

## The Uneasy Case for California's "Care Custodian" Statute

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### INTRODUCTION

In about a decade, California will be "the grayest state in the nation."<sup>1</sup> More than six million residents—one-seventh of the population—will be over age sixty-five.<sup>2</sup> This demographic sea change, unprecedented longevity,<sup>3</sup> and the growing number of elders who opt to remain in their own homes as they age has "push[ed] demand for home care services, such as bathing and dressing, meal preparation and driving clients on errands."<sup>4</sup> Home caregivers—who earn an average of \$20,283 per year<sup>5</sup> and are exempt from federal minimum wage and overtime laws<sup>6</sup>—will be tending to a generation that has amassed seventy percent of the country's wealth,<sup>7</sup> and passes about a trillion dollars by inheritance each year.<sup>8</sup>

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<sup>1</sup> Steve Geissinger, *Baby Boomer Issues Looming*, OAKLAND TRIB., Oct. 2, 2006, available at 2006 WLNR 17028019 (quoting California Assemblywoman Patty Berg).

<sup>2</sup> See Jennifer Coleman, *Report: California Population Will Grow Older, More Diverse*, S.J. MERCURY NEWS, Nov. 23, 2005, at B5, available at 2005 WLNR 18879683; Press Release, Governor Schwarzenegger Announces the California Nurse Education Initiative, Apr. 13, 2005, available at <http://gov.ca.gov/index.php?/press-release/2046> (last visited June 23, 2008).

<sup>3</sup> See, e.g., U.S. Bureau of the Census, *Longevity and Health Characteristics*, at 3-1, available at <http://www.census.gov/prod/1/pop/p23-190/p23190-g.pdf> (last visited June 23, 2008) (noting that "life expectancy at birth ha[s] reached a record high").

<sup>4</sup> Barbara Correa, *Home Sweet Home: Elderly Parents, Children Need Early Talk About Care*, DAILY NEWS (L.A.), April 3, 2008, at B1, available at 2008 WLNR 6391885; see also Sandra Block, *Elder Care Shifting From Nursing Homes*, U.S.A. TODAY, June 25, 2007, at 1B, available at 2007 WLNR 11917438 (noting that the percentage of people over seventy-five in care facilities fell more than three percent from 1985 to 2004). Even the "frailest elderly remain in their own homes." Michael Vitez, *National Conference on Aging Delivers Wake-up Call to Boomers*, PHILADELPHIA INQUIRER, March 11, 2007, at A4, available at 2007 WLNR 4598239.

<sup>5</sup> See California Employment Development Department, Home Health Aid Fact Sheet, available at <http://www.calmis.ca.gov/file/HealthCare/HCC-Home-Health-Aides.pdf> (last visited June 23, 2008).

<sup>6</sup> See *Long Island Care, Ltd. v. Coke*, 127 S.Ct. 2339, 2345 (2007) (holding that the Fair Labor Standards Act does not apply to a "domestic worker who provides 'companionship services' to elderly and infirm men and women").

<sup>7</sup> See Marilyn Gardner, *Love and Money and Fraud*, CHRISTIAN SCI. MONITOR, Aug. 9, 2006, at 14, available at 2006 WLNR 13703280.

<sup>8</sup> See John Leland, *Breaking the Silence*, N.Y. TIMES, Mar. 18, 2008, at H1 (calling this "[t]he largest intergenerational transfer of wealth in American history"). Even after estate taxes, experts predict that beneficiaries will receive between \$24 trillion and \$65.3 trillion between 1998 and 2052. See John J. Havens & Paul G. Schervish, *Why The \$41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11, 49 (2003).

At the intersection of these trends stands a novel California statute. Probate Code section 21350 presumptively voids testamentary gifts to “a care custodian of a dependent adult.”<sup>9</sup> No other state bars devises to caregivers.<sup>10</sup> Yet Section 21350 defines “care custodian” and “dependent adult” broadly. A “care custodian” includes any non-relative “providing health services or social services to an elder or dependent adult.”<sup>11</sup> A “dependent adult” is anyone over sixty-four “whose physical or mental abilities have diminished because of age.”<sup>12</sup>

Thus, on its face, the statute suggests that a beneficiary can forfeit a legacy by “simply cooking for an elderly person, driving a house-bound individual to the bank or doctor, or going shopping for them.”<sup>13</sup> To avoid this perverse result, California courts uniformly held that Section 21350 governed “professional ‘care custodians’”<sup>14</sup> and not “well-meaning friend[s].”<sup>15</sup> Recently, however, in *Bernard v. Foley*,<sup>16</sup> the California Supreme Court rejected these views and held that the statute’s text contains neither a “professional or occupational limitation” nor a “preexisting personal friendship exception.”<sup>17</sup> Despite the California Supreme Court’s “customary and proper reticence in encouraging legislative action,”<sup>18</sup> the majority, concurring, and dissenting opinions in *Bernard* placed the onus on the legislature to clarify the statute.<sup>19</sup>

The legislature tasked the California Law Revision Commission with “considering the overall effectiveness of the current statutory scheme.”<sup>20</sup> On May 14, 2008, the Commission proposed redefining (1) “care custodian” as “a person who provides health or social services to a dependent adult for compensation, as a profession or occupation” and (2) “dependent adult” as a person who is eligible for appointment of a conservator.<sup>21</sup>

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<sup>9</sup> CAL. PROB. CODE § 21350(a)(6) (West 2007).

<sup>10</sup> See Jessica Garrison, *Caregivers’ Inheritance Is Blocked*, L.A. TIMES, Aug. 22, 2006, at 3, available at 2006 WLNR 14500607.

<sup>11</sup> See CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.17(y) (West 2007).

<sup>12</sup> See CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.23(a) (West 2007).

<sup>13</sup> *In re Conservatorship of Estate of Davidson*, 6 Cal. Rptr. 3d 702, 711–12 (Ct. App. 2003).

<sup>14</sup> *Id.* at 713.

<sup>15</sup> *In re Conservatorship of McDowell*, 23 Cal. Rptr. 3d 10, 22 (Ct. App. 2004).

<sup>16</sup> 139 P.3d 1196 (Cal. 2006).

<sup>17</sup> *Id.* at 1204–05.

<sup>18</sup> *Bernard*, 139 P.3d at 1210 (George, C.J., concurring).

<sup>19</sup> See *id.* at 1207–08 (“In the event, however, we have mistaken the Legislature’s intention, that body may readily correct our error.”); *id.* at 1210 (George, C.J., concurring) (“[T]he Legislature would do well to consider modifying or augmenting the relevant provisions”); *id.* at 1214 (Corrigan, J., dissenting) (“[T]here is no reason to believe the Legislature intended such an outcome.”).

<sup>20</sup> See ASSEMB. B. 2034, 2005–2006 Leg., Reg. Sess. (Cal. 2006), available at [http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab\\_2001-2050/ab\\_2034\\_bill\\_20060907\\_chaptered.pdf](http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_2001-2050/ab_2034_bill_20060907_chaptered.pdf).

<sup>21</sup> See Cal. Law Revision Comm’n, Memorandum 2008-21, Study L-622, Donative Transfer Restrictions, May 14, 2008, at 19–20, available at <http://clrc.ca.gov/pub/2008/MM08-21.pdf>.

These amendments would limit the statute and thus vastly improve it. Yet despite the Law Revision Commission's license to re-imagine the law, it accepts the premise that byzantine rules must regulate devises to caregivers. I respectfully challenge that assumption. I highlight four points that I believe have not received their due in the debate over how to reform Section 21350. The first is that California courts uniquely respect testamentary autonomy. In other states, scholars complain that "courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent."<sup>22</sup> This is not so in California. The "care custodian" provision—which substitutes a categorical legislative determination for a testator's express wishes—deviates from this tradition. Second, the legislature enacted Section 21350 to create a presumption of wrongdoing when lawyers receive devises in estate plans they had authored. However, California common law already recognized that exact presumption. Thus, the statute changed little about a lawyer's right to inherit from a client. Yet when with little fanfare the legislature extended the statute to caregivers, it fundamentally altered a caregiver's ability to accept a legacy from a patient. At the same time, the good reasons to preclude lawyers from profiting from their own draftsmanship do not apply to caregivers.

Third, the Law Revision Commission offers three rationales for retaining the "care custodian" clause: (1) caregivers have the opportunity to exert undue influence; (2) elders depend on caregivers; and (3) gifts to caregivers seem inherently "undue."<sup>23</sup> To be sure, caregivers enjoy dominion over impaired elders. Yet caregivers provide services that, even if remunerated, are selfless and socially beneficial. As a normative matter, it is unclear why gifts to caregivers should be suspect. Fourth, an inflexible rule is not a good fit for the deeply personal question of a testator's intent. The undue influence doctrine covers the same terrain at less risk of disregarding autonomy or penalizing kindness.<sup>24</sup>

This essay contains two parts. Part I sketches the history of the "care custodian" provision and the cases that have struggled to interpret it. Part II examines the Law Revision Commission's tentative recommendations and concludes that, although they would enhance the "care custodian" provision, they would not preclude it from causing dubious results.

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22 Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996).

23 See Cal. Law Revision Comm'n, *supra* note 21, at 7–8.

24 California's potent Elder Abuse and Dependent Adult Civil Protection Act also provides for treble damages, recovery for pain and suffering, and attorneys' fees in elder abuse actions. See CAL. WELF. & INST. CODE §§ 15600–15675 (West 2007).

I. TESTAMENTARY AUTONOMY IN CALIFORNIA, SECTION 21350,  
AND THE “CARE CUSTODIAN” STATUTE

“[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.”<sup>25</sup> Thus, courts often make grandiose statements about testamentary autonomy. For example, “the right to testamentary disposition of one’s property is a fundamental one which reaches back to the early common law,”<sup>26</sup> “does not depend upon its judicious use,”<sup>27</sup> and includes the prerogative “to make an unjust or an unreasonable or even a cruel will.”<sup>28</sup>

Yet all states regulate testamentary gifts. The most common reasons courts refuse to enforce an otherwise valid will are the doctrines of incapacity and undue influence.<sup>29</sup> Incapacity requires proof that at the time the testator signed the will, she could not understand (1) the meaning of the testamentary act, (2) the extent of her property, and (3) her important relationships.<sup>30</sup> Undue influence is more complex. Indeed, all wills stem from influence.<sup>31</sup> Thus, courts hold that influence is “undue” only when it is “brought to bear directly on the testamentary act, sufficient to overcome the testator’s free will, amounting in effect to coercion destroying the testator’s free agency.”<sup>32</sup> Cases usually hinge on whether a contestant has raised a presumption of undue influence. To do so, a contestant must prove that (1) the testator and the defendant had a confidential relationship, (2) the defendant actively participated in the will’s preparation or execution, and (3) the defendant unduly profited from the will.<sup>33</sup> If a contestant establishes these elements, the burden shifts to the defendant to show an absence of undue influence by a preponderance of the evidence.<sup>34</sup>

In most jurisdictions, scholars complain that courts use these rules to impose hegemonic norms.<sup>35</sup> *In re Kaufmann’s Will*<sup>36</sup> is an oft-cited

<sup>25</sup> John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975). I will use the terms, “testator” and “will,” even though this essay pertains equally to trusts.

<sup>26</sup> *In re Fritsch’s Estate*, 384 P.2d 656, 659 (Cal. 1963).

<sup>27</sup> *In re McDevitt’s Estate*, 30 P. 101, 106 (Cal. 1892).

<sup>28</sup> *In re Martin’s Estate*, 151 P. 138, 141 (Cal. 1915).

<sup>29</sup> Fraud can also invalidate a will, although it appears less often in cases. See *Estate of Newhall*, 214 P. 231, 235 (Cal. 1923) (“[F]alse representations . . . have been held to constitute fraud if it can be shown that they were designed to and did deceive the testator into making a will different in its terms from that which he would have made had he not been misled.”).

<sup>30</sup> See *In re Conservatorship of Bookasta*, 265 Cal. Rptr. 1, 3 (Ct. App. 1989).

<sup>31</sup> See, e.g., Ray D. Madoff, *Unmaking Undue Influence*, 81 MINN. L. REV. 571, 575 (1997).

<sup>32</sup> *Rice v. Clark*, 47 P.3d 300, 304 (Cal. 2002).

<sup>33</sup> See *Estate of Sarabia*, 270 Cal. Rptr. 560, 563 (Ct. App. 1990).

<sup>34</sup> See *id.* A contestant does not need to establish the presumption to win. See *David v. Hermann*, 28 Cal. Rptr. 3d 622, 631 (Ct. App. 2005) (finding the trial court properly “did not rely on the presumption, but rather applied the general principle of undue influence to a review of all the evidence”).

<sup>35</sup> Madoff, *supra* note 31, at 576 (“[T]he undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families”); see also Jeffrey G. Sherman, *Undue Influence and the Homosexual*

example of this tendency. In that case, Robert Kaufmann, the scion of a wealthy jeweler, left his estate to his lover and business partner, Walter Weiss, instead of his brothers, Joel and Aron. Robert enclosed a letter with his will that articulated his profound feelings for Walter.<sup>37</sup> Nevertheless, a New York appellate court concluded that the will stemmed from Walter's undue influence. The court expressed doubt that Robert could have chosen to bequeath his fortune to an "unrelated" person.<sup>38</sup> It then dismissed the letter as "utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy."<sup>39</sup> Cases such as *Kaufmann* have prompted some commentators to declare that incapacity and undue influence serve, "not to protect freedom of testation, but rather to protect the testator's family against disinheritance."<sup>40</sup>

California jurisprudence has been far more protective of idiosyncrasy. A mid-century study found that in contests—generally brought by unhappy heirs-at-law—juries invalidated legacies seventy-seven percent of the time.<sup>41</sup> Yet appellate courts reversed a whopping fifty percent of these verdicts for insufficient evidence.<sup>42</sup> Rather than insulating juries from reviewing courts, in 1988 the legislature eliminated the right to a jury trial for will contests.<sup>43</sup> Thus, the state has a tradition of taking testamentary freedom seriously.

Three doctrinal nuances illustrate this point. First, in capacity cases, California courts have insisted that a contestant prove that the testator was of "unsound mind" at the very moment she executed the will.<sup>44</sup> They thus have rejected incapacity claims, even when faced with strong evidence of testator impairment before and after the signing. In *Estate of Mann*,<sup>45</sup> for

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*Testator*, 42 U. PITT. L. REV. 225, 267 (1981) ("[T]estamentary plans will continue to be unduly jeopardized so long as courts regard homosexuality as a special case"); Leslie, *supra* note 22, at 236; Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 210 (2001) (asserting that courts "manipulate mental capacity doctrines such as 'undue influence' . . . to reach results more in accord with the family paradigm").

<sup>36</sup> 247 N.Y.S.2d 664 (App. Div. 1964).

<sup>37</sup> The letter left no doubt that Robert was in love with Walter:

Walter gave me the courage to start something which slowly but eventually permitted me to supply for myself everything my life had heretofore lacked: an outlet for my long-latent but strong creative ability in painting . . . a balanced, healthy sex life which before had been spotty, furtive and destructive; an ability to reorientate myself to actual life and to face it calmly and realistically. All of this adds up to Peace of Mind—and what a delight, what a relief after so many wasted, dark, groping, fumbling immature years to be reborn and become adult!

*Id.* at 671.

<sup>38</sup> Indeed, the court telegraphs its holding in the opinion's second sentence. *See id.* at 665 ("The contestants are the distributees of and the proponent is unrelated to the decedent.").

<sup>39</sup> *Id.* at 674.

<sup>40</sup> Madoff, *supra* note 31, at 619.

<sup>41</sup> *See Note, Will Contests on Trial*, 6 STAN. L. REV. 91, 92 (1953).

<sup>42</sup> *See id.* at 92 n.4.

<sup>43</sup> *See CAL. PROB. CODE* § 8252(b) (West 2007) ("The court shall try and determine any contested issue of fact that affects the validity of the will.").

<sup>44</sup> *In re Lingenfelter's Estate*, 241 P.2d 990, 996 (Cal. 1952).

<sup>45</sup> 229 Cal. Rptr. 225 (Ct. App. 1986).

example, the testator had dementia and was placed under a conservatorship. She was “not eating or caring for herself properly; . . . she was unclean and smelled like urine,” and would often “forget[ ] dates, the time of year, and what she was doing.”<sup>46</sup> Nevertheless, the court of appeal reversed a jury determination of incapacity because the only witnesses to the will’s execution “all testified decedent was aware of what she was doing at the time.”<sup>47</sup>

Second, in undue influence cases, most states deem a beneficiary to have “actively participated” in the will’s creation if she “directed the testator to the drafting lawyer, made the appointment for the testator, or even merely knew of the contents of the will.”<sup>48</sup> However in California, “the mere fact of the beneficiary procuring an attorney to prepare the will is not sufficient.”<sup>49</sup> For instance, in *Estate of Fritschi*,<sup>50</sup> the California Supreme Court held that the testator’s mistress did not “actively participate” in a will that favored her to the detriment of the testator’s children even though she attended discussions about the estate plan, located a witness for the will, gave the testator a pen, and remained just outside the room.

Third, most jurisdictions do not look beyond whether a beneficiary is related to a testator when deciding whether she would “unduly profit”:

A ‘natural’ disposition is one which provides for a testator’s heirs at law. As one court succinctly put it: ‘[T]he natural object of a will maker’s bounty is one related to him/her by consanguinity.’ The status of the beneficiary, rather than the quality of the beneficiary’s relationship to the testator, determines what is a natural disposition for purposes of the undue influence analysis. In determining status, courts have generally relied on the intestacy statutes as a model for naturalness.<sup>51</sup>

California takes the opposite approach. For example, in *Estate of Sarabia*<sup>52</sup>—a case that provides a vivid counterpoint to *Kaufmann*—Guillermo Sarabia, an opera singer, left his estate to his agent and companion, Leonard Gibbs.<sup>53</sup> Sarabia’s brother filed a contest, arguing that Gibbs’s profit was “undue” since he was not related to Sarabia and would take nothing without the will.<sup>54</sup> The court of appeal disagreed, reasoning that a fact-finder must place itself in a testator’s shoes to determine whether profit is “undue”:

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<sup>46</sup> *Id.* at 227–28.

<sup>47</sup> *Id.* at 230.

<sup>48</sup> Madoff, *supra* note 31, at 587.

<sup>49</sup> See *Estate of Bould*, 287 P.2d 8, 16 (Cal. Ct. App. 1955) (collecting cases).

<sup>50</sup> 384 P.2d 656, 661 (Cal. 1963).

<sup>51</sup> Madoff, *supra* note 31, at 590–91 (quoting *In re Estate of Maheras*, 897 P.2d 268, 273 (Okla. 1995)).

<sup>52</sup> 270 Cal. Rptr. 560 (Ct. App. 1990).

<sup>53</sup> *Id.* at 561.

<sup>54</sup> See *id.* at 563.

For the trier of fact to decide what influence was 'undue' clearly entails a qualitative assessment of the relationship between the decedent and the beneficiary. . . . The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition.<sup>55</sup>

Thus, because Sarabia was less close to his brother than to Gibbs, the court held that Gibbs's profit was not "undue."<sup>56</sup>

Yet, as protective as California courts were of testamentary autonomy, they regarded one class of bequests as suspect—those to the drafting attorney. Such devises automatically gave rise to a presumption of undue influence.<sup>57</sup> This bright-line rule made sense; by definition, the drafting attorney enjoys a confidential relationship with the testator and plays an active role in the will's preparation and execution. Although the drafting attorney might not unduly profit from the will, lawyers are fiduciaries for their clients, and thus "proof that the benefit to an attorney was 'undue' is not required to trigger a presumption of undue influence."<sup>58</sup> Similarly, courts held lawyers to a higher standard for rebutting the presumption, requiring "clear and satisfactory evidence."<sup>59</sup>

In sum, freedom of testation was not just lofty rhetoric in California; rather, it was woven into the fabric of the common law. Events in the early 1990's would test these principles.

#### A. Section 21350

In 1992, the *Los Angeles Times* published a searing exposé of James D. Gunderson, an Orange County lawyer who had written himself into many of his elderly clients' estate plans.<sup>60</sup> From his law offices inside Leisure World—a gated retirement community so large it became its own municipality<sup>61</sup>—Gunderson routinely prepared wills that lavished bequests upon himself.<sup>62</sup> These gifts included \$3.5 million from a 98-year-old blind

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<sup>55</sup> *Id.* at 564.

<sup>56</sup> *See id.* at 565–66.

<sup>57</sup> *See* Estate of Lind, 257 Cal. Rptr. 853, 856 (Ct. App. 1989); *see also* Estate of Auen, 35 Cal. Rptr. 2d 557, 562–63 (Ct. App. 1994) (rejecting attorney's claim that the traditional three-element test for the presumption of undue influence applies). Similarly, Probate Code section 6112 creates a presumption of "duress, menace, fraud, or undue influence" for testamentary gifts to a necessary subscribing witness. Section 6112 actually liberalized this rule; previously, such gifts were absolutely void to the extent they exceeded the witness's intestate share. *See* CAL. PROB. CODE § 51, repealed by Stats. 1983, c. 842, § 18, operative Jan. 1, 1985.

<sup>58</sup> *Auen*, 35 Cal. Rptr. 2d at 562.

<sup>59</sup> *In re Phillip's Estate*, 172 P.2d 377, 378 (Cal. Ct. App. 1946). Conversely, an interested witness—like a defendant in a common law undue influence action—must refute the presumption of invalidity by a preponderance of the evidence. *See* CAL. PROB. CODE § 6112 (West 2007).

<sup>60</sup> *See* Davan Maharaj, *Lawyer Inherited Millions in Stock, Cash From Clients*, L.A. TIMES, Nov. 22, 1992, at A1, available at 1992 WLNR 4030163.

<sup>61</sup> *See California Retirement Community to Become City of Seniors*, Mar. 3, 1999, available at <http://www.cnn.com/US/9903/03/leisure.world.01> (last visited June 30, 2008).

<sup>62</sup> *See* Davan Maharaj, *Leisure World Lawyer Heir to Clients' Millions*, L.A. TIMES, Nov. 22,

and deaf man<sup>63</sup> and \$250,000 from a woman whom Gunderson had described in court papers as “unable to pay her bills or manage her assets.”<sup>64</sup> Gunderson also peppered his instruments with clauses that shifted tax liability to other beneficiaries<sup>65</sup> and insulated his “inheritance” from contests.<sup>66</sup>

The articles sparked outrage and threatened to eviscerate the standing of the probate bar and bench.<sup>67</sup> The California Legislature responded swiftly. Less than a year after the stories broke, it passed a bill—A.B. 21—to “unambiguously prohibit the most patently offensive actions of Gunderson.”<sup>68</sup> A.B. 21 created Probate Code section 21350, which invalidates transfers to “disqualified person[s]”: the drafting attorney, their family, their law partners, and their employees.<sup>69</sup> New Section 21351 carved out narrow exceptions. The first is for the transferor’s relatives and

1992, at A1, available at 1992 WLNR 4029997.

<sup>63</sup> See An Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Merrill A. Miller*, L.A. TIMES, Nov. 22, 1992, at A43, available at 1992 WLNR 4029597 [hereinafter, Maharaj, *Merrill A. Miller*].

<sup>64</sup> See Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Emerald Mary Sully*, L.A. TIMES, Nov. 22, 1992, at A43, available at 1992 WLNR 4027557; see also Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Margaret Hough*, L.A. TIMES, Nov. 22, 1992, at A43, available at 1992 WLNR 4029045 (describing a conveyance of real property that Gunderson recorded in his favor a year after the owner had died); Davan Maharaj, *4 Clients Whose Estates Enriched James D. Gunderson: Martin L. Fisher*, L.A. TIMES, Nov. 22, 1992, at A43, available at 1992 WLNR 4027466 (describing Gunderson receiving ninety-nine percent of a client’s estate). The story soon went national. See *Judge Removes Attorney as Trustee*, WASH. TIMES, Dec. 14, 1992, at A6, available at 1992 WLNR 149893; *Attorney Investigated for Estate Dealings*, SEATTLE TIMES, Dec. 14, 1992, at A12, available at 1992 WLNR 1087089; *Lawyer Stripped of Control of Elderly Clients’ Money*, ORLANDO SENTINEL, Dec. 14, 1992, at A8, available at 1992 WLNR 4370156; *California Lawyer Queried on Wills*, BOSTON GLOBE, Dec. 14, 1992, at 6, available at 1992 WLNR 1852585.

<sup>65</sup> See Maharaj, *Merrill A. Miller*, *supra* note 63.

<sup>66</sup> See Davan Maharaj, *Bill Targets “No Contest” Estate Ploy*, L.A. TIMES, Dec. 10, 1992, at B1, available at 1992 WLNR 4009546.

<sup>67</sup> See Editorial, *Laws Must Be Toughened to Protect the Elderly from Exploitation*, L.A. TIMES, Nov. 25, 1992, at B6, available at 1992 WLNR 4036978 (“38 other states have adopted tougher guidelines set by the American Bar Assn. prohibiting lawyers, under threat of disbarment, from preparing trusts or wills in which they are beneficiaries. California should do the same.”); George C. Balderas, Letter to the Editor, L.A. TIMES, Dec. 13, 1992, at B11, available at 1992 WLNR 4017373 (describing a talk radio show which featured “a string of callers all relating negative experiences with their attorneys.”); Robert R. Shively, Letter to the Editor, L.A. TIMES, Dec. 13, 1992, at B11, available at 1992 WLNR 4018065 (“[H]ow did Mr. Gunderson persuade Superior Court probate judges to approve such wills for probate?”). High-level figures tried to control the damage. The president of the State Bar of California “stress[ed] how important it is for any person who questions the actions of an attorney to report this behavior.” Harvey I. Saferstein, Letter to the Editor, L.A. TIMES, Dec. 7, 1992, at B6, available at 1992 WLNR 4065722. The Supervising Judge of the Orange County Probate Department called for “a comprehensive review of the Probate Code, the Probate Court Rules and the Attorney Rules of Ethics.” Tully H. Seymour, *Living Trusts, Probate Court Duties in Supervising Estates Reviewed*, L.A. TIMES, Dec. 20, 1992, at B6, available at 1992 WLNR 4071077.

<sup>68</sup> ASSEMB. COMM. ON THE JUDICIARY, B. ANALYSIS., A.B. 21, 1993–1994 Leg., Reg. Sess. (Cal. 1993) (“AB 21 was introduced in response to . . . the activities of a probate attorney, Mr. James D. Gunderson, from Orange County”), available at [http://info.sen.ca.gov/pub/93-94/bill/asm/ab\\_0001-0050/ab\\_21\\_cfa\\_930208\\_101917\\_asm\\_comm](http://info.sen.ca.gov/pub/93-94/bill/asm/ab_0001-0050/ab_21_cfa_930208_101917_asm_comm).

<sup>69</sup> See CAL. PROB. CODE § 21350(a)(1)–(3) (West 2007); *id.* § 21350.5. The bill also made “[a]ny person who has a fiduciary relationship with the transferor . . . who transcribes the instrument or causes it to be transcribed” a “disqualified person.” *Id.* § 21350(a)(4).

spouse or domestic partner.<sup>70</sup> Another requires a neutral lawyer to attest in a "certificate of independent review" that the gift was voluntary.<sup>71</sup> A third permits the lawyer to prove that "the transfer was not the product of fraud, menace, duress, or undue influence" (1) by clear and convincing evidence, (2) not based solely on the testimony of any "disqualified person."<sup>72</sup> If the lawyer fails, she must pay the contestant's costs and attorneys' fees.<sup>73</sup>

Some lawmakers, including Governor Wilson, and members of the press saw the statute as a potent weapon against financial elder abuse.<sup>74</sup> Yet rather than blazing a trail, the statute largely codified the common law. As noted, California courts already assumed that devises to drafting attorneys flowed from undue influence<sup>75</sup> and required "clear and satisfactory evidence" to overcome this presumption.<sup>76</sup> To be sure, Section 21350 also prohibited drafting attorneys from carrying their burden with their own testimony and saddled them with paying a successful contestant's attorneys' fees and costs.<sup>77</sup> Ironically, though, its next biggest change was probably to create exceptions to what had been an inflexible presumption of invalidity.<sup>78</sup> Thus, perceptions notwithstanding, Section 21350 did little to change the state of the law.

#### B. The "Care Custodian" Provision

In 1997, the state's booming in-home care industry led the Trusts and Estates Section of the Bar to sponsor a novel amendment to the statute. The Trusts and Estates Section was concerned about the sway that "practical nurse[s]" and others "hired to provide in-home care" have over "demented elder[s]."<sup>79</sup> The legislature responded with A.B. 1172. Noting that "practical nurses or other caregivers hired to provide in-home care. . . are often working alone and in a position to take advantage of the person they are caring for,"<sup>80</sup> the legislature added a "care custodian of a

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<sup>70</sup> See *id.* § 21351(a).

<sup>71</sup> See *id.* § 21351(b).

<sup>72</sup> See *id.* § 21351(d). As originally enacted, the statute excluded testimony from all "disqualified persons." See CAL. PROB. CODE § 21351(d) (2001), amended by Stats. 2002, c. 412 (S.B.1575), § 1.

<sup>73</sup> See *id.*

<sup>74</sup> See Davan Maharaj, *Wilson Signs Bill to Protect Estates of the Elderly*, L.A. TIMES, Aug. 3, 1993, at B1, available at 1993 WLNR 4201678 (quoting Wilson as declaring that section 21350 "gives the state sufficient ammunition against these legal vultures who are preying on the vulnerable members of our society.")

<sup>75</sup> See *supra* note 57 and accompanying text.

<sup>76</sup> See *supra* note 58 and accompanying text.

<sup>77</sup> See *supra* notes 71–72 and accompanying text.

<sup>78</sup> See *supra* note 70.

<sup>79</sup> California Law Revision Commission, Study L-622, Mar. 10, 2008, at 2, available at <http://www.clrc.ca.gov/pub/2008/MM08-13.pdf> (last visited June 30, 2008) (quoting Letter from Don Green and Marc B. Hankin to David Long, State Bar of California Director of Research, Oct. 16, 1996) ("A 'practical nurse' (or other caregiver hired to provide in-home care for an aging progressive dementia victim) might find it too easy to take advantage of the dependence and close working relationship to induce the demented elder to make testamentary gifts").

<sup>80</sup> S. RULES COMM., B. ANALYSIS, ASSEMB. B. 1172, 1997–1998 Leg., Reg. Sess. (Cal. Aug. 8, 1997), available at [http://info.sen.ca.gov/pub/97-98/bill/asm/ab\\_1151-1200/ab\\_1172\\_cfa\\_19970828\\_](http://info.sen.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970828_)

dependent adult” to Section 21350’s litany of “disqualified person[s].”<sup>81</sup> Thus, the statute now reads:

[N]o provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following: (1) The person who drafted the instrument. (2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument. (3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation. . . . (6) A care custodian of a dependent adult who is the transferor.<sup>82</sup>

The statute defines “dependent adult” and “care custodian” broadly. Even though the Trusts and Estates Section described the protected class as “dementia victim[s],”<sup>83</sup> the term “dependent adult” includes anyone over sixty-four “whose physical or mental abilities have diminished because of age.”<sup>84</sup> Likewise, despite the legislature’s preoccupation with nurses “hired [for] in-home care,”<sup>85</sup> the term “care custodian” includes a catalog of specific entities and individuals, plus a sweeping catch-all: “[a]ny other. . . person providing health services or social services to elders or dependent adults.”<sup>86</sup> This liberal scope would soon cause mischief.

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<sup>81</sup> CAL. PROB. CODE § 21350(a)(6) (West 2007).

<sup>82</sup> *Id.* § 21350(a).

<sup>83</sup> California Law Revision Commission, Study L-622, *supra* note 79.

<sup>84</sup> *See* CAL. PROB. CODE § 21350(c) (West 2007) (“[T]he term ‘dependent adult’ has the meaning as set forth in Section 15610.23 of the Welfare and Institutions Code and also includes those persons who . . . are older than age 64”); CAL. WELF. & INST. CODE § 15610.23(a) (West 2007).

<sup>85</sup> S. RULES COMM., B. ANALYSIS, ASSEMB. B. 1172, 1997–1998 Leg., Reg. Sess. (Cal. Aug. 8, 1997), available at [http://info.sen.ca.gov/pub/97-98/bill/asm/ab\\_1151-1200/ab\\_1172\\_cfa\\_19970828\\_193607\\_sen\\_floor.html](http://info.sen.ca.gov/pub/97-98/bill/asm/ab_1151-1200/ab_1172_cfa_19970828_193607_sen_floor.html).

<sup>86</sup> *See* CAL. PROB. CODE § 21350(c) (West 2007) (“The term ‘care custodian’ has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code.”); CAL. WELF. & INST. CODE § 15610.17(y) (West 2007). In full, Welfare and Institutions Code section 15610.17 states:

‘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: [¶] (a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code. [¶] (b) Clinics. [¶] (c) Home health agencies. [¶] (d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services. [¶] (e) Adult day health care centers and adult day care. [¶] (f) Secondary schools that serve 18- to 22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders. [¶] (g) Independent living centers. [¶] (h) Camps. [¶] (i) Alzheimer’s Disease day care resource centers. [¶] (j) Community care facilities, as defined in Section 1502 of the Health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and Safety Code. [¶] (k) Respite care facilities. [¶] (l) Foster homes. [¶] (m) Vocational rehabilitation facilities and work activity centers. [¶] (n) Designated area agencies on aging. [¶] (o) Regional centers for persons with developmental disabilities. [¶] (p) State Department of Social Services and State Department of Health Services licensing divisions. [¶] (q) County welfare departments. [¶] (r) Offices of patients’ rights advocates and clients’ rights advocates, including attorneys. [¶] (s) The office of the long-term care ombudsman. [¶] (t) Offices of public conservators, public guardians, and court investigators. [¶] (u) Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the following: [¶] (1) The federal Developmental

### C. Cases Interpreting the "Care Custodian" Provision

The "care custodian" statute first reared its head in *Estate of Shinkle*.<sup>87</sup> Laverne Shinkle was seventy-seven years old and in poor health. Her closest relative was a cousin she had not seen for forty years.<sup>88</sup> After she fractured a hip at home, she recovered at South Valley Hospital, a skilled nursing facility. There she met C.J. Thompson, the volunteer long-term care ombudsman.<sup>89</sup> Despite rules prohibiting ombudsmen from befriending patients, Thompson helped Shinkle run errands, pay her bills, and balance her checkbook. Even when he was sent to another facility and she returned home, he visited her. When she said she wanted to leave her property to him, he arranged for her to consult with an estate planner.<sup>90</sup>

The trial court struck down the devise to Thompson and the courts of appeal affirmed. The court of appeal explained that the definition of "care custodian" expressly includes a "long-term care ombudsman."<sup>91</sup> In response, Thompson asserted that his transfer and Shinkle's discharge from the facility meant that he was not her ombudsman at the time she executed the trust.<sup>92</sup> He cast himself as "only an 'informal friend,' providing 'friendly aid to an at-home individual.'"<sup>93</sup> The court was not persuaded. It held that Thompson's ombudsman status helped him meet Shinkle, earn her confidence, and learn intimate details about her.<sup>94</sup> It then refused to disturb the trial court's finding that Thompson had not disproved undue influence under Section 21351.<sup>95</sup>

Two years later, *In re Conservatorship of Estate of Davidson*<sup>96</sup> wrestled with whether a good friend provided "health services or social services" and thus was a disqualified "care custodian." In the 1960's, Dolores Davidson and her husband met Stephen Gungl and his partner.

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Disabilities Assistance and Bill of Rights Act of 2000, contained in Chapter 144 (commencing with Section 15001) of Title 42 of the United States Code, for protection and advocacy of the rights of persons with developmental disabilities. [¶] (2) The Protection and Advocacy for the Mentally Ill Individuals Act of 1986, as amended, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code, for the protection and advocacy of the rights of persons with mental illness. [¶] (v) Humane societies and animal control agencies. [¶] (w) Fire departments. [¶] (x) Offices of environmental health and building code enforcement. [¶] (y) 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.

<sup>87</sup> 119 Cal. Rptr. 2d 42 (Ct. App. 2002).

<sup>88</sup> *Id.* at 50.

<sup>89</sup> Ombudsmen are trained, state-certified volunteers who "serve as advocates for residents in long-term-care facilities." *Id.* at 44.

<sup>90</sup> *See id.* at 46.

<sup>91</sup> *See id.* at 53 (explaining that "care custodian" includes "'an employee of . . . [t]he office of the long-term care ombudsman'") (quoting CAL. WELF. & INST. CODE § 15610.17(s)).

<sup>92</sup> *See id.* at 54.

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* ("But for the ombudsman program, Thompson would not have met Shinkle, would not have had access to her financial and personal information, and would not have gained her trust.")

<sup>95</sup> *See id.* at 56.

<sup>96</sup> 6 Cal. Rptr. 3d 702 (Ct. App. 2003).

The two couples forged a close bond, and spent birthdays, anniversaries, and holidays together.<sup>97</sup> About ten years later, Davidson's husband died. Gungl visited often, helped out around the house, and, when Davidson could no longer drive, he chauffeured her. Davidson called Gungl and his partner "her boys."<sup>98</sup> In 1990, she executed a will leaving her estate to her cousin, Elaine Morken.

In 1992, Davidson began to decline. Gungl and his partner cooked, gardened, and banked for Davidson, bought her groceries and medications, and drove her to the doctor.<sup>99</sup> In 1995, Gungl, who was revising his and his mother's estate plan, recommended that Davidson place her assets in a trust. In 1996, Davidson signed an instrument that left \$5,000 to Morken and the balance of her estate to Gungl. In 1998, Morken and her husband—who only saw Davidson a few times a year—learned about the new estate plan.<sup>100</sup> They complained to the public guardian about Gungl and asked the court to appoint a conservator for Davidson. In the conservatorship proceeding, Gungl submitted an accounting that revealed he had written twenty-four checks from Davidson to himself that he had labeled "salary" or wages.<sup>101</sup> When Davidson died in 2000, Morken's husband<sup>102</sup> challenged the trust under Section 21350.

The trial court determined that Section 21350 did not apply to Gungl. The court of appeal affirmed on three independent grounds. First, the court held that Gungl's sporadic acts of kindness were "unsophisticated care and attention," not "health services or social services."<sup>103</sup> The court reasoned that a contrary result would penalize good Samaritans:

[V]irtually *any* individual providing personal care to a dependent adult, no matter how intimately and personally connected they might be, would be disqualified from receiving a gift, bequest, devise, or other donative transfer from the dependent adult under a trust or will unless they were related to the dependent by blood or marriage. Appellant's interpretation of 'care custodian' is so broad as to include not only the provision of health care or social services, but such acts as simply cooking for an elderly person, driving a house-bound individual to the bank or doctor, or going shopping for them.<sup>104</sup>

Second, the court examined the history of the "care custodian" provision and found that the legislature meant to bar gifts only to professional caregivers.<sup>105</sup> The court admitted that Davidson had

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<sup>97</sup> *See id.* at 705.

<sup>98</sup> *See id.*

<sup>99</sup> *See id.* at 706, 712.

<sup>100</sup> *See id.* at 707. Davidson was wary that the Morkens intended to place her in a nursing home and seize control of her financial affairs. *See id.*

<sup>101</sup> *See id.* at 716. The court in the conservatorship proceeding surcharged Gungl for \$7,782.70 of unaccounted expenses. Although it called Gungl's "actions . . . sloppy, disorganized, and often unwise," it refused to find that Gungl acted in bad faith. *See id.* at 716 n.12.

<sup>102</sup> Elaine Morken died shortly before Davidson. *See id.* at 705.

<sup>103</sup> *Id.* at 713.

<sup>104</sup> *Id.* at 711–12.

<sup>105</sup> *See id.* at 713–14.

compensated Gungl for his services.<sup>106</sup> Nevertheless, it credited Gungl's testimony that he simply used this money to reimburse himself for out-of-pocket expenses.<sup>107</sup> Third, the court determined that the statute did not apply to people like Gungl, whose "provision of care developed naturally from a preexisting genuinely personal relationship."<sup>108</sup> Finally, even assuming that Gungl was a "care custodian," the court held that he had carried his burden under Section 21351 of proving that "Davidson's decision to leave the bulk of her estate to [him] rather than the Morkens was based on a long-standing affectionate relationship between the two, and not undue influence."<sup>109</sup>

Similarly, *In re Conservatorship of McDowell*<sup>110</sup> held that Section 21350 did not apply to a "well-meaning friend." In February, 2000, Kathryn McDowell, a retiree, met Ann Netcharu.<sup>111</sup> Netcharu bought McDowell coffee and food. When McDowell returned from a stint in the hospital that summer, Netcharu washed her and changed her diapers.<sup>112</sup> In August, the court appointed a public guardian as McDowell's conservator.<sup>113</sup> In September, 2000, Netcharu took McDowell to three different lawyers before finding one willing to draft a will. McDowell left half of her estate to Netcharu. Before she signed the will, she said she relied on Netcharu "for medical care, home maintenance, food and clothing," and wanted to leave her money "because [she] was assisting her."<sup>114</sup> The public guardian sought to nullify that will and create a new one leaving McDowell's estate to charity.<sup>115</sup> The trial court granted the petition and held that Section 21350 voided the gift to Netcharu.<sup>116</sup>

The court of appeal reversed, acknowledging that McDowell had known Netcharu for a mere six months when she executed her estate

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<sup>106</sup> *Id.* at 716.

<sup>107</sup> *Id.* at 717 & n.13.

<sup>108</sup> *Id.* at 716. The court articulated a three-factor test to determine whether an individual is a "care custodian": "(1) the length of time the individuals had a personal relationship before assuming the roles of caregiver and recipient; (2) the closeness and authenticity of the personal relationship; and (3) whether any money was paid for the provision of care." *Id.*

<sup>109</sup> *Id.* at 719. Oddly, the court then held that Morken's husband had failed to establish a presumption of common law undue influence, reasoning that Gungl neither actively participated in the execution of the trust nor unduly benefited. *See id.* at 721–22. The court had already opined that Gungl had met his burden under section 21351 of disproving undue influence by clear and convincing evidence—a more rigorous showing than that required to rebut the conventional presumption of undue influence. Thus, the issue of whether Morken's husband had established a presumption of common law undue influence should have been superfluous.

<sup>110</sup> 23 Cal. Rptr. 3d 10 (Ct. App. 2004).

<sup>111</sup> *See id.* at 16.

<sup>112</sup> *See id.*

<sup>113</sup> *See id.* at 12.

<sup>114</sup> *Id.* at 17.

<sup>115</sup> *See id.* at 13. This procedure, where a conservator seeks court permission to take an action on behalf of the conservatee, is called a "petition for substituted judgment." *See* CAL. PROB. CODE § 2580(a) (West 2007).

<sup>116</sup> *See McDowell*, 23 Cal. Rptr. 3d. at 13.

plan.<sup>117</sup> Nevertheless, relying heavily on *Davidson*, it reasoned that Netcharu did not provide “health services or social services” because she had never engaged in care-giving in any other capacity:

[T]here is no evidence [Netcharu] generally offered care services to the elderly and dependent adult population as a paid or volunteer provider. Nor is there evidence that [her] relationship with Ms. McDowell grew out of a preexisting professional or occupational connection or that [Netcharu] and Ms. McDowell had a quid pro quo arrangement, under which Ms. McDowell reasonably expected [Netcharu] to provide care, and [Netcharu] reasonably expected something in return. Rather, the court found that [Netcharu] was a well-meaning friend.<sup>118</sup>

Thus, the court of appeal remanded the case for the lower court to consider the conservator’s other claims: whether the doctrines of incapacity and undue influence vitiated the will.<sup>119</sup>

But two years later, in *Bernard v. Foley*,<sup>120</sup> the California Supreme Court saw the statute through a different prism than *Shinkle*, *Davidson*, or *McDowell*. James Foley and his girlfriend, Ann Erman, were Carmel Bosco’s “longtime personal friends.”<sup>121</sup> In 1991, Bosco created a trust that left her sister, Ann Cassell, a third of her estate, and made other relatives residual beneficiaries.<sup>122</sup> Over the next decade, Bosco amended her trust three times, naming different trustees, but preserving her original dispositional scheme.<sup>123</sup>

In 2001, Bosco learned that she had cancer.<sup>124</sup> On June 12, 2001, she amended her trust again, nominating Foley as successor trustee. This was the first time she had mentioned either Foley or Erman in her estate plan. In July, at Erman’s “repeated urging,” Bosco moved in with her and Foley.<sup>125</sup> Bosco could not care for herself, and so Erman and Foley shopped for her, cooked for her, managed her finances, cleaned her room, did her laundry, bathed her, changed her diapers, and administered an array of medications.<sup>126</sup> In August and September of 2001, Bosco amended her trust twice more, giving Foley additional power as trustee and removing devises to other relatives.<sup>127</sup> Finally, on September 25, she signed the seventh amendment, which left “the ‘lion’s share’” of her property to Foley and Erman.<sup>128</sup> She died three days later.<sup>129</sup>

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<sup>117</sup> See *id.* at 22.

<sup>118</sup> *Id.* at 21–22.

<sup>119</sup> See *id.* at 26.

<sup>120</sup> 139 P.3d 1196 (Cal. 2006).

<sup>121</sup> *Id.* at 1197. Erman, in fact, had once been married to Bosco’s nephew. See *id.* at 1198 n.2.

<sup>122</sup> See *id.* at 1210 (George, C.J., concurring).

<sup>123</sup> See *id.*

<sup>124</sup> See *id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 1202.

<sup>127</sup> See *id.* at 1211.

<sup>128</sup> *Id.*

<sup>129</sup> See *id.* at 1210–11.

Justice Werdegar, joined by Justices Baxter and Chin, held that Foley and Erman were "care custodians." The majority strictly adhered to the text of Section 21350. It reasoned that the statute incorporates "[a]ny. . . person" tendering "health services or social services" into the definition of the term "care custodian."<sup>130</sup> At the same time, the majority noted that the statute says nothing about the person's vocation or history with the dependent adult.<sup>131</sup> The majority therefore overruled *Shinkle, Davidson*, and *McDowell* to the extent they recognized "a professional or occupational limitation" or "a preexisting personal friendship exception."<sup>132</sup> The majority noted that this "may in some instances result in inequity," but declined to second-guess the legislature.<sup>133</sup> Finally, the majority emphasized that Foley and Erman were not beneficiaries who only later became "care custodians"; instead, they had never appeared in Bosco's testamentary instruments until after they had begun caring for her.<sup>134</sup> Accordingly, because Foley and Erman had provided "substantial, ongoing health services," the majority voided the bequests to them.<sup>135</sup>

Chief Justice George concurred, reasoning that the case was a shining example of why the legislature wisely refused to delineate between paid and unpaid caregivers. The Chief Justice noted that even amateur caregivers enjoy dominion over their charges.<sup>136</sup> Yet the Chief Justice also conceded that the statute could produce "counterintuitive" results.<sup>137</sup> He opined that less cause for skepticism exists when a dependent adult confers a gift on a friend who "provide[s] substantial, ongoing health services. . . for an extended period."<sup>138</sup> He therefore called on the legislature to add a temporal element to the "care custodian" provision.<sup>139</sup>

Justice Corrigan, joined by Justices Kennard and Moreno, dissented. Justice Corrigan took issue with the majority's construction of the statute, noting that the definition of "care custodian" contains twenty-four examples of entities and institutions. Given that backdrop, Justice Corrigan

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<sup>130</sup> *Id.* at 1202 (majority opinion).

<sup>131</sup> *See id.* at 1204.

<sup>132</sup> *Id.* at 1202. Bizarrely, the majority later claimed to be overruling *Shinkle, Davidson*, and *McDowell* "to the extent they interpreted section 21350 as allowing for a preexisting personal friendship exception," while saying nothing about *Davidson* and *McDowell's* discrete professional or occupational exception. *Id.* at 1209 n.14. In light of the rest of the opinion, this must be an inadvertent omission.

<sup>133</sup> *See id.* at 1208 ("[W]e need not strain to discern (because we are not free to impose a universally desirable result in terms of public policy.)" (internal quotations omitted)).

<sup>134</sup> *See id.* at 1209 ("Foley and Erman became beneficiaries of the Trust only pursuant to changes decedent made in her will while she was living with them and they were providing her with care services.").

<sup>135</sup> *Id.* at 1197, 1202.

<sup>136</sup> *See id.* at 1211 (George, C.J., concurring).

<sup>137</sup> *Id.* at 1212.

<sup>138</sup> *Id.* at 1211.

<sup>139</sup> *See id.* at 1212 (proposing that a bequest created "within one year following the commencement of a new nonprofessional caregiving relationship or within one year preceding the death of the dependent adult, will be subject to the presumption of undue influence").

explained, the catch-all phrase “[a]ny other . . . person providing health services or social services” must be understood as encompassing others “who provide[ ] care or assistance through some formal relationship, rather than on a private friendship or familial basis.”<sup>140</sup> Justice Corrigan also doubted that lawmakers intended to disincentivize kindness and generosity:

In terms of public policy, it seems unwise to penalize Good Samaritans by making them less eligible to receive the gratitude of those they help, the kinder they have been. As the majority opinion points out, Foley and Erman welcomed the decedent into their own home and performed a variety of challenging, personal, and distasteful tasks to ease the burdens of her final illness. The law should not cast a jaundiced eye on those who provide such care to family or friends, and there is no reason to believe the Legislature intended such an outcome.<sup>141</sup>

Finally, *In re Estate of Odian*<sup>142</sup> followed *Bernard* and determined that a “paid live-in companion” was a “care custodian.” In 2000, Helen Odian, an eighty-four year-old who lived alone, hired Catharina Vulovic to shop, cook, perform chores, and drive. Odian eventually asked Vulovic to live with her in return for \$500.00 per week.<sup>143</sup> They spent holidays together. Odian became close to Vulovic’s children. She told friends that “she would not have lived as long” without Vulovic and “that she wanted to leave her estate to [her].”<sup>144</sup> In 2001, however, when a financial advisor recommended that Odian prepare a trust, Odian explained that she wanted to name charities as beneficiaries.<sup>145</sup> The day before Odian’s appointment to sign the trust, the financial advisor received a fax, written by Vulovic, that Odian wanted to draft her own will. Odian then signed a form estate plan—in which Vulovic had filled in all the blanks—that left her estate to Vulovic. The financial advisor was unable to contact Odian afterwards. An investigator from adult protective services and a psychologist met with Odian and found her unable to recall details about her life, including Vulovic’s name.<sup>146</sup>

The trial court voided the gifts on several grounds: incapacity, undue influence, and the “care custodian” statute.<sup>147</sup> The court of appeal affirmed. The court reasoned that *Bernard* doomed Vulovic’s claims that the statute did not apply because of her friendship with Odian or because she “was arguably not a professional caregiver.”<sup>148</sup> The court then addressed the thornier issue of whether Vulovic had provided the kind of services that makes one a “care custodian.” Vulovic argued that *Davidson* remained

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<sup>140</sup> *Id.* at 1213 (Corrigan, J., dissenting).

<sup>141</sup> *Id.* at 1214 (internal citations omitted).

<sup>142</sup> 51 Cal. Rptr. 3d 390, 392 (Ct. App. 2006).

<sup>143</sup> *Id.* at 393.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 393.

<sup>146</sup> *Id.* at 395.

<sup>147</sup> *Id.* at 392.

<sup>148</sup> *See id.* at 398–99.

good law to the extent it suggested that "services such as cooking, cleaning, shopping and driving do not amount to health or social services of a care custodian."<sup>149</sup> Although the court agreed that this aspect of *Davidson* had survived *Bernard*,<sup>150</sup> it construed *Davidson*'s holding differently:

*Davidson* did not actually hold that services such as those are not social services within the meaning of the statute. In *Davidson*, the court found, primarily, that the beneficiary of the estate was not a care custodian because his role as the decedent's caregiver arose naturally from his long-term friendship with her and not from his employment as a caregiver. Secondly, the court *questioned* whether services such as cooking, gardening, running errands, providing transportation, grocery shopping and providing assistance with banking could be equated with social services.<sup>151</sup>

Likewise, *Odian* noted that *Bernard* mentioned that "substantial and ongoing health services" make one a "care custodian" but did not discuss "social services."<sup>152</sup> Calling it "a question of first impression," *Odian* held that "an expansive interpretation of 'social services' . . . best promotes the Legislature's objective of protecting vulnerable dependent adults from exploitation."<sup>153</sup> Because Vulovic was a "paid live-in caregiver" who "took care of [O dian's] home" and "cooked, cleaned, and drove" Odian, the court determined that she was a "care custodian."<sup>154</sup>

#### D. The Current State of the Law

The most glaring problem with the definition of "care custodian" is that it is virtually boundless: "[a]ny [other]. . . person[] providing health services or social services to elders or dependent adults."<sup>155</sup> Even though *Bernard* held that "health services" must be "substantial" and "ongoing," it conjured these limiting principles out of thin air<sup>156</sup>—an odd move in light

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<sup>149</sup> *Id.* at 399 (internal quotations omitted).

<sup>150</sup> *See id.* at 399 n.7 ("In *Bernard*, the court disapproved *Davidson* only to the extent that *Davidson* held that section 21350(a) allows for a 'preexisting personal friendship exception.' Thus, *Davidson* remains citable authority with respect to its discussion of the social services issue.") (internal citations omitted).

<sup>151</sup> *Id.* at 399–400 (internal citations omitted).

<sup>152</sup> *Id.* at 400. ("In *Bernard*, the court did not discuss the meaning of the term 'social services,' and it did not hold, as appellant contends, that *only* the provision of substantial ongoing health services renders a caregiver a care custodian . . .").

<sup>153</sup> *Id.* at 401.

<sup>154</sup> *Id.* The court also held that Vulovic had failed to rebut the presumption under section 21351, as she attacked the evidence offered against her, rather than offered affirmative evidence of her own. *See id.* at 402.

<sup>155</sup> *See* CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.17(y) (West 2007). Similarly, the term "dependent adult" includes any person over sixty-four who has "diminished because of age." CAL. PROB. CODE § 21350(c) (West 2007); CAL. WELF. & INST. CODE § 15610.23(a) (West 2007). Of course, one would be hard-pressed to find anyone over sixty-four who did *not* fit this bill.

<sup>156</sup> *Compare* *Bernard v. Foley*, 139 P.3d 1196, 1197, 1202 (Cal. 2006) *with id.* at 1214 n.3 (Corrigan, J., dissenting) ("The majority imports the terms *substantial* and *ongoing* care into the statute without supporting citation of statutory language or legislative history.").

of the majority's textualist approach to statutory interpretation.<sup>157</sup> Moreover, although *Bernard* took pains to point out that it might reach a different result if "friends who were [already] testamentary beneficiaries of a testator *subsequently* became care custodians"<sup>158</sup>—a situation in which the caregiver would have little incentive to exploit the elder—the statute does not address the issue. If *Bernard* could not create a preexisting friendship exception in the face of legislative silence, then it cannot defensibly create a preexisting beneficiary exception in the face of legislative silence. Thus, as long as the California Supreme Court gives the statutory language talismanic significance, one cannot minister to a senior without running the risk of becoming a "care custodian."<sup>159</sup>

The meaning of "social services" is equally, if not more, elusive. Although *Odian* asserts that *Davidson* merely "*questioned*" whether duties "such as cooking, gardening, running errands, providing transportation, grocery shopping and . . . banking" could be "social services,"<sup>160</sup> *Odian* is incorrect. *Davidson* squarely held that "errands, chores, and household tasks . . . cannot be equated with the provision of 'health services and social services.'"<sup>161</sup> *Odian*'s self-proclaimed "expansive interpretation of 'social services'" better accords with *Bernard*'s reluctance to read exclusions into the statute.<sup>162</sup> Yet, if "social services" means nothing more than "socializing" or "helping," then Section 21350 sweeps within its ambit any bequest from an elder to a friend. This cannot be the legislature's intent. One can rectify *Odian* with *Davidson* because *Odian*, unlike *Davidson*, featured a salaried, live-in caregiver. Volovic shared almost every waking moment with *Odian*, and thus had more of an opportunity to control her.<sup>163</sup> Such distinctions, however, are born of common sense, not anything in the definition of "care custodian." Thus, the statute desperately needs reform.

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<sup>157</sup> See *id.* at 1204 (majority opinion) (rejecting Foley and Erman's arguments "[i]n light of the statutory language").

<sup>158</sup> *Id.* at 1209 (emphasis added).

<sup>159</sup> The *Bernard* majority dismissed fairness concerns because the "certificate of independent review" in "section 21351 provides a clear pathway to avoiding section 21350." *Id.* at 1208. Yet after practicing at an estate planning firm and researching both reported and unreported cases for this article, I have never heard of anyone actually using the "certificate of independent review" procedure. The consensus among estate planning attorneys was that few testators were willing to pay for an independent attorney to undertake the searching investigation necessary to rule out caretaker overreaching. In addition, the specter of malpractice liability made them reluctant to participate in the certification process.

<sup>160</sup> *Odian*, 51 Cal. Rptr. 3d at 399–400.

<sup>161</sup> *Bernard v. Foley*, 139 P.3d 1196, 1197, 1202 (Cal. 2006).

<sup>162</sup> *Odian*, 51 Cal. Rptr. 3d at 402.

<sup>163</sup> Compare *id.*, 51 Cal. Rptr. 3d 390 with *In re Conservatorship of Estate of Davidson*, 6 Cal. Rptr. 3d 702, 712 (Ct. App. 2003) ("during the time period most relevant to this case, Davidson was still essentially maintaining her independence").

## II. THE LAW REVISION COMMISSION'S TENTATIVE RECOMMENDATIONS

The Law Revision Commission recently voted to limit the definition of "care custodian" to paid caregivers:

21362. (a) "Care custodian" means a person who provides health or social services to a dependent adult for compensation, as a profession or occupation. The compensation need not be paid by the dependent adult.

(b) For the purposes of this section, "health and social services" include, but are not limited to, the administration of medicine, medical testing, wound care, housekeeping, shopping, cooking, transportation, assistance with hygiene, and assistance with finances.<sup>164</sup>

The Commission also proposed (1) recasting "dependent adult" as someone for whom "[a] court would have appointed a conservator for the person. . . if a petition for conservatorship had been filed,"<sup>165</sup> (2) clarifying that the statute applies "only if the donative instrument was executed during the period in which the care custodian provided services to the transferor,"<sup>166</sup> (3) reducing the burden on caregivers to disprove undue influence<sup>167</sup> from clear and convincing evidence to a preponderance of the evidence, and (4) allowing caregivers to carry this burden solely through the testimony of a "disqualified person."<sup>168</sup>

These changes would ameliorate the statute's fundamental defect—its staggering breadth. In addition, restricting the term "care custodian" to paid caregivers would align the text with its animating concerns about those "hired to provide in-home care."<sup>169</sup> Yet the proposals also elucidate that this area of law does not lend itself to regulation. Indeed, they raise many new questions. Would the new definition of "care custodian"—an individual who caretakes "for compensation, *as a profession or occupation*"—apply to Volovic, who drew a salary but "had never previously worked as a caregiver and was arguably not a professional

<sup>164</sup> Cal. Law Revision Comm'n, *supra* note 21, at 19.

<sup>165</sup> *Id.* at 19–20.

<sup>166</sup> *Id.* at 21.

<sup>167</sup> The Commission eliminates the statute's reference to "menace or duress," correctly noting that none of the rationales for the presumption justify "terms of art that describe extreme forms of coercion." *Id.* at 5.

<sup>168</sup> See Minutes of Meeting, California Law Revision Comm'n, April 10, 2008, at 3, 5, available at <http://www.clrc.ca.gov/pub/Minutes/Minutes2008-04.pdf> (last visited Oct. 24, 2008). Although an express preexisting friendship exception could achieve many of these goals, it would also create uncertainty by requiring courts to define a "friend." See, e.g., Ethan J. Leib, *Friendship and the Law*, 54 UCLA L. REV. 631, 638–47 (2007) (proposing a ten-factor "set of criteria [which] may be useful in delineating the contours of the friendship relation."); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 205 (2007) (noting that courts refuse to enforce instructions for a trustee to make distributions to the settlor's unidentified "friends" for lack of an ascertainable beneficiary).

<sup>169</sup> CAL. S. B. ANALYSIS., ASSEMB. B. 1172, July 8, 1997 (emphasis added); see also Kirsten M. Kwasneski, Comment, *The Danger of a Label: How Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish to Make a Gift to a Personal Friend*, 36 GOLDEN GATE U. L. REV. 269, 290 (2006) (proposing that the Legislature amend section 21350 to "encompasses only those individuals who are in the occupation of providing caretaking services.").

caregiver[?]"<sup>170</sup> Why exempt C.J. Thompson in *Shinkle*, whose role as ombudsman, for which he earned no "compensation," gave him access to sensitive financial information about elderly patients?<sup>171</sup> What does the slippery phrase "health services or social services" mean?<sup>172</sup> As noted above, these terms are so vague that they seem to encompass any manner of providing assistance to an elder. They thus invite arbitrary line-drawing regarding the nature and degree of chores; it is now unclear where "unsophisticated care and attention"<sup>173</sup> ends and full-blown "social services" begin. Moreover, they contain a fundamental perversity—the more kindness one displays toward an elder, the more likely it is that one will be statutorily disinherited.<sup>174</sup> Finally, what is it about the caregiving relationship that justifies making caregivers, paid or otherwise, "disqualified person[s]"? I examine this last question in the next section.

#### A. Policy Rationales for Retaining the "Care Custodian" Provision

The Law Revision Commission offers three reasons for retaining the "care custodian" provision: (1) caregivers have an opportunity to unduly influence their patients; (2) "dependent adults" are especially vulnerable; and (3) devises to caregivers are likely "unnatural."<sup>175</sup> I discuss each in turn.

##### 1. Opportunity to Exert Undue Influence

The Commission correctly notes that "[t]he intimacy, privacy, and duration of a care custodian relationship provides a significant opportunity to exert undue influence on a dependent adult."<sup>176</sup> But this may be equally true of other relationships that would not fall within the revised statute: an elder's family, close friends, doctors, spiritual advisors, and volunteer caregivers. Moreover, courts routinely announce that the "mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient" to prove undue influence.<sup>177</sup> Indeed, that is why California courts have demanded "a showing that the beneficiary actively participated in the preparation of the will" and actually

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<sup>170</sup> *In re Estate of Odian*, 51 Cal. Rptr. 3d 390, 399 (Ct. App. 2006).

<sup>171</sup> *See Estate of Shinkle*, 119 Cal. Rptr. 2d 42, 54 (Ct. App. 2002) ("But for the ombudsman program, Thompson would not have met Shinkle, would not have had access to her financial and personal information, and would not have gained her trust.")

<sup>172</sup> The Law Revision Commission's illustrative list, *see supra* note 21, does not answer this question. It includes, *but is not limited to* "housekeeping, shopping . . . transportation . . . [and] assistance with finances" (emphasis added).

<sup>173</sup> *In re Conservatorship of Estate of Davidson*, 6 Cal. Rptr. 3d 702, 713 (Ct. App. 2003).

<sup>174</sup> Justice Corrigan alludes to this point. *See Bernard v. Foley*, 139 P.3d 1196, 1214 n.3 (Cal. 2006) (Corrigan, J., dissenting) ("Those who provide only trivial or undependable care may inherit, while those whose care is substantial and ongoing are not only to be denied, but also assessed costs and attorney fees.")

<sup>175</sup> *See* Cal. Law Revision Comm'n, *supra* note 21, at 7–8.

<sup>176</sup> *Id.*

<sup>177</sup> *In re Welch's Estate*, 272 P.2d 512, 514 (Cal. 1954).

"affect[ed] the contents of the will" to shift the burden to the beneficiary.<sup>178</sup> The "care custodian" provision only presumes that caregivers actively participate in the preparation and execution of the will because of a historical accident—Section 21350 first governed gifts to drafting attorneys, who *by definition* create the will. The common law also indulged in the sensible inference that lawyers actively participate in their client's will.<sup>179</sup> Conversely, there is no inexorable tether between the act of caregiving or the role of a caregiver and the contents of an elder's estate plan. Thus, to the extent the statute assumes that caregivers dictate their patients' testamentary instruments, its basis for doing so is unclear. To the extent it dispenses with this requirement, it ignores a factor that California courts have recognized as a telling indication of undue influence.

## 2. Vulnerability of "Dependent Adults"

The Commission explains that "a transferor may be dependent on a care custodian for assistance with the necessities of life" and may also suffer from debilitating conditions "that could make the transferor more vulnerable to pressure and manipulation."<sup>180</sup> The Commission sets the statute on firmer ground by changing the definition of "dependent adult" from anyone over sixty-four<sup>181</sup> to individuals who would require a conservator.<sup>182</sup>

Nevertheless, evidence of a testator's impairment does not factor into the test for raising the presumption of undue influence. As such, making it a pillar for a novel extension of the presumption is unusual. Although a few cases have mentioned the testator's susceptibility to bolster their conclusion that a beneficiary obtained a gift by undue influence, the general rule is that "proof of the testator's mental weakness does not establish more than a conjecture that the will is the result of undue influence."<sup>183</sup> California courts have also required a testator to be severely incapacitated to lose the right to devise property. Even being under a conservatorship does not suffice.<sup>184</sup> Thus, without significantly more, the fact that "dependent adults" may be particularly vulnerable to undue influence is not a persuasive basis for barring gifts to "care custodians."

## 3. "Undue Profit" to Caregivers

Finally, and most importantly, the Commission contends that, "[a]n estate plan may be considered unnatural if it provides a large gift to a person who is not related to the transferor or is remotely related, while

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<sup>178</sup> Estate of Swetmann, 102 Cal. Rptr. 2d 457, 466 (Ct. App. 2000) (collecting cases); *see also* Estate of Bould, 287 P.2d 8, 16 (Cal. Ct. App. 1955) (collecting cases).

<sup>179</sup> Estate of Auen, 35 Cal. Rptr. 2d 557, 562 (Ct. App. 1994).

<sup>180</sup> Cal. Law Revision Comm'n, *supra* note 21, at 8.

<sup>181</sup> *See supra* note 155.

<sup>182</sup> Cal. Law Revision Comm'n, *supra* note 21, at 19–20.

<sup>183</sup> William H. Lindsley et al., *Wills*, 64 CAL. JUR. 3D § 188 (2007) (collecting cases).

<sup>184</sup> *See Estate of Mann*, 229 Cal. Rptr. 225, 230-31 (Ct. App. 1986).

providing a less generous gift to close relations.”<sup>185</sup> According to the Commission, this rationale is a valid basis for distinguishing between paid and unpaid caregivers: “While a large gift to a paid employee may appear ‘unnatural,’ the same gift to a friend or Good Samaritan may not.”<sup>186</sup>

Yet the hallmark of the “undue profit” element under California law—what makes the state’s undue influence doctrine so progressive—is its fact-intensive flexibility.<sup>187</sup> Indeed, the test calls for the judge to place herself in the testator’s shoes—to disregard labels and examine the substance of each relationship.<sup>188</sup> The Law Revision Commission is absolutely correct that *some* testamentary gifts to caregivers “may” seem unnatural, especially if they come at the expense of close friends or family. But this will not always be the case. For example, in *Shinkle* and *Odian*, the “care custodian” provision invalidated transfers even though the caregivers were closer to the testators in their final years than any other person.<sup>189</sup> At the same time, both cases featured strong countervailing evidence that called the caregivers’ motives into question.<sup>190</sup> Trial courts and the doctrine of undue influence “exist[ ] to resolve”<sup>191</sup> questions of whether a testamentary gift is “natural” or whether a profit is “due.” A bright-line rule is a poor fit.

Moreover, not only is *any* assumption about “undue profit” troubling, but this particular assumption—that all testamentary gifts to paid caregivers are “undue”—is hardly convincing. Caregivers make little money,<sup>192</sup> rarely have health insurance,<sup>193</sup> and perform invaluable and often distasteful tasks. Elders “need catheters, oxygen tanks, and wheelchairs. They need someone to put a spoon in their mouths, to get them on the toilet, to pull on their socks, and to remind them what day it is. They need someone to oversee an arsenal of medications and a cadre of medical specialists.”<sup>194</sup> Indeed, “[i]ndividuals with three or four chronic illnesses have 8 to 14 physicians taking care of them. The complexity for caregivers is a tremendous challenge.”<sup>195</sup> Especially in states such as California, where

<sup>185</sup> Cal. Law Revision Comm’n, *supra* note 21, at 8.

<sup>186</sup> *Id.*

<sup>187</sup> *See supra* note 52, at 564.

<sup>188</sup> *See id.*

<sup>189</sup> Estate of Shinkle, 119 Cal. Rptr. 2d 42, 50 (Ct. App. 2002) (noting that the testator’s closest relative was a cousin whom she had not seen for four decades); *In re* Estate of Odian, 51 Cal. Rptr. 3d 390, 392–93 (Ct. App. 2006).

<sup>190</sup> *See Shinkle*, 119 Cal. Rptr. 2d at 47–48 (Ct. App. 2002) (noting that Thompson suggested that Shinkle make an estate plan and was close behind her during meetings with her lawyer); *Odian*, 51 Cal. Rptr. 3d at 394 (noting that Volovic apparently isolated Odian and filled out her will for her).

<sup>191</sup> Bernard v. Foley, 139 P.3d 1196, 1215 (Cal. 2006) (Corrigan, J., dissenting).

<sup>192</sup> *See supra* notes 5–6 and accompanying text.

<sup>193</sup> *See* Bob Moos, *Who’ll Care for Aging Boomers?*, DALLAS MORNING NEWS, July 4, 2007, at 1A, available at 2007 WLNR 12671984 (estimating that only half of caregivers have health insurance, and “[i]f a caregiver has coverage, it’s usually because of a spouse or another job.”).

<sup>194</sup> *Elder Care Challenges and Solutions: Hearing Before the Senate Joint Econ. Comm.*, 116th Cong. (2007) (testimony of Virginia Morris), available at 2007 WLNR 9245900.

<sup>195</sup> Michael Vitez, *National Conference on Aging Delivers Wake-up Call to Boomers*, PHILA. INQUIRER, Mar. 11, 2007, at A4, available at 2007 WLNR 4598239.

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seniors often have valuable illiquid assets, such as real estate, a senior could very well want to reward a caregiver for his or her efforts but be unable to do so during life. Thus, there should be nothing inherently suspect about a bequest to a paid caregiver.

## CONCLUSION

The "care custodian" provision casts a long shadow over California probate law. Currently, its definitions are so broad, and exceptions so narrow, that it is doctrinally and theoretically incoherent. As the law now stands, when an unrelated beneficiary helps an elder in any fashion, they do so at their own peril. The California Law Revision Commission's tentative recommendations would circumscribe the statute and thus are a good first step. But before its mandate to rethink the statute expires, the Commission should seriously consider whether to abandon the "care custodian" provision once and for all.