Study L-623 April 21, 2009

Second Supplement to Memorandum 2009-22

Presumptively Disqualified Fiduciary (Introduction of Study)

Memorandum 2009-22 discusses whether the presumption of menace, duress, fraud, or undue influence that arises under Probate 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 received a letter from Disability Rights California ("DRC") on this topic, which was discussed in the First Supplement to Memorandum 2009-22.

DRC has now written a second letter to expand on the views expressed in its first letter. It is attached. The points raised in the new letter will be discussed at the April meeting.

Respectfully submitted,

Brian Hebert
Executive Secretary

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). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

Disability Rights California

California's protection and advocacy system

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April 20, 2009

Brian Hebert
California Law Revision Commission
By Email: bhebert@clrc.ca.gov

Re: Presumptively Disqualified Beneficiaries

Dear Mr. Hebert,

I am writing in response to the First Supplement to the Commission's Memorandum 2009-22, concerning our comments to the Commission's proposals with regard to presumptively disqualified beneficiaries. In its supplemental memorandum, the Commission confirms that there are significant legal safeguards in place to prevent the improper appointment of a conservator because the appointment is made by a court. However, the Commission states that 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.

Neither of the Commission's memoranda give any indication of why common law protections against menace, duress, fraud or undue influence fail to protect dependent adults in the appointment of attorneys-in-fact, whether "dependent adult" is defined under existing law or under the proposed definition contained in SB 105. Furthermore, the Commission's supplemental memorandum does not address Disability Rights California's concern about the importance of attorneys-in-fact to the independence of many people with disabilities. Our previous comments discussed how attorneys-in-fact can help people avoid institutionalization by making critical day-to-day financial and other decisions that they are not able to make or implement on their own. Similarly, a durable power of attorney can allow a person to appoint someone to make medical decisions on his or her behalf

when he or she is no longer capable of making those decisions alone, potentially avoiding the need to be placed under conservatorship.

A care custodian has exactly the type of intimate relationship with a dependent adult that would make him or her a natural choice to be appointed as an attorney-in-fact. This is true particularly under the existing definition of care custodian, but also under the narrower definition proposed under SB 105. When a dependent adult makes the decision to appoint a care custodian as an attorney-in-fact, it is the knowledge that the appointment will be presumed to be valid that gives the individual confidence that the attorney-in-fact will be able to exercise the authority that he or she is granted. Similarly, it is the presumption of validity that gives a third party such as a medical provider or a financial institution confidence in relying on the authority of the attorney-in-fact to act on behalf of the individual. Reversing the presumption would put a cloud on the power of attorney that would make it virtually meaningless. This could have serious consequences for an individual who is relying on an attorney-in-fact to make decisions on his or her behalf that may well affect his ability to live independently.

On another point, in our previous comments we inadvertently failed to address the Commission's proposals to extend the presumption of invalidity to executors and powers of appointment. Our position with regard to executors is similar to our position with regard to conservators, Existing judicial supervision of probate proceedings make it unnecessary and inadvisable to deprive an individual of the confidence that his or her choice of an executor will be respected after his or her death. Because a power of appointment is similar to a donative transfer for these purposes, for the reasons discussed in our previous comments with regard to donative transfers we would object to any presumption of invalidity under the current definitions of "dependent adult" and "care custodian."

Thank you for your consideration.

Sincerely,

Sean Rashkis
Attorney

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