Study L-622 April 3, 2008

First Supplement to Memorandum 2008-13

Donative Transfer Restrictions: Care Custodian as Disqualified Person

The Commission has received two letters commenting on the issue of a "care custodian" as a "disqualified person" under Probate Code Section 21350. They are attached in the Exhibit as follows:

The letter from TEXCOM also includes comments on issues raised in Memorandum 2008-10, relating to the derivative disqualification of relatives and business associates of those who are categorically defined as disqualified persons.

The letter from PAI is the result of staff efforts to solicit comments from organizations that work for the rights of the disabled or are directly involved with the issues of elder abuse or custodial care. It is important that those perspectives inform the Commission's deliberations. The staff appreciates the input from PAI and will continue its efforts to solicit input from such groups when a tentative recommendation is ready for circulation.

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

DEPENDENT ADULT

One of the main points raised in both the letters is the proper definition of the term "dependent adult." Who should be within the protected class, if anyone?

Objection to Any Limitation on Dependent Adults

PAI's main point is that the law should not impose *any* special burden on the testamentary power of disabled persons as a class. Even those persons who are

suffering mental disabilities should not be presumed incapable of resisting undue influence. Concerns about mental capacity are properly addressed by existing law governing capacity, through individualized determinations. See generally Exhibit pp. 8-12.

This is a good point that the Commission needs to consider. As discussed in Memorandum 2008-13, the staff sees little justification for creating a special protected class for those who are physically disabled. For example, there is no reason to believe that a person with muscular dystrophy, who needs assistance with some tasks, is so vulnerable to undue influence from a care custodian as to create a strong statutory presumption of undue influence.

PAI's letter argues that the same skepticism should be extended to statutory protection of those with mental disabilities. Why should a person who has a mental impairment that does not interfere with testamentary capacity be presumed to be vulnerable to undue influence?

PAI advocates that the care custodian provision be eliminated entirely. Any issues of incapacity or undue influence involving a disabled person should be handled in the same way that they are handled for a nondisabled person, under the general law on incapacity and undue influence.

Limiting the Protected Class to Seniors

TEXCOM opposes the idea of defining the protected class by reference to age. Such an approach will be over- and under-inclusive in different fact situations. See Exhibit p. 2.

That is true. However, the existing statute is already over-inclusive. Any rational narrowing of the protected class will be an improvement.

Furthermore, there are many statutes that treat seniors differently, as a class, from other persons. For example, persons over 70 must appear in person to renew a driver's license. That requirement is over- and under-broad. It imposes a burden on some who have no impairment of their driving ability at all, and will miss younger people who have age-related driving impairment.

Any age-based rule will be imperfect. Nonetheless, it might represent a reasonable (and readily determinable) way to define the protected class. As noted in Memorandum 2008-13, it would also be consistent with the originally stated intent of TEXCOM and the Legislature, that the care custodian provision protect seniors from abuse.

PAI has reservations about any age-based class, given the other protections that the law already affords to seniors. See Exhibit p. 11.

Defining "Mental Impairment"

TEXCOM notes the difficulty of defining mental impairment. See Exhibit p. 3. PAI raises the same concern. See Exhibit p. 11.

TEXCOM also points out that the existing Due Process in Competence Determination Act (DPCDA) provides a thorough set of rules for making determinations about competency. See Sections 810-813. DPCDA establishes a rebuttable presumption that "all persons have the capacity to make decisions and to be responsible for their acts or decisions." Section 810(a). "The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks capacity to do a certain act." Section 811(d).

However, lack of capacity is not the same thing as vulnerability to undue influence. Undue influence "overcomes the will, without convincing the judgment." *In re Anderson's Estate*, 185 Cal. 700, 707, 198 P. 407 (1921). That distinction recognizes that a person may have full mental capacity, yet still succumb to undue influence. The question is whether the existence of some mental impairment creates a special vulnerability to undue influence. If that question could be answered simply by determining whether the person has decisionmaking capacity, then the Donative Transfer Restriction Statute would serve no purpose. A lack of capacity would itself be sufficient to invalidate the gift.

Eligibility for Conservatorship

TEXCOM writes to further explain its proposal that the definition of "dependent adult" be drawn from the standard that governs the appointment of a conservator of the person or of the estate. The proposal was not intended to include a requirement of clear and convincing evidence. See Exhibit p. 4.

TEXCOM argues that the facts relevant to determining whether a person is eligible for a conservatorship would typically be noted by the estate planning attorney who is first contacted to assist with drafting an estate plan. If the attorney has any reason to believe that the client falls within the dependent adult class, the attorney will be sure to counsel the client about the operation of Section 21350 and the need to obtain an independent attorney certificate to save any gift to a care custodian. The attorney's notes about the client's condition would be

available if there is eventually a contest based on Section 21350. The risk of malpractice will ensure scrupulous care in this regard. See Exhibit p. 5.

PAI objects to the TEXCOM proposal. It believes that application of the standard for appointment of a conservator of the *person* is improper. See Exhibit pp. 12-13. To appoint a conservator of the person, the court must find that the conservatee is "unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter…." Section 1801(a). That could include a disabled person who has no special vulnerability to undue influence.

By contrast, appointment of a conservator of the *estate* requires that the conservatee be "substantially unable to manage his or her own financial resources or resist fraud or undue influence…." Section 1801(b).

However, PAI goes on to object that the standard for appointment of a conservator of the estate would also be inappropriate, because proof sufficient to meet that standard would largely obviate the need for the statutory presumption of undue influence. See Exhibit pp. 12-13.

"Dependency" as Sole Criteria

Another possibility that has occurred to the staff would be to define the protected class without any reference to disability. Simply define "dependent adult" as any adult who requires the assistance of a care custodian "to carry out normal activities," or some such. The point would be to focus on the fact of dependency as the basis for presuming some vulnerability, rather than any underlying condition that gives rise to the dependency.

The staff is not sure that this would address the fundamental objection raised by PAI, that the law should not impose special burdens on the testamentary powers of disabled persons as a class. It might also present too many line drawing questions (e.g., is gardening a normal activity or house cleaning?).

CARE CUSTODIAN

TEXCOM strongly suggests that the category of care custodian be limited to those who provide services as a profession or occupation. See Exhibit p. 5. They are concerned that the staff's proposal, which would focus on whether the care custodian was "paid" for the services provided, would be less precise and harder for estate planning attorneys to determine.

The staff has no general objection to using TEXCOM's language, rather than any reference to payment for service. Specific language will be presented in the staff draft tentative recommendation.

DERIVATIVE DISQUALIFICATION

TEXCOM argues against any expansion of the derivative disqualification of the relatives and business associates of disqualified persons, beyond what is already provided in existing law. See Exhibit pp. 6-7.

The staff intends to discuss this issue orally, at the April meeting.

Respectfully submitted,

Brian Hebert
Executive Secretary

Dear Brian,

Texcom considered Memoranda 2008-10 and 2008-13 at its March 15 meeting. Because of the time consumed in responding to new legislation, Texcom was unable to complete its consideration of Memorandum 2008-10.

Background

I have been drafting wills and trusts for over 40 years. I also have litigated and mediated scores of cases involving claims of undue influence and transfers to a disqualified care custodian. Like many estate planners, I represent clients who are mentally impaired, but who have testamentary capacity. The court has appointed me in more than six cases as the attorney for the conservatee to prepare the conservatee's donative instrument. I co-authored the CEB *Action Guide: Capacity and Undue Influence* and authored the chapter on Substituted Judgment in CEB's *California Conservatorship Practice*. I have lectured frequently on issues relating to elder law and undue influence for CEB, the State Bar, and county bar associations. After the Supreme Court's decision in *Bernard v. Foley*, I chaired Texcom's task force on the care custodian issue.

My colleagues on Texcom have been similarly immersed in issues relating to planning for impaired clients and the care custodian statute. During the nearly six years that I have served on Texcom, it has followed the courts' changing response to the care custodian statute and debated proposals to reform the statute. Texcom's members bring to this issue a wide variety of perspectives. Most Texcom members today are estate planners, but many of those planners also specialize in elder law. Other Texcom members have litigated undue influence cases and contested conservatorships. Unlike many other litigation practices (for example, criminal or personal injury), trusts and estates attorneys do not usually represent just one side. The attorneys on Texcom represent both clients who attack instruments on undue influence or care custodian grounds as well as clients who defend against those attacks. Texcom's membership during this period also has included both a probate commissioner and a probate staff attorney, who daily deal with issues relating to clients with impaired capacity, undue influence, and the care custodian statute. Because of the breadth of its collective experience, Texcom's collective wisdom on this issue is far greater than that of any individual member.

What most impresses me about Texcom's deliberations on the care custodian statute is that, despite the members' differing perspectives, Texcom has achieved a near unanimous consensus on who should be protected under the care custodian statute and who should be considered a care custodian.

Texcom's response to the staff's proposals discussed below reflects two basic criticisms: (1) the proposals fail to consider their effect on estate planners, who will be responsible for implementing the statute; and (2) the proposed standard for determining who is a member of the protected class – a person over 65 with mental disabilities – is both over-inclusive and under-

inclusive in defining those who need additional protection from undue influence.

The term "dependent adult"

Both memoranda use the term "dependent adult" to describe the class of persons being protected. "Dependent adult" is a defined term in Welfare and Institutions Code Section 15610.23. Texcom asks CLRC to adopt a different definition and to use another term to describe the class to avoid confusion.

Defining the protected class

The care custodian statute should not define the protected class in an overly-inclusive way. The statute imposes a limited, but significant, restriction on the right of clients to make donative instruments. If the client is a member of the protected class, the client can not make a valid donative transfer, in general, to a care custodian unless another attorney, who is independent of the transferee, reviews the donative instrument, counsels the client, and concludes that the transfer, in effect, is not the product of fraud or undue influence. The need to retain a second attorney increases the cost and inconvenience to the protected person. Many elderly clients planning their estates are asset rich and cash poor. Many elderly clients can not easily travel to an attorney's office. Elderly clients should not be required to undergo the additional expense and inconvenience of retaining a second attorney to counsel them about their estate plans unless it is necessary to achieve the statute's goals.

Persons over age 65

Although no specific vote was taken, Texcom opposes the proposal in Memorandum 2008-13 limiting the protected class to persons 65 years or older. The virtue of defining the protected class by age is that it creates a bright line. The attorney need only ask the client for a driver's license, passport, or birth certificate, to determine whether the client is subject to the statute's restrictions. The vice of the bright line is that it will apply to many clients unnecessarily and will fail to apply to many other clients who should be protected. A client may be 70 years old and in complete control of her faculties and affairs. Another client may be 50 years old and in need of the statute's protection. For example, the court appointed me as guardian ad litem in the case of a 35-year old California lottery winner with mild mental retardation and mild schizophrenia, who was living with her mother. But for the caution of the lottery commission and the intervention of Adult Protective Services, which petitioned to conserve her, she would have needed the statute's protection from a fiduciary under a power of attorney.

Persons with a mental disability

In addition, a test based on whether the client has a mental disability, as Memorandum 2008-13 suggests, will also subject many persons to the statute who are not in need of protection from care custodians. "Mental" means "relating to, done by, or occurring in the mind" and

"relating to disorders or illnesses of the mind." Concise Oxford English Dictionary (11th Ed.), p. 892. The word "disability" means "a physical or mental condition that limits a person's movements, senses, or activities;" or "a disadvantage or handicap, especially one imposed or recognized by the law." Concise Oxford English Dictionary, p. 407. The definition is so broad as to be useless in achieving the statute's purpose. A person with Asperberger's syndrome has a disorder of the mind that limits his activities. But that person may be able to carry out many activities, such as holding a full-time job, and may have testamentary capacity and the ability to resist undue influence. Another may have a phobia that prevents her from working in an air-conditioned building, but be able to resist undue influence. Similarly, persons afflicted with depression, dyslexia, epilepsy, or other forms of mental disability may have a condition that limits their activities in some respects, but still function well in other respects, and may be able to resist undue influence.

Effect of DPCDA

The memorandum's proposal to limit the definition of protected persons to persons with mental disabilities also is inconsistent with the Due Process in Competence Determination Act (DPCDA) (Prob. Code §§810-813, 1801, 1881, 3201, 3204, 3208). DPCDA establishes a rebuttable presumption of capacity. Prob. Code § 810(a). A mental or physical disorder, by itself, does not affect the presumption of capacity. Prob. Code § 810(b).

Although the care custodian statute is concerned with undue influence, and not capacity, DPCDA applies to both determinations of undue influence as well as incapacity. DPCDA's uses the term "capacity" not merely to describe testamentary or contractual capacity, but "the capacity (of all persons) to make decisions and to be responsible for their acts or decisions." Probate Code § 810(a). More specifically, a conservator of the estate may be appointed for a person solely on the ground that the person is substantially unable to resist undue influence. Prob. Code § 1801(b). If the court appoints a conservator of the estate, the conservatee loses the capacity to contract. Probate Code §§ 1870, 1872. DPCDA requires that a determination that a person lacks the capacity to contract "should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder." Prob. Code § 810(c). See also CEB, California Conservatorship Practice §§ 1.9, 1.10.

DPCDA also requires evidence of a correlation between the deficit and the decision or acts in question. Prob. Code § 811(a). Thus, a petition to appoint a conservator typically describes the proposed conservatee's functional behavior. CEB, California Conservatorship Practice § 5.37. Examples of evidence that support the appointment of a conservator of the estate are that the proposed conservatee has poor short term memory, fatigues easily, is unable to concentrate for a sustained period of time, spends a good part of each day sleeping in front of the television, relies on others to write checks on his account, relies on others to manage his investments, receives a small cash allowance but can not remember how he spends it, leaves his home only in the company of family or friends, and needs supervision to take his medicines properly.

Dependent adult

The definition of "dependent adult" under Welfare and Institutions Code Section 15610.23 also fails to accurately describe those persons whom the statute seeks to protect. It applies to any person "who has physical or mental limitations that restrict his or her ability to carry out normal activities...." "Normal" means "conforming to a standard; usual, typical, or expected." Concise Oxford English Dictionary, p. 975. Under this standard, Franklin Delano Roosevelt would need a second attorney to review his will to make a gift to his physical therapist. Limiting the standard to "mental limitations" that restrict one's "ability to carry out normal activities" will not cure the problem because the ability to carry out "normal activities" does not by itself indicate lack of susceptibility to undue influence. For example, I have had clients who live independently but who persist in purchasing lottery tickets to an extreme degree or who insist that they have won a publisher's sweepstakes contest. These clients likely have frontal lobe dementia, which makes them particularly vulnerable to fraud because of poor judgment, their inability to stop participating in such schemes, and the fact that they believe, at face value, claims that they have won. See CEB *Action Guide: Capacity and Undue Influence* (Feb. 2008), p. 87.

Conservatorship standard

Texcom recommends that the statute incorporate the following definition, adapted from Probate Code Section 1801: "A person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter; or a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence." The vote was 25 in favor, none opposed, and one abstention.

In recommending that the statute adopt the test for whether a conservator of the person or estate should be appointed, Texcom does **not** recommend that the burden of proof be clear and convincing evidence. The restriction that the care custodian statute imposes on donative freedom, while significant, is considerably less than the restrictions that a court's appointment of a conservatee imposes on personal autonomy. For example, a conservatee can not contract; sell, convey, or transfer property; incur a debt; encumber property; make a gift or waive a right. Prob. Code §1870 and §1872. A conservatee may even lose the right to vote. Elec. C. § 2150.

Memorandum 2008-13, argues that the standard under Section 1801 is inappropriate because the determination usually would be made after the protected person's death, that it would be difficult then to reconstruct whether the protected person would meet the standard for appointment of a conservator at the time that the donative instrument was created, and that the existing definition of dependent adult is easier to apply because it turns on more objective criteria (whether a person can carry out normal activities).

But the initial determination will be made by the estate planning attorney while interviewing the client in order to prepare a will or trust. Estate planning attorneys are likely to

be familiar with the objective factors that indicate the client's potential susceptibility to undue influence, such as whether the client arrived at the office in the company of another person, does not write his own checks, does not shop for himself, and does not keep track of his own medications. The estate planner has good reason to note in their files why they think the client is or is not a member of the protected class. The estate planner faces malpractice liability for failing to refer a client to another attorney for a certificate of independent review if the client is a protected person under the statute. *Osornio v. Weingarten* (2004) 124 Cal. App. 4th 304, 329. The estate planner's notes will be available to the parties if litigation arises after death.

The purpose of the care custodian statute will be better served by using the test for the appointment of a conservator under Section 1801 than by using the test for determining whether a person is a "dependent adult" under the Welfare and Institutions Code. Estate planning attorneys and probate judges are familiar with how Section 1801 operates. Under DPCDA, the test under Section 1801 is a functional test, focusing on the protected person's ability to carry out tasks that relate to the client's ability to care for herself. The estate planning attorney will be able to question the client about her ability to carry out these tasks. The estate planning attorney's notes will be useful if and when the issue arises after the client's death as to whether the client should be a member of the protected class. A test that focuses instead on the relationship between "mental disabilities" and "normal activities" will include as protected persons many who do not need the statute's protection while excluding others who do.

Defining "care custodian"

Texcom reiterates its support of a definition limiting "care custodians" to those who provide professional or occupational services to the transferor. The vote was 25 in favor, one opposed, and one abstention. Memorandum 2008-13, on the other hand, suggests defining "care custodian" as "A person who provides health or social services to a dependent adult and is paid for the provisions of those services."

Unless the estate planner knows who is and who is not a "care custodian," the statute will not serve its prophylactic purpose. The estate planner is more likely to be able to comply with the statute if the definition of "care custodian" is limited to those who provide professional or occupational services to the transferor. The estate planner will need to ask his or her client making gifts to non-family members whether the client employs anyone and, if so, who and what services the employee provides. If the employee is a paid companion or a practical nurse, the attorney will advise the client of the need to get a certificate of independent review. That is a far simpler question to explore with a client than whether the client ever gave money to a non-family member mentioned in the client's will or trust and, if so, what was the client's purpose.

A difficulty with payment as the touchstone for inclusion is that in the case of neighbors or close friends, it often is difficult to know whether any payment received by a neighbor or close friend is a gift, a payment for services, or reimbursement for funds advanced. If a neighbor regularly buys meals for a protected person and receives reimbursement, the issue will arise

whether the payments give rise to a "care custodian" classification.

Nor will a general de minimis exception solve the problem. The longer the relationship, the greater the sum of cumulative transfers. Moreover, when the relationships persist over a long period, the issue will arise as to when the transferor became a protected person and when the neighbor or friend became a care custodian. Whatever test is used for the protected class, gray areas will exist in which it is not clear when or if the transferor is protected under the statute and when or if a payment to a neighbor or friend should be subject to a general de minimis rule.

Another difficulty with payment as the criterion for inclusion is the growing number of affinity relationships that are not traditional family relationships. The San Francisco County probate department reports a growing number of care custodial cases involving gay and lesbian relationships in which the parties chose not to register as domestic partners because they did not want to disclose the nature of their relationship and family members later contested the gift. In many of those cases, the applicability of the cohabitant exception under Section 21351(a) is unclear because the parties may not have shared the same residence. And even if the parties shared the same residence, proving the cohabitant exception invariably will be expensive and delay the estate's distribution to the beneficiaries.

Payment as the test for determining whether a beneficiary is a care custodian also is inconsistent with the cohabitant exception. Among the factors that determine whether the beneficiary is a cohabitant are whether the transferor and the beneficiary share income or expenses and whether they jointly own or use property. The family members will use evidence of transfers of funds as proof that the beneficiary was a care custodian, while the beneficiary will argue that the evidence shows that the transfers were proof of sharing income or expenses or that the transfers show joint ownership or use of property. A test based on the provision of occupational or professional services to the transferor will avoid this problem.

The original purpose of extending to "care custodians" the restrictions on gifts to lawyers and fiduciaries was to create a presumption of invalidity of gifts to "practical nurses or other caregivers hired to provide in-home care." The revised statute restricting donative transfers will satisfy that goal if it defines "care custodian" to include those who provide occupational or professional services to the transferor. Amending the statute to include as a care custodian any non-family member who receives payment is likely to punish the virtuous and to leave competent estate planners as befuddled as they are now in trying to comply with the statute.

Derivative disqualification

Texcom only had time to consider the question in Memorandum 2008-10 whether the derivative disqualification of Section 21350(a)(3) should apply to professions or occupations other than lawyers. Texcom unanimously voted that the derivative disqualification should be limited to lawyers.

No compelling need exists to create a broad new category of "disqualified persons," which burdens the right of clients to make wills and trusts. The proposal deals with a problem that does not appear to exist. There is no lay-person equivalent of Mr. Gunderson. The law of undue influence is adequate to protect the elderly from lay people who draft donative instruments that benefit third parties. A presumption of undue influence arises if a confidential relationship exists between the testator and the beneficiary, the beneficiary actively participates in creating the will, and the beneficiary receives an undue profit. CLRC Memorandum 2007-30, p. 12. The act of drafting a donative instrument should be sufficient to establish all elements except undue profit. Lawyers are different from lay persons who foolishly undertake to prepare a donative instrument for another. Lawyers are in a position of trust with respect to their clients. To betray that trust to benefit themselves is egregious conduct. The conduct of an accountant who drafts a will for another may be stupid or foolish, but it is not shameful. Finally, creating a broad category of disqualified employees and co-owners creates the need for a de minimis rule. A 10 percent ownership rule for an IBM employee makes sense; a 10 percent ownership rule for a law partner does not. The bright line should not be a 10 percent associate. The bright line instead should be drawn around lawyers, their employees, and their co-owners.

Although Texcom did not discuss the proposal to include law firms organized as a limited liability company, I believe that the proposal will not be controversial.

Texcom did not consider whether the derivative disqualification under Section 21350(5) relating to fiduciaries should be extended or refined.

Thank you for considering Texcom's proposals.

Very truly yours,

Neil F. Horton

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Advancing the rights of Californians with disabilities

M E M O R A N D U M

TO: Brian Hebert, California Law Revision Commission

FROM: Elizabeth Zirker, PAI Staff Attorney

RE: "Donative Transfer Restriction Statute," as discussed in Memorandum 2008-13.

DATE: April 2, 2008

I. INTRODUCTION

Protection and Advocacy, Inc. (PAI), is a federally-mandated and federally-funded non-profit organization that advocates for the rights of people with disabilities throughout California. We appreciate the opportunity to comment on the Law Revision Commission's proposed changes to the care custodian provision of Probate Code Section 21350 *et seq,* as discussed in the Commission's Memorandum 2008-13. This provision presumptively invalidates a donative transfer by a "Dependent Adult" to the individual's "Care Custodian," as defined in the statute. PAI agrees with the Commission that the statutory definitions of "Care Custodian" and "Dependent Adult" are too broad. However, we do not agree with the Commission's current proposals to narrow the definitions.

The Commission describes the question in evaluating the care custodian provision as whether the likelihood that a gift from a dependant adult to a care custodian is the product of undue influence is "so high as to justify a statutory presumption that shifts the burden of proof from the contestant to the beneficiary." (Memorandum 2008-13 at 11). In contrast, PAI suggests that the focus of the inquiry be shifted to the right of the transferor to make decisions about the distribution of her estate with the confidence that her instructions will be implemented upon her death. State and federal laws such as the Americans with Disabilities Act are based on the

importance of protecting the rights of people with physical and mental disabilities to direct their own lives, and the premise that these rights may be restricted only through an *individualized determination* that the restriction is necessary as the least restrictive alternative in a specific situation. With this perspective, and in light of existing statutory and common law protections against fraud and undue influence in donative transfers by seniors and people with disabilities,[1] PAI proposes that the care custodian provision be stricken in its entirety.

II. PAI'S COMMENTS ON THE COMMISSION'S PROPOSALS

A. The Commission's Concerns about the Definition of "Care Custodian" Reflect Inherent Problems with the Care Custodian Provision Itself.

PAI acknowledges the potential risk of unscrupulous caregivers taking advantage of vulnerable individuals, resulting in donative transfers that are the result of fraud or undue influence. However, as discussed above, this risk is addressed in other existing statutory and common law protections. Furthermore, this risk must be balanced against an individual's right to make donative transfers with the

[1] For example, in consumer rights cases, damages awarded may be higher where a senior citizen or a disabled person is harmed, and fines imposed for unfair or deceptive acts or practices or unfair methods of competition may be tripled where the act affects a senior or person with a disability. *See*, Cal. Civil Code §§ 1780 (b); 3345(b); Cal Bus. & Prof. Code § 17206.1; The Financial Elder Abuse Reporting Act of 2005, Cal. Gov't Code § 7480; Cal. Probate Code § 259 (invalidating any transfer where: (1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult; (2) The person is found to have acted in bad faith; (3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent). In addition, the California Elder Abuse and Dependent Adult Civil Protection Act, Welf. & Inst. Code §§ 15600–15675, provides for remedies that include general damages, damages for pain and suffering, and attorney's fees for physical abuse, neglect, or financial abuse when the abuser is guilty of "recklessness, oppression, fraud, or malice."

presumption that they will be carried out in accordance with the transferor's expressed intent.

PAI agrees with the Commission that the current statutory definition of "Care Custodian" is much too broad. First, the definition is borrowed from the list of individuals and agencies that are mandated to report situations of abuse and neglect, without regard to whether they are in a position to unduly influence a particular individual's decisions. Moreover, the Commission's struggle in attempting to narrow that definition reflects the contradiction that caregivers, in addition to being in a potential position of influence over the individual under their care, are also likely to be the natural objects of that individual's bequest.

It is important to recognize that in most circumstances, caregivers offer valuable comfort, safety and support to individuals who are unable to take care of themselves. It is, therefore, natural and common for an individual to express her gratitude to her caregiver by means of a bequest, especially if the individual does not have the means to adequately compensate the caregiver for his services during her lifetime. The Commission's attempts to resolve this contradiction by narrowing the definition of "Care Custodian" on the basis of factors such as when a gift should be considered "natural," and when that determination should be made, are well-directed but misplaced. Existing law appropriately protects people from fraud and undue influence in donative transfers based on the individual facts of each situation, with a presumption that a transfer is valid until proven otherwise. The nature of the caregiving relationship in each situation will be unique. The Commission should not attempt to anticipate situations that would justify shifting the presumption away from the validity of a donative transfer. Each situation should be addressed according to its individual facts.

B. The Commission's Proposals to Narrow the Definition of "Dependent Adult" Are Not Workable.

PAI agrees with the Commission that the current statutory definition of "Dependent Adult" is much too broad. However, PAI does not agree with the Commission's proposals for narrowing that definition. Ultimately, the problems with the definition of "Dependent Adult," as with the definition of "Care Custodian," reflect problems inherent in attempting to codify situations in which the presumption should be shifted away from the validity of a donative transfer, rather than addressing that determination according to each unique situation, as is provided for under existing law.

1. Defining "Dependent Adult"on the Basis of Age

The Commission has proposed that the definition of "Dependent Adult" "could be narrowed to seniors. That would be consistent with the Bar's original justification for enactment of the care custodian provision." (Memorandum 2008-13 at 15).

Because PAI represents people with disabilities, we do not offer extensive comments on the proposal to define "Dependent Adult" on the basis of age. However, we note that even if narrowing the protected class to those 65 and older might be consistent with the statute's original intent, the definition of "senior" is becoming more and more fluid--as is demonstrated by the variety of ages qualifying an individual as a senior in the code sections cited by the Commission. Moreover, given the senior-focused consumer protections available under common law and by statute, an individualized assessment is more appropriate. Accordingly, there is no need to narrow the definition as to age.

2. Defining "Dependent Adult"on the Basis of the Nature of the Disability

The Commission has proposed limiting the definition of "Dependent Adult" to people with mental disabilities: **"**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." (Memorandum 2008-13 at 15.)

It is unclear to which type or types of mental disabilities the Commission is referring through the terms "cognitive difficulties" and "mentally impaired." In any event, it is inappropriate and dangerous to restrict an individual's right to make donative transfers based on a "likelihood" that someone who fits into a certain class of disabilities may be particularly vulnerable to fraud or undue influence. Mental disability does not necessarily imply vulnerability. Many people with mental disabilities are very strong advocates for themselves and other people. Moreover, as with seniors, there are existing systems in place that serve as resources and safeguards for people with cognitive or other mental disabilities, as well as the statutory and common law presumptions regarding undue influence and unnatural gifts.

3. "Dependent Adult" Defined on the Basis of Eligibility for Conservatorship

The Commission states:

The Trusts and Estates Section of the California State Bar (TEXCOM) proposes that the definition of dependent adult be changed to incorporate the standard used by courts to determine whether to appoint a conservator:

> 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. (Exhibit 1 to Memorandum 2008-13).

TEXCOM's proposal fails to acknowledge the important distinction between a Conservatorship of the Estate and a Conservatorship of the Person under the Probate Code. The standard for a Conservatorship of the Person – whether the individual is unable to care for her needs for health, food, clothing or shelter - is irrelevant to whether the individual is subject to undue influence when making a donative transfer. As discussed above, existing laws already protect these individuals from undue influence on a case-by-case basis, without drawing unwarranted conclusions about an individual based on the fact that she has a disability or is unable to care for her basic needs.

In contrast, the standard for a Conservatorship of the Estate is whether an individual is substantially unable to manage her own financial resources or resist fraud or undue influence. It is unnecessary to define "Dependent Adult" as an individual for whom a Conservator of the Estate has been appointed, since the conservator would be charged with safeguarding the assets of the conservatee in that situation. The same reasoning applies to an individual who is not conserved because she has an existing trustee or agent who serves as her protection against fraud and undue influence. It would be logical to define "Dependent Adult" as someone who meets the standard for Conservatorship of the Estate but who does not have a conservator or other individual available to protect her financial interests. However, as the Commission points out, the evidence required to prove

after an individual's death that she met the standard for a Conservatorship of the Estate would also prove that she was in a position to be the victim of fraud or undue influence, thereby obviating a need for a shift in the burden of proof.

III. CONCLUSION

PAI believes that creating a statutory presumption that shifts the burden of proof from the contestant to the beneficiary in a donative transfer improperly assumes that individuals with mental or physical disabilities do not have the capacity to make decisions about how they want their estates distributed. As the Law Revision Commission notes:

> "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. (Memorandum 2008-13, p.11)

PAI recommends that the care custodian provision be stricken, and that existing common law and statutory standards for undue influence in donative transfers be applied on an individualized basis as appropriate and necessary under the circumstances of each case.