellant's interpretation does violence not only to traditional principles of private charity and contemporary societal structures and relationships, but to the explicit language of the relevant statutes. The definition of "care custodian" in Welfare and Institutions Code section 15610.17, incorporated by reference in section 21350, clearly focuses on the occupational provision of "*health services and social services*" (italics added) by specifically enumerated public agencies and private professional organizations and individuals. The kind of personal, nonprofessional care provided by Gungl to Davidson may be brought within the scope of the subject statutes only by severely editing the statutory language.

Id. at 1049-50 (footnote omitted). The court held that the sorts of services provided by Gungl did not constitute "health services and social services" and so he was not a "care custodian" within the meaning of Section 21350.

In addition, the court discussed the legislative history of the care custodian provision (citing the materials discussed in the preceding section of this memorandum). The court concluded that the care custodian provision was intended to limit gifts to *professional* caregivers, and not "friends, intimates, or companions." *Id.* at 1050-51.

... we hold that the statute bars donative transfers to individuals who have assumed the role of “care custodian” to a dependent adult incidental to the professional or occupational provision of health or social services to that dependent adult, rather than in connection with a personal or familial relationship; and whose personal relationship, if any, with the dependent adult is entirely incidental, secondary to, and derived from the preexisting professional or occupational connection. By the same token, we hold that when an individual becomes what is in effect a care custodian of a dependent adult as a direct result of a preexisting genuinely personal relationship rather than any professional or occupational connection with the provision of health or social services, that individual should not be barred by section 21350 from the benefit of donative transfers unless it can otherwise be shown that the subject transfer was the result of undue influence, fraud or duress. In every case, the issue is whether the role of care custodian served as the primary basis of any other more personal relationship, or vice versa.

Id. at 1052-53.

Bernard v. Foley

Carmel Bosco, a widow with no children, was close to her extended family. She created a trust in 1991. One-third of the trust estate was to go to her youngest sister, apparently to provide for her care as an Alzheimer’s patient. Another eleven relatives were named as co-equal beneficiaries of the residue. The trust was amended a number of times. The sister’s one-third share was changed to a life estate, to be administered in trust during her lifetime. Of the residual co-beneficiaries, payments to a relative who had become disabled would also be managed by a trustee. *Foley*, 39 Cal. 4th at 817.

The trust was amended three more times, within several months of Bosco’s death. First it was amended to name longtime friend James Foley as sole trustee. It was then amended to delete three of the residual beneficiaries (including the one who had become disabled) and to eliminate the one-third life estate for the sister with Alzheimer’s. Finally, three days before Bosco’s death, the trust was amended to give each of the former residual beneficiaries \$25,000 and leave the entire residue to Foley and his girlfriend, Ann Erman (who was also a longtime friend of Bosco). Under that amendment, Foley and Erman would receive most of the estate. *Id.* at 817-18.

Bosco had moved in with Foley and Erman two months before her death. During that period they provided her a number of services including shopping,

meal preparation, changing diapers, bathing, the application of topical medications, the administration of oral medications including liquid morphine, and routine treatment of sores. *Id.* at 805-06.

Notwithstanding the fact that Foley and Erman had been friends with Bosco for years before providing these services and provided them as unpaid volunteers, the court held that they were care custodians within the meaning of Section 21350.

The court examined the language of the care custodian provision and the definitions that it incorporates and concluded that there is no statutory exception for a personal friend or volunteer. To the contrary, the relevant statutory definition of “care custodian” includes broad catch-all language:

15610.17. “Care custodian” means an administrator or an employee of any of the following public or private facilities or agencies, *or persons providing care or services* for elders or dependent adults, including members of the support staff and maintenance staff:

...
(y) *Any other* protective, public, sectarian, mental health, or private assistance or advocacy agency or *person providing health services or social services* to elders or dependent adults.

Welf. & Inst. Code § 15610.17(y) (emphasis added). The court concluded that the legislature intended for the italicized language in subdivision (y) “to be used in its unrestricted sense.” *Foley*, 39 Cal. 4th at 807.

[Nothing] in the statute’s structure, terms, or language authorizes us to impose a professional or occupational limitation on the definition of “care custodian” ... or to craft a preexisting personal friendship exception thereto.

Id. at 809.

The court went on to examine the legislative history of the care custodian provision and found nothing to change its interpretation. The court noted that an exception for friends could have been added if the Legislature had intended such an exception — a friendship exception exists in a provision regulating residential care facilities for seniors. That provision exempts “[any] arrangement for the care and supervision of a person ... by a close friend, whose friendship preexisted the contact between the provider and the recipient, and ... the arrangement is not of a business nature and occurs only as long as the needs of the recipient for care

and supervision are adequately met.” *Id.* at 811 (quoting Health & Safety Code § 1569.145(f)(2)).

Based on its construction of Section 21350, the court held that Foley was Bosco’s care custodian, adding:

It is not for us to gainsay the wisdom of this legislative choice. In the event, however, we have mistaken the Legislature’s intention, that body may readily correct our error.

Bernard v. Foley Concurrence

Chief Justice George went further in suggesting that the Legislature should reconsider the scope of the care custodian provision.

[Notwithstanding] our customary and proper reticence in encouraging legislative action, in the present context I believe the Legislature would do well to consider modifying or augmenting the relevant provisions in order to more fully protect the interests of dependent adults and society as a whole, by according separate treatment to longer term care custodians who undertake that role as a consequence of a personal relationship rather than as an occupational assignment.

Id. at 816.

In the Chief Justice’s view, the care custodian provision operated properly in the case of Foley and Erman. Nonetheless, he maintains that there are circumstances in which the same standard would work an injustice. His analysis and suggestions for reform are set out at length below:

The circumstances underlying the present case illustrate the Legislature’s wisdom in including, within the meaning of the statutes presumptively disqualifying a care custodian from becoming a testamentary beneficiary of the dependent adult, uncompensated friends or acquaintances who provide substantial, ongoing health or other services to a dependent adult. (Prob. Code, §§ 21350, subd. (a)(6), 21351, subd. (d).) In adopting the broad definition of a care custodian required to report elder abuse (Welf. & Inst. Code, § 15610.17) for purposes of defining those persons and entities subject to the presumption of undue influence under the Probate Code, the Legislature implicitly recognized that an individual acting in a caregiving capacity on behalf of a dependent adult who requires substantial, if not total care, assumes a role uniquely susceptible of exerting substantial influence over the dependent person, regardless of the formality of the arrangement.

That having been said, it is not difficult to imagine circumstances in which an unrelated individual, motivated by long-standing friendship, moral obligation, or other personal

incentive, undertakes without compensation to provide substantial, ongoing health care services on behalf of a dependent adult for an extended period. In such a case, the recipient of those services eventually may decide to recognize those acts by modifying his or her testamentary disposition of property to include the caregiver as a beneficiary. In the event the dependent adult modifies the instrument but thereafter expires prior to obtaining certificated independent review pursuant to Probate Code section § 21351, subdivision (b), the uncompensated long-term caregiver in that example, no less than the defendants in the present circumstances, would be presumptively disqualified from receiving that beneficial bequest.

In my view, it is questionable whether the uncompensated individual who in a nonoccupational capacity provides substantial, ongoing health services to a dependent adult for an extended period and eventually is made his or her beneficiary, should be subject to the identical presumptive disqualification and burden of proof imposed upon an individual who assumes the role of an unpaid caregiver for a relatively brief period preceding the dependent adult's favorable modification of a testamentary disposition, at a time that is fairly proximate to death.

As a practical matter, the justification for presuming an exercise of undue influence is less compelling when an individual having a preexisting personal relationship with the dependent adult renders health care and other services over a relatively lengthy period of time. First, the likelihood is less that a personal friend gratuitously providing substantial, ongoing health care services over a lengthy term is motivated by the prospect of obtaining undue economic benefit by coercing a testamentary modification. Second, an uncompensated but well-established caregiving relationship affords greater opportunity to the donor's relatives and other interested parties to observe the course of the relationship and to resolve any concerns occasioned by the caregiver's position of trust and potential ability to exert undue influence.

As a matter of policy, it is of doubtful social efficacy to apply the statutory presumption and evidentiary burden to an individual who in a nonprofessional capacity undertakes the serious responsibilities attending the long-term care of a dependent adult. To do so is counterintuitive to our sense that the uncompensated efforts of such an individual, benefiting the dependent adult in question and society in general, should be recognized and encouraged. Our most basic judicial task in the case before us consists of construing the statutory enactment in its present form and not in crafting or recommending its modification. Manifestly, the majority has accomplished the former task, interpreting Probate Code section 21350, subdivision (a)(6) to apply equally to professional, compensated persons and nonprofessional, uncompensated persons who act as care custodians in providing substantial, ongoing health services to a dependent adult. Although

I believe our statutory construction is correct and have no reservation regarding its application in the present case, applying the statute to those persons who have undertaken the long-term care of a dependent adult without compensation does not appear to take full measure of the importance to the individual or the benefits to society of such efforts born of preexisting personal relationships.

Accordingly, I would suggest legislative modification of the relevant statutes to exempt or otherwise limit application of the statutory presumption of undue influence in the case of uncompensated care custodians who provide long-term health care and other services for dependent adults. Such an exemption or limitation might resemble a standard originally applicable in the federal taxation of estates. Formerly, a decedent's estate was required to include in the gross estate all gifts made "in contemplation of death," a description that presumptively included the value of all gifts made by the decedent within three years of his or her death. (See 26 U.S.C. former § 2035(a); *United States v. Hemme* (1986) 476 U.S. 558, 563, 106 S.Ct. 2071, 90 L.Ed.2d 538; *Wheeler v. U.S.* (5th Cir. 1997) 116 F.3d 749, 760 [the former "contemplation-of death" provision" was replaced by the rule set forth in 26 U.S.C. § 2035(a) providing that transfers within three years of death are included in the gross estate]; *Hutchinson v. C.I.R.* (7th Cir. 1985) 765 F.2d 665, 669 [to forestall litigation seeking to ascertain whether a decedent made a transfer in contemplation of death, the Tax Reform Act of 1976 converted the statutory presumption into a mandatory rule that the value of all gifts made by the decedent within three years of death must be included in the gross estate].) In similar fashion, for purposes of testamentary transfers, the language in California's statutes conditionally disqualifying donative transfers to a care custodian — subject to rebuttal of the presumption of undue influence (Prob. Code, §§ 21350, 21351) — could be amended to provide that a change in testamentary disposition made by a dependent adult designating the care custodian as a beneficiary, within one year following the commencement of a new nonprofessional caregiving relationship or within one year preceding the death of the dependent adult, will be subject to the presumption of undue influence. In the situation where the donative transfer to an individual precedes his or her assumption of responsibilities as a care custodian or is made prior to the time that the donor assumes the status of a dependent adult, the statutory presumption would not apply. Similarly, where the donative transfer to a care custodian who provides uncompensated health care and other services to the dependent adult is made more than one year following the commencement of those caregiving services, the statutory presumption would not apply under such a proposed change.

Id. at 818-22.

Bernard v. Foley Dissent

It is worth briefly noting that Justices Corrigan, Kennard, and Moreno dissented in this case. Arguing from textual analysis and legislative history, the dissent maintained that the definition of “care custodian” is limited to professional care-givers. *Id.* at 821-24 (Corrigan, J., dissenting). Commenting generally on policy, the dissent concluded:

While it is certainly true that nonprofessionals may take advantage of the infirm, it is also true that the kind and generous may act graciously to ease the suffering of those in need. The motives at play in any given case is the kind of factual question the trial court exists to resolve. Absent a clear legislative pronouncement to the contrary, we should allow the court to do so without an artificially imposed presumption.

Id. at 824.

GENERAL BACKGROUND ON PROVING FRAUD AND UNDUE INFLUENCE

Before discussing the specifics of the care custodian provision, it is helpful to recall the general function of the Donative Transfer Restriction Statute and its relationship to the common law on undue influence in gift giving.

The Donative Transfer Restriction Statute supplements the common law on proving fraud and undue influence. It does not replace it.

If the beneficiary of a gift is a “disqualified person” under Section 21350, then the statutory presumption exists and the burden shifts to the beneficiary to prove that the gift was not the product of fraud or undue influence.

If the beneficiary is *not* a “disqualified person” under Section 21350, *the gift can still be challenged on the grounds of fraud or undue influence*. The contestant can try to invoke the common law presumption of undue influence, by showing that the beneficiary was in a confidential relationship with the transferor, actively participated in the creation of the gift, and received undue profit as a result of the gift. See *Rice v. Clark*, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002). If those facts cannot be established, the contestant can still attempt to prove undue influence, but bears the burden of proof. The types of evidence that can be offered to prove undue influence are discussed in Memorandum 2007-30, pp. 6-12.

The question in evaluating the care custodian provision is not whether a gift to a care custodian is likely to be the product of undue influence, but whether the

likelihood is so high as to justify a statutory presumption that shifts the burden of proof from the contestant to the beneficiary.

GENERAL POLICY BASIS FOR CARE CUSTODIAN DISQUALIFICATION

As noted above, a care custodian need not have participated in the creation of a donative instrument in order to be a disqualified person. The mere fact of being a care custodian of a transferor who is a dependent adult is sufficient to create the statutory presumption of undue influence. Why should that be?

The State Bar's explanation of the care custodian provision seems to focus on (1) the potential bad motive of those who "seek out and target dementing elders" for financial abuse, (2) the special opportunity to exert undue influence that exists for a person who provides care services, and (3) the special vulnerability to undue influence that may exist for a dependent adult (especially a person whose dependency results from a mental impairment).

Chief Justice George raises a similar concern about the caregiver's motive and suggests that long-term volunteer service is less likely to be motivated by improper interests. He also suggests that a longer term of service provides a greater opportunity for detection and correction of any problems that might arise with respect to fraud or undue influence.

Finally, the exception found in *Davidson*, for a gift to a care custodian who acts out of personal friendship, seems to be grounded in concern about the naturalness or unnaturalness of a gift to a care custodian. Under the common law the fact that a gift is "unnatural" can be an indicia of undue influence. A large gift to a stranger who provides paid services may be seen as unnatural and therefore suspect. The same gift to a close personal friend is more natural and should perhaps not be subject to the presumption of undue influence.

Each of these factors (bad motive, opportunity to exert undue influence, vulnerability to undue influence, and the naturalness of a gift) are discussed in more detail below. Timing considerations are also discussed.

BAD MOTIVE

As discussed above, the original justification for the care custodian provision was grounded on a concern that there was a "cottage industry" of swindlers using the provision of care services as a pretext or opportunity for the improper procurement of gifts.

The staff has no way of evaluating how common such premeditated abuse is (or would be in the absence of the care custodian provision). However, considering the widespread social need for custodial care, it seems likely that the great majority of custodial caregivers are honest and are simply doing their jobs.

There are undoubtedly some intentional swindlers, who use caregiving as their *modus operandi*. There is probably a larger group of opportunistic swindlers, who start out as legitimate caregivers but decide to take improper advantage when an opportunity offers. But it still seems likely to the staff that most custodial caregivers have good motives and behave properly. To suggest that all care custodians should be treated as disqualified persons, based only on concerns about their motives, is probably an overreaction.

That said, the risk of bad motives should perhaps be one factor in weighing the proper scope and operation of the care custodian provision. For example, it may be that a person who provides care services as a result of a pre-existing personal friendship is less likely to have bad motives than a person who enters the care custodian relationship as a stranger. If so, that would offer some support for an exception based on close friendship.

Chief Justice George suggests that a long-term care relationship is less likely to be the product of bad motives than a short-term relationship. That makes sense. A person who sets out to commit fraud is probably interested in “easy marks” and will be unwilling to invest considerable time and effort into more difficult cases.

However, the staff is still inclined to believe that cases of premeditated fraud are rare. The greater risk probably comes from legitimate caregivers who act opportunistically. If so, then a longer term relationship may increase the risk of abuse, by increasing the opportunity and temptation to exert influence.

The staff sees no reason to presume that care custodians, as a group, have bad motives.

OPPORTUNITY TO EXERT UNDUE INFLUENCE

One of the traditional indicia of undue influence is the opportunity to exert undue influence. Clearly, a person who is in the home of a dependent adult on a regular basis, providing necessary and often intimate services, has a significant opportunity to influence that person.

However, “mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient” to prove undue influence. *In re Welch’s Estate*, 43 Cal. 2d 173, 175, 272 P.2d 512 (1954).

Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will and must amount to coercion destroying free agency on the part of the testator.

Id.

The opportunity that a care custodian has to exert influence is a general one. The fact of being a care custodian alone does not present any special opportunity to exert pressure on “the testamentary act” (i.e., on the creation of the donative instrument). The Donative Transfer Restriction Statute does not require any showing that a care custodian was in any way involved with the creation of the gift.

Under the common law, the fact that a beneficiary was the transferor’s care custodian would probably not be enough, by itself, to prove undue influence. However, that opportunity combined with some other fact, such as the special vulnerability of the transferor to undue influence (discussed below), might be enough to justify a presumption of undue influence.

VULNERABILITY OF DEPENDENT ADULT

Except as to age, Section 21350 defines “dependent adult” by incorporating Welfare and Institutions Code Section 15610.23:

15610.23. (a) “Dependent adult” means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) “Dependent adult” includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

Under Section 21350, there is no upper limit on the age of a “dependent adult.”

Although the original rationale for the care custodian presumption was to address the risk of financial abuse of “dementing seniors,” the definition of

“dependent adult” is quite a bit broader than that. It includes a person as young as 18 and those with purely physical disabilities.

An argument can be made that all dependent adults have a special vulnerability to undue influence. A relationship of dependence may lead to dominance or even abuse.

However, it is not clear that all forms of dependence pose the same risk. For example, a frail senior with advancing dementia is probably more vulnerable to fraud or undue influence than a 30 year old with a purely physical disability.

The Commission should consider whether the definition of “dependent adult” is too broad. There are at least three ways in which it could be narrowed.

Age

The protected class could be narrowed to seniors. That would be consistent with the Bar’s original justification for enactment of the care custodian provision. It may also be the case that seniors are more prone to conditions such as chronic fatigue, pain, depression, and social isolation, which could increase vulnerability to pressure from a care custodian.

Various statutes in California define a person as “elderly” or a “senior citizen” based on age. See, e.g., Bus. & Prof. Code § 17206.1 (“senior citizen” means person 65 years of age or older); Civ. Code § 51.3 (“senior citizen” means person of 62 years of age or older, or 55 years of age or older in special circumstance); Civ. Code § 798.34 (“senior homeowner” means homeowner 55 years of age or older).

The care custodian provision could include a similar age restriction.

Nature of Disability

The protected class could be narrowed to those with mental disabilities. Again, that would be consistent with the Bar’s original justification for enactment of the care custodian provision.

It seems likely that a person with cognitive difficulties would have a greater vulnerability to fraud or undue influence than a person with a purely physical disability. A mentally impaired person might be more easily tricked or bullied.

Eligibility for Conservatorship

TEXCOM proposes that the definition of dependent adult be changed to incorporate the standard used by courts to determine whether to appoint a conservator.

The intent is to include within the definition of “protected person” those persons for whom a conservator is not appointed because the person has an existing trustee or an agent under a financial or health care power, but who otherwise would be unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter or who is substantially unable to manage his or her own financial resources or resist fraud or undue influence.

See Exhibit p. 1. Section 1801 provides:

1801. Subject to Section 1800.3:

(a) A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter, except as provided for the person as described in subdivision (b) or (c) of Section 1828.5.

(b) A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

(c) A conservator of the person and estate may be appointed for a person described in subdivisions (a) and (b).

(d) A limited conservator of the person or of the estate, or both, may be appointed for a developmentally disabled adult. A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual, shall be designed to encourage the development of maximum self-reliance and independence of the individual, and shall be ordered only to the extent necessitated by the individual’s proven mental and adaptive limitations. The conservatee of the limited conservator shall not be presumed to be incompetent and shall retain all legal and civil rights except those which by court order have been designated as legal disabilities and have been specifically granted to the limited conservator. The intent of the Legislature, as expressed in Section 4501 of the Welfare and Institutions Code, that developmentally disabled citizens of this state receive services resulting in more independent, productive, and normal lives is the underlying mandate of this division in its application to adults alleged to be developmentally disabled.

(e) The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

(Section 1800.3 provides that a conservatorship shall not be granted unless it is the least restrictive alternative needed for the protection of the conservatee. Section 1828.5 places limitations on the appointment of a conservator for a developmentally disabled adult with some capacity for independence.)

The staff has two concerns about using Section 1800 as the definition of “dependent adult”:

(1) A court’s decision on whether to create a conservatorship occurs while the proposed conservatee is still alive. The proposed conservatee may be able to testify in the proceedings, giving the court a direct opportunity to evaluate the person’s condition. Expert testimony may be easy to obtain.

By contrast, if the Section 1801 standard were incorporated into the Donative Transfer Restriction Statute, it would usually operate after the transferor’s death (and perhaps long after creation of the donative instrument at issue). It may be very difficult to reconstruct whether the person would have met the standards for appointment of a conservator at the time that the donative instrument was created, especially if the standard is clear and convincing evidence (as it is under Section 1801(e)). It would be much easier to apply the existing definition of “dependent adult,” which turns on more objective criteria (e.g., whether a person can carry out normal activities).

(2) The proof required under Section 8100 would largely undercut the value of Section 21350. If a contestant can prove, by clear and convincing evidence, that a transferor lacked capacity to manage finances or was unable to resist fraud and undue influence, the contestant will have met much of the burden of proving incapacity, fraud, or undue influence. In that case, there would be little need for a presumption of undue influence.

UNNATURAL GIFT

The common law recognizes that an “unnatural gift” may be evidence of undue influence. An estate plan may be considered unnatural if it fails to provide for close family members (the “natural objects” of the transferor’s bounty), or treats those natural objects unequally. However, a gift is *not* considered unnatural if there is a clear reason for what might otherwise be considered an unnatural disposition. 64 Cal. Jur. 3d *Wills* §§ 158, 163 (2007).

In effect, the concept of a natural gift is a sort of presumption that a transferor will favor close relatives and friends over those who are more remote in relation and intimacy.

Concern about unnatural gifts seems central to the care custodian provision. The provision seems to reflect skepticism that a person would want to leave a large gift to an employee. A transferor’s other heirs are likely to object that such a

gift is unnatural and must have been the product of undue influence. The statute gives presumptive weight to such objections.

As will be discussed in a later memorandum, the statutory presumption of undue influence does not apply to a gift to a family member, spouse, domestic partner, or cohabitant of the transferor. That exception appears to be based on the concept of natural gifts. A gift to a family member is not presumed to be the product of undue influence because it is natural and expected that a transferor will make a gift to a family member.

That same logic could be applied to justify an exception for close friends and volunteers. While a large gift to a stranger who provides paid services may seem unnatural, the same gift to a long-time friend or Good Samaritan may not. Such gifts are to be expected and are therefore less likely to be the product of undue influence.

There are two main ways in which the concept of natural gifts might be reinforced in the Donative Transfer Restriction Statute: the exemption of friends and the exemption of volunteers.

Exemption of Friends

The staff believes that a close friend can be a “natural object” of a person’s bounty. In some cases, a close friend may be higher in a person’s regard than a member of the person’s extended family. As a matter of policy, if family members are exempt from the presumption of undue influence (Section 21351 exempts them to the fifth degree of kinship), close friends should also be exempt.

However, that proposition raises difficulties of definition and proof.

What is a Friend?

As the court noted in *Bernard v. Foley*, the law regulating senior housing exempts:

(2) Any arrangement for the care and supervision of a person or persons from only one family by *a close friend, whose friendship preexisted the contact between the provider and the recipient*, and both of the following are met:

(A) The care and supervision is provided in a home or residence chosen by the recipient.

(B) The arrangement is not of a business nature and occurs only as long as the needs of the recipient for care and supervision are adequately met.

Health & Safety Code § 1569.145(f)(2) (emphasis added).

A quick survey of the codes reveals a number of other provisions that depend, to some extent, on the concept of friendship. See, e.g., Bus. & Prof. Code § 3765 (regulation of respiratory therapy does not prohibit “gratuitous care by a friend or member of the family”); Ins. Code § 1668.1(e)(2) (grounds for suspension or revocation of agent’s license include inducing client to name agent’s friend as beneficiary); Prob. Code §§ 1829 (proposed conservatee’s friend has standing to support or oppose conservatorship), 4765 (patient’s friend has standing to petition in proceedings relating to health care for a patient without decision making capacity); Welf. & Inst. Code § 7250 (application for writ of habeas corpus may be made by friend of person committed in mental institution, on behalf of that person).

The staff could not find any California statute that defines the term “friend.” That is not surprising. It would be difficult to create a fixed standard that would reliably differentiate between “friends” and mere “acquaintances.”

Academic attempts to provide a legal definition are interesting, but fall short of providing a clear standard. See, e.g., Ethan Leib, *Friendship and the Law*, 54 UCLA L. Rev. 631, 642 (2007) (stating broad characteristics of friendship, including voluntariness, trust, solidarity, exclusivity, reciprocity, warmth, mutual assistance, equality, and duration over time); Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not Acquaintance)*, 33 Pepp. L. Rev. 575, 585 (2006) (“A friend is another human to whom one feels loyalty. This loyalty is not based on money, family or fear. A friend is one to whom the friend feels admiration, love and respect — which are distinct from ordinary social or business acquaintance and the requisite collegiality (politeness) associated with that social or business intercourse.”). The Merriam-Webster Online Dictionary defines “friend” as “one attached to another by affection or esteem” or “a favored companion.”

Apparently, the existing statutes that recognize friendship rely on courts to exercise judgment as to whether a particular relationship rises to the level of friendship. In most cases, that would probably be sufficient.

Friendship Exception

If the Commission decides that the care custodian provision should treat friends differently than strangers, that approach could be implemented with an exception similar to the exception recognized in *Conservatorship of*

Davidson, 113 Cal. App. 4th at 1052-53 (which was overruled in *Bernard v. Foley*):

“Care custodian” does not include a person who provides services to a dependent adult as a direct result of a preexisting friendship.

That language does not provide a definition of “friendship” but a court should be able to determine, on a case-by-case basis, whether such a friendship existed and was the reason for the provision of care.

The proposed language would require that the friendship exist *before* the provision of care. That seems necessary in order to avoid having the friendship exception swallow the rule. It seems likely that every disqualified care custodian would argue that the gift was the product of a friendship that developed out of the care custodian relationship.

Exemption of Volunteers

Another possible narrowing of the care custodian provision would be to exempt those who provide care services as volunteers. TEXCOM advocates this approach:

Texcomm recommends that the definition of “care custodian” be limited to persons who provide professional or occupational services to the transferor.

Texcomm has not yet taken a final position on whether those services should or should not be limited to health or social services. The terms “professional” or “occupational” attempt to distinguish two situations. The first is the Good Samaritan. Texcomm supports a Good Samaritan exception to the presumption of undue influence for gifts to care custodians. The second situation is that of payment. A Texcomm consensus exists that defining care custodians to include all those who receive payment would be too broad. For example, if payment were sufficient to disqualify a beneficiary and if a protected person tells the neighbor’s child to keep the change from a \$20 bill that the child used to buy sundries, the protected person could not later include a \$5,000 gift to that child in her will.

See Exhibit p. 1.

Such an exception may be justified on the theory that a gift to a volunteer is more “natural” than a gift to an employee. The gift is more likely to be an expression of gratitude to a person who provided care services out of altruism rather than as an occupational duty.

That said, the staff is not sure that a person's gratitude to a volunteer caregiver would necessarily be greater than the gratitude a person feels to a low-wage care-giver. In each case, a gift might be a sincere expression of gratitude.

If the Commission decides to exempt a volunteer caregiver from the care custodian provision, that could be done by limiting the definition of "care custodian" to:

A person who provides health or social services to a dependent adult and is paid for the provision of those services. For the purposes of this section, payment does not include the reimbursement of expenses incurred on the dependent adult's behalf.

TEXCOM's concern about small gratuities taking a person out of the volunteer exception would be better addressed by a general de minimis exception to the Donative Transfer Restriction Statute as a whole. Such an exception already exists. See Section 21351(h). That provision will be analyzed in a subsequent memorandum discussing general exceptions.

TIMING CONSIDERATIONS

Contemporaneity

As the California Judges Association pointed out when the care custodian provision was first proposed, the provision says nothing about when the determination of care custodian status must be made.

Under the common law, undue influence means influence that is brought to bear directly on the testamentary act. "[It] must be influence used directly to procure the will...." *In re Welch's Estate*, 43 Cal. 2d 173, 175, 272 P.2d 512 (1954). In other words, the question of whether a person is exerting undue influence focuses on the act of creating the donative instrument.

What, then, should be the result if the donative instrument is made before the care custodian relationship begins? During the relationship? After the relationship has ended?

Donative Instrument Created Before Commencement of Care

Obviously, a gift that is made before the commencement of a care custodian relationship cannot have been the product of pressure applied during that relationship. A care custodian should not be disqualified from receiving such a gift.

In the situation where the donative transfer to an individual precedes his or her assumption of responsibilities as a care custodian or is made prior to the time that the donor assumes the status of a dependent adult, the statutory presumption would not apply.

Bernard v. Foley, 39 Cal. 4th 794, 822, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006) (George, C.J., concurring).

TEXCOM makes the same suggestion:

Texcomm approves the principle that a transfer under a donative instrument should be valid to a person who has a relationship with a transferor that does not involve providing care custodial services at the time that the transferor signs the donative instrument, even if the transferee later provides care custodial services.

See Exhibit p. 1. **The staff agrees.**

Donative Instrument Created During Provision of Care

A gift created during the care custodian relationship seems to present the greatest potential for undue influence. A care custodian's opportunity to exert influence over a dependent adult is probably at its apex during the care custodian relationship. That is when the care custodian has sustained private contact with the dependent adult. That is when the transferor's dependence on the care custodian is greatest.

The presumption of undue influence should apply to a donative instrument that is created during an ongoing care custodian relationship.

Donative Instrument Created After Care Custodian Relationship Ends

The difficult question is whether the presumption of undue influence should apply to a gift that is made after the care custodian relationship ends. That question arose in *Estate of Shinkle*, 97 Cal. App. 4th 990, 119 Cal. Rptr. 2d 42 (2002).

In that case, Laverne Shinkle broke her hip at the age of 77 and was admitted to an extended care facility for recovery. C.J. Thompson was a volunteer long-term-care ombudsman for the facility. In addition to providing routine assistance to Shinkle, Thompson also provided services that were outside of the ordinary scope of an ombudsman's duties. He helped Shinkle to pay her bills, do her banking, and ran some personal errands for her. Shinkle told Thompson that she wanted to leave her estate to him. *Id.* at 996-97.

Shinkle stayed in an extended care facility for roughly three years. Thompson was her ombudsman for most of that time, but was transferred to a different facility about five months before Shinkle was discharged and returned to her home. Even after the transfer, Thompson continued to visit Shinkle and to assist her with her finances. He claimed that these visits were the result of his friendship with Shinkle and had no connection to his former duties as ombudsman. *Id.* at 998-99

After Shinkle went home, Thompson continued to visit. He made arrangements for Shinkle to meet with an estate planner. Shinkle executed a trust, with Thompson as beneficiary, about a month after returning home. She died about a month later. *Id.* at 1000.

The designation of Thompson as trust beneficiary was challenged under Section 21350 on the grounds that Thompson was the care custodian of Shinkle, a dependent adult.

The court held that Thompson was a disqualified person under the care custodian provision, notwithstanding the fact that his services as ombudsman had ended some six months before Shinkle executed her trust.

Thompson's relationship with Shinkle arose out of his volunteer work as an ombudsman. But for the ombudsman program, Thompson would not have met Shinkle, would not have had access to her financial and personal information, and would not have gained her trust. He would not have learned that she had few friends and no contact with her family. Thompson was a "care custodian" under Probate Code section 21350(a)(6) and Welfare and Institutions Code section 15610.17 while he served as Shinkle's ombudsman at GHC and South Valley. Thompson's work as an ombudsman, as a "care custodian" under section 21350(a)(6), enabled him to gain access to Shinkle and to gain her confidence.

The trust relationship Thompson developed with Shinkle as a result of his ombudsman position continued after he was transferred to another facility and after Shinkle went home. Furthermore, Thompson understood the nature of his fiduciary relationship with Shinkle and was still a certified ombudsman when the trust documents were executed and when Shinkle died. Thompson's status as a care custodian for Shinkle did not change after he was transferred or after she went home. If that were the case, an ombudsman could inherit from a former resident after that person was discharged from the facility, thereby circumventing the purpose of section 21350. If we were to adopt Thompson's reasoning and find that he was no longer a "care custodian" for Shinkle, either after he transferred or after she went home, individuals like Thompson could avoid the prohibitions of section

21350 merely by changing their assignments, changing jobs, or ceasing to provide volunteer services in order to benefit from a donative transfer from someone with whom they had previously had a fiduciary relationship. Such a construction would be contrary to the purpose of section 21350, which is to prevent care custodians from taking advantage of their elderly charges and obtaining gifts through undue influence.

Id. at 1006.

Shinkle provides an example of a case where the presumption of undue influence arising from the care custodian relationship probably should persist, even after the end of the formal care custodian relationship. However, it is not difficult to imagine cases where the opposite result would be proper. Suppose that a home-care nurse provides assistance to a senior for a year after the senior suffers a disabling accident. They become friends and the nurse visits once or twice a month on a regular basis thereafter. Five years later, while enjoying good health, the senior amends her trust to include a gift to her friend and former nurse. Under that hypothetical, it is harder to justify a presumption of undue influence based on the former care-giving.

The staff would be interested to hear from practitioners with experience in estate planning, elder abuse, and dependent care as to which approach should be taken on this issue.

Duration

Chief Justice George suggests that the care custodian provision should differentiate between a short-term care relationship and a long-term care relationship. Where there is a long-term relationship, family members and friends of the dependent adult will have a greater opportunity to detect any problems that might arise and take steps to address them.

[An] uncompensated but well-established caregiving relationship affords greater opportunity to the donor's relatives and other interested parties to observe the course of the relationship and to resolve any concerns occasioned by the caregiver's position of trust and potential ability to exert undue influence.

Bernard v. Foley, 39 Cal. 4th 794, 819, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006) (George, C.J., concurring).

While the staff agrees that a longer relationship gives more time to detect and address an abusive situation, it also increases the opportunity to apply pressure

and the temptation to do so. The relationship between Thompson and Shinkle lasted for over three years.

It is not clear, when both consequences of a long-term relationship are considered together, that there would be a net advantage to exempting long-term relationships from the care custodian provision.

Proximity to Death

Chief Justice George also suggests that a gift made less than a year before the transferor's death is more likely to be the product of undue influence than a gift made more than a year before the transferor's death. *Id.* at 820.

There may be justifiable concerns about an estate plan executed shortly before the transferor's death. The transferor's capacity may be impaired by illness. The transferor's judgment may be distorted by anticipation of death. A sense of urgency may lead the transferor to make errors.

Nonetheless, there is no general presumption that a gift made shortly before death is the product of incapacity or undue influence. It is not clear why proximity to death should heighten concern that a care custodian has exerted undue influence.

The Chief Justice notes that federal tax laws have special rules for gifts made within a certain time period before death. However, it appears that those special rules are intended to address the problem of gifts made in anticipation of death as a way of avoiding estate taxation. Similarly, Probate Code Section 9653(a)(2) allows for the recovery of property transferred in anticipation of death, as necessary to satisfy creditor claims. In each case, the concern is not that the transferor has been tricked or pressured into making a gift, but that the transferor is making the gifts in order to avoid taxes or debts.

The staff invites alternative views, but does not presently recommend that gifts created shortly before death be treated any differently under the Donative Transfer Restriction Statute.

VICARIOUS DISQUALIFICATION OF ASSOCIATES OF CARE CUSTODIAN

Memorandum 2008-10 discusses the fact that the presumption of undue influence applies to specific types of "disqualified person" as well as the specified relations and business associations of those disqualified persons. See Section 21350(a)(2)-(3), (5).

The Donative Transfer Restriction Statute treats care custodians in the same way. A gift to a specified relation or business associate of the care custodian is also subject to the presumption of undue influence. See Section 21350(a)(7).

Memorandum 2008-10 raised a number of minor drafting and policy issues relating to the provisions vicariously disqualifying a person's relatives and business associates. Those same issues apply, in exactly the same way, to the relatives and business associates of a disqualified care custodian.

The staff intends to draft a single standard for the vicarious disqualification of relatives and business associates of a specifically identified disqualified person. For that reason, the issues discussed in Memorandum 2008-10 are not reiterated here. When the staff prepares a draft of proposed language on the topic, the Commission can evaluate whether there is any reason to differentiate between the relations and associates of care custodians as opposed to the relations and associates of a drafter or fiduciary transcriber.

RECAP OF ALTERNATIVES

The Commission should decide which of the following reforms, if any, it wishes to include in a tentative recommendation:

- **Limit the definition of "dependent adults" to persons 65 years or older.** This would better reflect the original rationale for the care custodian provision and might better reflect the class of dependent persons who are especially vulnerable to fraud and undue influence.
- **Limit the definition of "dependent adults" to persons with mental disabilities.** This would better reflect the original rationale for the care custodian provision and might better reflect the class of dependent persons who are especially vulnerable to fraud and undue influence.
- **Redefine "dependent adult" to borrow the standard that governs the appointment of a conservator.** This option is proposed by TEXCOM. The staff has concerns about the level of proof required by that standard.
- **Narrow the definition of "care custodian" to exclude a person who provides services as a result of a pre-existing personal friendship.** This exception would recognize that a gift to a friend is a "natural gift," similar to a gift to a close relative. It might raise some difficult issues of proof, as there is no bright line definition of friendship.
- **Narrow the definition of "care custodian" to exclude a person who provides services as an unpaid volunteer.** This exception

would recognize that a gift to a volunteer may reflect the transferor's gratitude and is not necessarily an unnatural gift.

- **Exempt a gift created before a care custodian relationship is established.** There is no basis for presuming that the gift is the improper product of the care custodian relationship.
- **Exempt a gift created after a care custodian relationship has ended.** This presents a difficult policy choice.
- **Exempt a care custodian relationship of long duration.** A lengthy relationship provides time for friends and relations to detect and address any problems that may develop in the relationship. On the other hand, it also provides more time to exert pressure.
- **Provide for especially strict treatment of gifts made shortly before death.** The staff does not recommend this reform.

Once the Commission has made decisions on which reforms to include in a tentative recommendation, the staff will draft implementing language for review at a future meeting.

REMAINING ISSUES

The following issues remain to be addressed in future memoranda:

- Disqualification of interested witnesses.
- General exceptions to disqualification.
- Requirements for rebuttal of the presumption.
- Independent attorney certification of an otherwise invalid gift.
- Miscellaneous provisions.

Respectfully submitted,

Brian Hebert
Executive Secretary

**EMAIL FROM NEIL HORTON, TRUSTS AND ESTATES SECTION
OF THE CALIFORNIA STATE BAR
(MAY 16, 2007)**

Texcomm has been debating ways to improve Probate Code Section 21350's prohibition against donative transfers from "dependent adults" to "care custodians" for several years. A consensus exists that the current statute's definitions of "dependent adult" and "care custodian" are too broad and that the certificate of independent review procedure to validate these kinds of transfers is ill-suited for its purpose. Listed below are several suggestions that Texcomm asks CLRC to consider in response to AB 2034 as well as issues that Texcomm is still considering.

1. Re-define the protected class

Texcomm recommends substituting the term "protected person" for "dependent adult" and defining the "protected person" as a person for whom a conservator of the person or of the estate may be appointed pursuant to Section 1801. The intent is to include within the definition of "protected person" those persons for whom a conservator is not appointed because the person has an existing trustee or an agent under a financial or health care power, but who otherwise would be unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter or who is substantially unable to manage his or her own financial resources or resist fraud or undue influence.

2. Re-define care custodian

Texcomm recommends that the definition of "care custodian" be limited to persons who provide professional or occupational services to the transferor.

Texcomm has not yet taken a final position on whether those services should or should not be limited to health or social services. The terms "professional" or "occupational" attempt to distinguish two situations. The first is the Good Samaritan. Texcomm supports a Good Samaritan exception to the presumption of undue influence for gifts to care custodians. The second situation is that of payment. A Texcomm consensus exists that defining care custodians to include all those who receive payment would be too broad. For example, if payment were sufficient to disqualify a beneficiary and if a protected person tells the neighbor's child to keep the change from a \$20 bill that the child used to buy sundries, the protected person could not later include a \$5,000 gift to that child in her will.

3. Timing of transfer and status as care custodian

Texcomm approves the principle that a transfer under a donative instrument should be valid to a person who has a relationship with a transferor that does not involve providing care custodial services at the time that the transferor signs the donative instrument, even if the transferee later provides care custodial services.

4. Attorney's certificate

Texcomm agrees that the test for determining whether the person issuing the certificate is independent of the care custodian should be the same as that set out in Rules of Professional Conduct 3-310(b)(1) and (3), relating to when an attorney has an obligation to inform the client of a relationship. In other words, for an attorney to be independent, the attorney must have no legal, business, financial, professional, or personal relationship with the transferee.

Texcomm also agrees that, for the certificate to be valid, the attorney must be independent as defined above and must consult with the client about whether the donative instrument is the produce of fraud, menace, duress, or undue influence. Texcomm, however, has rejected the requirement that the consultation occur before the client signs the donative instrument. Texcomm has not yet decided whether to recommend any other time constraints on the attorney's ability to sign a certificate.

5. Overcoming presumption of undue influence

Texcomm recommends that the burden of proof required of a care custodian to overcome the presumption of undue influence be preponderance of the evidence rather than clear and convincing evidence.

6. De minimus transfers

Texcomm agrees that a de minimus rule should apply to transfers to care custodians, but has not yet determined what the de minimus amount should be.

7. Statute of limitations

What limitations period should apply to an action to invalidate a transfer under a trust instrument to a disqualified person if the trustee properly served the Section 16061.7 notice? Texcomm is not yet ready to suggest a resolution to the apparent conflict between Sections 21356 and 16061.8.

Under Probate Code Section 21356, an action to establish the invalidity of a transfer described in Section 21350, other than by will, may be brought within the later of three years after the transfer became irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer.

But under Probate Code Section 16061.8, in the case of a trust where notice is given under Section 16061.7, the period of a contest is shortened to 120 days after notice is served or 60 days after the trusts terms are mailed or personally delivered during the 120 day period, whichever is later. Should this shorter period of limitations apply to a transfer under a trust instrument to a disqualified person if the trustee gives the Section 16061.7 notice?

Thank you for your attention to this letter.

**PART 3.5. LIMITATIONS ON TRANSFERS TO
DRAFTERS AND OTHERS
(PROB. CODE §§ 21350-21356)**

§ 21350. Invalid transfers

21350. (a) Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:

(1) The person who drafted the instrument.

(2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.

(3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation.

(4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.

(5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in paragraph (4).

(6) A care custodian of a dependent adult who is the transferor.

(7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6).

(b) For purposes of this section, “a person who is related by blood or marriage” to a person means all of the following:

(1) The person’s spouse or predeceased spouse.

(2) Relatives within the third degree of the person and of the person’s spouse.

(3) The spouse of any person described in paragraph (2).

In determining any relationship under this subdivision, Sections 6406, 6407, and Chapter 2 (commencing with Section 6450) of Part 2 of Division 6 shall be applicable.

(c) For purposes of this section, the term “dependent adult” has the meaning as set forth in Section 15610.23 of the Welfare and Institutions Code and also includes those persons who (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64. The term “care custodian” has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code.

(d) For purposes of this section, “domestic partner” means a domestic partner as defined under Section 297 of the Family Code.

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

(d) The court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. If the court finds that the transfer was the product of fraud, menace, duress, or undue influence, the disqualified person shall bear all costs of the proceeding, including reasonable attorney's fees.

(e) Subdivision (d) shall apply only to the following instruments:

(1) Any instrument other than one making a transfer to a person described in paragraph (1) of subdivision (a) of Section 21350.

(2) Any instrument executed on or before July 1, 1993, by a person who was a resident of this state at the time the instrument was executed.

(3) Any instrument executed by a resident of California who was not a resident at the time the instrument was executed.

(f) The transferee is 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 an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(g) For purposes of this section, "related by blood or marriage" shall include persons within the fifth degree or heirs of the transferor.

(h) The transfer does not exceed the sum of three thousand dollars (\$3,000). This subdivision shall not apply if the total value of the property in the estate of the transferor does not exceed the amount prescribed in Section 13100.

(i) The transfer is made by an instrument executed by a nonresident of California who was not a resident at the time the instrument was executed, and that was not signed within California.

§ 21352. Third party liability

21352. No person shall be liable for making any transfer pursuant to an instrument that is prohibited by this part unless that person has received actual notice of the possible invalidity of the transfer to the disqualified person under Section 21350 prior to making the transfer. A person who receives actual notice of the possible invalidity of a transfer prior to the transfer shall not be held liable for failing to make the transfer unless the validity of the transfer has been conclusively determined by a court.

§ 21353. Effect of invalid transfer

21353. If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue, but only to

the extent that the value of the transfer exceeds the intestate interest of the disqualified person.

§ 21354. Contrary provision in instrument

21354. This part applies notwithstanding a contrary provision in the instrument.

§ 21355. Application of part

21355. This part shall apply to instruments that become irrevocable on or after September 1, 1993. For the purposes of this section, an instrument which is otherwise revocable or amendable shall be deemed to be irrevocable if on September 1, 1993, the transferor by reason of incapacity was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.

§ 21356. Commencement of action

21356. An action to establish the invalidity of any transfer described in Section 21350 can only be commenced within the periods prescribed in this section as follows:

(a) In case of a transfer by will, at any time after letters are first issued to a general representative and before an order for final distribution is made.

(b) In case of any transfer other than by will, within the later of three years after the transfer becomes irrevocable or three years from the date the person bringing the action discovers, or reasonably should have discovered, the facts material to the transfer.

WELFARE AND INSTITUTIONS CODE
SECTIONS 15610.17 AND 15610.23

§ 15610.17. Care custodian

15610.17. "Care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff:

(a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

(b) Clinics.

(c) Home health agencies.

(d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.

(e) Adult day health care centers and adult day care.

(f) Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.

(g) Independent living centers.

(h) Camps.

(i) Alzheimer's Disease day care resource centers.

(j) Community care facilities, as defined in Section 1502 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code.

(k) Respite care facilities.

(l) Foster homes.

(m) Vocational rehabilitation facilities and work activity centers.

(n) Designated area agencies on aging.

(o) Regional centers for persons with developmental disabilities.

(p) State Department of Social Services and State Department of Health Services licensing divisions.

(q) County welfare departments.

(r) Offices of patients' rights advocates and clients' rights advocates, including attorneys.

(s) The office of the long-term care ombudsman.

(t) Offices of public conservators, public guardians, and court investigators.

(u) Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the following:

(1) The federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, contained in Chapter 144 (commencing with Section 15001) of Title 42 of the United States Code, for protection and advocacy of the rights of persons with developmental disabilities.

(2) The Protection and Advocacy for the Mentally Ill Individuals Act of 1986, as amended, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code, for the protection and advocacy of the rights of persons with mental illness.

(v) Humane societies and animal control agencies.

(w) Fire departments.

(x) Offices of environmental health and building code enforcement.

(y) Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.

§ 15610.23. Dependent adult

15610.23. (a) "Dependent adult" means any person between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.

(b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.