Study L-622 September 30, 2008

Memorandum 2008-47

Donative Transfer Restrictions (Staff Draft 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. At the September meeting, the Commission considered public comment on the tentative recommendation and directed the staff to prepare a staff draft of a final recommendation, incorporating the provisional decisions made at the September meeting. **A staff draft recommendation is attached to this memorandum for review by the Commission.**

There is one significant substantive issue that has not yet been fully resolved: the proper scope of the statutory presumption of fraud and undue influence that applies when a "dependent adult" makes a gift to that person's "care custodian." The scope of the presumption is largely determined by the definition of the terms "dependent adult" and "care custodian."

We have received additional input on that issue from Protection and Advocacy, Inc. ("PAI"), an organization that advocates for the rights of persons with disabilities. A letter from PAI on this issue is attached. See Exhibit pp. 1-2. In submitting its letter, PAI also provided a copy of a letter it sent to the Commission on April 2, 2008. That letter is also attached, as further background on PAI's position. See Exhibit pp. 3-8. For reference, a copy of the existing Donative Transfer Restriction Statute is attached at Exhibit pp. 9-12.

Once the Commission has considered the issues raised in this memorandum, it should decide whether to approve the attached staff draft as its final recommendation, with or without changes. The deadline for submission of the recommendation to the Legislature is January 1, 2009.

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

BACKGROUND

Existing Law

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 a gift to (or drafted by) 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 care custodian presumption was added in 1997. See 1997 Cal. Stat. ch. 724; AB 1172 (Kaloogian). It was sponsored by the State Bar Trusts and Estates Section, which provided the following written rationale to the Legislature:

> Digest: Under current law, there is a presumption of invalidity that applies to gifts made to lawyers or other [fiduciaries]. However, under current law, a "practical nurse" (or other caregiver hired to provide in-home care for an aging progressive dementia victim) might find it too easy to take advantage of the dependence and close working relationship to induce the demented elder to make testamentary gifts to the "practical nurse." Unfortunately, it is not clear that the "practical nurse" would be within the ambit of Section 21350(a)(4). There is a growing "cottage industry" of people who seek out and target dementing elders.
>
> This proposal would have the effect of bringing the "practical nurse" within the ambit of section 21350(a)(4).
>
> Purpose: The purpose of this proposal is to prevent the growing "cottage industry" of "practical nurses" from successfully taking advantage of dementing elders.
>
> …
>
> Illustrations: Grandfather is diagnosed as having Alzheimer's disease, and can not live alone safely. The family hires a "practical nurse" to provide in-home caregiver services to Grandfather. Grandfather signs a will devising a substantial portion of his estate to the "practical nurse." This proposal would impose on the "practical nurse" the same burden as any fiduciary, with respect to proving the absence of undue influence.

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

The language implementing the care custodian presumption goes beyond the purpose described above, applying the presumption of undue influence to a much broader range of persons than "practical nurses" and "dementing elders."

The existing definition of "dependent adult" is provided in Section 21350(c). It incorporates the following definition from the Welfare and Institutions Code:

> 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.

Welf. & Inst. Code § 15610.23. That definition is not limited to elders or persons with cognitive impairment.

The existing definition of "care custodian" is also broader than is strictly necessary to serve its stated rationale, i.e., to protect dependent adults from "practical nurses." See Section 21350(c), which incorporates the following definition from the Welfare and Institutions Code:

> "Care custodian" means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff:
>
> (a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.
>
> (b) Clinics.
>
> (c) Home health agencies.
>
> (d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services.
>
> (e) Adult day health care centers and adult day care.
>
> (f) Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders.
>
> (g) Independent living centers.
>
> (h) Camps.
>
> (i) Alzheimer's Disease day care resource centers.

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

(k) Respite care facilities.

(l) Foster homes.

(m) Vocational rehabilitation facilities and work activity centers.

(n) Designated area agencies on aging.

(o) Regional centers for persons with developmental disabilities.

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

(q) County welfare departments.

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

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

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

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

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

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

(v) Humane societies and animal control agencies.

(w) Fire departments.

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

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

Welf. & Inst. Code § 15610.17. (Note that PAI is itself a "care custodian" under subdivision (u) of that section.)

The breadth of that definition makes sense in its context. It exists in a statute that obligates "care custodians" to report abuse of a dependent adult or elder. Welf. & Inst. Code § 15630. For that purpose, a very broad definition of "care custodian" is appropriate (e.g., it makes sense that fire department officials who learn of abuse should be required to report it). However, the definition appears to be overbroad when used to define the class of persons who are in a position to exert undue influence against a dependent adult. For example, why include a

building inspector within the scope of the care custodian presumption of undue influence? See Welf. & Inst. Code § 15610.17(x).

The definition of "care custodian" also includes broad catch-all language. The California Supreme Court construed the reference in Section 15610.17(y), to any "person providing health services or social services to elders or dependent adults," to mean literally what it says. See *Bernard v. Foley*, 39 Cal. 4th 794, 807, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006). As was made clear in that case, there is no exception for those who provide services as a friend or Good Samaritan.

Taken together, the existing definitions of "dependent adult" and "care custodian" result in a very broad presumption. Any adult who requires assistance to carry out "normal activities" or is an inpatient at a health care facility is considered a "dependent adult," and any person who provides health services or social services to that person is a "care custodian." Thus, a gift from a 20-year old with a back injury to a friend who helps with grocery shopping would arguably fall within the scope of the presumption.

Tentative Recommendation

In preparing the tentative recommendation, the Commission concluded that the care custodian presumption was broader than it needed to be. It encompassed transferors who are not necessarily subject to any heightened risk of undue influence (i.e., adults with disabilities), and gifts to care custodians that do not seem to be "unnatural" (i.e., gifts to friends and other volunteer caregivers).

The proposed law would have narrowed the definitions of "care custodian" and "dependent adult," as discussed below.

Proposed Definition of "Care Custodian"

The proposed law would not continue the existing definition of "care custodian" that is derived from the abuse reporting statute.

Instead, it would use language somewhat similar to the catch-all language used in that definition, but would expressly limit the definition to persons who provide services for remuneration, as a profession or occupation (i.e., volunteers would not be included). The proposed definition, with minor changes approved at the September meeting, would read 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 remuneration need not be paid by the dependent adult.
>
> (b) 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, and assistance with finances.

Proposed Section 21362.

That approach has two benefits. First, it would exempt those who provide services as volunteers. As discussed in prior memoranda and in the tentative recommendation, a gift to a friend or Good Samaritan who provides volunteer care services does not appear "unnatural" to the same extent as a gift to a stranger who is paid to provide services. For that reason, it makes sense to exempt gifts to volunteers from the statutory presumption of undue influence (just as gifts to family members are exempt). If there is evidence that a gift to a volunteer may be the product of undue influence, it can be challenged under the common law, without the benefit of the statutory presumption.

Second, this proposed definition would not include the lengthy list of persons and entities that are obligated to report abuse, but are not in the sort of relationship with a dependent adult that the care custodian presumption was intended to address (e.g., fire fighters, building inspectors, animal control officers).

It might be possible to refine the definition slightly (as discussed later in the memorandum), but the basic policy choice reflected in the proposed definition seems sound.

Proposed Definition of "Dependent Adult"

Under the tentative recommendation, a "dependent adult" would be a person whose disability is severe enough that the person would qualify for a conservatorship. In other words, at the time of making the gift at issue, the transferor 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). Thus:

> "Dependent adult" means a person who, at the time of executing the instrument at issue under this part, satisfied both of the following requirements:
>
> (a) The person was 18 years old or older.

(b) 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.

Proposed Section 21366.

The benefit of such an approach is that it requires an individualized assessment of the transferor's condition before imposing the presumption of undue influence. That would limit the presumption to cases in which its application is clearly justified. The approach would avoid the arguably overbroad application of the presumption to all persons who have disabilities or are admitted to 24-hour health facilities.

The Commission received comments critical of that approach. See Memorandum 2008-36. The criticisms centered on two issues:

First, eligibility for a conservatorship would be too high a standard for application of the presumption of undue influence. In many cases, that standard would effectively require proof of the transferor's incapacity to make contracts. That would make the presumption largely redundant (as contractual incapacity is already sufficient grounds for invalidation of an instrument other than a will). It would also exclude many cases where the "dependent adult" has capacity to contract and is able to manage his or her own affairs, but is still vulnerable to undue influence as a result of the pressures brought to bear in the care custodian relationship.

Second, eligibility for a conservatorship would be difficult to prove after the fact. In the ordinary case, eligibility for a conservatorship is determined while the proposed conservatee is still alive and can be examined. The court appoints a professional investigator to interview the conservatee and other related persons and issue a report and recommendation to the court. The proposed conservatee may appear in the court proceedings and testify.

By contrast, the care custodian presumption would typically operate after the transferor has died, when court investigation and transferor testimony would be unavailable. What's more, the determination of eligibility for a conservatorship would need to be made as of the date that the donative instrument at issue was executed, which might have been years before the transferor's death. It would often be difficult to prove the transferor's condition at that past time.

In reaction to those concerns, the Commission directed the staff to prepare language that would continue the substance of the existing definition of "dependent adult," with two changes:

(1) *Replace the reference to "normal activities" with a reference to "major life activities" (drawn from the Fair Employment and Housing Act).* See Gov't Code § 12926(i) ("mental disability" defined), (k) ("physical disability" defined). This would arguably create a higher standard for application of the presumption, requiring the limitation of a major life activity, rather than a "normal" activity. It would also use terminology that is better grounded in statute and case law.

(2) *Expand the rule providing that a person is a dependent adult if he or she is admitted to a 24-hour health facility, to also include a person admitted to a long-term care facility.* Logically, if admission to a hospital or nursing facility creates a heightened risk of undue influence, the same would probably be true of admission to a long-term care facility. The staff sees no reason to believe that the risk of undue influence in a long-term care facility would be lower than in a 24-hour health facility.

Those changes could be implemented with the following language:

> 21366. "Dependent adult" means a person who, at the time of executing the donative instrument at issue under this part, was 18 years old or older and satisfied one or more of the following conditions:
>
> (a) The person had a physical or mental limitation that limits a major life activity or that limits the person's ability to protect the person's rights.
>
> (b) The person was 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.
>
> (c) The person resided in a long-term care facility, as defined in Section 15610.47 of the Welfare and Institutions Code.

That is the language used in the attached staff draft recommendation. If the Commission decides to take a different approach, the staff will revise the draft accordingly.

DISCUSSION OF ALTERNATIVES

The term "dependent adult" describes the class of transferors who are subject to the care custodian presumption. Although the original rationale for the presumption described that class as elders suffering from dementia, the actual language used in the statute is much broader than that. It encompasses both young and old adults, with either physical or mental disabilities, as well as any adult who is an inpatient in a 24-hour health facility.

The breadth of the definition of "dependent adult" is a concern because of a fundamental policy trade-off underlying the care custodian presumption. The

presumption is intended to protect those at risk of being unduly pressured to make gifts, but it does so by erecting a significant impediment to making a gift — the transferor must obtain an independent attorney certification of the validity of the gift or run the risk that the gift will be challenged and will fail (at a minimum, the beneficiary would bear the cost of proving the validity of the gift in court). Thus, the presumption imposes a restraint on the testamentary freedom of "dependent adults" that does not exist for other adults. To the extent that the protected class is defined as those with disabilities, it operates to impose a special restriction on the autonomy of persons with disabilities.

PAI is concerned about that aspect of existing law, and urges the Commission to focus on

> 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 the 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 the existing statutory and common law protections against fraud and undue influence in donative transfers by seniors and people with disabilities, PAI proposes that the care custodian provision be stricken in its entirety.

See Exhibit p. 4 (emphasis in original) (footnote omitted).

That possibility, and a number of other possible approaches to refining the scope of the care custodian presumption, are discussed below. **The Commission needs to decide which approach to use in its final recommendation.**

Eliminate Care Custodian Presumption

As advocated by PAI, one possible response to concern about impairment of the testamentary freedom of persons with disabilities would be to eliminate the care custodian presumption. There would then be no special impediment to a person with a disability (or admitted to a 24-hour health facility) when making a gift to a care custodian. If such a gift is the product of undue influence, it could still be challenged under the common law governing undue influence.

Such a change would be at odds with the Legislature's clear policy judgment that the care custodian relationship (however it is defined) creates a special risk of undue influence that justifies the imposition of a presumption. (The bill

adding the care custodian presumption was unanimously approved in both the Assembly and Senate.)

The staff believes that the Legislature's basic policy choice in creating the care custodian presumption of undue influence was reasonable. The care custodian relationship provides an extended opportunity to exert influence, in private, on a person whose position of dependency could create a special vulnerability to pressure. **While it makes sense to attempt to "fine tune" the scope of the presumption, in order to minimize overbreadth, the staff does not see a good justification for eliminating the presumption entirely.**

Use Conservatorship Standard in Defining "Dependent Adult"

The tentative recommendation substantially recast the definition of "dependent adult" by using the standard that governs eligibility for a conservatorship, thus:

> "Dependent adult" means a person who, at the time of executing the instrument at issue under this part, satisfied both of the following requirements:
> (a) The person was 18 years old or older.
> (b) 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.

Proposed Section 21366.

Refinement of Standard

The staff received informal input from Neil Horton, the Commission's liaison with the Executive Committee of the Trusts and Estates Section of the State Bar ("TEXCOM"), suggesting a slight modification of the above language. He suggests that it would be problematic to condition the definition on a determination that a court "would have appointed a conservator" for the transferor, because there are many factors that can influence a court's decision on whether or not to appoint a conservator. Even if a person's *condition* would justify the appointment of a conservator, the court might decline to appoint one if there is some less intrusive way to protect the proposed conservatee.

Rather than using the "would have appointed" language, Mr. Horton suggests directly incorporating the substantive criteria from Section 1801(a)-(b), governing the appointment of a conservator. The following language would implement that approach:

> "Dependent adult" means a person who, at the time of executing the instrument at issue under this part, was 18 years old or older and satisfied one or both of the following conditions:
>
> (a) The person was unable to provide properly for the person's personal needs for physical health, food, clothing, or shelter.
>
> (b) The person was substantially unable to manage the person's own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.

(That language would not continue special rules relating to a limited conservatorship for a person with a developmental disability.)

If the Commission chooses to recommend the conservatorship standard, it should probably use language along the lines proposed above, to avoid complications that might arise when factors other than the condition of the transferor might have affected whether a court "would have" appointed a conservator.

Pros and Cons of Using Conservatorship Standard

The advantages and disadvantages of using the conservatorship standard are discussed above and are reiterated below:

The principal advantage of the approach is that the standard would turn on an *individualized* assessment of the transferor's condition. Using that approach, the presumption would only be applied in circumstances in which the transferor is proven to have been unusually vulnerable. That would largely avoid the problem of overbreadth, because the presumption would not automatically apply to any person who has a disability or is admitted as an inpatient to a 24-hour health facility.

The staff sees two significant disadvantages to use of the conservatorship standard.

First, the conservatorship standard is largely coextensive with incapacity to contract. See Section 1872 (appointment of conservator of the estate is an adjudication that the conservatee lacks the capacity to bind the estate). That would make the care custodian presumption largely redundant, because incapacity to contract is already grounds to invalidate an instrument other than a will. In other words, once incapacity to contract is proven, there will often be no need to prove undue influence.

Even where the conservatorship standard does not equate to incapacity, it might still set too high a standard for the application of the presumption. A

heightened risk of undue influence from a care custodian may exist in many cases in which the dependent adult does not need a conservator. For example, an elderly transferor might be in possession of her mental faculties, and able to manage the necessities of life, but still be vulnerable to pressure from a care custodian because of chronic loneliness, isolation, frailty, depression, or pain. A definition of "dependent adult" that is based exclusively on the need for a conservatorship would probably exclude such persons from the protection afforded by the care custodian presumption.

Second, even if the conservatorship standard is proper as a matter of policy, it might be unworkable as a practical matter. Courts are used to applying the conservatorship standard in proceedings in which the proposed conservatee is still alive, can be examined by a court-appointed investigator, and can perhaps appear at the conservatorship proceedings and testify. None of that would be possible when challenging a gift after the death of the transferor.

Furthermore, because the relevant issue is the transferor's freedom from undue influence *at the time of making the gift*, the relevant question is whether the transferor was a "dependent adult" *at that time* (which might have been many years before the transferor's death). That sort of backward-looking appraisal would be more difficult to perform if the standard were based on a subjective evaluation of the totality of the transferor's condition, than if it were based on a bright line test of more objective facts (e.g., did the transferor have a disability? was the transferor an inpatient at a 24-hour health facility?).

Although the idea of using an individualized determination of the transferor's condition has advantages, **the staff is concerned that the conservatorship standard would set the bar too high and might present difficult problems of proof.** The overall effect might be to increase litigation (over whether the presumption applies in the first place) and narrow the presumption to such an extent that it would rarely apply (and would most often apply in circumstances where there are other sufficient grounds to contest a gift).

Keep Existing Definition of "Dependent Adult"

The most conservative approach would be to simply preserve existing law. The staff found no published cases suggesting any disagreement about the definition's meaning or dissatisfaction with its scope. While the legislative assignment to the Commission singled out the scope of the "care custodian"

definition for study, no special mention was made of the "dependent adult" definition.

While there is a good policy reason to try to narrow the scope of the definition, the result must be a workable standard that is broad enough in scope to effectuate the Legislature's general policy of protecting dependent adults from undue influence by caregivers. **If the Commission does not find an alternative approach that meets those parameters, it would be reasonable to simply preserve the existing definition.** The proposed law would clearly improve existing law in many other respects, even if this particular point is not improved.

Modify Existing Definition to Use Language from FEHA

One possible modification of the existing definition, which was provisionally approved by the Commission at the September meeting, would be to eliminate the existing reference to a person's ability to carry out "normal activities." The term "normal activities" is not defined and might be construed very broadly to include activities that are "normal" but relatively inconsequential. The staff found only one published case addressing the meaning of "normal activities." It was not particularly helpful for our purposes. See *People v. Matye*, 158 Cal. App. 4th 921, 925, 70 Cal. Rptr. 3d 342 ("Walking, of course, is a normal activity.") (That case construed an identical definition of the term "dependent adult" that is used in Penal Code Section 368, which criminalizes abuse of an elder or dependent adult.)

Instead, the Commission suggested using language that is drawn from the Fair Employment and Housing Act (FEHA) definition of "disability," i.e., a condition that "limits a major life activity."

That language would appear to set a higher bar, requiring that the limited activity be a "major" life activity, rather than just a "normal" activity.

The change would also provide greater clarity, because the term "major life activity" is defined in FEHA and its implementing regulations:

> (i) "Mental disability" includes, but is not limited to, all of the following:
>
> (1) Having any mental or psychological disorder or condition, such as mental retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities, that limits a major life activity. For purposes of this section:
>
> (A) "Limits" shall be determined without regard to mitigating measures, such as medications, assistive devices, or reasonable

> accommodations, unless the mitigating measure itself limits a major life activity.
>
> (B) A mental or psychological disorder or condition limits a major life activity if it makes the achievement of the major life activity difficult.
>
> (C) "Major life activities" shall be broadly construed and shall include physical, mental, and social activities and working.
>
> …
>
> (k) "Physical disability" includes, but is not limited to, all of the following:
>
> (1) Having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that does both of the following:
>
> (A) Affects one or more of the following body systems: neurological, immunological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.
>
> (B) Limits a major life activity. For purposes of this section:
>
> (i) "Limits" shall be determined without regard to mitigating measures such as medications, assistive devices, prosthetics, or reasonable accommodations, unless the mitigating measure itself limits a major life activity.
>
> (ii) A physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss limits a major life activity if it makes the achievement of the major life activity difficult.
>
> (iii) "Major life activities" shall be broadly construed and includes physical, mental, and social activities and working.

Gov't Code § 12926(i)(1) & (k)(1). An implementing regulation elaborates further on the meaning of "major life activities":

> "Major Life Activities" are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Primary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement.

2 Cal. Code Regs. § 7293.6(e). There is also interpretive guidance as to the meaning of the term "major life activity" as it is used in the Americans With Disabilities Act:

> "Major life activities" are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For

> example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.

29 C.F.R. § 1630.2(i).

In addition to those express definitions, FEHA and the ADA have been the subject of extensive employment litigation. Those cases provide another source of interpretation of the term "major life activities." For example:

> ''Major'' in the phrase ''major life activities'' means important. See Webster's, supra, at 1363 (defining ''major'' as ''greater in dignity, rank, importance, or interest''). ''Major life activities'' thus refers to those activities that are of central importance to daily life. In order for performing manual tasks to fit into this category—a category that includes such basic abilities as walking, seeing, and hearing— the manual tasks in question must be central to daily life.

Toyota Motor Mfg., Kentucky, Inc. v Williams, 534 U.S. 184, 197 (2002) (construing ADA). See, e.g., See also M. Chin, *et al*, Cal. Prac. Guide: Employment Litigation, *Disability Discrimination* §§ 9:400-9:435 (ADA), 9:2195-9:2241 (FEHA) (2006).

The connection to extrinsic sources of interpretative guidance could be noted in the Comment, as follows:

> **Comment.** Section 21366 restates the substance of the first sentence of former Section 21350(c) (which incorporated the definition of "dependent adult" from Welfare and Institutions Code Section 15610.23), with two changes:
>
> (1) The reference to a person's restricted "ability to carry out normal activities" has been replaced with the reference to a condition that "limits a major life activity." The new language is drawn from the Fair Employment and Housing Act. See Gov't Code § 12926(i)(1) & (k)(1) ("'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working."); 2 Cal. Code Regs. § 7293.6(e) ("'Major Life Activities' are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Primary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement."). For interpretive guidance on the meaning of the term as used in the Americans with Disabilities Act, see 29 C.F.R. § 1630.2(i) ("'Major life activities' are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.").
>
> …

Should the "major life activities" terminology be used? **The staff is unsure.** On one hand, that language would provide some advantages. It would add clarity by using a term that is defined in statute and regulation and that has been construed in decisional law. It would also seem to better define the substantive scope of the definition, which really should be focused on activities that are central to daily life (e.g., dressing), rather than being merely "normal" (e.g., playing golf).

On the other hand, the definition of "major life activity" seems to have been shaped by its original context and may be overly concerned with a person's employability. "Primary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement." 2 Cal. Code Regs. § 7293.6(e). That emphasis is misplaced for our purposes, which might cause problems.

Furthermore, the staff has not heard any complaints about the use of the term "normal activities," from the Legislature, the courts, or elsewhere. In the absence of any evidence that the term is causing problems, it might be best to leave the existing language undisturbed. The risk of unforeseen consequences of a revision is always present, and weighs against making changes where the need to do so is not clearly established.

Modify Existing Definition to Include Resident of Long-Term Care Facility

Another possible modification of the existing definition, which the Commission provisionally approved at the September meeting, would be to add another prong to the definition, as shown in proposed subdivision (c) below:

> 21366. "Dependent adult" means a person who, at the time of executing the donative instrument at issue under this part, was 18 years old or older and satisfied one or more of the following conditions:
>
> …
>
> (c) The person resided in a long-term care facility, as defined in Section 15610.47 of the Welfare and Institutions Code.
>
> **Comment.** Section 21366 restates the substance of the first sentence of former Section 21350(c) (which incorporated the definition of "dependent adult" from Welfare and Institutions Code Section 15610.23), with two changes:
>
> …
>
> (2) Subdivision (c) is new.

PAI objects to that change, which it believes would make the definition of "dependent adult" too broad. See Exhibit p. 1.

It is correct that this change would broaden the scope of the definition. **Nonetheless, the staff believes it makes good policy sense.** Under existing law, a person who is an inpatient in an acute care hospital, skilled nursing facility, or other "24-hour health facility" is considered a dependent adult. The care custodian presumption applies to such persons. Thus, a gift from a person, while an inpatient in a skilled nursing facility, to a nurse in that facility, would be presumed to be the product of undue influence.

The staff believes that the same vulnerability to undue influence would exist in a long-term care setting. In fact, the risk of undue influence might be higher, due to the extended duration of the relationship and the possibility that care might be subject to less rigorous supervision. The staff sees no reason to believe that the risk of undue influence would be *lower* in a long-term care facility.

At first glance, it seems odd that the existing definition of "dependent adult" does not include those who reside in long-term care facilities. The reason for that apparent gap may be fairly straightforward. The elder abuse statute from which the definition of "dependent adult" is drawn protects *two* classes of persons: dependent adults *and elders*. The first class is limited to persons between the ages of 18 and 64, who either have a disability or are inpatients in a 24-hour health facility. The second class includes any California resident over the age of 64 (without any requirement of disability or institutionalization). Welf. & Inst. Code § 15610.27.

The Legislature may have simply assumed that younger adults do not live in long-term care facilities, and that the term "elder" would encompass those who do live in long-term care facilities.

The merits of such an assumption appear to break down in the Donative Transfer Restriction Statute, which eliminates the distinction between dependent adults and elders, combining *all* adults into the definition of "dependent adult." Consequently, elders who live in long-term care facilities are not within the protected class. **That appears to be an unintended gap in coverage, which should probably be corrected.**

If the Commission chooses to expand the definition of "dependent adult" to include those in long-term care, it should perhaps make that change prospective only. Of all of the changes discussed in this study, this is the only one that would substantively expand the scope of the presumption of undue

influence. Thus, it would presumptively invalidate some gifts that are not subject to the presumption under existing law. That might work an unfair surprise on those who relied on former law in creating donative instruments.

If the Commission agrees, the underscored language below could be added:

> (c) The person resided in a long-term care facility, as defined in Section 15610.47 of the Welfare and Institutions Code. This subdivision does not apply to an instrument that became irrevocable before January 1, 2010.

"Dependent Elder"

Another possible approach would be to replace the concept of "dependent adult" with the concept of "dependent elder." In other words, whatever definition of "dependent" that the Commission recommends, the minimum age could be raised from 18 years of age to some higher minimum age (e.g., 65 years old or older).

That approach would more closely conform to the original stated purpose of the care custodian presumption — the protection of vulnerable elders. It might also strike a better balance between the competing policies of protecting elders and preserving the independence of persons with disabilities generally.

This approach, like any approach that is based on a bright line rule, would not be a perfect fit at the margins. There would be some cases where the care custodian presumption would apply to individuals who do not need its protection, and other cases where it would not apply to individuals who do need its protection. Despite that, it would arguably be a better fit with the policies served by the presumption than exists under the current statute, which applies the care custodian presumption to *every* adult who is disabled or is an inpatient in a 24-hour health facility.

This would be a significant deviation from the tentative recommendation and existing law, but the Commission should give it serious consideration.

Appropriate Age for Definition of "Elder"

If the Commission is interested in limiting the care custodian presumption to gifts from dependent "elders," it should give thought to what age would be an appropriate minimum in defining that class. As noted above, the abuse reporting statute in the Welfare and Institutions Code defines "elder" as a person who is 65 years old or older. Other elder protection statutes also define "elder" as someone who is 65 years old or older. See Bus. & Prof. Code § 17206.1 (unfair

competition); Civ. Code § 1761 (Consumers Legal Remedies Act); Prob. Code § 259 (invalidation of gift to abuser of elder transferor); Penal Code § 368 (crimes against elders). In enacting Penal Code Section 368, the Legislature declared:

> The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection, not unlike the special protections provided for minor children, because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.

Penal Code § 368(a).

The staff received an informal suggestion that any age limit should be based on empirical evidence on the age of onset of serious cognitive impairment in elders. The staff agrees that such evidence would be important if the definition were to be based *exclusively* on age (i.e., any gift from an "elder" to a care custodian is subject to the care custodian presumption). Under that approach, age would be serving as an indicator of the likelihood of disability.

However, the proposal would be to define the protected class as *dependent* elders (e.g., elders with disabilities or who are inpatients in 24-hour health facilities or long-term care). In that case, age is not needed as an *indicator* of likely disability; the definition would be expressly limited to those who have *actual* disabilities or are living in care facilities.

For that reason, it is not crucial that the age chosen for the definition of "elder" correlate to any specific level of disability. Nonetheless, the Commission might find it helpful to review some general data on age-related disabilities.

Health and Aging Data

The National Institute on Aging produces a regular report on health and aging. National Inst. on Aging, *Growing Older in America: The Health and Retirement Study* (2007) (hereinafter "HRS"). The NIA describes its report as follows:

> The Health and Retirement Study (HRS), sponsored by the National Institute on Aging under a cooperative agreement with the University of Michigan, follows more than 20,000 men and women over 50, offering insight into the changing lives of the older U.S. population. Launched in 1992, this multidisciplinary, longitudinal study has become known as the Nation's leading

resource for data on the combined health and economic conditions of older Americans.

<http://www.nia.nih.gov/ResearchInformation/ExtramuralPrograms/BehavioralAndSocialResearch/HRS.htm>

For the most part, the HRS displays data using bar charts, without providing the precise numerical data underlying those charts, so numerical references in this discussion are all approximations. In some cases, the HRS differentiates between genders, without providing aggregate data for all persons. In the data below, gender-differentiated data has been roughly averaged. These approximations introduce some inaccuracy, but still give a general sense of the relationship between advancing age and disability. The table below shows the incidence of the listed conditions, within different age groupings:

	55-64 yrs	**65-74 yrs**	**75-84 yrs**	**85+ yrs**
Severe Cognitive Limitations	1%	2.5%	3%	5%
Severe Depressive Symptoms	15%	14%	16%	19%
Limitation in Activities of Daily Living	11%	13%	22%	40%

HRS at 27, 34.

The HRS defines a person with a "severe cognitive limitation" as one who make errors on half or more of nine "very easy" questions from a standard geriatric screen for mental status (HRS at 27) — a fairly high degree of impairment. Unfortunately, the HRS does not provide data for less severe cognitive impairment.

However, the HRS does note that the incidence of cognitive impairment is much higher among persons who have been "institutionalized." While in general, 10% of the U.S. population age 70 or older has a moderate to severe cognitive impairment, the rate exceeds 50% for those who are institutionalized. HRS at 25. That seems to support the idea of including long-term care residents within the definition of "dependent" persons. It would not be surprising (though the HRS provides no data on the issue) if rates of depression and physical disability were also much higher for those who are "institutionalized."

Finally, it would appear that the numbers for those with "limitation in activities of daily living" is probably a good indicator of the percentage of the population that would be included within the term "dependent elder" as discussed in this memorandum. That is because the HRS definition of "activities

of daily living" (or "ADL") is functionally similar to the definition of "major life activities" that the Commission is considering using. HRS defines ADL as "eating, dressing, bathing, toileting, getting in and out of bed, and being mobile in one's own residence." HRS at 34.

Based on the percentage of elders with limitation of ADL, it appears that a disability-based definition would encompass a relatively small percentage of elders, with the likelihood of it applying to any particular person increasing with that person's age (along with the increased likelihood of cognitive impairment or depression).

The staff sees nothing in the HRS data that points to an obviously appropriate minimum age for a definition of "elder." Instead, it might be best to use 65 years old as the floor, for consistency with the other elder protection statutes cited above.

Mental Disability

Another possible modification of the "dependent adult" definition would be to limit it to those with mental disabilities. The theory for that approach would be that a person with a mental disability is more vulnerable to pressure and fraud than a person with a physical disability.

If such a limitation were added in combination with an age limit, that change would come very close to achieving the originally stated purpose of the care custodian presumption — protecting elders with dementia.

However, the staff sees two problems with that approach. First, it may not be clear in all cases how to differentiate between a mental impairment and a physical one, between different levels of severity of impairment, or between different types of impairments (e.g., mood disorder, memory disorder, reasoning disorder). Any attempt to draw such distinctions could lead to hair-splitting litigation and unanticipated results.

Second, it is not clear that the care custodian presumption should be limited to cases of mental disability. The opportunity for a care custodian to exert undue influence may exist in any dependency relationship. **The staff is not inclined to pursue this option.**

Conclusion

The staff believes that the existing definition of "dependent adult" is probably broader than it needs to be to accomplish the intended purpose of the care custodian presumption. That overbreadth is problematic. It adds an extra

procedural burden to all transferors with disabilities, including those who are not specially vulnerable to undue influence, and can invalidate their gifts to caregivers.

However, the staff does not believe that the problem of overbreadth is so great as to warrant complete abandonment of the care custodian presumption. As has been discussed in this and prior memoranda, the care custodian relationship creates an extended, private opportunity to exert undue influence over a person whose condition of dependency may cause heightened vulnerability to pressure. The Legislature is plainly concerned about that prospect and has adopted a policy that tilts heavily toward protection. The staff does not see a strong enough reason to abandon that clear policy choice.

That said, there are ways in which the definition of "dependent adult" might be improved, to better match the class of persons that the Legislature sought to protect.

First, use of the "major life activity" language would slightly narrow the definition, and would add definitional clarity. **The staff believes that this would probably be a minor improvement, but is not sure whether there is a strong enough justification for making a change to that language, which does not appear to be causing any problems.**

Second, adding residents of long-term care facilities to the definition would be consistent with the existing policy choice of defining "dependent adult" to include adult inpatients of 24-hour health facilities. Logically, if admission to a short-term care facility presents a serious risk of undue influence from caregivers, then admission to a long-term care facility should create the same risk (or greater). Also, as the HRS data points out, institutionalization is associated with a much higher incidence of cognitive impairment.

Such an approach would also close a gap in the scope of the protection afforded to dependent adults, a gap that does not exist in the abuse reporting statute and that is probably the inadvertent result of combining the existing definitions of "dependent adult" and "elder." **The staff recommends that the proposed definition of "dependent adult" include a resident of a long-term care facility. If so, the change should probably be prospective only, to avoid invalidation of gifts executed under former law.**

Finally, the protected class could be redefined as "dependent *elders*." That could be accomplished by raising the minimum age requirement from 18 to 65 (or perhaps higher). This would be a significant narrowing of the protected class,

which would (1) bring it more in line with the original purpose of protecting "elders," and (2) remove an obstacle to the testamentary freedom of younger persons with disabilities. **The staff sees merit in this approach, but is not sure whether it would narrow the application of the presumption too much.**

POSSIBLE CONFORMING ADJUSTMENT TO DEFINITION OF CARE CUSTODIAN

If the Commission decides to define "dependent adult" (or "dependent elder") by reference to a condition that "limits major life activities," it might make sense to use parallel language in the proposed definition of "care custodian." For example, the proposed definition could be modified as follows:

> 21362. ~~(a)~~ "Care custodian" means a person who provides health ~~or social~~ services or assistance with major life activities to a dependent adult for remuneration, as a profession or occupation. The remuneration need not be paid by the dependent adult.
>
> ~~(b) 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, and assistance with finances.~~

As can be seen, replacing "social services" with the term "assistance with a major life activity" would obviate the need for any elaboration of what is meant by "social services" — a point of continuing concern to TEXCOM, which worries that the term could be stretched to include services that are not connected in any way to a person's disability.

The staff invites comment on this possibility.

CONCLUSION

The Commission needs to decide whether to approve the attached draft as its final recommendation, with or without changes. If not, the staff will prepare a new revised draft and present it to the Commission at the December meeting. That will be the last scheduled meeting before the study deadline of January 1, 2009.

Respectfully submitted,

Brian Hebert
Executive Secretary

PAI Protection & Advocacy Inc.

Soon to be Disability Rights California

OAKLAND REGIONAL OFFICE
1330 Broadway, Suite 500
Oakland, CA 94612
Tel: (510) 267-1200
TTY: (800) 649-0154
Toll Free: (800) 776-5746
Fax: (510) 267-1201
www.pai-ca.org

September 11, 2008

Brian Hebert
Law Revision Commission

By Email: bhebert@clrc.ca.gov

Dear Mr. Hebert,

On April 2, 2008, Protection and Advocacy, Inc. (PAI) provided comments to the Law Revision Commission on its proposed changes to the care custodian provision of Probate Code Section 21350 *et seq.* This provision presumptively invalidates a donative transfer made by a "Dependent Adult" to the individual's "Care Custodian." The Commission incorporated PAI's comments into its Tentative Recommendation dated June 2, 2008. The Tentative Recommendation proposed narrowing the definitions of Dependent Adult and Care Custodian, correctly emphasizing the importance of using individualized determinations rather than generalized assumptions to determine who should be presumed to be incapable of executing a donative instrument.

Subsequent to the release of the Commission's Tentative Recommendations, PAI was surprised to read the Commission's Memorandum 2008-36, dated August 20th, in which it not only retracted its proposal to narrow the definition of Dependent Adult, but proposed a new definition that is much broader than the original definition that it set out to revise. PAI has significant concerns about a bill that would include the Commission's most recent proposed definition of Dependent Adult.

Attached for your reference is PAI's April 2nd memorandum setting forth our concerns about the existing definition of Dependent Adult. In addition to proposing that the existing definition be maintained, the Commission proposes a "second prong" that expands the current definition to include all adults who are admitted to health care or long-term care facilities. The Commission provides absolutely no support for the statements that "arguably" individuals who are

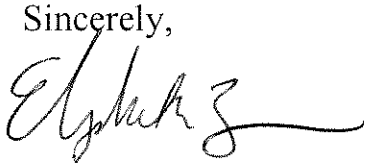
admitted to health care facilities are "in an extreme position of dependence on caregivers," or that it would "probably be good policy" to also include residents of long-term care facilities. We can think of no reason why a person should lose his or her right to make a presumptively valid bequest just because he or she has been admitted to a hospital, nursing home or similar health care or long-term care facility.

The Commission's August 20th memo provides no sound legal or policy rationale for its abrupt change in position, which was apparently prompted by comments from two attorneys. The Commission acknowledges in its memo that these attorneys' comments were based on mischaracterizations of the law concerning conservatorship and capacity. However, despite rejecting the attorneys' arguments, the Commission went on to propose a 180 degree shift in its position to broadening rather than narrowing the definition of Dependent Adult. The Commission's only coherent reason for the shift was that the protections for people with disabilities that it endorsed in its previous memo "may present a perception problem in the Legislature, if the proposed law is seen as too one-sided." (Memorandum 2008-36, p.8.) If the Commission decided to change its tentative recommendation to protect people with disabilities because it did not think that the protections are politically feasible, then PAI will provide input and address that concern when a bill is introduced in the legislature.

Finally, as a side note for future reference, the Commission should be aware that many people are offended by terminology that describes an individual directly by reference to his or her disability. For example, it is more widely accepted to refer to someone as a "competent adult with paraplegia" rather than a "competent adult paraplegic." (This is commonly referred to as "People First" language.)

Thank you for your attention. We appreciate your consideration of our comments, and look forward to receiving your response.

Sincerely,



Elizabeth Zirker
Staff Attorney

PAI Protection & Advocacy Inc.

Advancing the rights of Californians with disabilities

OAKLAND REGIONAL OFFICE
1330 Broadway, Suite 500
Oakland, CA 94612
Tel: (510) 267-1200
TTY: (800) 649-0154
Toll Free: (800) 776-5746
Fax: (510) 267-1201
www.pai-ca.org

MEMORANDUM

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

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[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.

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

§ 21350. Invalid transfers

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

(1) The person who drafted the instrument.

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 21350.5. "Disqualified person" defined

21350.5. For purposes of this part, "disqualified person" means a person specified in subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply.

§ 21351. Exceptions

21351. Section 21350 does not apply if any of the following conditions are met:

(a) The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner, pursuant to Division 2.5 (commencing with Section 297) of the Family Code, of the transferee or the person who drafted the instrument. For purposes of this section, "cohabitant" has the meaning set forth in Section 13700 of the Penal Code. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

(b) The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter:

"CERTIFICATE OF INDEPENDENT REVIEW

I, _____, have reviewed
(attorney's name)

_____ and counseled my client,
(name of instrument)

_____ on the nature
(name of client)

and consequences of the transfer, or transfers, of property to:

_____ contained in the instrument.
(name of potentially disqualified person)

I am so disassociated from the interest of the transferee as to be in a position to advise my client independently, impartially, and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the instrument that otherwise might be invalid under Section 21350 of the Probate Code are valid because the transfer, or transfers, are not the product of fraud, menace, duress, or undue influence.

_____"
(Name of Attorney) (Date)

Any attorney whose written engagement signed by the client is expressly limited solely 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.

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

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

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

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

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

(f) The transferee is a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding an interest for this entity, but only to the extent of the interest of the entity, or the trustee of this trust. This subdivision shall retroactively apply to an instrument that becomes irrevocable on or after July 1, 1993.

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

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

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

§ 21352. Third party liability

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

§ 21353. Effect of invalid transfer

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

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

§ 21354. Contrary provision in instrument

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

§ 21355. Application of part

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

§ 21356. Commencement of action

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

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

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

#L-622

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

RECOMMENDATION

Donative Transfer Restrictions

October 2008

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF TENTATIVE RECOMMENDATION

Existing law restricts donative transfers by imposing a statutory presumption of menace, duress, fraud, or undue influence when a gift is made to a "disqualified person." Subject to specific statutory exceptions, the term "disqualified person" includes:

- A person who drafts a donative instrument.
- A fiduciary who transcribes a donative instrument (or causes it to be transcribed).
- A "care custodian" of a "dependent adult."
- Certain relatives and business associates of a disqualified person.

Chapter 215 of the Statutes of 2006 directs the Law Revision Commission to study the operation and effectiveness of the Donative Transfer Restriction Statute and recommend improvements.

The Commission recommends the following changes to improve the Donative Transfer Restriction Statute:

- Revise the definition of "care custodian" to exclude volunteer care-givers.
- Revise the definition of "dependent adult" to include a person living in a long-term care facility.
- Limit the presumption of undue influence that arises when a dependent adult makes a gift to a care custodian to instruments that are executed during the care custodian relationship.
- Add an interested witness of a will to the list of disqualified persons, replacing the similar rule in Probate Code Section 6112.
- Limit the statutory presumption, so that it does not create a presumption of menace or duress. Menace and duress are extreme forms of misconduct and a presumption of such extreme misconduct is unwarranted.
- Increase the amount of the small gift exception.
- Clarify the meaning of "related by blood or marriage" and "degree of kinship."
- Clarify when an attorney is sufficiently "independent" of a donative transfer to conduct an independent attorney certification of a donative transfer.
- Eliminate special evidentiary restrictions on rebutting the presumption, thereby conforming to general law on rebutting a presumption of undue influence.
- Eliminate the special statute of limitations, thereby conforming to general law on initiating a contest.
- Make other minor substantive and technical improvements.

DONATIVE TRANSFER RESTRICTIONS

BACKGROUND

In 1993, it was reported that a California estate planning attorney was exploiting his elderly clients by drafting estate plans for them that included large gifts to himself, his family, and his colleagues.[1] In response to those reported abuses, the Legislature enacted Probate Code Section 21350 *et seq* (hereafter, "Donative Transfer Restriction Statute"), which establish a statutory presumption of menace, duress, fraud, or undue influence when an instrument[2] makes a gift to the person who drafted or transcribed the instrument.[3] The statutory presumption acts as a supplement to the common law on menace, duress, fraud, and undue influence.[4] A gift that does not fall within the scope of the statutory presumption can still be challenged under the common law.

The statutory presumption was expanded in 1997,[5] so that it also applies to a gift made by a "dependent adult"[6] to that person's "care custodian."[7] That change was proposed by the Trusts and Estates Section of the State Bar, to address concern that "practical nurses" were taking financial advantage of "dementing seniors."[8]

The application of the statutory presumption to a care custodian has been criticized as overbroad.[9] In 2006, the Chief Justice of the California Supreme Court raised a similar concern and suggested that the Legislature review the application of the statute to a care custodian.[10] Later that year, a statute was enacted directing the California Law Revision Commission to conduct a

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1. See, e.g., D. Maharaj, *Assembly OKs Bill to Ban Client Bequests to Lawyers*, Los Angeles Times (July 17, 1993).

2. "'Instrument' means a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property." Prob. Code § 45.

3. 1993 Cal. Stat. ch. 293.

4. See Bernard v. Foley, 39 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); Rice v. Clark, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

5. 1997 Cal. Stat. ch. 724.

6. See Prob. Code § 21350(c) (incorporating definition of "dependent adult" from Welf. & Inst. Code § 15610.23, except that any person over age 17 can be dependent adult).

7. See Prob. Code § 21350(c) (incorporating definition of "care custodian" from Welf. & Inst. Code § 15610.17).

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

9. See, e.g., Letter from Sam Crump to Jody Remke, California Judges Association (June 26, 1997) (on file with Commission); K. Kwasneski, *The Danger of a Label: How the Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish to Make a Gift to a Personal Friend*, 36 Golden Gate U. L. Rev. 269, 284-88 (2006).

10. Bernard v. Foley, 39 Cal. 4th at 816 (George, C.J., concurring).

comprehensive study of the operation of the Donative Transfer Restriction Statute.[11]

This recommendation reports the Commission's findings and includes proposed legislation to remedy problems that exist in the current statute.

OVERVIEW OF EXISTING LAW

Presumption of Menace, Duress, Fraud, or Undue Influence

Under existing law, a gift to a "disqualified person" is presumed to be invalid, as the product of menace, duress, fraud or undue influence.[12] Clear and convincing evidence is required to rebut the presumption.[13] The rebuttal evidence must include evidence other than the testimony of a disqualified person.[14] A disqualified person who unsuccessfully attempts to rebut the presumption bears all of the costs of the proceeding, including reasonable attorney's fees.[15]

Disqualified Persons

There are four classes of "disqualified persons":

(1) The drafter of the instrument.[16]

(2) A fiduciary of the transferor who transcribes the instrument or causes it to be transcribed.[17]

(3) A care custodian of a dependent adult.[18]

(4) A close relation, cohabitant, or specified business associate of a person in one of the first three classes.[19]

Unless an exception applies, a gift to any of these disqualified persons is presumed to be the product of menace, duress, fraud, or undue influence.

Statutory Exceptions

There are six categorical exceptions to the operation of the statutory presumption. The presumption does not apply in any of the following circumstances:

(1) The disqualified person is a close relation or cohabitant of the transferor.[20]

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11. 2006 Cal. Stat. ch. 215 (AB 2034 (Spitzer)).
12. Prob. Code §§ 21350(a), 21350.5, 21351(d).
13. *Id.*
14. *Id.*
15. *Id.*
16. Prob. Code §§ 21350(a)(1), 21350.5.
17. Prob. Code §§ 21350(a)(4) , 21350.5.
18. Prob. Code §§ 21350(a)(6) , 21350.5.
19. Prob. Code §§ 21350(a)(2)-(3), (5), (7) , 21350.5.

(2) The instrument was drafted by a close relation or cohabitant of the transferor.[21]

(3) The instrument is executed by a conservator on behalf of a conservatee and is approved by the court under the procedures for substituted judgment.[22]

(4) The beneficiary is a public entity or tax-exempt nonprofit entity.[23]

(5) The gift is valued at $3,000 or less, if the estate is valued at $100,000 or more.[24]

(6) The instrument is executed outside of California by a transferor who is not a resident of California at the time of execution.[25]

Independent Attorney Certification

In addition to the categorical exceptions, there is a validating procedure that can be used to avoid the statutory presumption of menace, duress, fraud, or undue influence. The statutory presumption does not apply if a gift is reviewed by an independent attorney who counsels the transferor about the nature and consequences of the gift and certifies that the gift is not the product of menace, duress, fraud, or undue influence.[26]

Effect of Failed Transfer

If a gift fails as a result of the statutory presumption, the instrument operates as if the disqualified person had predeceased the transferor, without spouse or issue, but only to the extent that the value of the gift exceeds what the disqualified person would have received if the transferor had died intestate.[27]

Commencement of Action

The time to commence an action to challenge a gift under Section 21350 depends on the nature of the instrument at issue. In the case of a will, the action must be commenced before an order for final distribution is made.[28] For any other instrument, the action must be commenced within the later of 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.[29]

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20. Prob. Code § 21351(a), (g).
21. *Id.*
22. Prob. Code § 21351(c).
23. Prob. Code § 21351(f).
24. Prob. Code § 21351(h).
25. Prob. Code § 21351(i).
26. Prob. Code § 21351(b).
27. Prob. Code § 21353.
28. Prob. Code § 21356.
29. *Id.*

ANALYSIS AND RECOMMENDATIONS

General Policy

The general policy of the existing statute is to identify classes of gifts that present a heightened risk of menace, duress, fraud, or undue influence, and to establish a rebuttable presumption of invalidity for those gifts.

The Commission finds no reason to question that general approach. It is consistent with the approach taken under the common law on undue influence, which includes a presumption of undue influence when certain factual indicia of undue influence are established.[30] The factual grounds for the common law presumption differ from the grounds for the statutory presumption, but the general principle is the same.

The statutory presumption established by Probate Code Section 21350 is also similar to another existing statutory presumption that arises when a will makes a devise to a necessary witness of the will.[31] In both cases, the Legislature has determined that certain facts surrounding the creation of an instrument create a significant enough risk of undue influence as to justify imposing a rebuttable presumption.

Probate Code Section 21350 supplements the common law; it does not preempt it.[32] That is appropriate. There will be many circumstances that do not fall within the scope of the statutory presumption but that nonetheless involve the use of menace, duress, fraud, or undue influence to procure a gift. Such gifts can be contested under established common law principles.

Although the general policy served by the existing statute is sound, there are a number of specific problems that should be addressed. Those problems, and the reforms proposed by the Commission to address them, are discussed in detail below.

Menace and Duress

Under the existing statute, a gift to a disqualified person is presumed to be the product of menace, duress, fraud, or undue influence.[33] If the presumption is not rebutted by the disqualified person, the gift fails.[34]

That approach is reasonable with respect to the presumption of fraud and undue influence. The circumstances governed by the statutory presumption bear many of

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30. The facts establishing the common law presumption of undue influence are: (1) the existence of a confidential relationship between the transferor and the beneficiary, (2) the participation of the beneficiary in the creation of the will, and (3) an undue profit to the beneficiary. See Rice v. Clark, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

31. See Prob. Code § 6112.

32. See Bernard v. Foley, 39 Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); Rice v. Clark, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

33. Prob. Code § 21351(d).

34. Prob. Code § 21353.

the common law indicia of fraud and undue influence, including a confidential relationship between the transferor and beneficiary, beneficiary participation in the creation of the gift, undue profit, an opportunity for the beneficiary to exert undue influence, and vulnerability of the transferor to undue influence.[35]

This is not true for menace and duress. Menace and duress are terms of art that describe extreme forms of coercion, often rising to the level of criminal misconduct.[36]

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 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.

The proposed law would not continue the presumption of menace and duress.[37]

Drafter or Transcriber of Instrument as Disqualified Person

Under existing law, the class of "disqualified persons" includes a person who receives a gift and either (1) drafts the instrument that makes the gift, or (2) is a fiduciary of the transferor and transcribes the instrument (or causes it to be transcribed).[38]

The Commission finds no reason to question that approach. It is consistent with the common law presumption of undue influence that arises when a beneficiary is in a confidential relationship with a transferor, participates in the creation of the gift, and receives an undue profit.[39] A drafter or fiduciary transcriber of an

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35. For a general discussion of the evidentiary indicia of undue influence, see 64 Cal. Jur. 3d *Wills* §§ 173-221 (2007).

36. Civ. Code § 1561 provides:

> Duress consists in:
>
> 1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
>
> 2. Unlawful detention of the property of any such person; or,
>
> 3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harrassing [sic] or oppressive.

Civ. Code § 1562 provides:

> Menace consists in a threat:
>
> 1. Of such duress as is specified in Subdivisions 1 and 3 of the last section;
>
> 2. Of unlawful and violent injury to the person or property of any such person as is specified in the last section; or,
>
> 3. Of injury to the character of any such person.

37. See proposed Prob. Code § 21380 (presumption of fraud or undue influence) *infra*.

38. Prob. Code § 21350(a)(1) & (4).

39. See Rice v. Clark, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

instrument is often in a confidential relationship with the transferor, directly participates in creating the gift, and will often appear to receive undue profit.[40]

Care Custodian as Disqualified Person

Existing Law

The existing definition of "care custodian" is very broad. It includes any "person providing health services or social services."[41] Such services can include the administration of medicine, cleaning and bandaging injuries, bathing, assisting with the toilet, shopping, cooking, housekeeping, driving, and assisting with finances.[42]

Two appellate decisions held that the definition of "care custodian" was limited to a person who provides services as a profession or occupation, and not as the result of a preexisting personal relationship.[43] As one of the decisions explained:

> This interpretation of the term "care custodian" as used in section 21350 achieves the prophylactic purpose of the statute by protecting dependent adults from the predatory practices of individuals who misuse their professional positions to obtain personal favors, without doing violence to those authentic personal relationships in which care giving is the natural outgrowth of long-standing friendship, affection and genuine charity.[44]

That interpretation of "care custodian" was directly overruled by the California Supreme Court, which held that there is no exception for a person who provides services out of friendship or charity.[45] The Court's holding was based mainly on statutory interpretation and legislative history:

> In short, neither the statutory language nor the legislative history supports a preexisting personal friendship exception to section 21350's presumptive disqualification of care custodian donees. It is not for us to gainsay the wisdom of

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40. Because the statutory presumption does not apply to close relatives of the transferor (Prob. Code § 21351(a)), it is more likely than usual that a gift to a disqualified person would be characterized as unnatural and would therefore be considered "undue profit." See Estate of Sarabia, 221 Cal. App. 3d 599, 607, 270 Cal. Rptr. 560 (1990) (in determining whether a gift constitutes undue profit, the court must consider "the respective relative standings of the beneficiary and the contestant to the decedent in order [to] determine which party would be the more obvious object of the decedent's testamentary disposition."). Any gift to the transferor's attorney is deemed to constitute undue profit. See Estate of Auen, 30 Cal. App. 4th 300, 310, 35 Cal. Rptr. 2d 557 (1994) ("Transactions between attorneys and their clients are subject to the strictest scrutiny.").

41. See Bernard v. Foley, 39 Cal. 4th 794, 807, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006) (interpreting Welf. & Inst. Code § 15610.17).

42. *Id*. at 805-06.

43. See Conservatorship of Davidson, 113 Cal. App. 4th 1035, 6 Cal. Rptr. 3d 702 (2004); Conservatorship of McDowell, 125 Cal. App. 4th 659, 23 Cal. Rptr. 3d 10 (2004).

44. *Davidson*, 113 Cal. App. 4th at 1053.

45. Bernard v. Foley, 39 Cal. 4th at 807.

this legislative choice. In the event, however, we have mistaken the Legislature's intention, that body may readily correct our error.[46]

In a concurring opinion, Chief Justice George took the unusual step of suggesting that the Legislature revisit the care custodian provision:

> [Notwithstanding] our customary and proper reticence in encouraging legislative action, in the present context I believe the Legislature would do well to consider modifying or augmenting the relevant provisions in order to more fully protect the interests of dependent adults and society as a whole, by according separate treatment to longer term care custodians who undertake that role as a consequence of a personal relationship rather than as an occupational assignment.[47]

In a dissenting opinion, three justices argued that the statutory presumption does not and should not apply to a person who provides care services as a friend or volunteer, rather than as a profession or occupation:[48]

> While it is certainly true that nonprofessionals may take advantage of the infirm, it is also true that the kind and generous may act graciously to ease the suffering of those in need. The motives at play in any given case is the kind of factual question the trial court exists to resolve. Absent a clear legislative pronouncement to the contrary, we should allow the court to do so without an artificially imposed presumption.[49]

Policy Rationales for Care Custodian Presumption

There are three sound policy rationales for presuming fraud or undue influence when a gift is made to the care custodian of a dependent transferor:

(1) *Opportunity to exert undue influence*. The opportunity to exert undue influence on a transferor is one of the common law indicia of undue influence.[50] The intimacy, privacy, and duration of a care custodian relationship provides a significant opportunity to exert undue influence on a dependent adult.

(2) *Special vulnerability to undue influence*. Undue influence is influence that "overcomes the will without convincing the judgment."[51] Any demonstrated vulnerability of a transferor to such influence can be offered as evidence of undue influence.[52] Because a transferor may be dependent on a care custodian for assistance with the necessities of life, often including

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46. *Id*. at 813.

47. *Id*. at 816 (George, C.J., concurring).

48. *Id*. at 821-24 (Corrigan, J., dissenting).

49. *Id*. at 824.

50. See 64 Cal. Jur. 3d *Wills* § 187 (2007).

51. *In re* Anderson's Estate, 185 Cal. 700, 707, 198 P. 407 (1921).

52. See 64 Cal. Jur. 3d *Wills* § 188 (2007).

assistance with personal matters, the transferor may be unusually vulnerable to influence from the care custodian. Furthermore, the dependency relationship may result from physical or cognitive impairments (e.g., incipient dementia, chronic pain, depression) that could make the transferor more vulnerable to pressure and manipulation.

(3) *Unnatural gift*. The claim that a gift is "unnatural" is also a recognized indicia of undue influence.[53] An estate plan may be considered unnatural if it provides a large gift to a person who is not related to the transferor or is remotely related, while providing a less generous gift to close relations (the "natural objects" of the transferor's bounty). Because Probate Code Section 21351 exempts close family members and small gifts, the statutory presumption will only operate when a relatively large gift is made to a non-relative (or remote relative). Under those facts, the gift to the care custodian may appear "unnatural."

Analysis and Recommendation

The first two rationales for the care custodian presumption, the opportunity to exert undue influence and the vulnerability of the transferor to influence, apply equally to both occupational and non-occupational caregivers. In either case, the caregiver will have the same extended opportunity to exert influence over the transferor and the transferor is just as likely to be vulnerable to influence.

The third rationale, the apparent unnaturalness of a large gift to a care custodian, does not apply with equal force to occupational and non-occupational caregivers. While a large gift to a paid employee may appear "unnatural," the same gift to a friend or Good Samaritan may not. It seems likely that a person who is receiving care services from a friend, neighbor, or other volunteer would feel genuine gratitude and affection toward that person.

The question of whether a gift appears natural is a critical distinction in determining whether the gift should be subject to the statutory presumption of undue influence. The existing treatment of gifts to family members demonstrates the importance of that factor.

A recent study found that over 85% of confirmed cases of elder financial abuse were perpetrated by relatives of the abused elder.[54] Despite the prevalence of abuse by relatives, family members are exempt from the statutory presumption of undue influence. The reason for that apparent incongruity seems clear. 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 the product of undue influence. Nor is there

53. See, e.g., *In re* Finkler's Estate, 3 Cal. 2d 584, 46 P.2d 149 (1935) (will named husband of niece of transferor's predeceased spouse as heir, omitted half-sister). See also 64 Cal. Jur. 3d *Wills* § 158 (2007).

54. 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, with in-patient service providers responsible for 4.1% of elder financial abuse. *Id.*

anything inherently suspicious about a family member providing care services to a dependent relative. Such assistance is expected and beneficial.

The same principles would seem to apply, though with less force, to a gift to a friend, neighbor, or Good Samaritan who provides voluntary services to a dependent adult. A gift to such a person is not so "unnatural" as to justify the presumptive invalidation of the gift.

The facts in *Conservatorship of Davidson*[55] illustrate this point. In that case, the "care custodian" had been close friends with the transferor for 30 years before the transferor became disabled. The friend then provided a range of health and social services to the transferor, as a volunteer. The transferor's decision to leave a large gift to her long-time friend seems as natural as a decision to leave a gift to a relative.

For the reasons discussed above, the Commission recommends that volunteer caregivers be excluded from the definition of "care custodian."[56] A gift to a volunteer caregiver could still be challenged under the common law on fraud and undue influence, but would not be presumed to be the product of fraud and undue influence.

The Commission also recommends that the definition of "care custodian" be narrowed in another way. Under existing law, the definition of "care custodian" is borrowed from Welfare and Institutions Code Section 15610.17,[57] which uses the term in defining those persons who are legally required to report elder abuse. That definition is very broad, and includes persons who should be required to report elder abuse, but who do not present the risk of undue influence that the Donative Transfer Restriction Statute is meant to address (e.g., the definition expressly includes animal control officers, fire fighters, and building inspectors).[58]

The Commission recommends that the definition of "care custodian" not incorporate the lengthy list of persons who are required to report elder abuse.[59]

Dependent Adult

The care custodian provision only applies if the transferor is a dependent adult.[60] So, for example, a gift to a transferor's physician or housekeeper would not be presumed to be the product of fraud or undue influence unless the transferor is a dependent adult.

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55. 113 Cal. App. 4th 1035, 6 Cal. Rptr. 3d 702 (2004).
56. See proposed Prob. Code § 21362 *infra*.
57. Prob. Code § 21350(c).
58. Welf. & Inst. Code § 15610.17(v)-(x).
59. See proposed Prob. Code § 21362 *infra*.
60. Prob. Code § 21350(a)(6).

The requirement that a transferor be a dependent adult appears to be grounded in an assumption that a person in a condition of dependency will be more vulnerable to fraud and undue influence than a person who is independent.

The fact of dependency alone might contribute to that vulnerability. A transferor who is dependent on another may be socially isolated and more susceptible to threats or other pressure from the person on whom the transferor relies for essential care.

The risk of undue influence may also be heightened by the physical or mental condition of a dependent adult. A transferor with dementia, chronic pain, fatigue, depression, or other disabling conditions may have a lowered resistance to pressure. That may explain why, under existing law, the definition of "dependent adult" includes any adult who is disabled.[61]

However, the existing definition of "dependent adult" may be overbroad. The originally stated purpose of the care custodian presumption was to protect elders with dementia.[62] Under existing law, the definition of "dependent adult" is broader than that, encompassing any adult who has a disability or is admitted as an inpatient to a 24-hour health facility.

This broad scope imposes restrictions on the testamentary freedom of all disabled and institutionalized adults. They must obtain independent attorney certification of the validity of a gift or face a significant risk that the gift will be challenged and invalidated.

The Commission considered a number of ways in which the definition of "dependent adult" might be narrowed to better fit the originally stated purpose. It did not find any alternative that would clearly improve on existing law. Therefore, the Commission recommends that the existing definition be retained, with two changes:

(1) The existing reference to the undefined term "normal activities"[63] would be replaced with a reference to "major life activities," a term that is used in the Fair Employment and Housing Act.[64]

(2) The existing language providing that "dependent adult" includes an inpatient of 24-hour health facilities would be expanded to also include a person living in a long-term care facility. The risk of undue influence over a person who has been admitted to a 24-hour health facility also exists for a person who resides in a long-term care facility.

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61. "Dependent adult" is defined as an adult "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." See Welf. & Inst. Code § 15610.23; Prob. Code §21350(c).

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

63. See Welf. & Inst. Code § 15610.23(a).

64. See Gov't Code § 12926(i)(1), (k)(1).

Timing Limitation

The Commission recommends that the presumption of fraud or undue influence that applies to a gift from a dependent adult to a care custodian should only apply if the instrument was executed during the period in which the care custodian provided care services.[65] An instrument executed before the commencement of care services or after the termination of care services is unlikely to have been the product of fraud or undue influence exerted through the care custodian relationship. If there is evidence that such a gift is the product of fraud or undue influence, it could be contested under the common law, without the benefit of the statutory presumption.

Interested Witness of Will

Under Probate Code Section 6112, there is a presumption of menace, duress, fraud, or undue influence when a will makes a devise to a necessary witness of the will. This reflects the same general policy effectuated by Probate Code Section 21350. However, the two statutes differ significantly in their details.[66]

The Law Revision Commission sees no policy reason to treat a devise to an interested witness of a will differently from other gifts that are presumed, by statute, to be the product of fraud or undue influence.

The proposed law would harmonize the treatment of all such gifts. This would be achieved by including an interested witness within the scope of the general statutory presumption and eliminating the parallel rules provided in Section 6112.[67]

Derivative Disqualification

Under existing law, the spouse, domestic partner, close relative, cohabitant, or business associate of a disqualified person is also treated as a disqualified person.[68] For example, if an attorney drafts a will that makes a gift to the attorney's spouse, that gift is also subject to the statutory presumption of menace, duress, fraud, or undue influence.

The proposed law would continue most of the substance of the existing rules on derivative disqualification, with the following improvements:

- The rule that disqualifies certain persons affiliated with the law firm of the drafting attorney would be generalized to also apply to the law firm of a fiduciary transcriber.[69]

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65. See proposed Prob. Code § 21380(a)(3) *infra*.

66. *E.g., compare* Prob. Code § 6112(c) (presumption rebutted by preponderance of evidence) *with* Prob. Code § 21351(d) (presumption rebutted by clear and convincing evidence).

67. See proposed Prob. Code §§ 21372, 21380(a)(4) *infra*.

68. Prob. Code §§ 21350(a)(2)-(3), (5), (7) , 21350.5.

69. *Compare* Prob. Code § 21350(a)(3) *with* proposed Prob. Code § 21380(a)(7) *infra*.

- The existing reference to a "law partnership or law corporation" would be replaced with a general reference to a "law firm," so as to include a limited liability company, sole proprietorship, or any other type of business entity.[70]
- The definition of "related by blood and marriage" would be revised to fully harmonize the treatment of spouses and domestic partners.[71]
- The definition of "cohabitant" that applies to the exemption for a gift to the transferor's "cohabitant"[72] would be generalized so that it also applies to the derivative disqualification of a "cohabitant" of a disqualified person.[73]

Categorical Exceptions

Existing law exempts certain beneficiaries and instruments from the operation of the statutory presumption.[74]

The proposed law would continue those exceptions, with three minor substantive changes:

- The definition of "related by blood or marriage" that governs the derivative disqualification of relatives would be generalized to also apply to the exemptions that involve relatives of the transferor.[75]
- The "heirs" of the transferor would not be exempt. The exemption of "heirs" is largely redundant, as existing law already exempts family members within the fifth degree. To the extent that the exemption of heirs is not redundant, it goes too far, by exempting any relative, without regard for the degree of kinship.
- The exemption for an instrument that is drafted by the transferor's spouse, domestic partner, cohabitant, or relative within the fifth degree of kinship would be extended to also govern an instrument that is transcribed by the transferor's spouse, domestic partner, cohabitant, or relative.[76]
- The exception for a small gift of $3,000 or less would be increased to include a gift of $5,000 or less.[77]

Rebuttal of the Presumption

Under existing law, the statutory presumption can only be rebutted by clear and convincing evidence,[78] which must include some evidence other than the

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70. *Id.*

71. *Compare* Prob. Code § 21350(b) *with* proposed Prob. Code § 21374 *infra*.

72. Prob. Code § 21351(a).

73. See proposed Prob. Code § 21364 *infra*.

74. See Prob. Code § 21351(a) (gift to transferor's spouse, domestic partner, cohabitant, relative within fifth degree; instrument drafted by transferor's spouse, domestic partner, cohabitant, relative within fifth degree), (c) (judicially approved gift executed by conservator on behalf of conservatee), (f) (gift to public or nonprofit entity), (h) (small gift), (i) (instrument executed out of state by nonresident).

75. *Compare* Prob. Code § 21351(g) *with* proposed Prob. Code § 21374 *infra*.

76. *Compare* Prob. Code § 21351(a) *with* proposed Prob. Code § 21382(b) *infra*.

77. *Compare* Prob. Code § 21351(h) *with* proposed Prob. Code § 21382(e) *infra*.

testimony of the beneficiary.[79] Furthermore, the presumption appears to be conclusive as to some drafters of instruments.[80]

None of those evidentiary restrictions apply to (1) the common law presumption of undue influence, or (2) the presumption that arises when a will makes a devise to a necessary witness. A preponderance of the evidence is sufficient to rebut those presumptions.[81]

This difference in treatment is counter-intuitive. The prerequisites for the statutory presumption under the Donative Transfer Restriction Statute are easier to establish than the prerequisites for the common law presumption,[82] yet the presumption arising under the Donative Transfer Restriction Statute is considerably harder to rebut (and in some cases appears to be conclusive).

The purpose of the Donative Transfer Restriction Statute is to protect a transferor from fraud or undue influence in circumstances that suggest such misconduct has occurred. The purpose is not to prohibit gifts to certain persons or interfere with the operation of gifts that are freely and intentionally given. If a beneficiary can prove, by a preponderance of the evidence, that a gift is not the product of fraud or undue influence, the gift should not fail. That is true whether the presumption arises under the common law, under Probate Code Section 6112, or under Probate Code Section 21350.

The proposed law would not continue the strict evidentiary requirements for rebuttal of the statutory presumption.[83] A preponderance of the evidence would be sufficient to rebut the presumption.

Independent Attorney Certification

Under existing law, the statutory presumption can be avoided if an independent attorney reviews the instrument, counsels the transferor about the nature and consequences of the transfer, and certifies that the gift is not the product of menace, duress, fraud, or undue influence.[84]

The proposed law would continue the substance of this saving mechanism, with the following changes:

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78. See Prob. Code § 21351(d).

79. *Id.*

80. See Prob. Code § 21351(e). The precise meaning of this provision is difficult to determine. It appears, however, that the general intent is to preclude rebuttal of the presumption by a drafter of an instrument.

81. 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).

82. There is no requirement that undue profit be proven to establish the statutory presumption. Nor is there a requirement that a care custodian participate in the creation of the gift in order to be presumptively disqualified. See Prob. Code § 21350(a).

83. *Compare* Prob. Code § 21351(d)-(e) *with* proposed Prob. Code § 21380(b) *infra*.

84. Prob. Code § 21351(b).

(1) A definition of "independent attorney" would be added to provide a clear standard as to the degree of disassociation required in order to provide an independent attorney certification.[85] The standard borrows concepts from the Rules of Professional Conduct governing attorney conflicts of interest.[86] This would provide a familiar rule for attorneys who are asked to certify an instrument.

(2) When an independent attorney drafts an instrument making a gift to a care custodian, the proposed law would allow the drafting attorney to certify that the gift is not the product of fraud or undue influence.[87] This would help transferors to complete such gifts, without the need for the services of two different attorneys. The attorney who drafts an instrument for a client is in a good position to counsel and evaluate the client and determine whether the gift is improper.

Effect of Failed Gift

If a gift fails as a result of the statutory presumption of fraud or undue influence, the beneficiary is treated as having predeceased the transferor, without spouse or issue, but only to the extent that the value of the invalid gift exceeds the amount that the beneficiary would have received as an heir if the transferor had died intestate.[88] In other words, the beneficiary of a failed gift would still receive an amount equal to that person's hypothetical intestate share.

The intestate share exception appears to serve no purpose. A gift to an "heir" is exempt from the statutory presumption.[89] Consequently, the only gifts that will fail are gifts to non-heirs. By definition, non-heirs are those persons who take nothing if a transferor dies intestate.[90] It is meaningless to guarantee an intestate share to those who have no rights in intestacy.

In addition to that technical problem, it is not clear why a person who is presumed to have procured a gift through fraud or undue influence should receive anything from the transferor's estate.

The proposed law would continue the existing rule as to the effect of a failed gift, but without the exception for an intestate share.[91] Thus, a beneficiary who fails to rebut the statutory presumption would be treated as having predeceased the transferor without spouse or issue, and would take nothing.

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85. See proposed Prob. Code § 21370 *infra*.
86. See California Rules of Professional Conduct 3-310(b)(1) & (3).
87. See proposed Prob. Code § 21384(c) *infra*.
88. See Prob. Code § 21353.
89. See Prob. Code § 21351(a).
90. See Prob. Code § 44 ("heir" defined).
91. See proposed Prob. Code § 21386 *infra*.

Statute of Limitations

Existing law provides special timing rules for the commencement of an action to challenge a gift under the statutory presumption.[92] Those rules are different from the general law governing the time to commence a contest of a will[93] or trust.[94]

The Commission recommends that the special statute of limitation rules not be continued. Instead, the general rules on when a contest may be commenced would apply to a contest filed under the proposed law. There is no clear policy reason to provide different time periods for filing a contest, depending on whether it is filed under the common law of undue influence or under the statutory presumption of undue influence.

Third Party Protection

The Donative Transfer Restriction Statute provides express immunity from liability for a third party property holder who transfers property pursuant to the terms of an instrument, if the transfer is "prohibited" by the Donative Transfer Restriction Statute, and the third party lacks "actual notice of the possible invalidity of the transfer to the disqualified person."[95] Conversely, a third party who relies on notice of the "possible invalidity of the transfer" in refusing to make the transfer, is not liable "unless the validity of the transfer has been conclusively determined by a court."[96]

Those rules make sense as a matter of policy. An institutional property holder like a bank or insurance company should not face liability for making a transfer pursuant to the terms of the governing instrument, absent actual knowledge that the transfer has been contested, and should not be liable for declining to transfer property pursuant to a contested instrument, until the court has determined that the transfer is valid.

However, there are two technical problems with the drafting of the provision, which the proposed law would correct:

- The reference to a "prohibited" transfer is inaccurate and potentially confusing. The Donative Transfer Restriction Statute does not "prohibit"

92. Prob. Code § 21356.

93. Prob. Code § 8270(a).

94. In general, when a revocable trust becomes irrevocable, the trustee is required to serve notice on the beneficiaries of the trust, the heirs of a deceased settlor, and if the trust is charitable, on the Attorney General. Prob. Code § 16061.7. A person who receives that notice must commence an action to contest the trust, if any, within 120 days of service of the notice or 60 days after delivery of the terms of the trust, whichever is later. Prob. Code § 16061.8. Otherwise, the time to commence an action challenging a trust is three, four, or five years, depending on the grounds for the contest and whether personal or real property is involved. J. Duncan & A. Zabronsky, California Trust and Probate Litigation § 5.17, at 97-98 (Cal. Cont. Ed. Bar, 2005).

95. Prob. Code § 21352.

96. *Id*.

transfers. It creates a rebuttable presumption of invalidity. The proposed law would not use the term "prohibited."

- Mere notice of the "possible invalidity" of a transfer under the Donative Transfer Restriction Statute is not a sufficiently clear basis on which to condition third party liability. The proposed law would instead require service of notice that a contest has been filed or that a court has determined the transfer to be valid.

Degree of Kinship

Two provisions of the Donative Transfer Restriction Statute make reference to a "degree of kinship."[97] There is no guidance, in the Probate Code or any other California code, as to how to calculate degrees of kinship. This may lead to confusion and inconsistency, both in the provisions at issue in this recommendation as well as the many other statutes that make reference to degrees of kinship or consanguinity.[98]

In order to provide guidance on this issue, the proposed law would add general rules of construction to the Probate Code.[99] Those provisions would be consistent with former Probate Code Sections 251-253,[100] which were repealed on the recommendation of the Law Revision Commission in 1982.[101] At that time, it was felt that the provisions were not necessary for purposes of the law governing wills and intestate succession. Given the other contexts in which degree of kinship is relevant, the Commission now believes that statutory guidance should be provided.

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97. Prob. Code §§ 21350(b), 21351(g).

98. Civ. Code §§ 1102.2 (property transfer disclosure duty), 1103.1 (hazard disclosure on transfer of residential property), 1708.7 (tort of stalking); Code Civ. Proc. §§ 229 (juror bias), 566 (eligibility to serve as receiver), 641 (objection to referee), 1800 (assignment for benefit of creditors); Corp. Code §§ 308 (provisional director), 5225 (provisional director), 7225 (provisional director); Fam. Code §§ 6211 ("domestic violence" defined), 8705 (notice of adoption), 9321 (adoption); Food & Agric. Code § 62708.5 (marketing laws); Gov't Code §§ 8893.3 (adequate wall anchorage), 8897.1 (delivery of earthquake guide to transferee of real property), 13113.8 (smoke detector requirements); Health & Safety Code §§ 7100 (disposition of human remains), 7105 (disposition of human remains), 24178 (human experimentation); Penal Code §§ 152.3 (reporting child abuse), 285 (crime of incest), 422 (criminal threats), 646.9 (crime of stalking), 836 (arrest without warrant), 3605 (witness to execution), 12028.5 (domestic violence); Prob. Code §§ 673 (power of appointment), 2111.5 (conservatorship), 2359 (conservatorship), 2403 (conservatorship), 6402 (intestate succession), 6402.5 (intestate succession); Veh. Code § 13803 (unsafe vehicle operation by family member); Welf. & Inst. Code §§ 319 (dependent children), 361.3 (dependent children), 361.5 (dependent children), 366.21 (dependent children), 366.22 (dependent children), 727.4 (dependent children), 11362 (medical assistance to children), 11400 (medical assistance to children).

99. See proposed Prob. Code § 13 *infra*.

100. See 1931 Cal. Stat. ch. 281.

101. *Wills and Intestate Succession*, 16 Cal. L. Revision Comm'n Reports 2301, 2509 (1982).

CONCLUSION

The Donative Transfer Restriction Statute imposes a statutory presumption that certain donative transfers are the product of fraud or undue influence and therefore invalid. Such a presumption is proper in circumstances where the facts indicate a heightened risk of fraud or undue influence. However, if the scope of the presumption is too broad, it could operate to defeat transferor intentions, by invalidating a gift that was not the product of fraud or undue influence.

The Commission's recommendations would adjust the scope of the statutory presumption to conform more closely with common law principles governing proof of undue influence. Most significantly:

- Gifts to volunteer care-givers would be removed from the scope of the presumption. Such a gift is not "unnatural" on its face and therefore does not present the same degree of risk of fraud or undue influence as a gift to a paid care custodian. That will help to avoid the invalidation of gifts that are intentionally made to friends and Good Samaritans. Such gifts could still be challenged under the common law, and if fraud or undue influence is proven, invalidated.
- The presumption arising when a dependent adult makes a gift to a care custodian would be limited to donative instruments that are executed during the existence of the care custodian relationship. Gifts made before the provision of care commences, or after it terminates, are not as likely to have been the product of fraud or undue influence by the care custodian. Such gifts could still be challenged under the common law, and if fraud or undue influence is proven, invalidated.
- The definition of "dependent adult" would be expanded to include a person living in a long-term care facility. That would be a logical extension of existing law, which defines "dependent adult" to include a person living in a 24-hour health facility. The risk of fraud or undue influence when a dependent adult makes a gift to a care custodian exists in a long-term care facility to the same or greater extent that it exists in a 24-hour health facility.
- The presumption would be limited to fraud and undue influence. The existing statute inappropriately creates a presumption of menace and duress, based on facts that do not support such a presumption.

The proposed law would also make a number of minor improvements to the Donative Transfer Restriction Statute, harmonizing inconsistent provisions, conforming the operation of the Donative Transfer Restriction Statute to the general law governing contests based on fraud and undue influence, and making a number of other minor substantive and technical changes.

Proposed Legislation

PROPOSED LEGISLATION

Prob. Code §§ 21350-21356 (repealed). Limitations on transfers

SEC. ___. Part 3.5 (commencing with Section 21350) of Division 11 of the Probate Code is repealed.

Comment. The substance of former Part 3.5 is restated, with some substantive changes, in Sections 21360 to 21392. See the Comments following those sections.

Prob. Code §§ 21360-21392 (added). Presumption of fraud or undue influence

SEC. ___. Part 3.5 (commencing with Section 21360) is added to Division 11 of the Probate Code, to read:

PART 3.5. PRESUMPTION OF FRAUD OR UNDUE INFLUENCE

CHAPTER 1. DEFINITIONS

§ 21360. Definitions

21360. The definitions in this chapter govern the construction of this part.

Comment. Section 21360 is new.

§ 21362. "Care custodian"

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 remuneration need not be paid by the dependent adult.

(b) 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, and assistance with finances.

Comment. Section 21362 is similar to the last sentence of former Section 21350(c), except that the definition of "care custodian" is now limited to a person who provides services for remuneration, as a profession or occupation.

Subdivision (b) provides an illustrative list of the sorts of services that are included in the term "health and social services."

See also Section 56 ("person" defined).

§ 21364. "Cohabitant"

21364. "Cohabitant" has the meaning provided in Section 13700 of the Penal Code.

Comment. Section 21364 continues the second sentence of former Section 21351(a) without substantive change, except that the definition is generalized so that it applies to every use of the term "cohabitant" in this part. Under former law, the definition of "cohabitant" applied to former Section 21351, but not to former Section 21350.

§ 21366. "Dependent adult"

21366. "Dependent adult" means a person who, at the time of executing the donative instrument at issue under this part, was 18 years old or older and satisfied one or more of the following conditions:

(a) The person had a physical or mental limitation that limits a major life activity or that limits the person's ability to protect the person's rights.

(b) The person was 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.

(c) The person resided in a long-term care facility, as defined in Section 15610.47 of the Welfare and Institutions Code.

Comment. Section 21366 restates the substance of the first sentence of former Section 21350(c) (which incorporated the definition of "dependent adult" from Welfare and Institutions Code Section 15610.23), with two changes:

(1) The reference to a person's restricted "ability to carry out normal activities" has been replaced with the reference to a condition that "limits a major life activity." The new language is drawn from the Fair Employment and Housing Act. See Gov't Code § 12926(i)(1) & (k)(1) ("'Major life activities' shall be broadly construed and includes physical, mental, and social activities and working."); 2 Cal. Code Regs. § 7293.6(e) ("'Major Life Activities' are functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. Primary attention is to be given to those life activities that affect employability, or otherwise present a barrier to employment or advancement."). For interpretive guidance on the meaning of the term as used in the Americans with Disabilities Act, see 29 C.F.R. § 1630.2(i) ("'Major life activities' are those basic activities that the average person in the general population can perform with little or no difficulty. Major life activities include caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. For example, other major life activities include, but are not limited to, sitting, standing, lifting, reaching.").

(2) Subdivision (c) is new.

See also Section 45 ("instrument").

§ 21368. "Domestic partner"

21368. "Domestic partner" has the meaning provided in Section 297 of the Family Code.

Comment. Section 21368 continues former Section 21350(d) and part of the first sentence of former Section 21351(a), without substantive change.

§ 21370. "Independent attorney"

21370. "Independent attorney" means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue under this part.

Comment. Section 21370 is new. The standard provided in this section is similar to California Rules of Professional Conduct 3-310(b)(1) and (3). See also Section 21384 (independent attorney review).

§ 21372. "Interested witness"

21372. (a) "Interested witness" means a subscribing witness to a will executed under Section 6110, who is also a devisee of the will.

(b) Notwithstanding subdivision (a), a person is not an "interested witness" if there are at least two subscribing witnesses who are not devisees of the will.

Comment. Section 21372 is consistent with the substance of former Section 6112(c). "Interested witness" is limited to a witness to a will executed under Section 6110 and does not include a witness to a will that is executed under Section 6111 (holographic will) or 6221 (California statutory will).

§ 21374. "Related by blood or affinity"

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.

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").

CHAPTER 2. OPERATION AND EFFECT OF PRESUMPTION

§ 21380. Presumption of fraud or undue influence

21380. (a) A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:

(1) The person who drafted the instrument.

(2) A person in a fiduciary relationship with the transferor who transcribed the instrument or caused it to be transcribed.

(3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor.

(4) An interested witness.

(5) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (4), inclusive.

(6) A cohabitant or employee of any person described in paragraphs (1) to (4), inclusive.

(7) A partner, shareholder, or employee of a law firm in which a person described in paragraph (1) or (2) has an ownership interest.

(b) The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by a preponderance of the evidence, that the donative transfer was not the product of fraud or undue influence.

(c) If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.

Comment. Subdivision (a) of Section 21380 restates the substance of former Section 21350(a), with two exceptions:

(1) Subdivision (a)(4) is new. It harmonizes former Section 6112(c) with the more detailed approach taken in this part.

(2) In subdivision (a)(7), former Section 21350(a)(3) has been generalized to include the law firm of a fiduciary of the transferor who transcribes an instrument or causes it to be transcribed.

Subdivision (b) restates the substance of the first sentence of former Section 21351(d), with three exceptions:

(1) The standard of proof has been changed to a preponderance of the evidence.

(2) The former limitation on proof by the testimony of the beneficiary is not continued.

(3) The presumption of menace and duress is not continued.

Subdivision (c) restates the substance of the second sentence of former Section 21351(d).

The burden of establishing the facts that give rise to the presumption under subdivision (a) is borne by the person who contests the validity of a donative transfer under this section. See Evid. Code § 500 (general rule on burden of proof).

See also Sections 45 ("instrument"), 21362 ("care custodian"), 21364 ("cohabitant"), 21366 ("dependent adult"), 21368 ("domestic partner"), 21372 ("interested witness"), 21374 ("related by blood or affinity").

§ 21382. Exceptions

21382. Section 21380 does not apply to any of the following instruments or transfers:

(a) A donative transfer to a person who is related by blood or affinity, within the fifth degree, to the transferor or is the cohabitant of the transferor.

(b) An instrument that is drafted or transcribed by a person who is related by blood or affinity, within the fifth degree, to the transferor or is the cohabitant of the transferor.

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

(d) A donative transfer to a federal, state, or local public entity, an entity that qualifies for an exemption from taxation under Section 501(c)(3) or 501(c)(19) of the Internal Revenue Code, or a trust holding the transferred property for the entity.

(e) A donative transfer of property valued at $5,000 or less, if the total value of the transferor's estate equals or exceeds the amount stated in Section 13100.

(f) An instrument executed outside of California by a transferor who was not a resident of California when the instrument was executed.

Comment. Subdivisions (a) and (b) of Section 21382 restate the substance of former Section 21351(a) and (g), except that "heirs of the transferor" are no longer included in the exception, and

the former exemption of an instrument drafted by an exempt person has been generalized to include an instrument that is transcribed by an exempt person.

Subdivision (c) continues former Section 21351(c) without substantive change.

Subdivision (d) continues former Section 21351(f) without substantive change.

Subdivision (e) continues former Section 21351(h) without substantive change.

Subdivision (f) continues former Section 21351(i) without substantive change.

See also Sections 45 ("instrument"), 21364 ("cohabitant"), 21374 ("related by blood or affinity").

§ 21384. Attorney certification

21384. (a) A gift is not subject to Section 21380 if the instrument is reviewed by an independent attorney who counsels the transferor about the nature and consequences of the intended transfer, attempts to determine if the intended transfer is the result of fraud or undue influence, and signs and delivers to the transferor an original certificate in substantially the following form:

"CERTIFICATE OF INDEPENDENT REVIEW

I, (attorney's name), have reviewed (name of instrument) and counseled the transferor, (name of transferor), on the nature and consequences of any transfers of property to (name of person described in Probate Code Section 21380) that would be made by the instrument.

I am an 'independent attorney' as defined in Probate Code Section 21370 and am in a position to advise the transferor independently, impartially, and confidentially as to the consequences of the transfer.

On the basis of this counsel, I conclude that the transfers to (name of person described in Probate Code Section 21380) that would be made by the instrument are not the product of fraud or undue influence.

_____

(Name of Attorney) (Date)"

(b) An attorney whose written engagement, signed by the transferor, is expressly limited solely to compliance with the requirements of this section, shall not be considered to otherwise represent the transferor as a client.

(c) An attorney who drafts an instrument can review and certify the same instrument pursuant to this section, but only as to a gift to a care custodian. In all other circumstances, an attorney who drafts an instrument may not review and certify the instrument.

(d) If the certificate is prepared by an attorney other than the attorney who drafted the instrument that is under review, a copy of the signed certification shall be provided to the drafting attorney.

Comment. Section 21384 restates the substance of former Section 21351(b), except that a drafting attorney may conduct the review and certification of a gift to a care custodian.

See also Sections 45 ("instrument"), 21362 ("care custodian"), 21370 ("independent attorney").

§ 21386. Effect of invalid transfer

21386. If a gift fails under this part, the instrument making the gift shall operate as if the beneficiary had predeceased the transferor without spouse, domestic partner, or issue.

Comment. Section 21386 restates the substance of former Section 21353. Language purporting to guarantee the beneficiary of a failed gift an amount equal to the intestate share of that beneficiary, had the transferor died intestate, is not continued. That language had no substantive effect. Under former Section 21351(a) & (g), a gift to an "heir" of the transferor was exempt from the presumption of invalidity established in Section 21350. Thus, the beneficiary of a gift that failed under former Section 21350 could only be a non-heir. A non-heir, by definition, is not entitled to an intestate share of the transferor's estate. See Section 44 ("heir" defined).

See also Sections 45 ("instrument"), 21368 ("domestic partner").

§ 21388. Liability of third party transferor

21388. (a) A person is not liable for transferring property pursuant to an instrument that is subject to the presumption created under this part, unless the person is served with notice, prior to transferring the property, that the instrument has been contested under this part.

(b) A person who is served with notice that an instrument has been contested under this part is not liable for failing to transfer property pursuant to the instrument, unless the person is served with notice that the validity of the transfer has been conclusively determined by a court.

Comment. Section 21388 restates the substance of former Section 21352, except that the provisions are now conditioned on service of notice that a contest has been filed or that the validity of a contested transfer has been conclusively determined by a court.

See also Section 45 ("instrument").

§ 21390. Contrary provision in instrument

21390. This part applies notwithstanding a contrary provision in an instrument.

Comment. Section 21390 continues former Section 21354 without substantive change.

See also Section 45 ("instrument").

§ 21392. Application of part

21392. (a) This part shall apply to instruments that become irrevocable on or after September 1, 1993. For the purposes of this section, an instrument that is otherwise revocable or amendable shall be deemed to be irrevocable if on September 1, 1993, the transferor by reason of incapacity was unable to change the disposition of the transferor's property and did not regain capacity before the date of the transferor's death.

(b) Nothing in this part precludes an action to contest a donative transfer under other applicable law.

Comment. Subdivision (a) of Section 21392 continues former Section 21355 without substantive change.

Subdivision (b) is new. It makes clear that this part supplements and does not supersede the common law governing menace, duress, fraud, and undue influence. See Bernard v. Foley, 39

Cal. 4th 794, 800, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006); Rice v. Clark, 28 Cal. 4th 89, 97, 47 P.3d 300, 120 Cal. Rptr. 2d 522 (2002).

See also Section 45 ("instrument").

CONFORMING AND TECHNICAL REVISIONS

Bus. & Prof. Code § 6103.6 (amended). Compensation for trustee services

6103.6. Violation of Section 15687 of the Probate Code, or of Part 3.5 (commencing with Section ~~21350~~ 21360) of Division 11 of the Probate Code, shall be grounds for discipline, if the attorney knew or should have known of the facts leading to the violation. This section shall only apply to violations that occur on or after January 1, 1994.

Comment. Section 6103.6 is amended to correct a reference to former Probate Code Section 21350.

Prob. Code § 13 (added). Degree of kinship or consanguinity

13. (a) The degree of kinship or consanguinity between two persons is determined by counting the number of generations separating those persons, pursuant to subdivision (b) or (c). Each generation is called a degree.

(b) Lineal kinship or consanguinity is the relationship between two persons, one of whom is a direct descendant of the other. The degree of kinship between those persons is determined by counting the generations separating the first person from the second person. In counting the generations, the first person is excluded and the second person is included. For example, parent and child are related in the first degree of lineal kinship or consanguinity, grandchild and grandparent are related in the second degree, and great-grandchild and great-grandparent are related in the third degree.

(c) Collateral kinship or consanguinity is the relationship between two people who spring from a common ancestor, but neither person is the direct descendant of the other. The degree of kinship is determined by counting the generations from the first person up to the common ancestor and from the common ancestor down to the second person. In counting the generations, the first person is excluded, the second person is included, and the common ancestor is counted only once. For example, siblings are related in the second degree of collateral kinship or consanguinity, an aunt or uncle and a niece or nephew are related in the third degree, and first cousins are related in the fourth degree.

Comment. Subdivision (a) of Section 13 restates the substance of former Section 251, as enacted by 1931 Cal. Stat. ch. 281.

Subdivision (b) restates the substance of former Section 252, as enacted by 1931 Cal. Stat. ch. 281.

Subdivision (c) restates the substance of former Section 253, as enacted by 1931 Cal. Stat. ch. 281. There is no first degree of collateral kinship or consanguinity.

Prob. Code § 2583 (amended). Proposed actions by court

2583. In determining whether to authorize or require a proposed action under this article, the court shall take into consideration all the relevant circumstances, which may include, but are not limited to, the following:

(a) Whether the conservatee has legal capacity for the proposed transaction and, if not, the probability of the conservatee's recovery of legal capacity.

(b) The past donative declarations, practices, and conduct of the conservatee.

(c) The traits of the conservatee.

(d) The relationship and intimacy of the prospective donees with the conservatee, their standards of living, and the extent to which they would be natural objects of the conservatee's bounty by any objective test based on such relationship, intimacy, and standards of living.

(e) The wishes of the conservatee.

(f) Any known estate plan of the conservatee (including, but not limited to, the conservatee's will, any trust of which the conservatee is the settlor or beneficiary, any power of appointment created by or exercisable by the conservatee, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the conservatee's death to another or others which the conservatee may have originated).

(g) The manner in which the estate would devolve upon the conservatee's death, giving consideration to the age and the mental and physical condition of the conservatee, the prospective devisees or heirs of the conservatee, and the prospective donees.

(h) The value, liquidity, and productiveness of the estate.

(i) The minimization of current or prospective income, estate, inheritance, or other taxes or expenses of administration.

(j) Changes of tax laws and other laws which would likely have motivated the conservatee to alter the conservatee's estate plan.

(k) The likelihood from all the circumstances that the conservatee as a reasonably prudent person would take the proposed action if the conservatee had the capacity to do so.

(*l*) Whether any beneficiary is ~~a person described in paragraph (1) of subdivision (b) of Section 21350~~ the spouse or domestic partner of the conservatee.

(m) Whether a beneficiary has committed physical abuse, neglect, false imprisonment, or fiduciary abuse against the conservatee after the conservatee was substantially unable to manage his or her financial resources, or resist fraud or undue influence, and the conservatee's disability persisted throughout the time of the hearing on the proposed substituted judgment.

Comment. Section 2583(*l*) is amended to replace a reference to former Section 21350(b)(1) with the substance of that former provision.

Prob. Code § 6112 (amended). Witnesses

6112. (a) Any person generally competent to be a witness may act as a witness to a will.

(b) A will or any provision thereof is not invalid because the will is signed by an interested witness.

(c) ~~Unless there are at least two other subscribing witnesses to the will who are disinterested witnesses, the fact that the will makes a devise to a subscribing witness creates a presumption that the witness procured the devise by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof. This presumption does not apply where the witness is a person to whom the devise is made solely in a fiduciary capacity.~~

~~(d) If a devise made by the will to an interested witness fails because the presumption established by subdivision (c) applies to the devise and the witness fails to rebut the presumption, the interested witness shall take such proportion of the devise made to the witness in the will as does not exceed the share of the estate which would be distributed to the witness if the will were not established. Nothing in this subdivision affects the law that applies where it is established that the witness procured a devise by duress, menace, fraud, or undue influence.~~

A devise to a subscribing witness is governed by Section 21380.

Comment. Section 6112 is amended to delete the provisions relating to the presumption of menace, duress, fraud, or undue influence that arises when a necessary subscribing witness of a will is a devisee of the will. That presumption is now governed by Section 21380.

Prob. Code § 15642 (amended). Removal of trustee

15642. (a) A trustee may be removed in accordance with the trust instrument, by the court on its own motion, or on petition of a settlor, cotrustee, or beneficiary under Section 17200.

(b) The grounds for removal of a trustee by the court include the following:

(1) Where the trustee has committed a breach of the trust.

(2) Where the trustee is insolvent or otherwise unfit to administer the trust.

(3) Where hostility or lack of cooperation among cotrustees impairs the administration of the trust.

(4) Where the trustee fails or declines to act.

(5) Where the trustee's compensation is excessive under the circumstances.

(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.

(7) If, as determined under Part 17 (commencing with Section 810) of Division 2, the trustee is substantially unable to manage the trust's financial resources or is otherwise substantially unable to execute properly the duties of the office. When the trustee holds the power to revoke the trust, substantial inability to manage the trust's financial resources or otherwise execute properly the duties of the office may not be proved solely by isolated incidents of negligence or improvidence.

(8) If the trustee is substantially unable to resist fraud or undue influence. When the trustee holds the power to revoke the trust, substantial inability to resist fraud or undue influence may not be proved solely by isolated incidents of negligence or improvidence.

(9) For other good cause.

(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.

(d) If the court finds that the petition for removal of the trustee was filed in bad faith and that removal would be contrary to the settlor's intent, the court may order that the person or persons seeking the removal of the trustee bear all or any part of the costs of the proceeding, including reasonable attorney's fees.

(e) If it appears to the court that trust property or the interests of a beneficiary may suffer loss or injury pending a decision on a petition for removal of a trustee and any appellate review, the court may, on its own motion or on petition of a cotrustee or beneficiary, compel the trustee whose removal is sought to surrender trust property to a cotrustee or to a receiver or temporary trustee. The court may also suspend the powers of the trustee to the extent the court deems necessary.

(f) For purposes of this section, the term "related by blood or marriage" shall include persons within the seventh degree.

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

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.

☞ **Note.** The form set out in Section 15642(b)(6)(B) has been presented in simplified form, to improve its readability without affecting its substance. The Commission is not proposing any amendment to that provision, other than the changes indicated in strikeout.

Prob. Code § 21310 (amended). Enforcement of no contest clause

21310. As used in this part:

(a) "Contest" means a pleading filed with the court by a beneficiary that would result in a penalty under a no contest clause, if the no contest clause is enforced.

(b) "Direct contest" means a contest that alleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:

(1) Forgery.

(2) Lack of due execution.

(3) Lack of capacity.

(4) Menace, duress, fraud, or undue influence.

(5) Revocation of a will pursuant to Section 6120, revocation of a trust pursuant to Section 15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument.

(6) Disqualification of a beneficiary under Section ~~6112 or 21350~~ 21380.

(c) "No contest clause" means a provision in an otherwise valid instrument that, if enforced, would penalize a beneficiary for filing a pleading in any court.

(d) "Pleading" means a petition, complaint, cross-complaint, objection, answer, response, or claim.

(e) "Protected instrument" means all of the following instruments:

(1) The instrument that contains the no contest clause.

(2) An instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause.

Comment. Section 21310 is amended to correct a reference to former Section 21350.

Prob. Code § 16062 (amended). Accounting

16062. (a) Except as otherwise provided in this section and in Section 16064, the trustee shall account at least annually, at the termination of the trust, and upon a change of trustee, to each beneficiary to whom income or principal is required or authorized in the trustee's discretion to be currently distributed.

(b) A trustee of a living trust created by an instrument executed before July 1, 1987, is not subject to the duty to account provided by subdivision (a).

(c) A trustee of a trust created by a will executed before July 1, 1987, is not subject to the duty to account provided by subdivision (a), except that if the trust is removed from continuing court jurisdiction pursuant to Article 2 (commencing with Section 17350) of Chapter 4 of Part 5, the duty to account provided by subdivision (a) applies to the trustee.

(d) Except as provided in Section 16064, the duty of a trustee to account pursuant to former Section 1120.1a of the Probate Code (as repealed by Chapter 820 of the Statutes of 1986), under a trust created by a will executed before July 1, 1977, which has been removed from continuing court jurisdiction pursuant to former Section 1120.1a, continues to apply after July 1, 1987. The duty to account under former Section 1120.1a may be satisfied by furnishing an account that satisfies the requirements of Section 16063.

(e) Any limitation or waiver in a trust instrument of the obligation to account is against public policy and shall be void as to any sole trustee who is ~~a disqualified person as defined in Section 21350.5~~ described in subdivision (a) of Section 21380 and is not described in Section 21382.

Comment. Section 16062(e) is amended to correct a reference to former Section 21350.5.
