Study L-623 August 19, 2009

Memorandum 2009-36

Presumptively Disqualified Fiduciary (Public Comment)

The Commission recently completed its study of Probate Code provisions that establish a statutory presumption of menace, duress, fraud, or undue influence when a donative instrument makes a gift to a person in a specified relationship to the transferor. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm'n Reports 107 (2008).

For example, Probate Code Section 21350 creates such a presumption when a donative instrument makes a gift to a "disqualified person" (i.e., the drafter of the instrument, a fiduciary of the transferor who transcribes the instrument (or causes it to be transcribed), a "care custodian" of a transferor who is a "dependent adult," and certain specified family members and associates of any of the preceding persons). There are significant exceptions to the presumption, including an exception for gifts to close family members of the transferor and for instruments drafted by family members. See Prob. Code § 21351(a).

That statutory presumption is borrowed and applied in a related context. Probate Code Section 15642(b)(6) provides for the removal of a sole trustee who is a disqualified person, 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.

As with Section 21350, there is a family member exception and a saving mechanism (involving certification by an attorney that the instrument at issue was not the product of menace, duress, fraud, or undue influence). See Prob. Code § 15642(b)(6)(A)-(B).

In effect, Section 15642 extends the policy of Section 21350, which presumes the invalidity of a *gift* to a disqualified person, to also presume the invalidity of a provision naming that person as sole trustee.

The Executive Committee of the Trusts and Estates Section of the State Bar ("TEXCOM") has suggested that the policy be extended further, to also presume the invalidity of a provision naming a disqualified person as executor of a will. Memorandum 2008-36, p. 20.

In considering that proposal, Memorandum 2009-22 discussed whether the policy should be broadened even further, to presume the invalidity of an instrument granting other types of fiduciary powers. The memorandum specifically discussed whether the presumption should apply to an instrument naming an executor, an instrument nominating a conservator, an instrument creating a power of attorney, and an instrument creating a power of appointment.

For each fiduciary power, the memorandum asked: (1) Would the grant of power confer some benefit on the person granted the power? (2) Could the power be abused to obtain an improper benefit? (3) Are there institutional checks in place, adequate to police against abuse of the power?

The staff felt that many of those questions would be best answered by those with direct practical experience of how the powers are actually exercised. For that reason, the staff requested input from practitioners, judges, and other interested persons.

In response, we have received letters from TEXCOM and from the Probate and Mental Health Law Committee of the California Judges Association ("CJA Committee").

The letters are attached as an exhibit.

GENERAL SUPPORT FOR BROAD PRESUMPTION

Both TEXCOM and the CJA Committee write in support of broadening the existing rule that provides for the presumptive removal of a sole trustee who is a "disqualified person," so that the presumption would also apply to other fiduciary powers.

The CJA Committee believes that the presumption should apply to an executor, a power of attorney, and a power of appointment. However, they are doubtful of the need to extend the presumption to a conservatorship:

> We agree with the CLRC staff that there is "little need to extend the presumption" to conservatorship nominations. Conservators are appointed after extensive notice and investigation, are bonded for assets, and subject to follow-up investigations.

See Exhibit pp. 1-2.

TEXCOM supports applying the presumption to all four of the identified fiduciary powers, including a conservatorship. However, with respect to a conservatorship, TEXCOM would limit the presumption to a conservator *of the estate* (as distinguished from a conservator of the person or a limited conservator for an adult with a developmental disability). See discussion at Exhibit p. 6.

The staff appreciates the thoughtful input from TEXCOM and the CJA Committee. **However, there is a significant obstacle to proceeding further with this study at this time.**

UNSETTLED LAW

The current study proposes to borrow the existing classification of "disqualified persons" used in Section 21350 and then apply that classification to instruments naming disqualified persons as fiduciaries. Consequently, any change to the existing classification will also have a significant substantive effect on the scope of the presumptions proposed in this study.

Senate Bill 105 (Harman) would substantively change the classification of disqualified persons (mostly as a result of proposed changes to the terms "care custodian" and "dependent adult"). Those changes could affect the policy concerns and preferences of the groups and individuals who have commented on this study. For example, TEXCOM's letter includes the following caveat:

> One substantial caveat is in order: Texcom's recommendations are premised on the assumption that the terms "dependent adult" and "care custodian" are re-defined as set forth in SB-105 or in a substantially similar manner. Absent such a change in the law, the courts will face the same difficulties in applying new statutes creating additional categories of presumptively disqualified fiduciaries that they presently face in applying section 21350 to presumptively invalid donative transfers. The new statutes could also unduly limit a dependent adult's appropriate choice of a fiduciary.

See Exhibit p. 4.

A similar concern was raised by Disability Rights California ("DRC"), in an earlier letter to the Commission on this topic. DRC noted that its position on the issues was dependent on whether and how the definitions of "care custodian" and "dependent adult" are changed by SB 105 (Harman). See First Supplement to Memorandum 2009-22.

Those sorts of concerns appeared to be manageable at the outset of this study, when it seemed likely that SB 105 would be enacted this year. However, as noted in Memorandum 2009-23, SB 105 has been made into a two-year bill. Consequently, the Legislature's final decision on the proper scope of the disqualified person classification will not be known until 2010.

That uncertainty as to the final state of the underlying law could cause the Commission to waste time and resources developing a proposal based on expectations that are not borne out. **For that reason, the staff recommends that this study be put on hold until the fate of SB 105 is settled.** That would probably mean setting it aside until the second quarter of 2010.

Respectfully submitted,

Brian Hebert
Executive Secretary

EMAIL FROM JORDAN POSAMENTIER, CALIFORNIA JUDGES ASSOCIATION (8/10/09)

Dear Brian,

Below are the CJA Probate & Mental Health Law Committee's comments on the proposed legislation re presumptively disqualified fiduciaries. These comments comprise the consolidated opinion of the Committee but not necessarily of CJA as a whole because the CJA Board has not reviewed and approved these comments.

Best regards,
Jordan

The issue is whether to extend the application of the statute regarding persons presumptively disqualified (because of fiduciary or other relationship) from inheritance or serving as trustee, to include presumptive disqualification from other fiduciary appointments:

(1) executor of a will,
(2) conservator,
(3) power of attorney, and
(4) power of appointment.

Whatever the scope of "presumptively disqualified persons" is (or should be, currently the subject of dispute in SB 105), it makes no sense to say, e.g., "you can't be a trustee, but you can act under a durable power of attorney (with the ability to transfer assets to yourself)." Because of the opportunity for abuse, durable powers of attorney are often called "a license to steal." So we support extending the same presumption against validity to powers of attorney naming someone presumptively disqualified.

We would likewise extend the presumptive disqualification to holders of powers of appointment. Mr. Gunderson of the OC had a clever trick when he couldn't convince a client to just write him into their will. He'd get them to give him a limited power of appointment to dispose of a percentage of his estate to a charity. When his clients died, he used this power to give the money to the rare and exotic birds unit of the San Diego Zoo. Having, then, extra cash, the rare and exotic birds unit of the San Diego Zoo would look for opportunities to buy rare and exotic birds. Conveniently for them, it happened that Mr. Gunderson was a breeder and seller of rare and exotic birds. So the money ended up back in Mr. Gunderson's hands.

We agree with the CLRC staff that there is "little need to extend the presumption" to conservatorship nominations. Conservators are appointed after extensive notice and investigation, are bonded for assets, and subject to follow-up investigations.

We would extend the presumptive disqualification to executors. They are appointed without independent investigation or scrutiny by the courts. They usually are unbonded, and have the ability to sell or refinance real estate assets under the IAEA, and abscond with the money. (By contrast, usually conservators cannot sell or encumber real property without a further noticed hearing and posting additional bond.) Many courts haven't the resources to do any follow-up to make sure personal representatives actually complete their fiduciary responsibilities.

The CLRC report mentions a concern about effectiveness of the presumption in these situations. Certainly, extending the presumption will be no panacea. We can't have the presumption work to invalidate transactions already done by attorneys-in-fact as to 3rd parties, or powers of attorney will cease to be effective because nobody will want to take the risk of transacting with the attorney-in-fact. But at least when the situation is brought to the court, we will be able to act in a way that is coherent throughout these fiduciary situations.

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August 14, 2009

VIA E-MAIL AND U.S. MAIL
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Re: Texcom Positions on Presumptively Disqualified Fiduciary Study

Dear Mr. Hebert:

I am writing to you on behalf of the Executive Committee of the California State Bar's Trust and Estate Section ("Texcom") to set forth its positions with respect to the desirability of proposing legislation creating additional categories of "presumptively disqualified" fiduciaries modeled on Probate Code section 15642.[1] Subject to statutory exceptions, section 15642 subjects persons described in section 21350(a) to removal as a trustee.[2] In brief, Texcom's positions are as follows:

1) persons identified in section 21350(a) should be presumptively subject to removal as the personal representative of an estate;

2) persons identified in section 21350(a) should be presumptively disqualified from serving as the conservator of the estate;

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[1] All statutory citations are to the Probate Code unless otherwise stated.

[2] In this context, "a person identified by section 21350(a)" need not be a donee of any donative transfer by the testator, conservator or principal under a power of attorney. Rather the person would be either:

(a) a person who drafts an instrument naming or nominating him or herself as the fiduciary;

(b) a person who has a fiduciary relationship with the testator, conservatee, or principal, and who transcribes the instrument naming or nominating him or herself as the fiduciary, or causes the instrument to be transcribed;

(c) a care custodian of a dependent adult who is the testator, conservator or principal; or

(d) in general terms, a person who has a close familial or financial relationship with the drafter, fiduciary transcriber, or care custodian.

3) persons identified in section 21350(a) should be presumptively subject to removal as an agent under a power of attorney where the scope of the power permits the attorney in fact to engage in transactions that could benefit him or herself; and

4) the donee of a power of appointment is not subject to "removal" since a power of appointment confers a gift rather than fiduciary powers. But section 21350 should be amended to clarify that this is the existing law, which would confirm that a power of appointment is presumptively invalid when held by a person identified in section 21350(a).

One substantial caveat is in order: Texcom's recommendations are premised on the assumption that the terms "dependent adult" and "care custodian" are re-defined as set forth in SB-105 or in a substantially similar manner. Absent such a change in the law, the courts will face the same difficulties in applying new statutes creating additional categories of presumptively disqualified fiduciaries that they presently face in applying section 21350 to presumptively invalid donative transfers. The new statutes could also unduly limit a dependent adult's appropriate choice of a fiduciary.

A detailed discussion of the rationale for Texcom's recommendations follows.

I. EXECUTOR OF A WILL

This study is being undertaken as a consequence of Texcom's recommendation in connection with the Commission's prior Donative Transfer Restrictions study that the presumption of fraud or undue influence applicable under section 15642(b)(6) as grounds to remove a trustee who is a disqualified person be extended to the removal of an executor who is a disqualified person. Texcom continues to recommend enactment of legislation with this effect. The principal distinction between a trustee and an executor is that the latter must be appointed by the court and in all cases exercises authority in administering the estate subject to the court's supervision. A trustee, in contrast, only administers a trust under the court's supervision when this is specifically invoked by the filing of a petition. While the opportunity for abuse is therefore greater with respect to trustees, in Texcom's opinion a presumption that a disqualified person serving as executor should be removed is still justified by the risk that an executor will abuse his or her authority over the estate.

First, court supervision operates "after the fact" and therefore generally serves to detect abuse. The risk of detection is an insufficient deterrent in many cases, which is why (subject to statutory exceptions) a personal representative must post a bond before letters are issued. See section 8480. Removal of an executor, in contrast, can operate as a prophylactic measure to prevent abuse from occurring in the first place. This is preferable to undertaking remedial measures, which, minimally, will consume the litigants' resources and the courts' limited time. Second, remedial measures may prove ineffective in that, for example, it may be impossible to locate an executor who has absconded with estate property, the executor may no longer have that property, the will may waive the requirement that the executor post a bond, or the executor may succeed in concealing his or her wrongdoing.

Significantly, the Legislature has not seen the existence of judicial scrutiny over a fiduciary as an adequate safeguard in other contexts. In particular, its desire to prevent abuses by court-appointed conservators led it to enact the Professional Fiduciaries Act, Business and Professions Code section 6500 et seq. A statutory amendment creating a presumption that a disqualified person who is serving as an executor should be removed is a far less onerous means of protecting against fiduciary abuse than a detailed regulatory licensing scheme.

By far the most common application of presumptive disqualification in this context would be to an attorney who has drafted a will naming himself or herself as the sole executor. While in the past this practice was relatively commonplace, that is no longer the case. Texcom believes that it is appropriate to view such instruments with a certain degree of suspicion and to place the burden on the attorney to demonstrate the propriety of the designation. This is what section 15642(b)(6) does with respect to an attorney serving as the sole trustee pursuant to a trust provision that the attorney drafted. Specifically, the court must remove such an attorney unless, based on "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 " or unless some other exception applies. Id. This exception helps to ensure that a self-named attorney is not unjustifiably removed and Texcom recommends that a similar exception apply with respect to executors (referencing the testator rather than the settlor).

The other exceptions to the removal of a disqualified person as the sole trustee -- a blood, marital or cohabiting relationship between the settlor and the trustee (subd. (b)(6)(A)), a certificate of independent review signed by an attorney disassociated from the interest of the trustee (subd. (b)(6)(C)), or prior court approval in a conservatorship of the instrument naming the attorney as executor (subd. (b)(6)(C)) also be carried forward in any proposal to presumptively disqualify an executor.[3] It would also make sense to extend to executors one of the exceptions to the invalidity of a donative transfer to a disqualified person; namely, the exception for governmental and nonprofit entities. See section 21351(f).

Enactment of a new law presumptively subjecting a disqualified person to removal as a trustee also entails determining whether there should be a similar presumption against appointment. At present, section 8502 sets forth five grounds for removal of an executor. Legislation presumptively subjecting a disqualified person serving as an executor to removal accordingly, could take the form of an amendment to section 8502 creating a sixth ground for

[3] It appears that some refinement of the exception to removal under section 15642(b)(6)(A) would be appropriate, both as applies to executors and trustees. First, this exception does not specify the degree of blood relationship between the settlor and the fiduciary that is required to establish the exception (Cf. section 21351(g) (persons within the fifth degree or heirs of the transferor are considered to be "related" for the purpose of the "related by blood or marriage" exception under section 21351(a).) Second, unlike the exception to presumptively invalid donative transfers, there is no exception for the removal of a trustee who was the settlor's registered domestic partner. Third, while a care custodian serving as the sole trustee is presumptively subject to removal, there is no exception for a care custodian who is related to the settlor.

removal. This is the approach that the Legislature took in presumptively subjecting disqualified persons to removal as a trustee, *i.e.*, it created a sixth ground for removal by adding subsection (b)(6) to section 15642. Alternatively, the Legislature could enact a new statute presumptively subjecting a disqualified person serving as an executor to removal. Due to the interplay section 8502 has with section 8402 -- the statute making certain categories of persons ineligible for *appointment* as a personal representative -- this difference in form will also make a substantial difference in substance. This is because under section 8502(a)(3), a person is not competent to act as a personal representative where "[t]here are grounds for removal of the person from office under section 8502." As such, an amendment to section 8502 presumptively subjecting a disqualified person to removal would also presumptively preclude the person's appointment as an executor, whereas enactment of a new statute apart from section 8502 would not have that effect. Obviously, this should be a conscious choice.

To date, Texcom has not determined whether to recommend presumptively disqualifying persons from appointment. The author, not speaking for Texcom, believes that the rationale favoring presumptive removal also supports presumptive disqualification from appointment, particularly the rationale favoring prophylactic measures over remedial measures.

II. CONSERVATORS

There are three basic types of conservators: 1) conservators of the person, who provide for conservatees' personal needs (section 1821(a)); 2) conservators of the estate, who manage conservatees' financial affairs (section 1821(b)); and 3) limited conservators for developmentally disabled adults, appointed for conservatees who retain all of their legal and civil rights except to the extent a court order expressly confers such rights on the conservator (section 1821(d)). Texcom recommends that a person identified in section 21350(a) as presumptively disqualified from receiving gifts also be presumptively disqualified from serving as a conservator of the *estate*, but that no such presumption apply with respect to service as the conservator of the person or the limited conservator of a developmentally disabled adult. The fundamental purpose of section 21350 is to protect property rights, which does not appropriately extend to the role of serving as a conservator of a person. Developmentally disabled persons subject to a limited conservatorship are presumed to be competent and should therefore be presumed able to make their own choice of a fiduciary.

Notably, a conservator of the estate generally has complete control over the conservatee's financial affairs (see section 2400 *et. seq.*) and many of the conservator's powers, including writing checks, selling securities and selling mutual funds can ordinarily be exercised without advance court approval. See sections 2544-2545. Conservators also receive compensation as authorized by the court. See section 2640. Accordingly, the opportunity to profit from serving as a conservator provides both an incentive to procure a nomination from a dependent adult and an opportunity to abuse the position for financial gain.

It is true, as Memorandum 2009-22 notes, that nomination as a conservator does not guarantee appointment, the appointment is only made after a court investigator interviews the proposed conservatee and those who are close to him or her and, once appointed, the court supervises the conservator. A presumption against the appointment of a disqualified person, however, is still warranted as an additional safeguard for at least eight reasons.

- Safeguards are particularly important in this context, because the conservatee is a living person very likely to be financially dependent on the assets managed by the conservator. A conservator who depletes the conservatorship estate does serious harm.

- Court investigators generally do not focus on the types of relationships identified by section 21350 in making recommendations regarding proposed conservators. A presumption against appointment would give rise to closer scrutiny in these circumstances and appropriately shifts the benefit of any doubt.

- Historically, and in part attributable to the fact that private individuals often serve as conservators, abuse and mismanagement has been a frequent problem in conservatorships of the estate. Conservators often defy supervision, for example, by failing to submit accountings or submitting them very late only after the threat or imposition of sanctions.

- Prophylactic measures to prevent harm are more effective than supervision to uncover wrongdoing followed by remedial measures to redress the harm.

- Particularly as to elderly proposed conservatees who may have become isolated over time, the number of persons who the court investigator interviews can be very limited. As well, in those cases a family member willing to serve as conservator may never emerge. Conservators often defy supervision, for example, failing to submit accountings or submitting them very late after the threat or imposition of sanctions.

- Conservatees often find themselves in a tug of war between competing proposed conservators. A disqualified person should have the burden of overcoming a presumption against appointment in this circumstance and a presumption, as opposed to *per se* disqualification, strikes an appropriate balance.

- Conservatees, by definition, are substantially unable to resist fraud and undue influence (section 1801(b)), and may be incapable of providing meaningful or accurate information to a court investigator or the court. Indeed, often a proposed conservatee never appears before the court.[4]

- A conservatorship can be established for a missing person. Section 1845 *et. seq.*

[4] Texcom does not agree that a compensated "care custodian" not covered by an exception under 21351, as that term would be defined under SB-105, would frequently be the most logical choice to be nominated as the conservator of the estate. But where the choice is appropriate, the care conservator would still have the opportunity to demonstrate this to the investigator and court since there would only be a *rebuttable* presumption against appointment.

III. ATTORNEYS IN FACT

A power of attorney is a written instrument pursuant to which a person with capacity to enter into a contract, the principal, grants authority to an attorney in fact, the agent. Section 4022. Powers of attorney are often, but not exclusively used so that someone can act on behalf of a principal who becomes incapacitated. A "springing power of attorney" becomes effective in the future and can be made agent on the principal's subsequent incapacity. Section 4030. A "durable power of attorney" may be exercised despite the principal's subsequent incapacity. Section 4125. The agent's act pursuant to a durable power of attorney bind the principal to the same extent that an act of the principal would be binding if undertaken when the principal had capacity. Section 4125. In essence, by executing a power of attorney the principal can give an attorney in fact authority to make decisions with respect to all of the principal's property, whether then owned or subsequently acquired. Section 4123. Section 4401 provides for a statutory form of power of attorney, readily available on the internet without charge, by which the principal court confer broad authority on the attorney in fact by initialing lines corresponding to various categories of transactions. These include, for example, "real property transactions," "stock and bond transactions," and banking and other financial institution transactions."

An attorney in fact, like a trustee, generally acts free of judicial intervention. Section 4500. While the principal can revoke the power of attorney (section 4153), this right is of little utility where the principal has become incapacitated. To rely on a person who is substantially unable to resist fraud or undue influence to revoke a power of attorney to protect himself or herself from financial abuse is unrealistic. Since the principal can simply revoke a power of attorney, almost invariably someone other than the principal files a petition to remove an attorney in fact. An attorney in fact is subject to removal under section 4541, but only where the court determines *all* of the following:

1) that the attorney in fact has violated or is unfit to perform fiduciary duties;

2) that the principal lacks the capacity to give or revoke a power of attorney when the court makes its determination; and

3) that revocation is in the best interest of the principal or the principal's estate.

Thus, to remove an attorney in fact ordinarily requires proof that the agent has actually engaged in some kind of wrongdoing.

If anything, a power of attorney provides greater opportunity for fiduciary abuse and can be more easily procured than a trust. There are often trust beneficiaries other than the settlor to whom the trustee must account or report or, minimally, have a sufficient interest in the trust's administration to make inquiries of the trustee. But there are no beneficiaries of a power of attorney whose existence might deter fiduciary abuse. Further, given the ready availability of statutory form powers of attorney and their lack of complexity relative to trusts, lay persons can more easily procure the execution of a power of attorney than a trust. Texcom believes that abuse of the authority conferred by a power of attorney is a significant problem that is increasingly being used as a means to commit elder abuse -- a single signature can enable the

abuse of the authority conferred by a power of attorney is a significant problem that is increasingly being used as a means to commit elder abuse -- a single signature can enable the perpetrator to engage in the multiple transactions necessary to take or sell every valuable asset the victim owns.

The financial incentive to wrongfully procure a power of attorney is obvious and the opportunity for abuse is rife. The rationale underlying section 15642(b)(6) strongly supports establishing a presumption that a disqualified person serving as an attorney in fact should be removed.[5]

IV. HOLDER OF A POWER OF APPOINTMENT

Memorandum 2009-22 invited Texcom to comment on the issue of whether the granting of a power of appointment constitutes a gift, in which case the statutory presumption under section 21350 may already apply to presumptively invalidate the grant. In Texcom's opinion, granting a power of appointment does constitute a "donative transfer" -- the terminology used by section 21350 -- as opposed to naming a fiduciary. Most fundamentally, section 610(e) defines the person who creates the power as a "donor" and section 610(d) defines the person to whom a power of appointment is given as a "donee." In addition, among other things, the donee of a general power of appointment may exercise the power in his or her own favor, or in favor of the donee's estate, the donee's creditors, or creditors of the donee's estate. See section 611(a). Finally, section 39 defines "fiduciary" but the specific types of fiduciaries it identifies do not include the holder of a power of appointment, who would also be outside the statute's catchall phrase "other legal representative subject to this code" as the role entails designating a person to receive property rather than acting as a representative.

Texcom agrees with the conclusion of Memorandum 2009-22 that there is an incentive to use fraud undue influence to obtain a power of appointment. In essence, this is a more sophisticated way to improperly procure a financial benefit from a dependent adult than simply procuring a bequest in a will or trust. Not only can the holder of a general power of appointment designate himself to receive the subject property but, as Memorandum 2009-22 correctly observes, even a general power of appointment ordinarily authorizes the donee to transfer the

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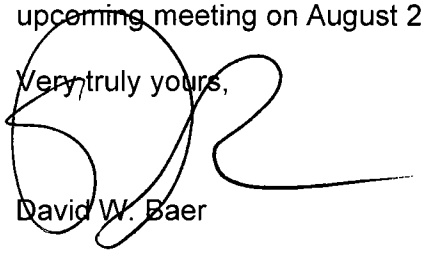
[5] At the last meeting addressing this topic, the Commission suggested that a statute providing for presumptively disqualified attorneys in fact might unduly restrict the utility of powers of attorney, which are widely used. Texcom does not believe that this will be a significant problem. First, that a disqualified person might be removed as a trustee certainly has not limited to the use of trusts. Second, if the petitioner seeking to remove the attorney in fact is not the principal, the petitioner must give the principal notice of the proceeding. Section 4544(a)(2). Third, since under section 4303 persons who act in good faith reliance on a power of attorney are immune from liability to the principal, the mere possibility that the attorney in fact could be removed should not deter third parties from engaging in transactions pursuant to powers of attorney. Nonetheless, there is no reason to provide for presumptive removal where the scope of the agent's authority does not permit the agent to benefit from the transaction. In particular, powers of attorney are often given to permit an agent to complete a specific transaction with a third person unrelated to the agent where the principal `will be unavailable to sign documents.

subject property to his or her family members or business associates. Accordingly, a presumption against the validity of a power of appointment certainly falls within the general rationale underlying section 21350 et seq.

Notably, while section 21350 et seq. operates by invalidating a provision of an instrument that makes a "donative transfer" to a "disqualified person," nothing in the statutory scheme or the related case law specifically states what a "donative transfer" is. Since the donee of a power of appointment may not immediately receive any property, if confronted with the issue, judicial officers who are less well versed in trust and estate law might be uncertain as to whether the grant of a power of appointment constitutes a "donative transfer" under section 21350. Given the important public policy of protecting dependent adults from financial abuse, there should be no uncertainty on this point. Accordingly, Texcom believes that if the Commission proposes any legislation as a result of this study, its proposal should include an amendment to section 21350 to clarify that, as a matter of existing law, the term "donative transfer" encompasses the creation of a power of appointment.

Please contact me if I can be of any further assistance. I look forward to attending the upcoming meeting on August 28.

Very truly yours,



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