Study L-622 October 23, 2008

# First Supplement to Memorandum 2008-47

## Donative Transfer Restrictions

The Commission has received another letter from Disability Rights California (formerly Protection and Advocacy, Inc.) (hereafter "DRC"), commenting on the provision of existing law that presumes the invalidity of a gift from a "dependent adult" to that person's "care custodian." See Prob. Code § 21350(a)(6). The letter is attached at Exhibit pp. 1-5.

We have also received a letter from retired Judge Arnold H. Gold, former Supervising Probate Judge of the Los Angeles County Superior Court, former Chair of the California Judges Association Probate and Mental Health Committee, and a former member (now advisor to) the California Judicial Council's Probate and Mental Health Committee. He writes as an individual and not on behalf of any of those entities. His letter is attached at Exhibit pp. 6-9.

The issues raised in those letters are discussed below.

### DEPENDENT ADULTS

One of the foundational facts establishing the care custodian presumption is the transferor's status as a dependent adult. Under existing law, the definition of "dependent adult" includes 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" or who is admitted as an inpatient to a 24-hour health facility. See Prob. Code § 21350(c); Welf. & Inst. Code § 15610.23.

As has been discussed at length in prior memoranda, the existing definition of "dependent adult" is largely coextensive with the concept of disability. For example, the definition of "disability" under the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213) (hereafter "ADA") includes an individual who has "a

physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102.

DRC is opposed to the existing care custodian provision "because it deprives individuals of their right to make presumptively valid donative transfers solely on the basis of their disability." See Exhibit p. 2.

DRC rejects the notion that persons with disabilities, as a class, are specially vulnerable to fraud and undue influence. See Exhibit p. 3 (citing 42 U.S.C. § 12101(a)(7) (finding that individuals with disabilities have been faced with restrictions and limitations "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.")).

In addition to its policy objections, DRC now argues that the existing care custodian presumption violates the ADA, because it discriminates against persons with disabilities. As discussed below, that may be the case.

**Given that possibility, the Commission should probably either (1) revert to the approach proposed in its tentative recommendation, which called for an individualized determination in defining "dependent adult," or (2) attempt to craft a definition that does not include disability as a necessary element.** Those possibilities are also discussed below.

## "DEPENDENT ADULTS" AND THE ADA

The staff has not had time to do an exhaustive analysis of the question of whether the ADA prohibits the disability-based rule in the existing care custodian presumption. Preliminary analysis of that question is summarized below.

### The ADA

The ADA prohibits discrimination against persons with disabilities. See 42 U.S.C. §§ 12101-12213. The ADA consists of four subchapters. For our purposes, the relevant subchapter is subchapter II, commonly known as Title II, which prohibits discrimination by public entities. Other subchapters set forth miscellaneous provisions (subchapter 4), and provisions prohibiting discrimination against disabled persons in employment (subchapter 1), and in places of public accommodation (subchapter 3).

**Prohibition Against Discrimination by a Public Entity Under Title II**

Generally speaking, Title II prohibits a public entity from discriminating on the basis of disability with respect to the public entity's services, programs, or activities. See 42 U.S.C. § 12132 ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."); see also §§ 12131(a) (defining public entity to include any state government), 12132(b) (defining qualified individual).

It is clear that a legislative act (like a state statute) can violate Title II, and be held invalid as a consequence. See, e.g., *T.E.P. v. Leavitt*, 840 F. Supp. 110 (1993) (striking down Utah statute prohibiting marriage by person with AIDS, as violative of ADA). See also Exhibit p. 3 (discussing legislative history of the ADA). The question is whether the care custodian presumption would be found to discriminate in violation of Title II.

*Elements of Discrimination Under Title II*

To state a claim under Title II, a plaintiff must show: "(1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability." *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002) (citing *Wienreich v. Los Angeles County Metro Transp. Auth.*, 114 F.3d 976 (9th Cir. 1997)).

The first two prongs appear to be standing requirements for bringing a claim, rather than part of the substantive test for unlawful discrimination, so they can be set aside. That said, it is worth noting that a person is "qualified" to participate in a public entity's services, programs, or activities, if that person would, with or without reasonable modification of rules or facilities, meet "the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(b). Persons with disabilities, as a class, are eligible to make donative transfers of their property. It would therefore seem that a person with a disability could satisfy the second prong of the test.

Skipping ahead to the fourth prong, it is clear that the operation of the care custodian presumption is conditioned in necessary part on the transferor's disability. So if there is an exclusion from or denial of benefits, it would be "by reason of the plaintiff's disability." Thus, the care custodian presumption probably satisfies the fourth prong of the test.

The harder question is whether the presumption satisfies the third prong. Does the presumption operate to exclude persons with disabilities from participation in state services, programs, or activities? Does it deny the benefits of those services, programs, and activities to persons with disabilities? The scope of impermissible discrimination under Title II is discussed below.

*Prohibited Discrimination*

Does the state's regulation of estate planning constitute a service, activity, or program that is governed by Title II, or otherwise discriminate against persons with disabilities?

The ADA probably does apply to state regulation of estate planning. This conclusion is supported in part by a holding that the ADA applies to a state's regulation of marriage. See *T.E.P. v. Leavitt*, 840 F. Supp. 110 (D. Utah 1993). In both contexts, the state is regulating and sanctioning conduct by private parties, rather than the activities of the state itself. If marriage laws can violate the ADA, the staff sees a good argument that estate planning laws can also violate the ADA.

It is worth noting generally that the scope of discrimination governed by Title II appears to be fairly broad. See A. Wooster, *When Does a Public Entity Discriminate Against Disabled Individuals in Provision of Services, Programs, or Activities under the ADA, § 12132*, 163 A.L.R. 339 (2008). "The broad language of the ADA Section prohibiting the exclusion of qualified individuals with disabilities from the services of public entities *brings within its scope anything a public entity does* ...." *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) (emphasis added). Because the "ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society, ... it must be broadly construed to effectuate its purposes." 14 C.J.S. Civil Rights § 99 (2008) (citing *Barden v. City of Sacramento*, 292 F.3d 1073 (9th Cir. 2002); *Schorr v. Borough of Lemoyne*, 243 F. Supp. 2d 232 (M.D. Pa. 2003).

For example, in *Crowder v. Kitagawa*, 81 F.3d 1480, 1484 (9th Cir. 1996), a Hawaiian dog quarantine law was held to violate Title II, even though it did not

facially discriminate against persons with disabilities. The court stated that the quarantine applies equally to all persons, but that it imposes a greater burden on persons with impaired sight, who rely on guide dogs. While the dogs are in quarantine, their owners are denied "meaningful access to state services, programs, and activities while such services programs, and activities remain open and easily accessible by others." *Id.* at 1481. This illustrates how a facially nondiscriminatory protective measure can violate the ADA, because of its indirect burden on those with disabilities.

In *Thompson v. Davis*, 295 F.3d 890 (9th Cir. 2002), the Ninth Circuit held that California's parole board unlawfully discriminated against persons with a disability by categorically denying parole to persons who had a history of substance abuse. The court held that "plaintiffs may state a claim under Title II based on their allegations that the parole board failed to *perform an individualized assessment* of the threat they pose to the community by *categorically* excluding from consideration for parole all people with substance abuse histories." *Id.* (emphasis added). Thus, it appears that categorical limits on those with disabilities are problematic, but limits based on an individualized assessment related to the purpose of a rule is not. Thus, a rule presuming that *all* persons with disabilities are specially vulnerable to undue influence and fraud might constitute violation under Title II. But a rule presuming undue influence when an individual is individually determined to be specially vulnerable to fraud or undue influence would probably be permissible. That makes sense, as many protective measures limit the freedoms of persons after an individual determination of vulnerability (e.g., conservatorship).

**Greater or Equal Protection Permitted**

The ADA does allow state law to provide "greater or equal protection" than the ADA. 42 U.S.C. § 12201(b); *Wood v. County of Alameda*, 875 F. Supp. 659 (N.D. Cal. 1995) ("Congress wanted to ensure that plaintiffs would never be denied the benefits of those state statutes which happen in fact to provide greater or equal protections than the ADA on the ground that the ADA 'preempts' such statutes in their entirety.")

One could perhaps argue that California's statute provides greater protection to individuals with disabilities by protecting them from undue influence in making gifts. Considering that the broad scope of the existing definition of "dependent adult" includes many persons who clearly do not need its

protections (e.g., persons with very minor physical disabilities), it seems likely that the burden imposed by the provision would weigh against any argument that it provides greater protection than the ADA and that it does not conflict with the ADA.

**Conclusion**

Although the staff has not yet done enough research to have reached a firm conclusion, there is a reasonable argument that a disability-based care custodian presumption could violate the ADA. The staff appreciates DRC raising this important issue. The close scrutiny that the Commission has given the care custodian presumption, with the assistance of DRC and other commentators, has exposed a possible illegality in existing law.

**Consequently, the staff recommends that the Commission either return to the approach proposed in the tentative recommendation (an individualized assessment of the person's capacity, based on the test for appointment of a conservator), or attempt to refashion the presumption so that it does not turn on the issue of disability.** Two new alternative approaches are discussed below.

## ALTERNATIVE TREATMENT OF DEFINITION OF "DEPENDENT ADULT"

**Focus on Elders and "Practical Nurses"**

The originally stated purpose of the care custodian provision was to protect elders with dementia from the undue influence of "practical nurses." See Memorandum 2008-47, pp. 2-3. The various problems with the scope of the care custodian presumption, discussed in this and prior memoranda, all result from the failure to narrowly tailor the law to fit that purpose.

One possible solution would be to narrow the presumption to more closely conform to that original purpose. For example, the concept of "dependent adult" could be replaced with "elder," and "care custodian" could be limited to a person who, for pay, provides nursing type services. Thus:

> **§ 21362. "Care custodian"**
>
> 21362. (a) "Care custodian" means a person who provides care custodian services to an elder for remuneration, as a profession or occupation. The remuneration need not be paid by the dependent adult.
>
> (b) For the purposes of this section, "care custodian services" means assistance with healthcare or personal hygiene, including

the administration of medicine, medical testing, wound care, bathing, and assistance with the toilet.

**§ 21362. "Elder"**

21362. "Elder" means a person who is 65 years old or older.

**§ 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:

….

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

….

That approach would be much closer to the originally stated purpose of the statute than the language that was actually enacted. It would not facially discriminate against those with disabilities. Instead, it would focus on the special vulnerability of an elder to a person who is paid to provide the elder with intimate health and hygiene care (as a practical nurse would do).

Another advantage of this approach would be its clarity. Under those definitions, it should be very easy for citizens, judges, and estate planners to determine whether a person is an elder or a care custodian. That would enhance predictability and reduce the risk of mistake.

The staff did not include language limiting the approach to elders with "dementia," for two reasons. First, it would be difficult to draft a bright line test. Cognitive impairment often develops incrementally with age. Second, as Judge Gold suggests, the test should be vulnerability, not incapacity. See Exhibit p. 8. Many elders may find themselves in positions of vulnerability, without any reduction in cognitive ability.

**The staff invites public comment on whether this approach represents a workable compromise.**

**Individualized Determination Based on Vulnerability**

The tentative recommendation proposed an individualized determination based on the transferor's eligibility for a conservatorship. In effect, that test focuses on the transferor's mental capacity (though eligibility for a conservatorship does not always equate to incapacity to contract, see discussion in Memorandum 2008-36, pp. 5-6; Memorandum 2008-47, pp. 11-12).

As noted above, Judge Gold opposes that approach as too limited. "I have seen many, many situations in which a person unduly influenced because of a disability was not so severely disabled as to qualify for a conservator." See Exhibit p. 8.

It would be possible to provide for an individualized determination that does not focus on mental capacity, but instead focuses on a person's vulnerability to fraud or undue influence. Judge Gold suggests that the existing definition be changed as follows:

> 21366. (a) "Dependent adult" means any [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 any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

See Exhibit p. 8.

That approach still relies on the existence of a disability, rather than the more general question of vulnerability. The same general approach could be expressed without any reliance on the fact of the transferor's disability, focusing instead on the condition of dependency:

> 21366. "Dependent adult" means a person over the age of 17 who, due to the person's condition of dependence on a care custodian, is determined to have a heightened vulnerability to fraud or undue influence.

As with the other options that have been discussed, the scope of that approach could be limited to elders, for example:

> 21366. "Dependent elder" means a person over the age of 64 who, due to the person's condition of dependence on a care custodian, is determined to have a heightened vulnerability to fraud or undue influence.

The obvious shortcoming of this approach is its reliance on a subjective standard. How does one assess "vulnerability?" It may be that the standard would be easily applied in practice, with judges and attorneys able to recognize vulnerability when they see it, but the lack of a bright line could lead to

inconsistent results (and a heightened risk of malpractice liability if a judge sees vulnerability where the estate planner did not).

**The staff invites public comment on whether an individualized determination based on heightened vulnerability represents a workable compromise.**

## DEFINITION OF "CARE CUSTODIAN"

Judge Gold has two concerns about the proposed definition of "care custodian," which reads 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.

### Remuneration

Judge Gold believes that the concept of "remuneration" is too limiting:

> I have seen cases where an undue influencer worked without compensation but in return for a current or prospective donative transfer. The statutory donative transfer restrictions should encompass such persons. I am concerned that the present or prospective donative transfer, being donative, may not qualify as "remuneration."

See Exhibit p. 7.

This concern is reasonable. However, if the prospect of a future donative transfer is included as an exception to the requirement of remuneration, the exception could consume the rule. In every case where the care custodian presumption is asserted, there will have been a donative transfer to a care custodian. It could always be argued that the prospect of the gift is what motivated the care custodian's actions.

Judge Gold suggests an alternative to the remuneration rule that could avoid the problem described above. Rather than limiting the provision to those who are paid, instead exempt those who can prove a pre-existing friendship with the transferor. See Exhibit p. 7.

The Commission considered just that possibility in developing its tentative recommendation, but was concerned that it created difficulties of definition and proof. See Memorandum 2008-13, pp. 18-20. The discussion from that memorandum is substantially reiterated below:

*What is a Friend?*

As the court noted in *Bernard v. Foley*, 39 Cal. 4th 794, 139 P.3d 1196, 47 Cal. Rptr. 3d 248 (2006), the law regulating senior housing exempts:

> (2) Any arrangement for the care and supervision of a person or persons from only one family by *a close friend, whose friendship preexisted the contact between the provider and the recipient*, and both of the following are met:
>
> (A) The care and supervision is provided in a home or residence chosen by the recipient.
>
> (B) The arrangement is not of a business nature and occurs only as long as the needs of the recipient for care and supervision are adequately met.

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

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

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

Academic attempts to provide a legal definition are interesting, but fall short of providing a clear standard. See, e.g., Ethan Leib, *Friendship and the Law*, 54 UCLA L. Rev. 631, 642 (2007) (stating broad characteristics of friendship, including voluntariness, trust, solidarity, exclusivity, reciprocity, warmth, mutual assistance, equality, and duration over time); Jeremy M. Miller, *Judicial Recusal and Disqualification: The Need for a Per Se Rule on Friendship (Not*

*Acquaintance)*, 33 Pepp. L. Rev. 575, 585 (2006) ("A friend is another human to whom one feels loyalty. This loyalty is not based on money, family or fear. A friend is one to whom the friend feels admiration, love and respect — which are distinct from ordinary social or business acquaintance and the requisite collegiality (politeness) associated with that social or business intercourse."). The Merriam-Webster Online Dictionary defines "friend" as "one attached to another by affection or esteem" or "a favored companion."

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

*Friendship Exception*

**If the Commission decides that the care custodian provision should include a friendship exception, in place of the volunteer exception, it could add language along the following lines:**

> "Care custodian" does not include a person who had a friendship with the transferor before providing care services.

That language does not provide a definition of "friendship" but a court should be able to determine, on a case-by-case basis, whether such a friendship existed.

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

Judge Gold suggests that there should be some minimum period of pre-existing friendship, in order to qualify for the exception. See Exhibit p. 7. Thus:

> "Care custodian" does not include a person who had a friendship with the transferor, at least one year before providing care services.

**The Commission should consider whether a pre-existing friendship exception would be better than an exception for a caregiver who acts without remuneration.**

**Profession or Occupation**

Judge Gold is also concerned about reliance on the term "profession or occupation" in defining "care custodian." See Exhibit p. 6. He believes that the terms are too vague. With respect, the staff does not see the ambiguity. **Nonetheless, the staff invites any suggestions for how the terms might be made clearer.**

Of course, if the "friendship exception" approach is followed, then there would be no need to refer to the care custodian's profession or occupation.

TIMING OF CARE CUSTODIAN PRESUMPTION

Judge Gold is concerned about the rule in the proposed law that limits the care custodian presumption to gifts executed *during* the care custodian relationship.

> It would not encompass persons who provided services before the donative instrument was executed, stopped providing those services just before the donative instrument was executed, and told the donor that the only circumstance under which the person would resume providing services would be if the transferor executed the donative instrument. It also would not encompass persons who never provided services before the donative instrument was executed, but told the donor that the only circumstance under which the person would provide services would be if the transferor executed the donative instrument. I have seen both of these scenarios. Perhaps the way of solving this drafting problem would be to be to disqualify if the donative instrument was executed within a window of time (one or two months?) before or after the services were provided.

See Exhibit p. 8.

The scenario of someone who refuses to commence service unless a gift is created seems unlikely if a "care custodian" is a person who provides service as a paid occupation or profession. In that case, the dependent person could simply interview and hire a different care provider. The problem seems more likely to arise with family members who are offering to provide service without pay. Note, however, that family members are exempt from the care custodian presumption.

By contrast, it does seem possible that a paid care custodian could effectively threaten to terminate service unless given a gift. The prospect of finding a replacement and upsetting settled routines might be enough of an incentive for

the dependent adult to acquiesce. There is also the problem that arose in *Estate of Shinkle*, 97 Cal. App. 4th 990, 119 Cal. Rptr. 2d 42 (2002). In that case, the undue influencer was a care custodian while Ms. Shinkle was living in a nursing facility, but the care custodian relationship ended when she was discharged. Nonetheless, the court found that the influence exerted during her time in the nursing home facilitated later pressure on Ms. Shinkle to create a gift to him after she was discharged (when he was no longer her care custodian).

One possible adjustment to the proposed law would be to make the timing rule asymmetrical. The care custodian presumption *would not* apply to a gift made *before* the care custodian relationship commenced, but *would* apply to a gift made *after* the relationship had terminated. That might better reflect the points discussed above.

Another alternative, proposed by Judge Gold, would be to provide a time cushion on either end of the relationship, so that the care custodian presumption would apply to any gift made within three months of the commencement of service, during service, or within three months after termination of service. See Exhibit p. 8. The staff is not sure that this would provide enough protection to justify the added complexity, but it is worth considering.

**The staff invites comment on these possible modifications of the proposed law.**

On a related point, Judge Gold correctly points out that the Comment to proposed Section 21380 does not describe the proposed timing rule. See Exhibit p. 8, n.1. After the Commission decides how to address the substance of that issue, the staff will revise the Comment accordingly.

### INTERESTED WITNESS OF A WILL

Under existing 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. That statutory presumption does not include any of the exemptions or other elaborations that exist under the Donative Transfer Restriction Statute. The Commission did not see any compelling policy reason for that difference in treatment between the two very similar statutory presumptions.

Under the proposed law, the substance of Section 6112 would be incorporated into the Donative Transfer Restriction Statute, so that all statutory presumptions of fraud or undue influence would be subject to the same rules.

Judge Gold objects to that approach. He sees no need to change Section 6112, and has two specific objections to the consequence of the approach taken under the proposed law. See Exhibit p. 7. They are discussed below.

**Menace and Duress**

Under existing Section 6112 and the existing Donative Transfer Restriction Statute, the statutory presumption is a presumption of menace, duress, fraud, or undue influence. Under the proposed law, the presumption would be limited to fraud and undue influence. There would be no statutory presumption of menace or duress.

Judge Gold objects to that proposed change being extended to the presumption that applies when a necessary witness of a will is also a devisee of the will. He notes that the presumption of menace or duress might have some appropriate application to an interested witness.

**With respect, the staff disagrees.** Menace and duress are defined terms, which encompass extreme forms of coercive conduct, much of it criminal. Civil Code Section 1569 provides:

> 1569. 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.

Civil Code Section 1570 provides:

> 1570. 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.

The Commission did not find any logical justification for presuming that a "disqualified person" under the Donative Transfer Restriction Statute (i.e., an instrument drafter or transcriber, or a care custodian) committed menace or duress against a transferor. Similarly, why should the fact that a devisee witnesses a will create a presumption that the witness unlawfully confined the testator, or detained her property, or threatened her with physical violence?

There is no clear causal connection between the fact establishing the presumption and any likelihood that the presumed facts are true. It may be reasonable to presume that the witness tricked or pressured the testator into making the will, but the law seems to go too far in presuming menace and duress.

**Exemption of Relatives**

On a similar point, Judge Gold objects that incorporating Section 6112 into the Donative Transfer Restriction Statute will create an exception that does not currently exist. A witness who is a close family member of the testator would not be subject to the statutory presumption.

That is correct. It is also true that the proposed law would extend a number of other existing exceptions, including a small gift exception, an exception for instruments executed out of state by nonresidents, and the independent attorney certification procedure that could be used to validate and save an otherwise suspect gift. In each of those cases, the Commission concluded that the exception makes good policy sense, and that it would make equal sense as applied to the interested witness presumption. The existing difference in treatment seems likely to have been the product of a lack of coordination between the two statutes, rather than a conscious policy choice.

For example, why should the law exempt a grandchild who *drafts* a will for his grandfather's signature from any presumption of undue influence, but have no exemption for a grandchild who *witnesses* a will? The staff does not see any policy justification for that distinction. The two situations are sufficiently analogous that the same rule should apply. If anything, the risk of undue influence or fraud is *greater* when a person drafts a self-serving will, than when the person witnesses a will drafted by another.

The same general principle applies to other existing differences in treatment. For example, why should a small gift to a *drafter* be exempt, while a small gift to a *witness* is not?

**In the absence of a clear distinction that would justify different treatment, there are clear advantages to harmonizing the treatment of all similar statutory presumptions.**

## SPECIAL EVIDENTIARY RESTRICTIONS

Judge Gold disagrees with the proposed relaxation of evidentiary standards when rebutting a presumption under the Donative Transfer Restriction Statute.

Under existing law, a beneficiary must prove the absence of menace, duress, fraud, or undue influence by clear and convincing evidence. Section 21351(d). The rebuttal evidence may not be based solely on the testimony of the beneficiary. *Id.*

The proposed law would lower the standard for rebuttal to a preponderance of the evidence, and remove the requirement that there be evidence other than the beneficiary's testimony. See proposed Section 21380(b). That would conform the treatment of the presumption that arises under the Donative Transfer Restriction Statute with the common law presumption of undue influence and the interested witness presumption under Section 6112.

The lower standard seems appropriate, because it is easier to establish the foundational facts for the presumption under the Donative Transfer Restriction Statute than it is to establish the facts giving rise to the common law presumption (which requires direct involvement by a person in a confidential relationship with the transferor, who receives undue profit as a result).

Judge Gold writes:

> Finally, I respectfully disagree with your proposal to eliminate the special evidentiary restrictions on rebutting the statutory presumption (i.*e.*, "upon clear and convincing evidence, but not based solely upon the testimony of [the potentially disqualified] person" — see existing Probate Code Section 21351(d)). At lines 10 - 13 on page 12 of your Tentative Recommendation, you reason that the distinction between this requirement in the disqualified persons situation (the "statutory" presumption" situation) and the absence of such a requirement in a common law presumption situation is counter-intuitive because the prerequisites for the statutory presumption are easier to establish. So, you reason, the statutory presumption should be as easy to rebut as the common law presumption. Not so. That argument completely overlooks the obvious Legislative intent to treat persons who are potentially disqualified because of their special relationships to transferors much more stringently than persons who do not have those sorts of special relationships - because of the greater likelihood that donative transfers to such persons are the result of undue influence. I have often found the special evidentiary restrictions to be of value in dealing with obvious undue influencers who fall within the disqualified persons statutes.

Judge Gold is correct that the proposed law would be contrary to the Legislature's intent, and that should certainly be weighed in considering the change. However, the Legislature has charged us with evaluating the statute and

proposing improvements. That assignment necessarily involves the possibility of proposing changes that strike a different policy balance than existing law.

**That said, the Commission should reconsider its proposal in light of Judge Gold's objection.** This issue presents a question of pure policy, rather than the correction of an error or oversight, so it is reasonable to reevaluate it in light of the new input.

Respectfully submitted,

Brian Hebert
Executive Secretary

Disability Rights California

*California's protection and advocacy system*

**LOS ANGELES REGIONAL OFFICE**
3580 Wilshire Boulevard, Suite 902
Los Angeles, CA 90010
Tel: (213) 427-8747
TTY: (800) 719-5798
Toll Free: (800) 776-5746
Fax: (213) 427-8767
www.disabilityrightsca.org

October 16, 2008

Brian Hebert
Law Revision Commission

*By Email: bhebert@clrc.ca.gov*

Dear Mr. Hebert,

I am writing to you on behalf of Disability Rights California, formerly Protection and Advocacy, Inc., with regard to the Law Revision Commission's proposed changes to the provision of Probate Code Section 21350 et seq. that presumptively invalidates a donative transfer made by a "Dependent Adult" to the individual's "Care Custodian." We were disappointed to read the Commission's Memorandum 2008-47, dated September 30, 2008, responding to our comments of September 11th. As a preliminary matter, the memorandum continues to reflect confusion between a conservatorship of the estate, which requires that the conservatee be unable to handle his or her own finances, and conservatorship of the person, which does not. The Commission's previously proposed definition of Dependent Adult covered both types of conservatorship, while the Commission's most recent memorandum rejects the conservatorship standard as "largely coextensive with incapacity to contract." Memorandum 2008-47, at p.11. This may be an accurate statement with regard to conservatorships of the estate, but not conservatorships of the person.

Our suggestion that the Commission narrow the definition of Dependent Adult to individuals who meet the standard for conservatorship of either the estate or the person is an attempt to preserve the legislative intent behind the donative transfer provision in a way that is consistent with civil rights laws such as the Americans with Disabilities Act (ADA), 42 U.S.C. §§12101 *et seq*. As discussed below, our opinion is that the provision as currently enacted violates the ADA because it deprives individuals of their right to make presumptively valid donative transfers solely on the basis of their disability. Replacing the Dependent Adult standard with a standard based on the need for conservatorship would put the provision in compliance with the ADA because it would base the deprivation of rights on an individualized determination not only that a person has a disability, but also that the person is unable to provide properly for his or her own physical health, food, clothing or shelter, or unable to manage his or her own financial resources or resist fraud or undue influence. See Probate Code §1801. The Commission's most recent proposal to broaden the definition of Dependent Adult does nothing to address the provision's conflict with the ADA, except to make it more explicit.

The ADA protects people from discrimination based on an actual or perceived disability. Although the coverage of the ADA differs in some ways from the coverage of the California Fair Employment and Housing Act (FEHA), the statutes are coextensive to the extent that they both protect from discrimination people who have "a physical or mental limitation that limits a major life activity." This is the language that the Commission has chosen to use as part of its proposed definition of Dependent Adult in the donative transfer statute.[1]

---

[1] The Commission's proposed definition of Dependent Adult is actually broader than those who are protected by the ADA and FEHA. The Commission's proposal also includes individuals whose disabilities limit their "ability to protect the person's rights," and those who are admitted as inpatients or residents of health care and long-term care facilities. We do not know what the Commission means by a limitation of an "ability to protect the person's rights," and our objections to including inpatients and long-term care facility residents are discussed in our previous comments. The present comments focus on our concerns about the definition of Dependent Adult to the extent that it applies to individuals who are protected by the ADA.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be *subjected to discrimination by any such entity*." 42 U.S.C. §12132 (emphasis added). A key element of the ADA is the requirement that restrictions on people with disabilities must be based on individualized determinations of each person's needs and abilities, rather than on generalizations or assumptions concerning people with disabilties as a group. See, e.g., 42 U.S.C. §12101(a)(7) (finding that individuals with disabilities have been faced with restrictions and limitations "resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.")

The text and legislative history of Title II leave no doubt that the ADA applies to actions taken by the state in its legislative capacity.[2] Title II specifies that it does not disturb other federal or state laws that provide equal or greater protection to people with disabilities. 42 U.S.C. §12201(b). The Department of Justice has interpreted this provision to mean that the ADA "does, however, prevail over any conflicting State laws." T. II Technical Assistance Manual II-1.4200. The House Report for Title II confirms this interpretation:

> The Committee has chosen not to list all the types of actions that are included within the term 'discrimination', as was done in Titles I and III, because this title essentially simply extends the antidiscrimination prohibition embodied in section 504 [of the Rehabilitation Act of 1973] to *all actions of state and local governments*.

House Report Part II at 84, *reprinted in* 1990 U.S.C.C.A.N. at 357 (emphasis added). See also *Id.* at 151, *reprinted in* 1990

---

[2] The ADA also makes it unlawful to "interfere with any individual in the exercise or enjoyment of...any right granted or protected by this chapter." 42 U.S.C. §12203. This section imposes an affirmative obligation on the Commission to ensure that the laws that it proposes are consistent with the ADA. This obligation is consistent with the mandate of the Commission's governing statute to "bring the law of this state into harmony with modern conditions." §12203. Gov't Code §8289(d).

U.S.C.C.A.N. at 434 (Title II of the bill makes *all actions of State and local governments* subject to the types of prohibitions against discrimination against qualified individuals with a disability included in section 504). (Emphasis added.)

Presumptively invalidating an individual's bequest involves a significant deprivation of that person's right to make decisions concerning his or her own property. Whether or not that deprivation is justified in any particular case will involve a highly fact-specific inquiry into the individual's condition and circumstances at the time the bequest was made. The Commission's two most recent memoranda on this proposal acknowledge the importance of basing deprivations of rights on individualized determinations rather than on assumptions concerning people with disabilities. However, in its most recent memorandum the Commission rejects "the idea of using an individualized determination of the transferor's condition" out of concern that the proposed conservatorship standard would "set the bar too high and might present difficult problems of proof." Memorandum 2008-47, at p.12. Under the ADA, this is not the Commission's choice to make. We agree with the Commission that the determination of whether an individual was subject to undue influence will not always be an easy one to make after the transferor has died. However, federal law requires that the determination be based on factors that are directly related to the potential for undue influence, rather than on assumptions based on the fact that the individual is a person with a disability.

According to current census figures, approximately 18% of the U.S. population (and approximately 50% of the staff at Disability Rights California) are protected by the ADA. The Commission's proposal to make the donative transfer provision apply to the same individuals who are covered by the ADA, as well as to patients and long-term care facility residents who may not meet that definition, would create an enormous group of individuals who are presumed to be incapable of making bequests to their caregivers. The Commission's proposed mechanism to allow people with disabilities to avoid a presumptively invalid bequest by obtaining a certificate from an independent attorney would help only those individuals who know about that mechanism and who have the resources to find and pay for an attorney to make that assessment. In effect, it would

establish a class of people with disabilities who can afford to protect their right to make donative transfers, and a class of people with disabilities who cannot.

As always, we appreciate your consideration of our comments, and look forward to receiving your response.

Sincerely,

Kevin Bayley
Staff Attorney

F:\DOCS\KEVIN\101608 LRC Comments.doc

HON. ARNOLD H. GOLD
JUDGE OF THE SUPERIOR COURT, RETIRED
PRIVATE DISPUTE RESOLUTION

10842 ALTA VIEW DRIVE
STUDIO CITY, CALIFORNIA 91604-3901

TELEPHONE
(213) 891-1501
FACSIMILE
(323) 822-0912
EMAIL
judgeagold@aol.com



October 17, 2008

File:_____

California Law Revision Commission
4000 Middlefield Road
Room D-1
Palo Alto, California 94303-4739

Re: Your Tentative Recommendation on **Donative Transfer Restrictions**

Ladies and Gentlemen:

I write to comment on your Tentative Recommendation issued in June of 2008 concerning Donative Transfer Restrictions.

I am a former Supervising Probate Judge of the Los Angeles County Superior Court, a former Chair of the California Judges Association Probate and Mental Health Committee and a former Member of (now an Advisor to) the California Judicial Council's Probate and Mental Health Committee. I am of course writing as an individual and not on behalf of that Court or those Committees.

I retired from the bench approximately seven and one-half years ago and have been active as a mediator in the probate field ever since. I have mediated approximately 650 probate cases, approximately 50 of which have involved issues arising under Probate Code Sections 21350 to 21356 – the subject of your Tentative Recommendation.

In my opinion, several modifications should be made in your Tentative Recommendation before it is made final. Not in the order of importance, those modifications are the following:

1. I am troubled by the phrase "for remuneration as a profession or occupation" in line 12 on page 19 of your Tentative Recommendation. While I understand the motivation for your recommending such a phrase (responding to the Chief Justice's concurring opinion in *Bernard v. Foley*), I perceive two problems with the phrase itself:

A. In my opinion, the words "for remuneration" are too limiting. I have seen cases where an undue influencer worked without compensation but in return for a current or prospective donative transfer. The statutory donative transfer restrictions should encompass such persons. I am concerned that the present or prospective donative transfer, being donative, may not qualify as "remuneration."

   The defect in the existing statutes that the majority opinion identified in the *Bernard* case was that those statutes disqualified persons who had "a preexisting personal friendship" with the donor. I suggest that the words "for compensation" be replaced by a specific exemption for persons who had a substantial personal relationship with the donor for at least, say, one year before the donative transfer or the execution of the donative instrument.

B. In my opinion, the words "as a profession or occupation" are too vague. More specific criteria are needed to guide the courts in determining what constitutes "a profession or occupation."

2. I disagree with your proposal to transfer existing Probate Code Section 6112's provisions concerning presumed "duress, menace, fraud, or undue influence" on the part of a witness to a will to the proposed disqualified persons statute (Section 21380). Section 6112 has worked well over the years, and I perceive very little justification for the proposed change. More importantly:

   A. By moving its provisions to the disqualified persons statute, the presumptions of duress and menace – which may have some applicability to a witness to a will - have been eliminated. The disqualified persons statute only gives rise to a presumption of fraud or undue influence.

   B. The presumption in the disqualified persons statute is inapplicable to persons related by blood or affinity, within the fifth degree, to the transferor. (See proposed Probate Code Section 21382(a) and (b), set forth at lines 10 – 14 of your Tentative Recommendation.) No justification appears for applying that exception to a person who witnesses a will.

3. While I understand the motivation (set forth at lines 13 and following on page 9 of your Tentative Report) for your suggested narrowing of the definition of a "dependent adult" (see proposed Section 21366, at lines 1 – 8 on page 20 of your Tentative Recommendation), in my opinion the suggestion narrows the definition far too much. I have seen many, many situations in which a person unduly influenced because of a disability was not so severely disabled as to qualify for a conservator. Vulnerability, not lack of capacity, should be the test. I believe that the problem you identify with the existing statutes arises out of existing Probate Code Section 21350(c)'s incorporation by reference of the arguably overbroad definition of "dependent adult" set forth in Welfare and Institutions Code Section 15610.23 (reproduced in footnote 56 on page 9 of your Tentative Recommendation). That problem could much better – and easily - be solved by reciting – right in the Probate Code - the definition of "dependent adult" set forth in Section 15610.23 but eliminating therefrom the phrase "to carry out normal activities or".

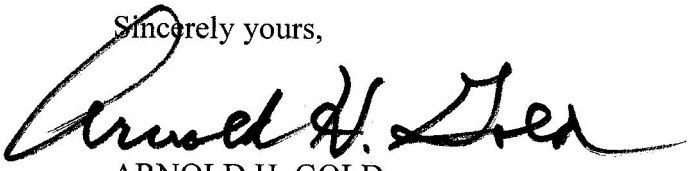
4. I respectfully but very strongly believe that the last clause of subparagraph (3) of subsection (a) of proposed revised Section 21380 (appearing at lines 13-15 on page 21 of your Tentative Recommendation) is misguided.[1] It would not encompass persons who provided services before the donative instrument was executed, stopped providing those services just before the donative instrument was executed, and told the donor that the only circumstance under which the person would resume providing services would be if the transferor executed the donative instrument. It also would not encompass persons who never provided services before the donative instrument was executed, but told the donor that the only circumstance under which the person would provide services would be if the transferor executed the donative instrument. I have seen both of these scenarios. Perhaps the way of solving this drafting problem would be to be to disqualify if the donative instrument was executed within a window of time (one or two months?) before or after the services were provided.

[1] The comment starting at line 27 on said page 21 is incorrect when it states that there are only two exceptions to the statement that new Subdivision (a) of Section 21380 restates the substance of former Section 21350. An additional exception is the modification that the last clause of proposed subparagraph (a)(3) makes in existing section 21350(a)(6).

5. Finally, I respectfully disagree with your proposal to eliminate the special evidentiary restrictions on rebutting the statutory presumption (*i.e.*, "upon clear and convincing evidence, but not based solely upon the testimony of [the potentially disqualified] person" – see existing Probate Code Section 21351(d)). At lines 10 – 13 on page 12 of your Tentative Recommendation, you reason that the distinction between this requirement in the disqualified persons situation (the "statutory" presumption" situation) and the absence of such a requirement in a common law presumption situation is counter-intuitive because the prerequisites for the statutory presumption are easier to establish. So, you reason, the statutory presumption should be as easy to rebut as the common law presumption. Not so. That argument completely overlooks the obvious Legislative intent to treat persons who are potentially disqualified because of their special relationships to transferors much more stringently than persons who do not have those sorts of special relationships – because of the greater likelihood that donative transfers to such persons are the result of undue influence. I have often found the special evidentiary restrictions to be of value in dealing with obvious undue influencers who fall within the disqualified persons statutes.

I appreciate the opportunity to comment on this very controversial proposal.

Sincerely yours,



ARNOLD H. GOLD