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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

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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

Erratum

The original title of this article in print was: "The Danger of a Label: How the Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish to Make a Gift to Personal Friend."

COMMENT

THE DANGER OF A LABEL: HOW THE LEGAL INTERPRETATION OF "CARE CUSTODIAN" CAN FRUSTRATE A TESTATOR'S WISH TO MAKE A GIFT TO PERSONAL FRIEND

INTRODUCTION

Mr. Jones was a widower who recently passed away at age eighty-three.¹ He was an only child with no children, and his closest living relative was his cousin Richard, who lives in New York with his wife and family. Richard rarely contacted or visited Mr. Jones, and he did not even attend Mrs. Jones's funeral almost ten years ago. Mr. Jones slowed down considerably in his last few years. He was diagnosed with adult diabetes and could walk only with the support of a walker. He had to give up his driver's license and so was unable to drive himself to the doctor for appointments or to the drugstore to fill prescriptions.

Cathy grew up next door to Mr. and Mrs. Jones and had a close, almost filial, relationship with them. After Mrs. Jones passed away, Cathy frequently visited with Mr. Jones in an effort to raise his spirits. As Mr. Jones slowed down with age, Cathy began helping him by doing his grocery shopping, bringing him meals, driving him to doctor's appointments and getting his prescriptions filled for him. Mr. Jones eventually gave her his power of attorney, so that she could also help him

¹ Hypothetical derived from *Conservatorship of Davidson*, changing names, relationships and circumstances. See *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702 (Ct. App. 2003).

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manage his finances. On his own initiative, Mr. Jones changed his will, leaving half of his estate to Cathy. Prior to this change, Mr. Jones's entire estate was to go to his cousin in New York.

When Mr. Jones passed away, Cathy was shocked and touched that Mr. Jones remembered her so generously in his will. Unfortunately, Mr. Jones's cousin may be able to invalidate this transfer, simply by raising the sword of California Probate Code Section 21350.²

Section 21350 provides a presumption of invalidity when an elder or dependent adult makes a donative transfer to his or her care custodian.³ The definition of "care custodian" has varied among California appellate courts, causing confusion within the legal profession as to what the term encompasses.⁴ The California Court of Appeal for the First Appellate District ("First District") held that a personal friend who provides caretaking services is excluded from the scope of the statute.⁵ Therefore, the transfer to Cathy would be valid in the First District.⁶ In contrast, the California Court of Appeal for the Second Appellate District ("Second District") recently rejected this definition and held that such friends *are* included in the term "care custodian."⁷ As a result, Cathy would receive nothing in the Second District, regardless of Mr. Jones's wishes.⁸

The California Supreme Court recently granted review of the issue but has not yet reached a determination.⁹ However, this Comment asserts that despite how the court rules, the legislature should clarify the definition of "care custodian" to avoid complicated judicial analyses.¹⁰ A close review of the legislative history of the enactment and subsequent amendment of Section 21350 reveals that the intent of the legislature was to include only professional care custodians within the scope of its presumption of invalidity.¹¹ Amending the statute's definition of "care custodian" would best clarify that only those in the business of providing care to elders or dependent adults are to be included within its reach.¹² Personal relationships that fall outside the scope of the statute would then

² CAL. PROB. CODE § 21350 (Deering 2005).

³ CAL. PROB. CODE § 21350(a)(6) (Deering 2005).

⁴ See *infra* notes 85-134 and accompanying text.

⁵ See *infra* notes 87-114 and accompanying text.

⁶ *Id.*

⁷ See *infra* notes 115-134 and accompanying text.

⁸ *Id.*

⁹ *Bernard v. Foley*, 30 Cal. Rptr. 3d 716 (Ct. App. 2005), *rev. granted*, No. S136070, 120 P.3d 1050 (Cal. Sep. 21, 2005).

¹⁰ See *Bernard*, 30 Cal. Rptr. 3d 724; see also *infra* notes 135-190 and accompanying text.

¹¹ See *infra* notes 141-165 and accompanying text.

¹² See *infra* notes 191-195 and accompanying text.

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be governed by the traditional law of undue influence, which is better suited to a consideration of such relationships.¹³

Part I of this Comment examines the climate in which Section 21350 was enacted, including a summary of the law that traditionally governed contests of testamentary transfers on the grounds of undue influence prior to the statute's enactment.¹⁴ Part II argues that the statutory definition of "care custodian" should encompass only professional care custodians.¹⁵ Part III supplies the textual amendments that should be made to provide sufficient clarification of the term's meaning.¹⁶ Part IV concludes that the statute's amendment would continue to protect vulnerable elders or dependent adults from being taken advantage of by those with whom they have a fiduciary relationship, while simultaneously protecting their right to devise their estates according to their wishes and allowing for the reward of those who care for their ailing friends.¹⁷

I. SECTION 21350'S MODIFICATION OF THE TRADITIONAL LAW GOVERNING UNDUE INFLUENCE

Before Section 21350 took effect in 1994,¹⁸ the long-standing rules of undue influence governed when a testamentary transfer was contested on the grounds of undue influence.¹⁹ Section 21350 was enacted to make donative transfers to drafters of testamentary instruments presumptively invalid, shifting the burden of proving otherwise to the transferee.²⁰ The statute was later modified to extend the presumption of invalidity to transfers made to care custodians of dependent adults.²¹ Due to conflicting interpretations of "care custodian" by California appellate courts,²² the current legal climate demands further amendment of the statute to clarify that only transfers to professional care custodians are

¹³ See *infra* notes 166-190 and accompanying text.

¹⁴ See *infra* notes 18-134 and accompanying text.

¹⁵ See *infra* notes 135-190 and accompanying text.

¹⁶ See *infra* notes 191-195 and accompanying text.

¹⁷ See *infra* notes 196-205 and accompanying text.

¹⁸ See Eric Bailey and Davan Maharaj, *Wilson Signs Bill to Protect Estates of the Elderly*, L.A. TIMES, Aug. 3, 1993, at B1; see also CAL. PROB. CODE § 21350 (Deering 2005).

¹⁹ See *infra* notes 24-39 and accompanying text.

²⁰ See *infra* notes 40-57 and accompanying text.

²¹ See *infra* notes 58-66 and accompanying text.

²² Compare *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702, 710-18 (Ct. App. 2003) with *Bernard v. Foley*, 30 Cal. Rptr. 3d 716, 720-25 (Ct. App. 2005), *rev. granted*, No. S136070, 120 P.3d 1050 (Cal. Sep. 21, 2005); see also *infra* notes 85-134 and accompanying text.

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subject to this presumption.²³

A. PRE-STATUTE LAW OF UNDUE INFLUENCE

Prior to the enactment of Section 21350, the law of undue influence governed contests of testamentary transfers.²⁴ The California Probate Code declares ineffective any testamentary provision that is procured by “duress, menace, fraud or undue influence.”²⁵ The burden of proving that a donative transfer was procured through one of these prohibited means lies with the contestant of the testamentary document.²⁶ The proof presented by the contestant may be direct or circumstantial, but it must be substantial to negate a deceased person’s will.²⁷ Due to the common-law tradition of giving deference to the wishes of testators, courts are reluctant to invalidate the will of a deceased person.²⁸ The provisions of a properly executed will are generally recognized as valid without regard to how others may think the testator could have or should have distributed his or her estate.²⁹

To prove undue influence in this context, a contestant must be able to show not only that the proponent of the will used his or her influence to secure its execution, but also that the influence exerted was equivalent to “coercion destroying free agency on the part of the testator.”³⁰ Showing that the proponent had only a “mere opportunity to influence” or “mere general influence” is not sufficient to meet the contestant’s burden of proof.³¹ The contestant must prove the influence used was such that it “overpower[ed] the volition of the testator and operate[d] directly on the testamentary act.”³² Therefore, a very high burden of proof must be met for a court to hold a will invalid on the grounds of undue influence.³³

However, when a contestant can prove three specific elements

²³ See *infra* notes 135-190 and accompanying text.

²⁴ See *infra* notes 25-39 and accompanying text.

²⁵ CAL. PROB. CODE § 6104 (Deering 2005).

²⁶ CAL. PROB. CODE § 8252 (Deering 2005).

²⁷ Estate of Williams, 221 P.2d 714, 718 (Cal. Ct. App. 1950) (quoting Estate of Gleason, 130 P. 872, 876 (Cal. 1913)).

²⁸ Estate of Fritschi, 384 P.2d 656, 659 (Cal. 1963) (quoting *In re McDevitt*, 30 P. 101, 106 (Cal. 1892)).

²⁹ *Id.*

³⁰ Estate of Trefren, 194 P.2d 574, 578 (Cal. Ct. App. 1948) (quoting Estate of Easton, 35 P.2d 614, 616-17 (Cal. Ct. App. 1934)).

³¹ *Id.*

³² *Id.*

³³ *Id.*

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existed at the time of a will's execution, a rebuttable presumption of undue influence arises.³⁴ The burden then shifts to the proponent of the testamentary document to prove no undue influence was exerted to procure its execution.³⁵ The three elements a contestant must prove are that the testator had a confidential relationship with the proponent, the proponent actively participated in either the will's preparation or execution, and the terms of the will result in undue profit to the proponent.³⁶ The standard of proof that must be met by the proponent in rebutting the presumption of undue influence is a preponderance of evidence,³⁷ a relatively low standard, reflecting the long-standing reluctance at common law to negate a will.³⁸ These rules of undue influence governed all contests of testamentary transfers prior to the enactment of Section 21350, and they continue to apply when a transferee falls outside the scope of the statute.³⁹

B. CALIFORNIA PROBATE CODE SECTION 21350

Section 21350 was enacted in 1993 (effective January 1, 1994), following a scandal in Orange County, California, where estate-planning attorney James D. Gunderson took advantage of his relationship with elderly clients by writing himself into their testamentary documents as a beneficiary or by giving himself discretionary power over distribution of their assets.⁴⁰ The presumed invalidity of transfers made to drafters of testamentary documents, created by the statute, was expanded in 1997 (effective January 1, 1998) to include other fiduciaries of dependent adults, including care custodians.⁴¹

1. *History and Enactment*

Following a year-long investigation of attorney James D. Gunderson, the *Los Angeles Times* published a report that revealed that Gunderson had drafted thousands of testamentary documents in which he was either left large bequests of money, was named executor or was given the authority to choose to which organizations his client's money

³⁴ Estate of Sarabia, 270 Cal. Rptr. 560, 563 (Ct. App. 1990).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ See *Fritschi*, 384 P.2d at 659.

³⁹ See *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702, 720-22 (Ct. App. 2003).

⁴⁰ See *infra* notes 42-57 and accompanying text.

⁴¹ See *infra* notes 58-66 and accompanying text.

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would go.⁴² For example, one of his clients, Merrill A. Miller, changed his trust at age ninety-eight, with Gunderson's assistance, to leave \$3.5 million of his \$18 million estate to Gunderson.⁴³ This bequest came to Gunderson tax-free, because the document shifted the burden of paying estate taxes to the other beneficiaries.⁴⁴ Furthermore, a no-contest clause was included in Miller's will and trust, so that any beneficiary who contested the instrument would automatically lose his or her share of the estate.⁴⁵

The exposé of Gunderson received much attention and increased the general concern that fiduciaries closely positioned to the elderly may abuse their relationship.⁴⁶ As a result, a movement began in the legal community to statutorily shift the burden of proof from the contestant of a testamentary instrument to the proponent by causing certain transferees to be presumptively disqualified.⁴⁷ The *Los Angeles Times* report "was the catalyst for Assemblyman [Tom] Umberg to introduce Assembly Bill No. 21, December 7, 1992" for consideration by the California legislature.⁴⁸

The legislature responded to the heightened concern for the elderly by enacting Section 21350.⁴⁹ The statute in its original form became law on January 1, 1994.⁵⁰ It provided that a provision for a donative transfer to the drafter or transcriber of an instrument, including a will or trust, was presumptively invalid.⁵¹ The scope of invalidity stretched to

⁴² Davan Maharaj, *Leisure World Lawyer Heir to Clients' Millions*, L.A. TIMES, Nov. 22, 1992, at A1.

⁴³ *Id.*; Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson; Merrill A. Miller*, L.A. TIMES, Nov. 22, 1992, at A43; Davan Maharaj, *Attorney Must Return Millions From Estate*, L.A. TIMES, July 16, 1994, at A1.

⁴⁴ Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson; Merrill A. Miller*, L.A. TIMES, Nov. 22, 1992, at A43.

⁴⁵ *Id.* The use of no-contest clauses, such as the one used in the Miller trust, which make it impossible for beneficiaries to contest the validity of a testamentary document without risk of losing their own shares of the estate, was an issue of particular concern for the legislature. *Brown v. Brown (In re Estate of Bryant)*, 52 Cal. Rptr. 2d 755, 762 (Ct. App. 1996) (Work, Acting P.J., dissenting); The Orange County Superior Court issued a judgment ordering Gunderson to return the \$3.5 million bequest, plus \$500,000 interest, to the heirs of Merrill A. Miller. Davan Maharaj, *Attorney Must Return Millions From Estate*, L.A. TIMES, July 16, 1994, at A1.

⁴⁶ *Brown*, 52 Cal. Rptr. 2d at 762 (Work, Acting P.J., dissenting).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Eric Bailey and Davan Maharaj, *Wilson Signs Bill to Protect Estates of the Elderly*, L.A. TIMES, Aug. 3, 1993, at B1.

⁵⁰ *Id.*

⁵¹ Legislative Counsel's Digest, Assemb. Bill No. 21 (1993-1994 Reg. Sess.), available at http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_0001-0050/ab_21_bill_930802_chaptered (last visited February 9, 2006).

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encompass all those who were active in causing the instrument to be drafted or transcribed, as well as any relative or business associate of the drafter or transcriber.⁵²

In *Graham v. Lenzi*, the California Court of Appeal for the Fourth Appellate District discussed the legislature's rationale in making such transfers presumptively invalid.⁵³ The court determined that the legislature was motivated by an awareness that an inherent danger existed that those who are "uniquely positioned to procure gifts from elderly persons through fraud, menace, duress or undue influence" may take advantage of their position to the detriment of trustors and testators.⁵⁴ Reflecting this observation made in *Graham v. Lenzi*, the First District added in *Bank of America v. Angel View Crippled Children's Foundation* that the section was passed "to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior."⁵⁵

This shift in the burden of proof from the contestant of a donative transfer to its proponent significantly changed the traditional law of undue influence.⁵⁶ The change reflected the climate of concern regarding the vulnerability of elderly people, in addition to concern that contestants of testamentary transfers were heavily burdened by the high level of proof required of them at common law to invalidate such transfers on the ground of undue influence.⁵⁷

2. 1997 Amendment

In 1997 (effective January 1, 1998), the legislature expanded the presumption of invalidity of Section 21350 to include donative transfers made to a transferor's care custodian.⁵⁸ The amendment was sponsored by the Estate Planning, Trust & Probate Law Section of the State Bar of California.⁵⁹ In moving for an expansion of the presumption of

⁵² *Id.*

⁵³ *Graham v. Lenzi*, 43 Cal. Rptr. 2d 407, 411 (Ct. App. 1995).

⁵⁴ *Id.*

⁵⁵ *Bank of America v. Angel View Crippled Children's Found.*, 85 Cal. Rptr. 2d 117, 120 (Ct. App. 1999).

⁵⁶ See *supra* notes 24-39 and accompanying text.

⁵⁷ See *Bank of America*, 85 Cal. Rptr. 2d at 121. Another significant result of the statutory presumption of invalidity was that the initiation of a proceeding attacking the validity of a testamentary document in such situations could no longer be hindered by an intimidating no-contest clause. *Brown*, 52 Cal. Rptr. 2d at 762 (Work, Acting P.J., dissenting).

⁵⁸ CAL. PROB. CODE § 21350(a)(6) (Deering 2005).

⁵⁹ See *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702, 713 (Ct. App. 2003); see also Sen.

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invalidity, the amendment's proponents wished to encompass "practical nurses or other caregivers hired to provide in-home care," in addition to the "lawyers or other fiduciaries" already included in the scope of the statute.⁶⁰ Thus, the current form of Section 21350 was born.⁶¹ Accordingly, the statute now mandates that a presumption of invalidity shall be ascribed to testamentary transfers made by a dependent adult to his or her care custodian.⁶²

The statutory definition of a "care custodian" is found in Section 15610.17 of the California Welfare and Institutions Code.⁶³ This section defines a care custodian as

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.⁶⁴

Specific types of agencies, clinics, and facilities follow this definition, which concludes with a final catchall provision incorporating "*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.*"⁶⁵ The portions of the "care custodian" definition italicized above created ambiguity as to whether individuals who care for friends are included, and those provisions have spurred confusion and inconsistency of application of Section 21350 among California appellate courts.⁶⁶

Comm. on Judiciary, comm. on Assemb. Bill No. 1172 (1997-1998 Reg. Sess.) p. 4, available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970723_152510_sen_comm.html (last visited February 9, 2006).

⁶⁰ See Sen. Comm. on Judiciary, comm. on Assemb. Bill No. 1172 (1997-1998 Reg. Sess.) p. 4, available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970723_152510_sen_comm.html (last visited February 9, 2006); see also *Davidson*, 6 Cal. Rptr. 3d at 713.

⁶¹ CAL. PROB. CODE § 21350 (Deering 2005).

⁶² CAL. PROB. CODE § 21350(a)(6) (Deering 2005).

⁶³ CAL. PROB. CODE § 21350(c) (Deering 2005).

⁶⁴ CAL. WELF. & INST. CODE § 15610.17 (Deering 2005) (emphasis added); see also *Bernard v. Foley*, 30 Cal. Rptr. 3d 716, 721-22 (Ct. App. 2005), *rev. granted*, No. S136070, 120 P.3d 1050 (Cal. Sep. 21, 2005) (analyzing the definition); see also *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702, 710-12 (Ct. App. 2003) (discussing the significance of the definition's text).

⁶⁵ CAL. WELF. & INST. CODE § 15610.17(a)-(y) (Deering 2005); see also *Bernard*, 30 Cal. Rptr. 3d at 721-22 (analyzing the provision); see also *Davidson*, 6 Cal. Rptr. 3d at 710-13 (discussing the significance of the definition's text).

⁶⁶ See *infra* notes 85-134 and accompanying text.

2006] *LEGAL INTERPRETATION OF "CARE CUSTODIAN"* 2773. *Exceptions to the Presumption of Invalidity*

The legislature has recognized exceptions to the presumption of invalidity created by Section 21350.⁶⁷ A transfer that satisfies any of the exceptions enumerated in California Probate Code Section 21351 falls outside the scope of presumed invalidity.⁶⁸

First, the legislature excluded family members from the presumption by providing an exception for those related to the transferor by blood or marriage, including a cohabitant or registered domestic partner of the transferor.⁶⁹ The term "related by blood or marriage" encompasses those who are related to the transferor within five degrees of kinship.⁷⁰ This creates a wide sphere of exclusion, in that it extends to a transferor's great-great-great-grandchildren, great-great-great-grandparents, great-grand uncles and aunts, great-grand nephews and nieces, and first cousins once removed.⁷¹ Section 21350, therefore, applies only to transfers between unrelated or distantly related individuals who are not cohabitants or registered domestic partners.⁷²

Second, a Certificate of Independent Review may be obtained at the time a donative provision to a prohibited transferee is executed.⁷³ Should a contest of the transfer subsequently arise, this document may be used to rebut the presumption of invalidity otherwise imposed by Section 21350.⁷⁴ The Certificate of Independent Review is a written declaration that must be made by an attorney independent from the person who drafted the donative instrument, at the time a provision for a prohibited transferee is executed.⁷⁵ The Certificate states that the attorney has counseled the client (i.e., the transferor) for the purpose of determining whether the purported transfer was the result of fraud, menace, duress, or undue influence, and has come to the conclusion that it was not.⁷⁶ A

⁶⁷ CAL. PROB. CODE § 21351 (Deering 2005).

⁶⁸ *Id.*

⁶⁹ CAL. PROB. CODE § 21351(a) (Deering 2005).

⁷⁰ CAL. PROB. CODE § 21351(g) (Deering 2005).

⁷¹ JOEL C. DOBRIS, STEWART E. STERK & MELANIE B. LESLIE, *ESTATES AND TRUSTS CASES AND MATERIALS* 67 (Robert C. Clark et al. eds., Foundation Press 2d ed. 2003) (1998) (providing the Table of Consanguinity to illustrate the degrees of kinship within a family).

⁷² CAL. PROB. CODE § 21351(a), (g) (Deering 2005).

⁷³ CAL. PROB. CODE § 21351(b) (Deering 2005).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* A point that may warrant re-evaluation by the legislature is the advantage of requiring that an *independent* attorney execute a Certificate of Independent Review. *Id.* This was a logical requirement when Section 21350 was in its original form, meaning the prohibited transferee was the drafter of the testamentary document, because a conflict of interest existed. Legislative Counsel's Digest, Assemb. Bill No. 21 (1993-1994 Reg. Sess.), available at <http://www.leginfo.ca.gov/pub/93->

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drafting attorney who knows that a client's intended beneficiary is within the group presumptively disqualified by Section 21350 has a duty to advise that the client obtain a Certificate of Independent Review.⁷⁷

Third, a court order may be obtained validating a donative transfer if its proponent presents clear and convincing evidence that the transfer was not the product of fraud, menace, duress or undue influence.⁷⁸ The rules governing the pursuit of such a court order are quite stringent.⁷⁹ The evidence used may not be based solely on the testimony of any person listed in Section 21350(a) of the California Probate Code,⁸⁰ namely: the drafter of the instrument; any partner, shareholder or employee of a law partnership or corporation the drafter has an interest in; fiduciaries of the transferor; and a care custodian of a transferor who is a dependent adult.⁸¹ Included within the scope of "drafter," "fiduciary" and "care custodian" are any of such person's employees or relations by blood or marriage (including a cohabitant or registered domestic partner).⁸² The required clear-and-convincing standard of proof is much higher than the "preponderance of evidence" necessary to rebut a presumption of invalidity at common law.⁸³ This is consistent with the legislative intent that a rebuttal of a Section 21350 presumption of invalidity be much more difficult for persons who fall within its scope.⁸⁴

94/bill/asm/ab_0001-0050/ab_21_bill_930802_chaptered (last visited February 9, 2006). But when the designated transferee is the client's care custodian, is the drafter not in the same position as an independent attorney, if not a better position, to make a judgment as to the circumstances of the transfer, similar to a capacity judgment? *See generally* Matthew Bender & Co., Inc., 1 CALIFORNIA WILLS & TRUSTS § 11.03 (2005) (discussing testamentary capacity). If a client and the estate-planning attorney have a continuous relationship pursuant to which the client has returned seeking an amendment of his or her testamentary documents, that attorney may in fact be in a much better position than outside counsel to determine whether a purported transfer is the result of undue influence.

⁷⁷ *Osnorio v. Weingarten*, 21 Cal. Rptr. 3d 246, 266-67 (Ct. App. 2004). However, a testator may create a holographic will without seeking the counsel of an attorney. *See generally* Matthew Bender & Co., Inc., 1 CALIFORNIA WILLS & TRUSTS § 11.08 (2005). Such a testator may be unaware of Section 21350's presumption of invalidity, and a transfer to a disqualified recipient could be invalidated if contested. *See* CAL. PROB. CODE § 21350 (Deering 2005); *see also* Estate of McDowell, 23 Cal. Rptr. 3d 10, 24 (Ct. App. 2004).

⁷⁸ CAL. PROB. CODE § 21351(e) (Deering 2005). This option is unavailable, however, if the transferee is the drafter of the testamentary instrument. CAL. PROB. CODE § 21351(e)(1) (Deering 2005).

⁷⁹ *See infra* notes 80-83 and accompanying text.

⁸⁰ CAL. PROB. CODE § 21351(d) (Deering 2005).

⁸¹ CAL. PROB. CODE § 21350(a) (Deering 2005).

⁸² *See* CAL. PROB. CODE § 21350(a)(2), (5), (7) (Deering 2005).

⁸³ *See* Estate of Sarabia, 270 Cal. Rptr. 560, 563 (Ct. App. 1990).

⁸⁴ *See* Bank of America v. Angel View Crippled Children's Found., 85 Cal. Rptr. 2d 117, 121 (Ct. App. 1999). In addition, the presumption does not apply to bequests under \$3,000 (but only if the transferor's total estate is in excess of the amount provided by California Probate Code Section

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C. CONFLICTING INTERPRETATIONS OF "CARE CUSTODIAN" IN CALIFORNIA APPELLATE COURTS

The California appellate courts' conflicting interpretations of the definition of "care custodian" under Section 21350 has resulted in confusion among the legal community regarding the scope of its meaning.⁸⁵ The principal component of the definition at issue is whether the term is meant to encompass both those who care for dependent adults out of a personal relationship and those who professionally provide such care and are hired for that purpose.⁸⁶

1. Conservatorship of Davidson *and the First Appellate District of California*

The First District held that a care custodian whose relationship with a dependent adult has grown from purely professional roots is the type of relationship addressed by Section 21350.⁸⁷ In *Conservatorship of Davidson*, a personal friendship with a dependent adult evolved into one of caretaking.⁸⁸ The question presented was whether such a friend was to be included in the presumption of invalidity created by Section 21350.⁸⁹ In holding that the statute was not meant to encompass personal relationships, the court reasoned it would be bad public policy to "punish" those who care for the elderly for charitable and personal reasons.⁹⁰

In *Davidson*, decedent Dolores Davidson was the close friend of Stephen Gungl for almost forty years.⁹¹ Mrs. Davidson and her husband, when he was alive, had frequently socialized with Gungl and his life partner Howard Holtz over the years, spending numerous celebratory occasions and holidays together.⁹² As Davidson ailed and declined with age, Gungl and Holtz provided her with increasing amounts of assistance, which included cooking, shopping, and driving her to perform

13100) or to instruments executed by nonresidents of California, unless the instrument was signed in California or the transferor was a California resident at the time of execution. *See* CAL. PROB. CODE § 21351(h), (i) (Deering 2005).

⁸⁵ *See infra* notes 87-134 and accompanying text.

⁸⁶ *Id.*

⁸⁷ *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702, 715-16 (Ct. App. 2003).

⁸⁸ *Id.* at 705-10.

⁸⁹ *Id.* at 704-05.

⁹⁰ *Id.* at 713.

⁹¹ *Id.* at 705.

⁹² *Id.*

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errands or to get to appointments, such as those with her doctor.⁹³ Davidson eventually gave Gungl her power of attorney so that Gungl could also maintain her finances.⁹⁴

Davidson ultimately revoked her original will, which had provided for the bulk of her estate to go to her cousin Elaine Morken and her cousin's husband Cal Morken, her closest living relatives.⁹⁵ Her original will also provided for several specific bequests to other individuals, including a \$1,000 gift to Gungl.⁹⁶ In the new testamentary documents Davidson executed, she left the bulk of her estate to Gungl, with only a nominal \$5,000 bequest to the Morkens.⁹⁷ Following Davidson's death, Cal Morken contested the gift to Gungl,⁹⁸ claiming it was invalid due to the care custodial nature of Gungl's relationship with Davidson.⁹⁹

The court disagreed with Morken's contention that Section 21350 was meant to encompass caretaking provided in connection with a personal relationship.¹⁰⁰ Instead, the court interpreted the enumeration of public agencies and private professional organizations and individuals listed in Section 15610.17 of the California Welfare and Institutions Code as implying only the occupational provision of caretaking services was to be affected by the statute.¹⁰¹ Thus, the court held that only those who provide care as part of "the *professional or occupational* provision of health or social services" are to be included within the scope of the statute.¹⁰²

In addition, the court created a test to determine whether a caregiving relationship is primarily personal or professional.¹⁰³ According to this test, the key issue in analyzing a care custodian relationship is determining whether the provision of health and social services or the personal relationship existed first.¹⁰⁴ The court provided three factors that must be weighed to make this determination: "(1) the length of time the individuals had a personal relationship before assuming the roles of caregiver and recipient; (2) the closeness and

⁹³ *Davidson*, 6 Cal. Rptr. 3d at 705.

⁹⁴ *Id.* at 706.

⁹⁵ *Id.* at 705-07. Davidson was an only child. *Id.* at 705. Her husband passed away in the late 1970's, and they had no children. *Id.*

⁹⁶ *Id.* at 705.

⁹⁷ *Davidson*, 6 Cal. Rptr. 3d at 707.

⁹⁸ *Id.* at 709-10. Elaine Morken passed away on January 15, 2000. *Id.* at 705.

⁹⁹ *Id.* at 709-10.

¹⁰⁰ *Id.* at 704-05.

¹⁰¹ *Id.* at 711-12; *see* CAL. WELF. & INST. CODE § 15610.17 (Deering 2005).

¹⁰² *Davidson*, 6 Cal. Rptr. 3d at 715 (emphasis added).

¹⁰³ *Id.* at 716.

¹⁰⁴ *Id.*

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authenticity of the personal relationship; and (3) whether any money was paid for the provision of care."¹⁰⁵

The court determined that an analysis of these factors showed that the relationship between Gungl and Davidson was personal and excluded from the reach of Section 21350.¹⁰⁶ It reasoned that the two had been friends for almost forty years, and the genuine nature of their friendship was clear.¹⁰⁷ Any money paid to Gungl was reimbursement for expenses related to care that he had expended, not compensation for his services.¹⁰⁸

Because Section 21350 was not triggered, the court then examined whether Cal Morken, as the contesting beneficiary, had met the burden of proving that the transfer was the result of duress, menace, fraud or undue influence, pursuant to the traditional rules of undue influence.¹⁰⁹ The court found that he had not made a showing that the three necessary elements creating a presumption of undue influence existed.¹¹⁰ Although Gungl and Davidson had a relationship that qualified as confidential, Morken had shown neither active participation in the execution of the testamentary documents nor undue profit.¹¹¹ Contacting the drafter of Davidson's trust and being present at the initial meeting did not constitute active participation in its execution on Gungl's part.¹¹² Additionally, after considering the duration of Gungl and Davidson's friendship and the tremendous amount of care Gungl had provided to her, in contrast with the little interest the Morkens had taken in Davidson, no undue profit to Gungl was shown.¹¹³ Therefore, the court held that Gungl had not unduly influenced Davidson, and the testamentary provisions Davidson had made for his benefit were affirmed as valid.¹¹⁴

2. *Bernard v. Foley and the Second Appellate District of California*

In contrast, the Second District declined to apply the test created by the *Davidson* court to determine whether a caretaking relationship had derived from a primarily personal or professional relationship.¹¹⁵ In

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 716-18.

¹⁰⁷ *Id.* at 717-18.

¹⁰⁸ *Davidson*, 6 Cal. Rptr. 3d at 716-17.

¹⁰⁹ *Id.* at 720-22; *see also supra* notes 24-39 and accompanying text.

¹¹⁰ *Davidson*, 6 Cal. Rptr. 3d at 720-22; *see supra* notes 34-38 and accompanying text.

¹¹¹ *Davidson*, 6 Cal. Rptr. 3d at 721-22.

¹¹² *Id.* at 721.

¹¹³ *Id.* at 721-22.

¹¹⁴ *Id.* at 722.

¹¹⁵ *Bernard v. Foley*, 30 Cal. Rptr. 3d 716, 723-24 (Ct. App. 2005), *rev. granted*, No.

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Bernard v. Foley, after a consideration of legislative intent and a strict reading of Sections 21350 and 21351, the court broadly defined “care custodian” to include all those who provide health services to the elderly or dependent adults, regardless of the personal or professional nature of their relationship, by focusing on the provision of health services.¹¹⁶

The *Bernard* court partially based its holding on the portion of Section 15610.17 of the California Welfare & Institutions Code that includes a catchall definition of care custodian as “persons providing care or services for elders or dependent adults.”¹¹⁷ The court concluded that a strict reading of Section 21350, and the fact that specific exemptions are made to the rule in Section 21351, implies the exclusion of any other exception.¹¹⁸ The court determined that “[h]ad the Legislature wished to exempt preexisting friends from the definition of care custodian, it would have done so,” and it was not the role of the courts to “usurp the legislative function” and expand the law in such a way.¹¹⁹

In *Bernard*, the decedent, Carmel L. Bosco, was also a widow with no children.¹²⁰ During the last two months of her life, Bosco lived with her nephew’s ex-wife, Ann Erman, and Erman’s boyfriend, James Foley.¹²¹ Three days before Bosco passed away, she amended her trust to designate Erman and Foley as equal beneficiaries of the trust residue.¹²² Prior to that time, no provision had been made for either Erman or Foley in the trust.¹²³ The beneficiaries whose interests in Bosco’s estate were reduced or eliminated as a result of the amendment contested its validity.¹²⁴

In reaching its decision, the court emphasized the significance of including the term “practical nurse” in the Senate Commentary on the Assembly Bill for the enactment of Section 21350(a)(6) of the California Probate Code.¹²⁵ The record showed that Erman and Foley assisted

S136070, 120 P.3d 1050 (Cal. Sep. 21, 2005).

¹¹⁶ *Id.* at 722-24.

¹¹⁷ *Id.* at 722; CAL. WELF. & INST. CODE § 15610.17(y) (Deering 2005).

¹¹⁸ *Bernard*, 30 Cal. Rptr. 3d at 724.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 718.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Bernard*, 30 Cal. Rptr. 3d at 718.

¹²⁴ *Id.* at 718-19.

¹²⁵ *Id.* at 720 (quoting Conservatorship of Davidson, 6 Cal. Rptr. 3d 702, 713 (Ct. App. 2003)); Sen. Comm. on Judiciary, comm. on Assemb. Bill No. 1172 (1997-1998 Reg. Sess.) p. 4, available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970723_152510_sen_comm.html (last visited February 9, 2006).

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Bosco with numerous tasks, including meal preparation, cleaning and helping her with daily personal hygiene maintenance.¹²⁶ Erman also administered oral medications and topical medicines to wounds on the decedent's legs.¹²⁷ The court held that the provision of such "health services" elevated the level of caretaking to that of a professional practical nurse.¹²⁸ Therefore, Erman and Foley fell within Section 21350's presumption of undue influence.¹²⁹ Since they did not present clear and convincing evidence to rebut that presumption, the testamentary provision made for their benefit was held invalid.¹³⁰

The *Bernard* court also distinguished *Davidson*, in which the assistance provided by the beneficiary basically consisted of cooking, shopping, driving and providing financial services, and did not constitute "health services" of a medical nature.¹³¹ But the definition of "care custodian" provided by Section 15610.17 of the California Welfare & Institutions Code includes in pertinent part the provision of "health services or social services."¹³² In focusing its decision on the health services Erman provided to Bosco, the *Bernard* court did not specifically address whether services similar to those in *Davidson* would fall within the scope of "social services," likewise making Section 21350 applicable.¹³³ However, its vehement rejection of *Davidson's* preexisting-personal-relationship exception strongly suggests that the *Bernard* court would have held someone like Gungl to be a care custodian within the scope of Section 21350.¹³⁴

II. THE NEED TO AMEND THE DEFINITION OF "CARE CUSTODIAN" TO INCLUDE ONLY PROFESSIONALS

Currently, there is no clear standard that may be relied upon regarding the correct definition of "care custodian."¹³⁵ Conflicting interpretations by California appellate courts reveal this ambiguity.¹³⁶ A

¹²⁶ *Bernard*, 30 Cal. Rptr. 3d at 722.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 725-26.

¹³⁰ *Id.*

¹³¹ *Id.* at 724-25.

¹³² CAL. WELF. & INST. CODE § 15610.17(y) (Deering 2005) (emphasis added).

¹³³ *Bernard*, 30 Cal. Rptr. 3d at 720-26.

¹³⁴ *Id.* at 723-24. The California Supreme Court has granted review of the decision reached in *Bernard*, but has not yet reached a determination. *Bernard v. Foley*, 30 Cal. Rptr. 3d 716 (Ct. App. 2005), *rev. granted*, No. S136070, 120 P.3d 1050 (Cal. Sep. 21, 2005).

¹³⁵ *See supra* notes 85-134 and accompanying text.

¹³⁶ *Id.*

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close scrutiny of the statute and the legislative intent behind its enactment support the First District's conclusion and its interpretation that only transfers to professional caregivers are regulated by this section.¹³⁷ To resolve the uncertainty, the text of the statutory definition of "care custodian" should be amended to include only professional caregivers and their employees.¹³⁸ Personal friends who become caregivers of the elderly or dependent adults should be excluded from the scope of the definition because (1) it was the legislature's original intent to include only professional caregivers,¹³⁹ and (2) the traditional law of undue influence is better suited to govern personal caregiving relationships that fall outside the intended scope of the statute.¹⁴⁰

A. THE LEGISLATURE DID NOT INTEND TO INCLUDE PERSONAL FRIENDS WITHIN THE SCOPE OF "CARE CUSTODIAN."

A close reading of both the proposal for legislation¹⁴¹ and analysis regarding the Assembly Bill for the enactment of section 21350(a)(6) of the California Probate Code¹⁴² suggests an intent to include only professional caregivers, and not personal caregivers, in the statutory definition of "care custodian."¹⁴³ A key element of the analysis is the inclusion of the term "practical nurse" in legislative documents.¹⁴⁴ The court in *Bernard* suggested that the term "practical nurse" may refer to an unlicensed individual who administers medicines and provides health services.¹⁴⁵ However, the general meaning of the term, as well as the context in which it is used in both the proposal and analysis, indicates it

¹³⁷ See *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702, 710-16 (Ct. App. 2003); see also *infra* notes 141-165 and accompanying text.

¹³⁸ See *infra* notes 191-195 and accompanying text.

¹³⁹ See *infra* notes 141-165 and accompanying text.

¹⁴⁰ See *infra* notes 166-190 and accompanying text.

¹⁴¹ See *Davidson*, 6 Cal. Rptr. 3d at 713; see also Cal. State Bar Estate Planning, Trust & Prob. Law Section, Legislative Proposal, Assemb. Bill No. 1172, excerpted from Senate Comm. on Judiciary legislative bill file.

¹⁴² See *Davidson*, 6 Cal. Rptr. 3d at 713; see also Sen. Comm. on Judiciary, comm. on Assemb. Bill No. 1172 (1997-1998 Reg. Sess.) p. 4, available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970723_152510_sen_comm.html (last visited February 9, 2006).

¹⁴³ *Davidson*, 6 Cal. Rptr. 3d at 712-13.

¹⁴⁴ *Id.*; see also *Bernard*, 30 Cal. Rptr. 3d at 720 (quoting *Davidson*, 6 Cal. Rptr. 3d at 713); see also Cal. State Bar Estate Planning, Trust & Prob. Law Section, Legislative Proposal, Assemb. Bill No. 1172, excerpted from Senate Comm. on Judiciary legislative bill file; see also Sen. Comm. on Judiciary, comm. on Assemb. Bill No. 1172 (1997-1998 Reg. Sess.) p. 4, available at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970723_152510_sen_comm.html (last visited February 9, 2006).

¹⁴⁵ *Bernard*, 30 Cal. Rptr. 3d at 722-25.

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was used to convey a professional relationship.¹⁴⁶

The proponents of adding care custodians to Section 21350's list of presumptively disqualified transferees emphasized the term "practical nurse" in articulating the purpose and application of the proposed amendment.¹⁴⁷ Concern was expressed that the elderly or other dependent adults may be taken advantage of by those in the "industry" who were determined to be "practical nurses."¹⁴⁸ The amendment's proponents felt that including care custodians within Section 21350's presumption of invalidity would "prevent the growing 'cottage industry' of 'practical nurses' from successfully taking advantage of dementing elders" by eliminating the incentive to do so.¹⁴⁹ Use of the word "industry" has a business connotation that indicates an intent by the proponents of the Bill for the amendment to apply to those who are in the *business* of being practical nurses, as opposed to those who provide medical care in the course of personal caregiving.¹⁵⁰

Furthermore, the general meaning ascribed to the term "practical nurse" has a professional connotation.¹⁵¹ Two dictionaries provide the definition of a "practical nurse" as either (1) a "licensed practical nurse" or (2) a "person who has had practical experience in nursing care but who is not a graduate of a degree program in nursing."¹⁵² Although the second part of this definition could be read to allow for the inclusion of individuals such as Ann Erman in *Bernard*, who administered oral medications and topical medicines to wounds on the decedent Carmel L. Bosco's legs,¹⁵³ another dictionary resolves this uncertainty by defining a "practical nurse" as "a nurse who cares for the sick *professionally*

¹⁴⁶ See *infra* notes 147-165; see also *Davidson*, 6 Cal. Rptr. 3d at 713.

¹⁴⁷ *Davidson*, 6 Cal. Rptr. 3d at 713; see also Cal. State Bar Estate Planning, Trust & Prob. Law Section, Legislative Proposal, Assemb. Bill No. 1172, excerpted from Senate Comm. on Judiciary legislative bill file.

¹⁴⁸ *Davidson*, 6 Cal. Rptr. 3d at 713; see also Cal. State Bar Estate Planning, Trust & Prob. Law Section, Legislative Proposal, Assemb. Bill No. 1172, excerpted from Senate Comm. on Judiciary legislative bill file.

¹⁴⁹ *Davidson*, 6 Cal. Rptr. 3d at 713 (quoting Cal. State Bar Estate Planning, Trust & Prob. Law Section, Legislative Proposal, Assemb. Bill No. 1172, excerpted from Senate Comm. on Judiciary legislative bill file) (emphasis added).

¹⁵⁰ See *Davidson*, 6 Cal. Rptr. 3d at 713.

¹⁵¹ See *infra* notes 152-155 and accompanying text.

¹⁵² "Practical Nurse," THE AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE (Joseph P. Pickett et al., eds., Houghton Mifflin Co. 4th ed. 2000), available at <http://www.dictionary.com/search?q=practical%20nurse> (last visited February 9, 2006); "Practical Nurse," THE AMERICAN HERITAGE® STEDMAN'S MEDICAL DICTIONARY (Houghton Mifflin Co. 2d ed. 2002), available at <http://www.dictionary.com/search?q=practical%20nurse> (last visited February 9, 2006).

¹⁵³ *Bernard*, 30 Cal. Rptr. 3d at 722.

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without having the training or experience required of a registered nurse.”¹⁵⁴ An additional source classifies a practical nurse as “a nurse who has *enough training to be licensed* by a state to provide routine care for the sick.”¹⁵⁵ When these definitions provided by various general dictionaries are taken as a whole, it appears that the generally accepted definition of a “practical nurse” is one who provides nursing services professionally.¹⁵⁶

Additionally, programs for the acquisition of practical nursing degrees are offered by a variety of educational institutions.¹⁵⁷ The Bureau of Labor Statistics in the U.S. Department of Labor, in a report issued on the occupational outlook of licensed practical nurses, describes a licensed practical nurse (“LPN”) as one who “care[s] for the sick, injured, convalescent, and disabled under the direction of physicians and registered nurses.”¹⁵⁸ Such nurses provide basic care such as monitoring their patients, administering medications and aiding with personal activities.¹⁵⁹ It is noteworthy that in the report, the term “practical nurse” is used interchangeably with “licensed practical nurse,” or “LPN,” indicating that a reference to a “practical nurse” has the same professional connotation.¹⁶⁰

In the analysis prepared for the Senate Judiciary Committee regarding the Assembly Bill for the enactment of Section 21350(a)(6) of the California Probate Code, the proponents of the bill expressed a desire to extend the scope of the statute by making donative transfers to

¹⁵⁴ “Practical Nurse,” MERRIAM-WEBSTER’S MEDICAL DESK DICTIONARY (Merriam-Webster, Inc. Revised ed. 2002), available at <http://www.dictionary.com/search?q=practical%20nurse> (last visited February 9, 2006) (emphasis added).

¹⁵⁵ “Practical Nurse,” WORDNET® 2.0 (Princeton University 2003), available at <http://www.dictionary.com/search?q=practical%20nurse> (last visited February 9, 2006) (emphasis added).

¹⁵⁶ See *supra* notes 152-155 and accompanying text.

¹⁵⁷ See Degree-Site.com, Index of Schools for Practical Nursing, available at http://www.degree-site.com/medical_healthcare/practical_nursing.html (last visited February 9, 2006).

¹⁵⁸ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2004-05 Edition*, Licensed Practical and Licensed Vocational Nurses, available at <http://www.bls.gov/oco/ocos102.htm> (last visited February 9, 2006); see also *Bernard*, 30 Cal. Rptr. 3d at 722.

¹⁵⁹ Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2004-05 Edition*, Licensed Practical and Licensed Vocational Nurses, available at <http://www.bls.gov/oco/ocos102.htm> (last visited February 9, 2006); see also *Bernard*, 30 Cal. Rptr. 3d at 722.

¹⁶⁰ See Bureau of Labor Statistics, U.S. Department of Labor, *Occupational Outlook Handbook, 2004-05 Edition*, Licensed Practical and Licensed Vocational Nurses, available at <http://www.bls.gov/oco/ocos102.htm> (last visited February 9, 2006).

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"practical nurses or other caregivers hired to provide in-home care" presumptively invalid.¹⁶¹ Taken in context, the phrase strongly suggests usage of the term "practical nurse" in a professional sense.¹⁶² The text in the analysis specifically states "practical nurses *or other caregivers hired to provide in-home care.*"¹⁶³ The use of the words "or other" indicates that practical nurses are considered hired caregivers.¹⁶⁴ This reveals legislative intent that those hired and paid to provide care to the elderly or dependent adults be included in the scope of the presumption of invalidity.¹⁶⁵

B. THE TRADITIONAL LAW OF UNDUE INFLUENCE IS BETTER SUITED TO GOVERN TRANSFERS MADE IN THE CONTEXT OF PERSONAL CAREGIVER RELATIONSHIPS.

If the circumstances surrounding a donative transfer left to a friend are suspect, the traditional law of undue influence provides sufficient recourse to a contestant.¹⁶⁶ These long-standing laws are much better suited to govern a personal caregiver relationship than the automatic presumption of invalidity created by Section 21350.¹⁶⁷ They provide for simultaneous protection of both the right of the decedent to devise his or her estate as he or she sees fit and the rights of a natural beneficiary.¹⁶⁸

Testamentary provisions procured by duress, menace, fraud or undue influence are ineffective.¹⁶⁹ A contestant has the burden of proving undue influence¹⁷⁰ but may shift the burden of proof to the proponent of the testamentary provision if the contestant is able to show (1) a confidential relationship between the transferor and beneficiary, (2) active participation on the part of the beneficiary in the execution of the

¹⁶¹ Conservatorship of Davidson, 6 Cal. Rptr. 3d 702, 713 (Ct. App. 2003); Sen. Comm. on Judiciary, comm. on Assemb. Bill No. 1172 (1997-1998 Reg. Sess.) p. 4, *available at* http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970723_152510_sen_comm.html (last visited February 9, 2006).

¹⁶² *See Davidson*, 6 Cal. Rptr. 3d at 712-13.

¹⁶³ Sen. Comm. on Judiciary, comm. on Assemb. Bill No. 1172 (1997-1998 Reg. Sess.) p. 4, *available at* http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970723_152510_sen_comm.html (last visited February 9, 2006) (emphasis added); *see Davidson*, 6 Cal. Rptr. 3d at 713.

¹⁶⁴ *See Davidson*, 6 Cal. Rptr. 3d at 713.

¹⁶⁵ *Id.* at 712-13.

¹⁶⁶ *See Davidson*, 6 Cal. Rptr. 3d at 720-22; *see also supra* notes 24-39 and accompanying text.

¹⁶⁷ *See Davidson*, 6 Cal. Rptr. 3d at 720-22.

¹⁶⁸ *Id.*

¹⁶⁹ CAL. PROB. CODE § 6104 (Deering 2005).

¹⁷⁰ CAL. PROB. CODE § 8252 (Deering 2005).

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testamentary document, and (3) undue profit to the beneficiary.¹⁷¹

A personal relationship in which a friend provides some care of either a financial or medical nature to a dependent adult is included in the scope of a “confidential relationship.”¹⁷² In *Estate of Chesney*, neighbors began to assist the decedent when she became incapacitated as a result of two strokes and a sprained ankle, and they later entered into an agreement with the decedent that they would care for her for the rest of her life in return for the deed to her house.¹⁷³ The court held that these neighbors had a confidential relationship with the decedent.¹⁷⁴ In *Estate of Wright*, a neighboring long-time friend was considered to have had a confidential relationship with the decedent because she provided services such as shopping, driving, administration of shots and payment of bills, and was a joint tenant in the decedent’s house and bank account.¹⁷⁵ Similarly, after determining that Section 21350 did not apply, the court in *Davidson* held that by virtue of the nature of the assistance Gungl provided to Davidson, their friendship amounted to a confidential relationship.¹⁷⁶ Thus, concerns regarding vulnerability that may result from such a relationship are already met.¹⁷⁷

However, under the traditional rules, the burden to disprove undue influence will not shift to such a friend unless the other two elements are also met: (1) the friend played an active role in the execution of a testamentary document from which he or she would benefit, and (2) the friend unduly profited from the transfer.¹⁷⁸ As discussed above, the court in *Davidson* found that these elements had not been met; therefore, the contesting beneficiary had not met his burden of proof and the trust was valid.¹⁷⁹ The court in *Estate of Wright* also concluded that the remaining two elements had not been shown to exist and held the contested instrument to be valid.¹⁸⁰

By contrast, in *Estate of Chesney*, the court found that the neighbors played an active role in the procurement of the contested will because Mrs. Bosworth not only was present at the signing of the will but had

¹⁷¹ See *Estate of Sarabia*, 270 Cal. Rptr. 560, 563 (Ct. App. 1990); see also *supra* notes 34-38 and accompanying text.

¹⁷² See, e.g., *Estate of Chesney*, 228 P.2d 46, 47-48 (Cal. Ct. App. 1951); see also, e.g., *Estate of Wright*, 33 Cal. Rptr. 5, 9 (Ct. App. 1963).

¹⁷³ *Chesney*, 228 P.2d at 47-48.

¹⁷⁴ *Id.* at 48.

¹⁷⁵ *Wright*, 33 Cal. Rptr. at 6-8.

¹⁷⁶ *Conservatorship of Davidson*, 6 Cal. Rptr. 3d 702, 721 (Ct. App. 2003).

¹⁷⁷ See *Davidson*, 6 Cal. Rptr. 3d at 720-22.

¹⁷⁸ *Id.*; see *Estate of Sarabia*, 270 Cal. Rptr. 560, 563 (Ct. App. 1990).

¹⁷⁹ *Davidson*, 6 Cal. Rptr. 3d at 722; see *supra* notes 109-114 and accompanying text.

¹⁸⁰ *Wright*, 33 Cal. Rptr. at 8-10.

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dictated the terms to an attorney who never consulted personally with the decedent.¹⁸¹ The court additionally found that the neighbors had unduly profited to the exclusion of the decedent's relatives, satisfying the third element.¹⁸² The satisfaction of all three elements resulted in a finding of undue influence that invalidated the will in question.¹⁸³

These examples demonstrate that the traditional law of undue influence protects personal friends to whom a decedent may wish to make a testamentary gift, while also providing protection to the decedent and other beneficiaries in the case of a suspect personal relationship.¹⁸⁴ It is logical to presume that no undue influence was involved when a friend exercised no power over how a testator chose to devise his or her property. This is a reasonable conclusion because the actions of the friend were completely independent from the drafting of any testamentary document. Likewise, if evidence is presented that a genuine friendship existed between a proponent of a will and an elder or dependent adult to whom the proponent provided attentive care, it is reasonable to conclude that a transfer to such a friend did not constitute undue profit, especially if someone who would appear to be a more natural object of the elder's bounty and affection took no interest in the elder.¹⁸⁵

Furthermore, as noted in *Estate of Fritschi*, "the right to dispose of one's property by will is most solemnly assured by law, and . . . does not depend upon its judicious use."¹⁸⁶ In *Davidson*, the court expressed concern that the imposition of "burdensome technical and procedural barriers on the ability of elderly individuals to recognize and reward services performed for them in their declining years by close personal friends, intimates and companions" would be the result of an inclusion of such individuals within the scope of Section 21350.¹⁸⁷ The court reasoned that this would essentially serve as punishment to those who had committed "self-sacrificing acts of care and companionship," as well as a limit on the fundamental right to testamentary disposition.¹⁸⁸

Because the traditional law of undue influence provides a scheme

¹⁸¹ *Chesney*, 228 P.2d at 48.

¹⁸² *Id.* at 47-49.

¹⁸³ *Id.* at 47 and 49.

¹⁸⁴ See *Davidson*, 6 Cal. Rptr. 3d at 720-22.

¹⁸⁵ See *Estate of Williams*, 221 P.2d 714, 719-20 (Cal. Ct. App. 1950); see also *Wright*, 33 Cal. Rptr. at 9-10; see also *Davidson*, 6 Cal. Rptr. 3d at 721-22.

¹⁸⁶ *Estate of Fritschi*, 384 P.2d 656, 659 (Cal. 1963) (quoting *In re McDevitt*, 30 P. 101, 106 (Cal. 1892)).

¹⁸⁷ *Davidson*, 6 Cal. Rptr. 3d at 713.

¹⁸⁸ *Id.*; see also *Fritschi*, 384 P.2d at 659.

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that better suits the situation in which a contestant questions a transfer resulting from a personal caregiver relationship, such personal friends should not be included within the automatic presumption of Section 21350.¹⁸⁹ This approach prevents encroachment upon the hallowed right of testators to devise their estates as they wish.¹⁹⁰

III. PROPOSED AMENDMENT OF THE STATUTORY DEFINITION OF “CARE CUSTODIAN”

Section 21350 uses the definition of “care custodian” provided by Section 15610.17 of the California Welfare and Institutions Code.¹⁹¹ Section 15610.17 currently begins by stating:

“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.¹⁹²

Ambiguity as to the scope of this definition would be resolved by shifting part of the text and adding the words “hired to provide,” to read as follows:

“Care custodian” means an administrator or an employee of any of the following public or private facilities or agencies, including members of the support staff and maintenance staff, or other persons *hired to provide* care or services for elders or dependent adults.

This change would clarify that the definition encompasses only those individuals who are in the occupation of providing caretaking services.

Following the enumeration of various public and private facilities and agencies,¹⁹³ the catchall provision at the end of the code section should likewise be modified to resolve ambiguity. It currently includes within the definition of “care custodian”:

Any other protective, public, sectarian, mental health or private assistance or advocacy agency or person providing health services or

¹⁸⁹ See *Davidson*, 6 Cal. Rptr. 3d at 714-15 and 720-22.

¹⁹⁰ *Id.*; see also *Fritschi*, 384 P.2d at 659.

¹⁹¹ CAL. PROB. CODE § 21350(c) (Deering 2005).

¹⁹² CAL. WELF. & INST. CODE § 15610.17 (Deering 2005).

¹⁹³ CAL. WELF. & INST. CODE § 15610.17(a)-(x) (Deering 2005).

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social services to elders or dependent adults.¹⁹⁴

However, the addition of the words "who is hired" would limit the scope of the definition to exclude a personal friend who provides care to an elder or dependent adult. Subpart (y) of Section 15610.17 should therefore read as follows:

Any other protective, public, sectarian, mental health or private assistance or advocacy agency or person *who is hired* to provide health services or social services to an elder or dependent adult.

These two changes to the text of Section 15610.17 of the California Welfare and Institutions Code would provide for consistency in application among California courts by clarifying that only professional individuals, hired for the purpose of providing care to an elder or dependent adult, are to be included within the scope of the "care custodian" definition.¹⁹⁵

IV. CONCLUSION

In expanding Section 21350's presumption of invalidity to include "care custodians," the legislature has created an ambiguity as to whom the term encompasses.¹⁹⁶ This ambiguity has manifested itself in the conflicting decisions of California appellate courts.¹⁹⁷ The First District's holding that only professional care custodians are included within the statute's scope is in direct contrast with the Second District's view that personal friends who provide care are also included.¹⁹⁸ The California Supreme Court has granted a petition for review of the decision reached by the Second District in *Bernard v. Foley*, but it has not yet reached a determination.¹⁹⁹ However, a statutory amendment would best clarify the statute and achieve consistency in application by California courts.²⁰⁰ The text of Section 15610.17 of the California Welfare and Institutions Code, which provides the definition of "care custodian" for purposes of Section 21350, should be amended to include

¹⁹⁴ CAL. WELF. & INST. CODE § 15610.17(y) (Deering 2005).

¹⁹⁵ See *Davidson*, 6 Cal. Rptr. 3d at 714-16.

¹⁹⁶ See *supra* notes 58-66 and accompanying text.

¹⁹⁷ See *supra* notes 85-134 and accompanying text.

¹⁹⁸ *Id.*

¹⁹⁹ *Bernard v. Foley*, 30 Cal. Rptr. 3d 716 (Ct. App. 2005), *rev. granted*, No. S136070, 120 P.3d 1050 (Cal. Sep. 21, 2005).

²⁰⁰ See *supra* notes 135-165 and accompanying text; see also *Bernard*, 30 Cal. Rptr. 3d at 724.

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only professional care custodians.²⁰¹ A study of the legislative history leading up to the enactment of Section 21350 supports a finding that only professional caregivers were meant to be included.²⁰² Furthermore, the traditional law of undue influence is better suited to govern contests that pertain to testamentary transfers to personal friends, who should fall outside the scope of Section 21350's presumption of invalidity.²⁰³ Modification of the wording of the definition of "care custodian" would clarify that only a professional care custodian falls within its scope.²⁰⁴ This would protect the testamentary right to disposition and allow for reward of the charitable provision of care given by well-meaning friends to ailing elders during their declining years, without sacrificing the protection of such vulnerable dependent adults.²⁰⁵

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²⁰¹ See *supra* notes 191-195 and accompanying text; see also *Davidson*, 6 Cal. Rptr. 3d at 714-16.

²⁰² See *supra* notes 141-165 and accompanying text.

²⁰³ See *supra* notes 166-190 and accompanying text.

²⁰⁴ See *supra* notes 191-195 and accompanying text.

²⁰⁵ See *Fritschi*, 384 P.2d at 659; see also *Davidson*, 6 Cal. Rptr. 3d at 713.

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