Study L-622 August 20, 2008

Memorandum 2008-36

Donative Transfer Restrictions (Comments on Tentative Recommendation)

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)). The deadline for submitting a recommendation to the Legislature is January 1, 2009.

On June 5, 2008, the Commission approved a tentative recommendation on the matter, which was circulated for public comment. The deadline for comment was August 8, 2008.

Comments on the tentative recommendation are attached in the Exhibit as follows:

The Commission should consider the points raised in the comments and decide whether to make any changes to the proposed law. Based on those decisions, the staff will prepare a draft recommendation for consideration at a future meeting.

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

GENERAL RESPONSE

The response to the tentative recommendation was generally favorable. Concerns were raised about some of the specifics of the proposed law, but there was no general opposition to the proposed law as a whole.

TEXCOM supports the proposed law:

> The Recommendation strikes an appropriate balance between respecting the rights of individuals, including those who have some form of physical or mental impairment, to make donative transfers and the need to protect dependent elders from those whose profession or occupation places them in a position to exert undue influence.

See Exhibit p. 1. Two TEXCOM suggestions for improvement of the proposed law are discussed below.

Jennifer A. Morse, a Napa attorney, believes that the proposed changes from existing law generally "represent an improvement," but she has some specific concerns. See Exhibit p. 2.

James S. Graham, a San Diego attorney, has significant objections to some of the most significant changes that the proposed law would make, but supports all of the other aspects of the proposed law. See Exhibit pp. 3-4.

The suggestions and concerns raised by the commenters are discussed below.

CARE CUSTODIAN AND DEPENDENT ADULT

Under existing law, a gift by a "dependent adult" to a "care custodian" is presumed to be the product of menace, duress, fraud, or undue influence, and is invalid unless the presumption is rebutted, or an exception applies. Sections 21350(a)(6), 21351.

There are a number of specific statutory exceptions, the most significant being (1) an exception for family members within the fifth degree of kinship, and (2) an exception for a gift that is reviewed by an independent attorney, who interviews the transferor and certifies that the gift is not the product of menace, duress, fraud, or undue influence. Section 21351.

The definitions of "dependent adult" and "care custodian" are very broad. A "dependent adult" is any adult who "who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights." Section 21350(c); Welf. & Inst. Code § 15610.23(a). A "care custodian" includes any person who provides "health services or social services" to a dependent adult. Section 21350(c); Welf. & Inst. Code § 15610.17. See also *Bernard v. Foley*, 39 Cal. 4th 794, 807, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006).

In effect, any disabled person who requires assistance to carry out "normal activities" is considered a "dependent adult" under existing law. That definition would apply to a bed-ridden Alzheimer's patient who requires 24-hour medical

assistance, but it would also apply to a mentally competent paraplegic, who requires minor assistance with housekeeping.

The definition of "care custodian" is also very broad. It would apply to an employee of a long-term nursing home, but would also apply to a personal friend who voluntarily helps out by driving a dependent adult to medical appointments, shopping, doing yard work, or the like.

Thus, a gift from a competent adult paraplegic, to a friend who helps out around the house, would be presumed to be the product of undue influence and would fail unless extraordinary steps were taken to save it.

These broad definitions have been interpreted strictly by the California Supreme Court, which declined to read in any exception for care custodians who provide services as volunteers, neighbors, or friends. *Bernard v. Foley*, 39 Cal. 4th 794, 807, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006). In a concurring opinion, Chief Justice George expressed some dissatisfaction with that result, and suggested that the Legislature revisit the scope of the definition of "care custodian." *Id.* at 816 (George, C.J., concurring). Three justices dissented, concluding that the statutory presumption of undue influence should not apply to a care custodian who provides services as a friend or volunteer. *Id.* at 821-24 (Corrigan, J., dissenting).

The Legislature has specifically directed the Commission to consider whether the definition of "care custodian" should include "long time family friends, nonprofessional caregivers who have a preexisting relationship with the transferor, or other 'good Samaritans.'" 2006 Cal. Stat. ch. 215.

After analyzing the policy purposes served by the statutory presumption of undue influence as it applies to a care custodian of a dependent adult, the Commission proposed significant substantive changes to the existing definitions:

- The definition of "dependent adult" would be limited to a person who would have been eligible for a conservatorship at the time that the donative instrument was executed. See proposed Section 21366.

  That approach would replace the existing bright line rule, which limits the testamentary freedom of all disabled persons as a class, with a rule that requires an individualized determination that a person could not "provide properly for his or her personal needs" or was "substantially unable to manage his or her financial resources or resist fraud or undue influence." Section 1801(a)-(b).

- The definition of "care custodian" would be limited to a person who provides services for remuneration, as an occupation or profession. See proposed Section 21362.

  That approach would exclude those who provide care services as volunteers, whether as friends of the dependent adult or as Good Samaritans.

In discussing these changes, it is important to recall that the definitions only affect the scope of the statutory presumption of undue influence. A gift that is excluded from that presumption could still be challenged under the common law of undue influence.

Policy Concerns About Proposed Definition of "Dependent Adult"

James S. Graham and Jennifer A. Morse have both expressed concern about the proposed definition of "dependent adult." Those concerns are discussed below.

Conservatorship Standard as Functional Equivalent of Incapacity

Mr. Graham strongly recommends against the proposed change to the definition of "dependent adult." He feels that it would "negate the protection that should be provided by the statutory scheme." See Exhibit p. 3.

In support of his argument, he notes that, under existing law, the appointment of a conservator of the estate is deemed to establish that the conservatee lacks the capacity to make a binding transaction (other than creation of a will). *Id.* (citing Sections 1871-1872).

The argument seems to be that reliance on the conservatorship standard to define "dependent adult" would be functionally equivalent to using a standard of mental incapacity, and that such a standard would be too strict.

The staff agrees that incapacity would be too strict a standard for the definition of "dependent adult." The risk of undue influence within the care custodian relationship is not limited to dependent adults who are mentally incompetent. A person may be mentally competent, but still be vulnerable to pressure from a care custodian. That vulnerability may be compounded by chronic conditions such as pain, fatigue, depression, or loneliness, which may strain a person's will without affecting the person's mental acuity. To limit the definition of "dependent adult" to the mentally incompetent would be to deny the statute's protection to many vulnerable people.

What's more, incapacity is already grounds to challenge a gift. If "dependent adult" were defined as an adult who lacks capacity, it would make the application of the Donative Transfer Restriction Statute to dependent adults redundant. In other words, there would be no need to establish a statutory presumption of undue influence when a gift is made by a dependent adult to a care custodian, if one of the prerequisites for the presumption is itself independent grounds to challenge the gift.

However, the proposed definition of "dependent adult" is not co-extensive with the concept of mental incapacity. Appointment of a conservator does not necessarily imply the incapacity of the conservatee:

> Before enactment of the conservatorship statute in 1957, a guardian could be appointed for an adult only if the adult were insane or incompetent. While appointment of a guardian settled the issue of the ward's capacity to handle the guardianship property, all wards were stigmatized by the finding of insanity or incompetence. It was primarily to avoid this stigmatization, and to permit protective proceedings for adults in need of assistance who were not necessarily insane or incompetent, that the conservatorship statute was enacted.

Guardianship-Conservatorship Law, 14 Cal. L. Revision Comm'n Reports 501, 532 (1978) (footnotes omitted).

Notwithstanding that general principle, Mr. Graham is correct that

> the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate.

Section 1872. However, that rule does not mean that *all* conservatees lack contractual capacity, for three reasons:

(1) Section 1872 states a default rule that can be overridden by the court, either at the time of appointing the conservator or subsequently. See Section 1873. Thus, a court may find that a conservatee of the estate possesses contractual capacity.

(2) Section 1872 does not affect a conservatee's capacity to make a will. See Section 1871(c). Thus, even a conservatee of the estate may still possess testamentary capacity.

(3) Section 1872 only applies to a conservatorship *of the estate*. Appointment of a conservator *of the person* is not deemed an adjudication that the conservatee lacks the capacity to contract.

For those reasons, the proposed definition of "dependent adult" would include some transferors who have the capacity to make wills and contracts.

Nonetheless, Mr. Graham's basic point is sound. The proposed definition of "dependent adult" would overlap with the concept of incapacity, which would be problematic for the reasons discussed above. Even where it would not overlap, it would significantly raise the threshold for application of the statutory presumption of undue influence in the care custodian context. **The Commission should consider whether requiring eligibility for conservatorship would be too strict a definition of "dependent adult."** (A possible alternative approach is discussed later in this memorandum.)

The advantage of the proposed definition is that it would require an individualized evaluation of the transferor's condition, and a determination that the transferor was in need of protection, rather than painting with a broad brush that sweeps in all disabled persons who require some assistance with daily living. Many disabled persons will not require the protection of the Donative Transfer Restriction Statute and should not be required to take extraordinary steps to save gifts from invalidation.

The disadvantage of the proposed definition is that the conservatorship threshold may exclude some persons that the statute was intended to protect. The risk of undue influence arising out of the care custodian relationship may exist in many cases where the dependent person would not be eligible for a conservatorship.

Problems of Proof

Jennifer Morse is concerned about the difficulty of proving that a transferor would have been eligible for a conservatorship at the time that a donative instrument was executed. That might be especially difficult after the transferor is dead (and cannot testify or be examined) and perhaps long after the donative instrument was created. See Exhibit p. 3.

When the idea of using the conservatorship standard to define "dependant adult" was first proposed by TEXCOM, the staff had similar concerns about the problems of proof presented by that approach. TEXCOM's response to that concern was summarized in the First Supplement to Memorandum 2008-13, at pages 3-4:

> 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.

That is a good point. However, there will be cases where a donative instrument is created without the advice of counsel (e.g., a form will, life insurance beneficiary designation, a TOD bank account). In those cases, attorney notes would not be available as evidence.

Problematic Implication

Jennifer A. Morse has also expressed concern about a possible implication that might be drawn from use of the conservatorship standard to define a "dependent adult":

> I think this language may be interpreted in a way that puts a higher burden on a drafting attorney to judge a client's "capacity," with respect to these statutes, differently than testamentary capacity, generally. Under the proposed section 21366, if I recommended an independent review to a client, would I also be obligated to recommend to that client that he or she be conserved?

See Exhibit p. 3.

The staff understands the concern. If an attorney recommends that a gift be independently reviewed, that would imply that the attorney sees some risk that the gift might be challenged under the statutory presumption. If the basis of that risk is the care custodian provision, then the attorney is impliedly concluding that the client might be a dependent adult. If the basis for that status is eligibility for a conservatorship, then one might infer that the attorney thinks the client should be conserved.

The implication doesn't necessarily follow. The drafting attorney might see no need for a conservatorship, but might still see some risk that the proposed donative instrument could be challenged in the future. If so, then advice to perform an independent review would simply be prudent, and would not necessarily imply that the attorney sees the need for a conservatorship. In fact, if the drafting attorney goes on to perform the independent review, and certifies

that the gift was not the product of fraud or undue influence, that would weigh against any implication that the client needs to be conserved.

It seems unlikely that the implication discussed here would be a significant practical problem.

Alternative Approach

In light of the concerns discussed above, the Commission may wish to consider preserving the existing definition of "dependent adult," which incorporates the more easily established criteria stated in Welfare and Institutions Code Section 15610.23:

> 15610.23. (a) "Dependent adult" means [an adult] 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 [an adult] 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.

While that definition would sweep in all disabled persons who require assistance with "normal activities," bear in mind that many of the other changes in the proposed law would operate to minimize the scope and effect of the statutory presumption (e.g., the definition of "care custodian" would be narrowed to exclude volunteers; independent attorney certification could be performed by the drafting attorney, rather than by a second attorney; the strict evidentiary rules governing rebuttal of the presumption would be relaxed, etc.).

In fact, the overall trend of the proposed law is to limit the scope and effect of the statutory presumption of undue influence. That may present a perception problem in the Legislature, if the proposed law is seen as too one-sided. Restoration of the existing definition of "dependant adult" would reduce that apparent imbalance, while preserving the other beneficial changes that are included in the proposed law.

Even if the Commission decides to keep the conservatorship standard for the definition of "dependent adult," it might make sense to add a second prong to the definition, along the lines of Welfare and Institutions Code Section 15641.23(b):

> "Dependent adult" includes any [adult] 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.

Arguably, any adult who is living in a health care facility is in an extreme position of dependence on caregivers, and it may therefore be appropriate to categorically presume undue influence when such a person makes a gift to a caregiver.

Such a rule would not affect all disabled persons as a class, but would be limited to a narrower group, who are arguably at greater risk of undue influence and in greater need of protection. The rule would also be easily determinable from objective facts, and so would not present the same problems of proof raised by Ms. Morse.

If that rule were adopted by the Commission, as a second type of "dependent adult," the more fact-dependent conservatorship standard would only be at issue with respect to those who receive in-home care services.

The staff sees considerable merit in adding language along the lines set out above.

In fact, it would probably be good policy to also include an adult who is living in a "a long-term care facility, as defined in Section 15610.47 of the Welfare and Institutions Code." The risk of undue influence may be even greater in nursing homes than in health care facilities.

Policy Objection to Proposed Definition of "Care Custodian"

James S. Graham also strongly opposes the proposed change to the definition of "care custodian."

> In my experience, a very substantial threat to elders is presented by persons who claim to be friends but, in fact, are something else altogether. While these so-called friends usually do not provide health or social services as a profession or occupation, invariably, while providing such services they end up being exceedingly well compensated. In one case with which I am presently involved, an elderly and ill woman during the last two months of her life signed checks totaling more than $500,000 to a supposed friend who provided her with health and social services. This case is but one example of a very real problem that is growing exponentially.

See Exhibit p. 3.

Such abuse by "friends" who provide volunteer care to dependent adults undoubtedly exists. However, that does not mean that all gifts to friends who provide voluntary care should be presumed invalid.

One empirical study of elder abuse, prepared for the U.S. Department of Health and Human Services, found that 60.4% of substantiated elder financial abuse cases were perpetrated by a child of the victim. Other relatives of the victim accounted for another 25.1% of the cases. Combined, 85.5% of all substantiated elder financial abuse cases were perpetrated by family members of the victim. National Center on Elder Abuse, *National Elder Abuse Incidence Study*, 4-29 (1998).

By contrast, in-home service providers were responsible for only 1.7% of the substantiated cases of elder financial abuse. *Id.* (In-patient service providers accounted for another 4.1% of elder financial abuse. *Id.*)

Those numbers suggest that family members are far more likely to exert undue influence on a vulnerable senior than care providers, yet family members are exempt from the existing statutory presumption of undue influence.

The explanation for that seeming incongruity is probably very simple. Family members are also the most likely intended beneficiaries of an at-death transfer. The "naturalness" of a gift to a family member weighs heavily against the presumption that such a gift was coerced. Nor is there anything suspicious about a family member providing care services to a dependent relative. Why should the fact that a grandchild drives grandmother to her doctor's appointments and helps her buy groceries once a week result in the presumptive disinheritance of that grandchild (while the inheritance of another grandchild, who does not provide any assistance, is left undisturbed)?

The staff sees no justification for such a result. The mere fact that the family member voluntarily provided care to the transferor is not an indicia of undue influence, nor should it be.

The same logic applies to a friend of the transferor. A gift to a friend is not in itself "unnatural" or suspicious. The mere fact that the friend voluntarily provides some care to the transferor should not be treated as indicia of undue influence. Application of the statutory presumption of undue influence to such facts would defeat many intentional and valid gifts to friends.

The proposed law would not immunize gifts to friends from challenge under the common law of undue influence (just as gifts to family members are not immunized). It would simply exempt such gifts from the statutory presumption.

Except for the technical changes discussed below, the staff recommends that the Commission retain the proposed definition of "care custodian."

Technical Concerns About Proposed Definition of "Care Custodian"

The proposed definition of "care custodian" includes an illustrative, non-exclusive, list of services that fall within the meaning of "health and social services" provided by a care custodian:

> For the purposes of this section, "health and social services" include, but are not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, transportation, and assistance with finances.

Proposed Section 21362(b).

TEXCOM urges the Commission to omit "transportation" from that list.

> The purpose of the list is to provide guidance to the courts in trying to determine what kinds of services should give rise to the heightened scrutiny afforded to "care custodians." If acting as a chauffeur or a cab driver is sufficient to characterize a person as a care custodian, then why not also include the gardener, the minister, or the young adult who reads to the elder whose vision has failed? Unlike those persons whose occupation requires them to provide companionship, housekeeping, shopping, cooking, or financial assistance to a dependent adult, a driver is not by virtue of providing a paid service likely to be in a position to exert undue influence.

See Exhibit p. 1.

Considering that the list is merely illustrative, the staff has no strong feelings either way about including transportation as an example. In many cases a "care custodian" will provide transportation in connection with other services, but it isn't clear that a person who serves *only* as a driver should or should not be included within the definition. **The staff has no objection to removing that item from the list.**

Neil Horton has also informally pointed out a drafting inconsistency in proposed Section 21362(a). **The staff recommends that the subdivision be revised, to make the terminology uniform, as follows:**

> 21362. (a) "Care custodian" means a person who provides health or social services to a dependent adult for remuneration, as a profession or occupation. The ~~compensation~~ remuneration need not be paid by the dependent adult.

Related by Affinity

Scott Bovee asks whether the definition of "related by affinity" is affected by the death of the person who serves as the basis for the affinity relationship. See Exhibit p. 1. For example, if the wife of one's uncle is related by affinity, would that relationship continue after the uncle's death?

Proposed Section 21374 defines "related by blood or affinity" for the purpose of the proposed law:

> 21374. (a) A person who is "related by blood or affinity" to a specified person means any of the following persons:
>
> (1) A spouse or domestic partner of the specified person.
>
> (2) A relative within a specified degree of kinship to the specified person or within a specified degree of kinship to the spouse or domestic partner of the specified person.
>
> (3) The spouse or domestic partner of a person described in paragraph (2).
>
> (b) For the purposes of this section, "spouse or domestic partner" includes a predeceased spouse or predeceased domestic partner.
>
> (c) In determining a relationship under this section, Sections 6406, 6407, and Chapter 2 (commencing with Section 6450) of Part 2 of Division 6, are applicable.

Under subdivision (a)(3), the definition would encompass the spouse or domestic partner of one's uncle (the uncle being a person described in subdivision (a)(2)). There is nothing in subdivision (a)(3) that requires that the referenced relative be living in order for an affinity relationship to exist. Thus, under that language, an affinity relationship with the spouse or domestic partner of an uncle would seem to survive the uncle's death.

The staff could find no clear authority on whether that is the rule in other contexts. Nonetheless, the rule makes sense. It seems likely that the affinity that one feels for a step-parent, or the spouse or domestic partner of a sibling, cousin, uncle, aunt, or other close relation, would survive the death of the relative that established the affinity relationship.

In order to avoid uncertainty on the point, and to affirm the understanding described above, the staff recommends that the Comment to proposed Section 21374 be revised as follows:

Comment. Section 21374 restates the substance of former Section 21350(b) to make clear that a spouse and domestic partner are treated in the same way under this provision.

Subdivision (a)(3) applies to the spouse or domestic partner of a relative regardless of whether that relative is living or deceased.

See also Section 21368 ("domestic partner").

Donative Instrument

Ms. Morse requests a definition of the term "donative instrument," to make clear whether it applies to such things as a beneficiary designation in an insurance policy or a pay-on-death bank account. See Exhibit p. 2.

The staff believes that existing law already provides sufficient guidance on this point. Section 45 provides:

> 45. "Instrument" means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.

For the sake of clarity, the staff recommends that a reference to Section 45 be added to the Comment of each section of the proposed law that uses the term "instrument."

Also, because the term "donative instrument" is somewhat redundant in this context, it might be clearer if the proposed law were revised to use only the defined term "instrument," rather than the undefined and potentially confusing "donative instrument." **The staff recommends making that change.**

REBUTTAL OF PRESUMPTION

Under existing law, a beneficiary who seeks to rebut the presumption of undue influence must present at least some evidence other than the beneficiary's own testimony. See Section 21351(d). The proposed law would eliminate that evidentiary requirement.

Mr. Graham opposes that change:

> I further disagree with the proposed changes insofar as they would revise the requirement that the statutory presumption invalidating a transfer include evidence other than the testimony of the beneficiary. It is precisely because the transferor is not able to provide testimony concerning the transfer that the burden should shift to the beneficiary to establish the validity of the transaction by some independent evidence other than his or her own testimony. In fact, I would recommend that the existing provision be expanded to disqualify the testimony of not only the beneficiary but also persons related to the beneficiary.

See Exhibit p. 4. (To be clear, the beneficiary's testimony is not "disqualified" under existing law. It simply cannot be the *only* evidence offered to rebut the presumption.)

That strict evidentiary rule does not apply to the common law presumption of undue influence, or the statutory presumption that arises when a will makes a devise to a necessary witness. See *Sarabia v. Gibbs*, 221 Cal. App. 3d 599, 605, 270 Cal. Rptr. 560 (1990); 64 Cal. Jur. 3d *Wills* § 224 (2007) (common law presumption); Prob. Code § 6112(c) (interested witness).

As the tentative recommendation notes, at pages 11-12, that difference in treatment is counterintuitive. The statutory presumption is considerably easier to establish than the common law presumption. Under the statutory presumption, one need only show that the beneficiary was the care custodian of a dependent adult. By contrast, the common law presumption requires proof that the beneficiary was in a confidential relationship with the transferor, was involved in creating the gift, and received "undue profit." See *Rice v. Clark*, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002). It does not make sense that a presumption that is easier to establish, with fewer indicia of undue influence, should be harder to rebut.

The proposed law harmonizes the law by eliminating the special strict rules for rebuttal of the statutory presumption. **The staff recommends that the Commission maintain that approach.**

STATUTE OF LIMITATIONS

Existing law provides a special statute of limitations for an action challenging a gift under the Donative Transfer Restriction Statute. Section 21356 provides:

> **§ 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.

For the most part, that provision lengthens the time for bringing an action to challenge a gift under the Donative Transfer Restriction Statute, as compared to the times provided for bringing similar contests generally.

The Commission did not find any compelling justification for these special limitation periods. Consequently, the proposed law would not continue the rules provided in Section 21356. Instead, a contest based on the statutory presumption of undue influence would be subject to the same limitation periods that apply generally to a contest based on undue influence.

Mr. Graham objects to that change, with respect to its effect on instruments other than a will or trust:

> The proposed shortening of the statute of limitations, insofar as it relates to instruments other than wills and trusts, should be rejected. It is important to keep in mind that, "'Instrument' is broadly defined in section 45 as a 'will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property." … The discovery of pre-death transfers by instruments that are not made by a will or a trust often requires more time than would be allowed by your proposed change.

Under Section 21356(b), an action to contest an instrument other than a will or trust must be brought within three years after the instrument becomes irrevocable, or three years after the contestant discovers, or reasonably should have discovered, the facts material to the transfer.

In the absence of that provision, the limitation period would appear to be governed by Code of Civil Procedure Section 338(d), which provides a three-year limitation period for an "action for relief on the ground of fraud or mistake." That is the same base period provided under Section 21356(b).

In addition, Section 338(d) specifically provides that the cause of action does not accrue "until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." That would seem to provide an accrual rule that is similar to the rule provided in Section 21356(b).

The staff does not believe that the proposed law would meaningfully shorten the time for bringing an action to contest an instrument other than a will or trust under the Donative Transfer Restriction Statute. **Unless the staff is missing the point of Mr. Graham's objection, no change should be made to the proposed law on this issue.**

CONFORMING REVISIONS

The proposed law includes "conforming revisions" that do nothing more than correct cross-references to sections that would be renumbered by the proposed law, to preserve the substance of existing law.

One of those conforming revisions would be made to existing Section 15642, which governs removal of a trustee. Subdivision (b)(6) provides for removal of a trustee by the court if the trustee is a "person named in subdivision (a) of Section 21350," unless the trustee falls into one of the specified exceptions (which parallel the family and independent review exceptions that apply to the statutory presumption of undue influence):

> (b) The grounds for removal of a trustee by the court include the following:
>
> …
>
> (6) Where the sole trustee is a person described in subdivision (a) of Section ~~21350~~ 21380, whether or not the person is the transferee of a donative transfer by the transferor, unless, based upon any evidence of the intent of the settlor and all other facts and circumstances, which shall be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress, or undue influence. Any waiver by the settlor of this provision is against public policy and shall be void. This paragraph shall not apply to instruments that became irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following conditions are met:
>
> (A) The settlor is related by blood or marriage to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.
>
> (B) The instrument is reviewed by an independent attorney who (1) counsels the settlor about the nature of his or her intended trustee designation and (2) signs and delivers to the settlor and the designated trustee a certificate in substantially the following form:
>
> "CERTIFICATE OF INDEPENDENT REVIEW
>
> I, (attorney's name), have reviewed (name of instrument) and have counseled my client, (name of client), fully and privately on the nature and legal effect of the designation as trustee (name of trustee), ~~of~~ contained in that instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and that

intent is not the product of fraud, menace, duress, or undue influence.

_____ "

(Name of Attorney) (Date)

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(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.

Jennifer Morse and TEXCOM have both raised issues relating to that provision. Those issues are discussed below.

Meaning of "Sole Trustee"

Section 15642(b)(6) provides for removal of a "sole trustee" who would be a disqualified person under the Donative Transfer Restriction Statute. The term "sole trustee" is not defined.

Ms. Morse believes that the meaning of the term is unclear and should be clarified: "I presume it means any named trustee acting alone — but could it mean the "sole" named trustee (meaning the only trustee named, ever)?" See Exhibit p. 2.

Section 15642 seems to be distinguishing between cases where there is a single trustee, and a case where there are co-trustees. However, the staff is not absolutely certain of that interpretation.

Even if the meaning of the term is unclear, **the staff recommends against attempting to define it as part of the proposed law.** Although Section 15642 is closely linked to the topic of this study, it addresses a separate issue that was not included within our statutory charge. As a general principle, we should be careful about exceeding our mandate. In this particular circumstance, time is short and it would be unwise to broach new issues that would require further study and might result in unforeseen complications.

Reference to Menace and Duress

Ms. Morse also notes that Section 15642 includes the same references to "menace and duress" that are included in the existing Donative Transfer Restriction Statute.

The proposed law would not continue any reference to menace or duress. As explained at page 5 of the tentative recommendation:

> The Commission does not believe that the statutory presumption should encompass menace and duress. The fact that a beneficiary of a gift drafted or transcribed the donative instrument, or served as the care custodian of the transferor, does not justify a presumption that the gift was procured through the extreme forms of misconduct that constitute menace and duress. Such beneficiaries should not be required to prove the absence of menace and duress in order to receive a gift.

Ms. Morse proposes that menace and duress also be deleted from Section 15642, to make it consistent with the proposed law. See Exhibit p. 2.

That suggestion makes sense. Section 15642(b)(6) piggy-backs on the statutory presumption of undue influence as grounds for removal of a sole trustee. If a gift to a person would be presumed to be the product of undue influence, then a trust provision naming that person as trustee is also presumed to be the product of undue influence. Thus, if the scope of the Donative Transfer Restriction Statute is narrowed, to remove any presumption of menace or duress, the same change should probably also be made to Section 15642.

The staff recommends that the terms "menace" and "duress" be deleted from Section 15642(b)(6) and (c), as follows:

> (b) The grounds for removal of a trustee by the court include the following:
>
> …
>
> (6) Where the sole trustee is a person described in subdivision (a) of Section ~~21350~~ 21380, whether or not the person is the transferee of a donative transfer by the transferor, unless, based upon any evidence of the intent of the settlor and all other facts and circumstances, which shall be made known to the court, the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud~~, menace, duress,~~ or undue influence. Any waiver by the settlor of this provision is against public policy and shall be void. This paragraph shall not apply to instruments that became irrevocable on or before January 1, 1994. This paragraph shall not apply if any of the following conditions are met:

(A) The settlor is related by blood or marriage to, or is a cohabitant with, any one or more of the trustees, the person who drafted or transcribed the instrument, or the person who caused the instrument to be transcribed.

(B) The instrument is reviewed by an independent attorney who (1) counsels the settlor about the nature of his or her intended trustee designation and (2) signs and delivers to the settlor and the designated trustee a certificate in substantially the following form:

"CERTIFICATE OF INDEPENDENT REVIEW

I, (attorney's name), have reviewed (name of instrument) and have counseled my client, (name of client), fully and privately on the nature and legal effect of the designation as trustee (name of trustee), ~~of~~ contained in that instrument. I am so disassociated from the interest of the person named as trustee as to be in a position to advise my client impartially and confidentially as to the consequences of the designation. On the basis of this counsel, I conclude that the designation of a person who would otherwise be subject to removal under paragraph (6) of subdivision (b) of Section 15642 of the Probate Code is clearly the settlor's intent and that intent is not the product of fraud~~, menace, duress,~~ or undue influence.

_____ "

(Name of Attorney) (Date)

This independent review and certification may occur either before or after the instrument has been executed, and if it occurs after the date of execution, the named trustee shall not be subject to removal under this paragraph. Any attorney whose written engagement signed by the client is expressly limited to the preparation of a certificate under this subdivision, including the prior counseling, shall not be considered to otherwise represent the client.

(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.

…

(c) If, pursuant to paragraph (6) of subdivision (b), the court finds that the designation of the trustee was not consistent with the intent of the settlor or was the product of fraud~~, menace, duress,~~ or undue influence, the person being removed as trustee shall bear all costs of the proceeding, including reasonable attorney's fees.

…

Comment. Section 15642(b)(6) is amended to correct a reference to former Section 21350 and to delete a superfluous word.

Subdivisions (b)(6) and (c) are amended to remove references to menace and duress. The references relate to the presumption of menace, duress, fraud, or undue influence that could arise under former Section 21350. Much of the substance of that provision is

> continued in Section 21380, but Section 21380 does not provide for a presumption of menace or duress. That change in the law makes the references to menace and duress in this section unnecessary.

Removal of Executor

As discussed, Section 15642 provides for removal of a trustee who would be a "disqualified person" under the Donative Transfer Restriction Statute.

TEXCOM notes there is no equivalent provision for removal of an executor who is named in a will, when the executor would be a disqualified person.

TEXCOM believes that the two situations are parallel and that Section 8502 (governing removal of a personal representative) should be revised to authorize removal of an executor who would be a disqualified person.

That suggestion seems very sensible. **Nonetheless, the staff recommends against including the suggested reform within the proposed law.** As discussed above, the Commission should be cautious about exceeding the scope of its statutory charge and broaching new issues, especially when the time remaining to meet the deadline for this study is so short.

CONCLUSION

After the Commission decides the issues that are discussed in this memorandum, the staff will prepare a draft recommendation for consideration at a future meeting.

To meet our statutory deadline, the recommendation must be approved no later than the December 2008 meeting.

Respectfully submitted,

Brian Hebert
Executive Secretary

EMAIL FROM SCOTT BOVEE
(JUNE 18, 2008)

Thanks. Here is my input/question. Would it be helpful to address whether an individual is "related by affinity" following a death. For instance, is a person "related by affinity" to a decedent who was once married to this same person's uncle? Does the relation by affinity end upon the death of the blood related uncle, or does the "related by affinity" continue even after the death of the uncle? I do not see that this is addressed in the proposed changes.

EMAIL FROM NEIL F. HORTON, EXECUTIVE COMMITTEE OF THE TRUSTS AND ESTATES SECTION OF THE STATE BAR
(AUGUST 7, 2008)

I write on behalf of Texcomm to support CLRC's Tentative Recommendation on Donative Transfer Restrictions. The Recommendation strikes an appropriate balance between respecting the rights of individuals, including those who have some form of physical or mental impairment, to make donative transfers and the need to protect dependent elders from those whose profession or occupation places them in a position to exert undue influence.

Texcom believes that CLRC would improve the proposed statute by making two changes.

First, CLRC should delete "transportation" from the illustrative list of services that are included in the term "health and social services." The purpose of the list is to provide guidance to the courts in trying to determine what kinds of services should give rise to the heightened scrutiny afforded to "care custodians." If acting as a chauffeur or a cab driver is sufficient to characterize a person as a care custodian, then why not also include the gardener, the minister, or the young adult who reads to the elder whose vision has failed? Unlike those persons whose occupation requires them to provide companionship, housekeeping, shopping, cooking, or financial assistance to a dependent adult, a driver is not by virtue of providing a paid service likely to be in a position to exert undue influence.

The proposed statute also should correct the inconsistency between the treatment of disqualified persons who are named as trustees and those who are named as executors under a will. Revocable trusts are a commonly used will substitute in California. A trustee who is a disqualified person is subject to removal under section 15642(b)(6). But no comparable provision exists with respect to removing a personal representative in section 8502.

A person whom the will names as executor has a right to appointment. Section 8420. Even though the court must appoint the person whom the will names, the court should

have the ability to remove a disqualified person acting as executor on a petition under section 8500. Consider the attorney who drafts a will containing a large bequest to himself. A residuary beneficiary may be able to defeat that gift under section 21350, but will be unable to remove the same attorney unless the beneficiary is able to show that removal is necessary to protect the estate or interested persons. Section 8502(d).

Texcom did not consider whether to recommend amending section 4541(d) to allow an interested party to petition the court to remove a disqualified person who is named as an attorney-in-fact. I do not believe that extending the disqualification to attorneys-in-fact is consistent with the underlying policy of deterring undue influence with regard to donative transfers. Unlike trustees of revocable trusts and executors of wills, an attorney-in-fact is not necessarily involved in making donative transfers and the court already possesses broad powers to remove an attorney-in-fact under section 4540(d)(3) if it is in the principal's best interests.

Thank you for considering these comments.

NEIL F. HORTON

HORTON & ROBERTS LLP

1901 HARRISON STREET

SUITE 1500

OAKLAND, CA 94612

EMAIL FROM JENNIFER A. MORSE (AUGUST 8, 2008)

In general, I believe the recommended changes represent an improvement.

For consistency, "menace" and "duress" also need to be deleted from Probate Code Section 15642(b)(6) and 15642(c).

I would welcome a definition of "donative instrument." In our practice, we have recently been discussing and considering whether the statute contemplates insurance beneficiary designations, pay on death designations, etc. Often these kinds of designations are done without attorney involvement, but seemingly could be negated under 21350 or the proposed 21380. Is that part of the intent?

I would also welcome clarification of "sole trustee" in 15642. I presume it means any named trustee acting alone - but could it only mean the "sole" named trustee (meaning the only trustee named, ever)?

Finally, while I generally agree with modifying the definition of a "dependent adult," I have trouble with the standard being that "a court would have appointed a conservator for the person, under subdivision (a) or (b) of Section 1801, if a petition for

conservatorship had been filed." First, I feel it would be difficult for a challenger to the donative transfer to meet this definition after the donor's death, perhaps years later. What proof could be offered? In addition, I think this language may be interpreted in a way that puts a higher burden on a drafting attorney to judge a client's "capacity," with respect to these statutes, differently than testamentary capacity, generally. Under the proposed section 21366, if I recommended an independent review to a client, would I also be obligated to recommend to that client that he or she be conserved?

Thank you for your work on these statutes, and for considering my comments.

Sincerely,

Jennifer A. Morse
Morse Law Office
1120 Franklin Street
Napa, CA 94559

EMAIL FROM JAMES S. GRAHAM
(AUGUST 8, 2008)

Dear Commission and Staff:

I am sending this e-mail in response to the invitation for public comment on the Tentative Recommendation concerning the revision of the statute relating to donative transfer restrictions. Generally speaking, I am opposed to many of the substantive changes to the law that have been proposed.

I would strongly recommend rejection of the proposed changes that would limit the definition of "care custodian." In my experience, a very substantial threat to elders is presented by persons who claim to be friends but, in fact, are something else altogether. While these so-called friends usually do not provide health or social services as a profession or occupation, invariably, while providing such services they end up being exceedingly well compensated. In one case with which I am presently involved, an elderly and ill woman during the last two months of her life signed checks totaling more than $500,000 to a supposed friend who provided her with health and social services. This case is but one example of a very real problem that is growing exponentially.

Likewise, I would strongly recommend rejection of the proposed changes that would limit the definition of "dependent adult." Narrowing the definition to only adults for whom a conservator could have been appointed would negate the protection that should be provided by the statutory scheme. While a conservatee does retain certain rights under Probate Code sec. 1871 including the right to make a will, the basic rule is that found in Probate Code sec. 1872 which states: "Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks

the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate."

I further disagree with the proposed changes insofar as they would revise the requirement that the statutory presumption invalidating a transfer include evidence other than the testimony of the beneficiary. It is precisely because the transferor is not able to provide testimony concerning the transfer that the burden should shift to the beneficiary to establish the validity of the transaction by some independent evidence other than his or her own testimony. In fact, I would recommend that the existing provision be expanded to disqualify the testimony of not only the beneficiary but also persons related to the beneficiary.

The proposed shortening of the statute of limitations, insofar as it relates to instruments other than wills and trusts, should be rejected. It is important to keep in mind that, "'Instrument' is broadly defined in section 45 as a 'will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property." Rice v. Clark (2002) 28 Cal.4th 89, 97 fn. 4. The discovery of pre-death transfers by instruments that are not made by a will or a trust often requires more time than would be allowed by your proposed change.

The final change to the tentative recommendation that I would suggest relates to the provision that would except transfers of property valued at $5,000 or less. I would suggest that this amount be increased to the amount of the annual gift tax exclusion prescribed in the Internal Revenue Code which, at present, is $12,000. But I would further add that the exception applies only if all transfers to the beneficiary in the aggregate total less than that sum.

In all other respects, I support the changes to the existing law proposed by the Tentative Recommendation.

Thank you for allowing me this opportunity to comment on your work.

Respectfully,

James S. Graham

707 Broadway, Suite 800

San Diego, CA 92101-5386