

## First Supplement to Memorandum 2009-22

**Presumptively Disqualified Fiduciary (Introduction of Study)**

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Memorandum 2009-22 discusses whether the presumption of menace, duress, fraud, or undue influence that arises under Probate Code Section 21350, with respect to an instrument *making a gift* to a specified “disqualified person,” should also be extended to an instrument *granting a fiduciary power* to such a person.

The Commission has received a letter from Disability Rights California (“DRC”), commenting on the issues discussed in Memorandum 2009-22. See Exhibit. DRC’s comments are briefly summarized below.

**Objection to Existing Definition of “Dependent Adult”**

As discussed in the context of the Commission’s prior study of the presumption of menace, duress, fraud, or undue influence that arises under Probate Code Section 21350, DRC objects to the definition of “dependent adult” used in that provision (because it encompasses *any* adult with a disability). See generally First Supplement to Memorandum 2008-13; First Supplement to Memorandum 2008-47. (Note that the Commission has recommended revising the definition of “dependent adult” to use a functional test, rather than a test based solely on a person’s disability. See *Donative Transfer Restrictions*, 38 Cal. L. Revision Comm’n Reports 107 (2008). That recommendation would be implemented by SB 105 (Harman), which is pending in the Legislature.)

DRC reiterates its opposition to the *existing* definition, and makes clear that it would oppose any extension of a presumption that is based on that definition. See Exhibit p. 1.

**Objection to Presumptive Disqualification of “Care Custodian” as Conservator or Attorney-in-Fact.**

DRC also opposes any extension of the presumption of menace, duress, fraud, or undue influence to an instrument naming a care custodian as conservator or attorney-in-fact, *regardless of how “dependent adult” is defined*. See Exhibit pp. 2-3.

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Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission’s website ([www.clrc.ca.gov](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

DRC explains its position as follows:

For many people with disabilities, a care custodian is the person who spends the most time with the individual and has the most in-depth knowledge of his or her personal needs, preferences and goals. This would make a care custodian a natural choice if the individual were to nominate a conservator or appoint an attorney-in-fact. Legal safeguards already exist to ensure that these nominations and appointments are not the result of menace, duress, fraud, or undue influence.

*Id.*

It is correct that there are significant legal safeguards in place to prevent the improper appointment of a conservator (because the appointment decision is made by the court). See Memorandum 2009-22, pp. 6-7; Exhibit p. 2.

It is less clear that there are adequate safeguards in place to protect against menace, duress, fraud, or undue influence in the execution of a power of attorney. DRC points out that a person must have legal capacity in order to execute an effective power of attorney. See Exhibit p. 3. However, incapacity is a different issue from menace, duress, fraud, or undue influence. A person may possess legal capacity, yet still fall victim to fraud or undue influence.

Respectfully submitted,

Brian Hebert  
Executive Secretary



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April 14, 2009

Brian Hebert  
California Law Revision Commission  
By Email: [bhebert@clrc.ca.gov](mailto:bhebert@clrc.ca.gov)

**Re: Presumptively Disqualified Beneficiaries**

Dear Mr. Hebert:

Disability Rights California, formerly Protection & Advocacy, Inc., is a federally-mandated and federally-funded non-profit organization that advocates for the rights of people with disabilities throughout California. We appreciate the opportunity to comment on the Law Revision Commission's Memorandum 2009-22, which proposes changes to Probate Code provisions governing presumptively disqualified beneficiaries.

The Commission's Memorandum 2009-22 follows its 2008 study of Probate Code §§ 21350-21356, which presumptively invalidate a donative transfer made by a "dependent adult" to the individual's "care custodian." The Commission's current memorandum proposes that this presumption of menace, duress, fraud, or undue influence be extended beyond donative transfers to the appointment of certain types of fiduciaries. As an organization that represents people with disabilities, Disability Rights California is writing to express concern with regard to the proposals to presumptively disqualify dependent adults from nominating their care custodians as conservators, and appointing their care custodians as attorneys-in-fact.

The Commission's donative transfer study resulted in a bill, SB 105, that would (among other things) narrow the definition of "dependent adult" for the purposes of the donative transfer provision. Although the Commission's current memorandum does not define "dependent adult" for the purposes of

**EX 1**

presumptively disqualifying certain fiduciaries, we assume that the definition would be the same as the definition for presumptively disqualifying donative transfers. Since SB 105 is currently pending, our comments are based on the definition of “dependent adult” contained in existing law. However, as discussed below, our concerns with the Commission’s current proposals are not limited to concerns about that definition.

A “dependent adult” is currently defined as an adult “who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental disabilities have diminished because of age.” Welf. & Inst. Code § 15610.23; Prob. Code § 21350(c). In the context of last year’s donative transfer study, the Commission recognized that this definition is vague, overbroad, and generally unworkable. Disability Rights California (then PAI) also called to the Commission’s attention the fact that the definition places restrictions on people with disabilities on the basis of generalized stereotypes and assumptions, in violation of federal law requiring that any such restrictions be based on individualized determinations as to a person’s actual abilities and needs. See, e.g. 42 U.S.C. § 12132 (Title II of the Americans with Disabilities Act, providing that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities or a public entity, or be subjected to discrimination by any such entity”). For these reasons, as elaborated in our comments to the donative transfer proposal, Disability Rights California would object to any statutory provisions that presumptively invalidate the nomination of conservators or the appointment of attorneys-in-fact based on the existing definition of “dependent adult.”

Furthermore, we would object to the extension of presumptive invalidity to the nomination of conservators and appointment of attorneys-in-fact even if the definition of dependent adult were amended in accordance with SB 105. For many people with disabilities, a care custodian is the person who spends the most time with the individual and has the most in-depth knowledge of his or her personal needs, preferences and goals. This would make a care custodian a natural choice if the individual were to nominate a conservator or appoint an attorney-in-fact. Legal safeguards already exist to ensure that these nominations and appointments are not the result of menace, duress, fraud or undue influence. For example, as the Commission recognizes, the appointment of a conservator is solely at the discretion of the court, which is guided by the best interests of the conservatee. Prob. Code § 1812(a). The individual’s

nomination of a potential conservator is only one factor that the court will take into account in making this determination. Although court approval is not required for the appointment of an attorney-in-fact, the appointment is valid only if the individual making it has the capacity to contract. Prob. Code §§ 4022, 4120.

While Disability Rights California recognizes the concern of a fiduciary abusing his or her responsibilities by misappropriating a principal's property, it is important for the Commission to take into account the role that attorneys-in-fact can play in allowing an individual with a disability to live independently. If an individual with a disability is unable to perform critical tasks such as paying bills or communicating with his or her bank, mortgage company, or retirement company, an attorney-in-fact may be able to allow the person to continue to live in the community and avoid institutionalization. A statutory presumption that discourages people with disabilities from appointing an attorney-in-fact with whom they have the most confidence may have the unintended consequence of creating a barrier to community living and pushing individuals with disabilities into institutional care.

Disability Rights California is committed to protecting the rights of individuals with disabilities to make decisions that affect their own lives including the decision to nominate a conservator or appoint an attorney-in-fact. The fact that a person has a disability does not, and must not under federal anti-discrimination law, support a presumption that he or she is unable to make these important decisions on his or her own behalf.

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

Sincerely,



Sean Rashkis  
Attorney