"NOTHING CAN BE LITIGATION-PROOFED FROM STUPIDITY OR GREED, BUT WHAT ARE THE 10 BEST THINGS AN ESTATE PLANNER CAN DO TO VALIDATE YOUR CLIENT'S DESIRE TO BENEFIT A POTENTIAL CARE CUSTODIAN?"

SARAH S. BROOMER, NANCY REINHARDT, & MARK A. LESTER – JANUARY 8, 2026

1. Don't plan for a client you've never known prior to estate planning engagement
2. Implement client intake and meeting policies to protect the estate plan *and don't vary from them without good cause*
3. Certificate of Independent Review
4. Develop an estate planning questionnaire that allows you to carefully identify all beneficiaries of your client's estate plan, especially those without family names – *draft supplemental questionnaire if beneficiary is or appears to potentially be a care custodian*
5. Include in your retainer agreement right to charge the estate your regular hourly rate for deposition and discovery responses
6. Send a letter to your client that a certificate of independent review should be obtained for estate plan where gifts to potential care custodian(s) – *send with some proof that it was delivered to your client – possibly also email and first class mail*
7. Geriatric assessment to support estate plan
8. Separate letter from client explaining the gift to potential care custodian – *why is the gift being made? What is the relationship that supports the gift?*
9. Separate letter from one or more family members affirming the gift and agreeing not to challenge
10. Copious notes re conferences with client for reasons for gifts and lack of input/control from others

SAN FERNANDO VALLEY BAR ASSOCIATION

PROBATE AND ESTATE PLANNING SECTION

July 22, 2025

"Don't be the Crash Test Dummy: Remuneration, Care Custodians, and Best Practice Suggestions"

Presented by Mark A. Lester, Esq. and Nancy Reinhardt, Esq.

I. Introductions and Introductory Remarks

II. Current Framework for Donative Transfers

A. Key Terms

1. Care Custodian

2. Dependent Adult

3. Health of Social Services

B. Presumption Issues

1. What is it?

2. How can it be overcome?

C. Remuneration

1. What is excluded?

2. Relationship to Compensation

3. What are some of the questions to ask about the financial relationship?

4. Why are actions being taken?

5. Examples including discussion of Gutierrez case

D. Ways to Rebut the Presumption

1. Certificate of Independent Review

2. Clear and Convincing Evidence

E. Duties of Drafting Attorney

F. Practice Tips

G. Attachments

Estate of Odian (2006) 145 Cal.App.4th 152

Osornio v. Weingarten (2004) 124 Cal.App.4th 304

Robinson v. Gutierrez (2023) 98 Cal.App.5th 278

Estate of Bernardine Barrow (unpublished opinion), Court of Appeal of the State of California, Second Appellate District Division One, Case B 253958, Filed September 24, 2016

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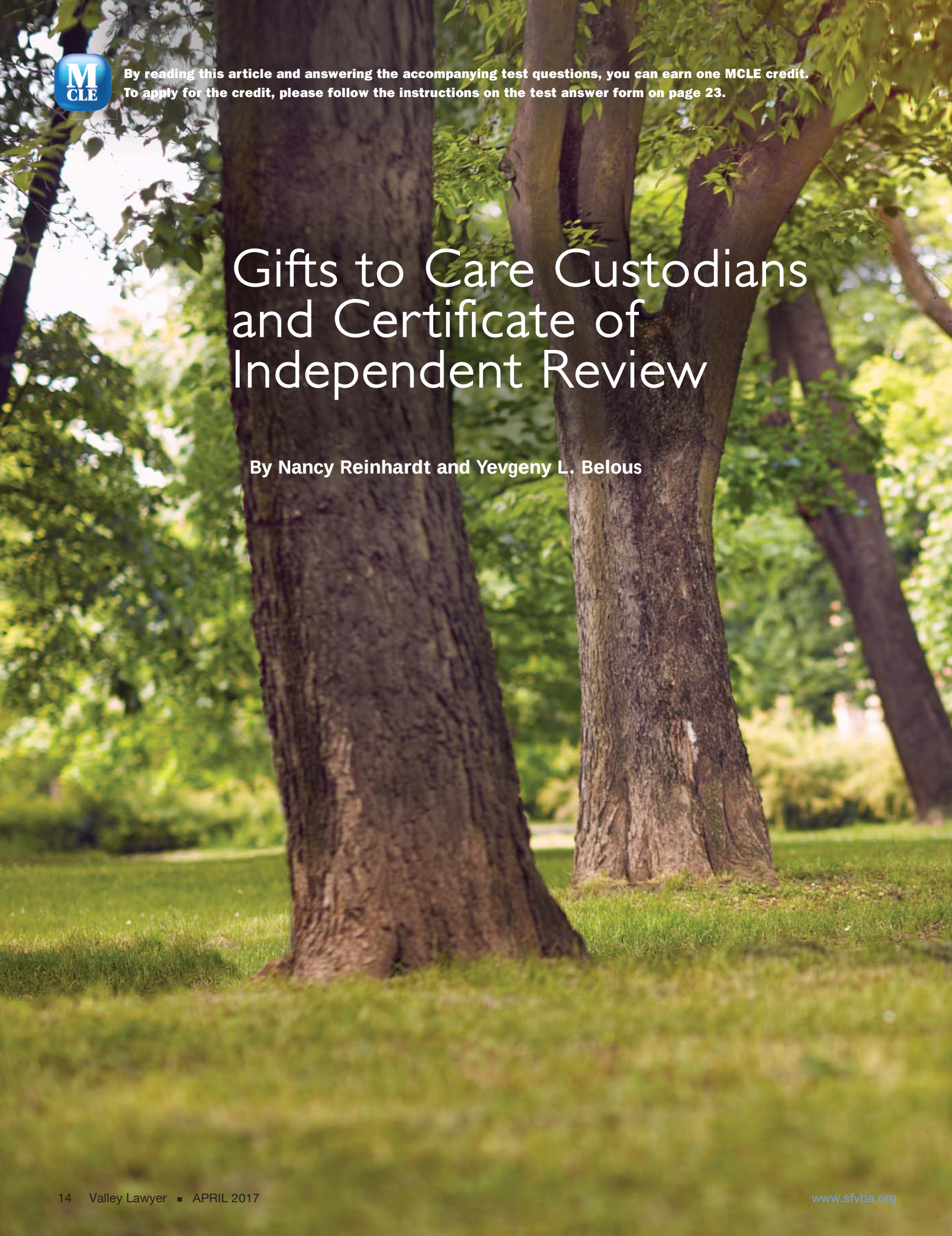


By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 23.

Gifts to Care Custodians and Certificate of Independent Review

By Nancy Reinhardt and Yevgeny L. Belous

The legal standing of care custodians—those who provide health and social services to dependent adults—is a potentially thorny area where, sadly, the exertion of undue influence on dependents and malpractice claims sometimes come to the fore. As the authors point out, "Strict adherence to the statute and case law will help ensure that a client's testamentary wishes are carried out and that the attorney's risk of discipline and malpractice are minimized."

THE CALIFORNIA COURTS AND LEGISLATURE recognize there are individuals in our society who are particularly vulnerable to undue influence. These vulnerable members of our society are protected by a diverse set of laws designed to prevent unscrupulous individuals from taking advantage of this susceptibility. One area where the exertion of undue influence is common is estate planning.

The California Probate Code lists seven categories of persons who cannot validly receive donative transfers, including, inter alia, a care custodian of a dependent adult.[1] Here, our focus is on those care custodians.

California Probate Code §21350 and *Bernard v. Foley*

California Probate Code §21350 is the predecessor to the current statute identifying the categories of individuals who cannot validly receive donative transfers. It is still the effective statutory framework for instruments which became irrevocable between September 1, 1993 and January 1, 2011.[2] Today, most cases related to this issue will be analyzed under the current statute.

However, there are still situations requiring analysis under §21350. The instrument shall be deemed irrevocable if the testator, by reason of incapacity, was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.[3] Hence, if a person became incapacitated on or before January 1, 2011, but died this year and never regained capacity, donative transfers made in his or her estate plan would be analyzed under §21350.

Under Probate Code §21350(a)(6), no provision, or provisions, of any instrument shall be valid to make any donative transfer to a care custodian of a dependent adult who is the transferor. One of the landmark cases in the area of prohibited transfers to care custodians is *Bernard v. Foley*. This 2006 California Supreme Court decision not only explains how §21350 relates to the common law doctrine establishing a presumption of undue influence these types of transfers, but is also the reason the California legislature overhauled §21350.

In *Bernard v. Foley*, the California Supreme Court recognized that California Probate Code §21350 was designed to supplement the common law doctrine establishing a rebuttable presumption of undue influence where the person who is alleged to have exerted such influence (1) has a confidential relationship with the testator; (2) actively participated in procuring the instrument; and (3) would benefit unduly by the instrument.[4]

One such "confidential relationship" addressed in §21350 is the relationship between a dependent adult and their care custodian. In *Bernard*, James Foley and his girlfriend, Ann Erman, were longtime personal friends of Carmel L. Bosco. For two months before Carmel L. Bosco's death, she resided at the Riverside home shared by James Foley and Ann Erman, who jointly cared for her during her final illness. The court was asked to determine whether close personal friends of a dependent elder adult who at the end of her life provided her with personal care are care custodians for the purposes of §21350. The court concluded that:

> "When an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian for purposes of the statutory scheme at issue, notwithstanding that the service relationship between the individuals arose out of a preexisting personal friendship rather than a professional or occupational connection."[5]

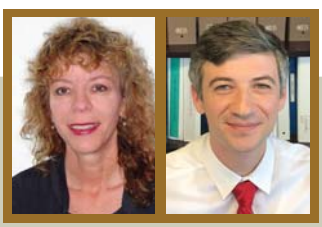
The court recognized that a substantial personal friendship existed between the testator and the disqualified individual. Despite this relationship, the court concluded that the statutory directive was clear—under California Probate Code §21350, there is no exception for preexisting social relationships. The court also concluded it was immaterial if the personal care services were provided with no expectation of compensation. Despite recognizing the harsh effect this statute may have in certain situations, the court explained that Probate Code §21351 provides a simple mechanism for avoiding the application of §21350. This mechanism is called the Certificate of Independent Review.[6]

At the conclusion of the *Bernard* decision, the court invited the Legislature to "correct our error" if they believed the court's interpretation of the §21350 went beyond the intended application.[7] The legislature did exactly that, creating the new statutory framework for potentially invalidating gifts to those defined as "care custodians." This new statutory framework is contained in California Probate Code §§21360 to 21392.

Current Statutory Framework for Donative Transfers

Under California Probate Code §21380(a)(3), a donative transfer to the care custodian of a dependent adult is presumed to be the product of fraud or undue influence if the instrument containing the transfer was executed during the period in which the care custodian provided services to the transferor or within 90 days before or after that period.

Once applicable, this presumption can be rebutted if the beneficiary can prove, by clear and convincing evidence, that



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the donative transfer was not the product of undue influence or fraud.[8] If a beneficiary is unsuccessful in their attempt to rebut this presumption, they shall bare all costs of those proceedings, including reasonable attorney fees.[9]

In order to determine whether a gift to a particular situation triggers the applications of California Probate Code §21380, it is important to understand the definitions and case law analyses of several key terms.

"Care custodians" are persons who provide health or social services to dependent adults, except for those individuals who provided such services without remuneration if the persons had a personal relationship with the dependent adult: (1) at least 90 days before provide those services; (2) at least 6 months before the dependent adult's death; and (3) before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.[10]

"Health or social services" are services provided to a dependent adult because of the person's dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.[11] Probate Code §21362(b) clearly expands on the California Supreme Court's previous analysis of which services can properly be considered "health or social services."

In *Conservatorship of Davidson*, a case decided before the enactment of California Probate Code §§21360 to 21392, the court concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking did not qualify as health and social services.[12]

"Dependent adult" is a person who, at the time of the execution of the instrument, is either: (1) 65 years of age or older and is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code §811, the person has difficulty managing his or her own financial resources or resisting fraud or undue influence; or (2) is 18 years of age or older and is unable to provide for his or her personal needs for physical health, food, clothing, or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code §811, the person has substantial difficulty managing his or her own financial resources or resisting fraud or undue influence.[13]

It is important to note that the rather expansive list of activities included in the definition of "health or social services" must be provided to the dependent adult because of the person's dependent condition. In *Estate of Shinkle*, a case decided prior to the enacting of the California Probate Code §§21360 to 21392, the California Supreme Court determined that a person with a pre-existing, genuine, personal relationship with the donor can provide health and social services without being a care custodian if the services naturally flow from the relationship.[14] It seems clear that the courts and the Legislature want to avoid disqualifying transferees rewarded by a transferor who received the genuine benefits of a personal relationship.

Instruments and Transfers

California Probate Code §21382 excludes the application of the care custodian rules to the following transfers and instruments: (1) transfers to person related by blood or affinity within the fourth degree or who is a cohabitant of the transferor; (2) instruments drafted or transcribed by a person related by blood or affinity within the fourth degree to transferor or is a cohabitant of the transferor; (3) a transfer of property valued at $5,000 or less, if the total value of the transferor's estate equals or exceeds the sum listed in California Probate Code §13100 (currently $150,000); or (4) the instrument is executed outside of California by a transferor who was not a California resident at the time of execution.[15]

Table of Consanguinity

While many of the terms in California Probate Code §21382 require no further explanation, certain terms require outside guidance. Determining whether an individual is related to the transferor within the fourth degree can be tricky in large families. One very useful guide used by practitioners to make this determination is the Table of Consanguinity.

The meaning of "cohabitant" is defined by California Penal Code §13700. The term "affinity" relates to a relationship created because of marriage (i.e., in-laws). For the purposes of §21382, this marriage can be entered into after the transferee previously served as a care custodian.[16] Further, if the requisite relationship by affinity exists at the time the instrument is executed, the exemption still applies, even if the relationship is no longer present at the time of death of the transferor.[17]

Certificate of Independent Review

There are a number of ways to render this section of the Probate Code inapplicable or to rebut the presumption that the transfer was the product of fraud or undue influence.

A review by an independent attorney that results in the execution of a Certificate of Independent Review is the primary methodology to help ensure that a gift to a care custodian does not fail as a result of the application of the statutory provisions discussed above.

Probate Code §21384 sets out the statutory requirements. First, the instrument containing the gift must be reviewed by an independent attorney. Second, the independent attorney must counsel the transferor. This counsel must address the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument. Third, this

counsel must be outside of the presence of any heir or proposed beneficiary. Fourth, the independent attorney must attempt to determine if the intended transfer is the result of fraud or undue influence. Fifth, an original Certificate of Independent Review in substantially the form set out in this section must be signed and delivered to the transferor with a copy provided to the drafting attorney.[18]

The term "independent attorney" is defined in Probate Code §21370. It means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue. This term also excludes an attorney who would be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue.[19]

It is interesting to note that there is at least one appellate court decision which contains a much more expansive definition of who is or might not be independent for purposes of the review and execution of a Certificate. In *Estate of Eugene Winans*, the court focused its discussion as to independence on the reviewing attorney's relationship with the donor. By reviewing the legislative history, the *Winans* court concluded that the word "independent" "would entail, at a minimum, 'an attorney not related to, or associated with, the drafter or the beneficiary of the transfer.'"[20]

Although *Winans* was decided under the prior statutory framework, there are some insightful comments in the opinion for consideration. While the prior statute did not discuss a minimum, adequate level of counseling and only contained "the barest description of the necessary counseling," the court declined to require that the reviewing attorney discuss the existence of the statute, its purpose and operation, and the concept of "disqualified persons."[21]

The term "nature and consequences" must be construed in light of the purpose of the statue, that is to ensure that the testator makes the bequest to a disqualified person both voluntarily and fully aware of the scope of the action. "Nature" extends to both the type and amount of the property being transferred.

The term "consequences" extended to those individuals who will not only receive the property but those who will not receive the property. The court found that proper counseling required the attorney to ensure that a testator understood that a disqualified person would receive the property and that the natural objects of the testator's bounty would not.[22]

The *Winans* court went on to require that the testator voluntarily intended this result and that he or she did not "believe himself or herself to be under any compulsion, whether legal, financial or otherwise, to make the bequest." This may extend to documenting advice to the testator and confirming his or her understanding that the disqualified person has already been fully compensated for services provided to the testator or otherwise has no legal claim on the testator's bounty.[23]

While the statute does not specifically require the counseling to be confidential, the Certificate provided for in §21384 stipulates that the reviewing attorney certify that he or she has advised the

transferor "independently, impartially, and confidentially." Thus, the *Winans* court agreed the statute required the counseling to occur confidentially. Caution should be taken to ensure that the otherwise disqualified person is not privy to the counseling discussions (in *Winans*, she is "in and out") and that the conversations cannot be overheard by third parties.[24]

The *Winans* court noted the best practice is "to hold the counseling session in complete privacy with only the testator and certifying attorney present." But the court refused to adopt a rule strictly prohibiting the presence of a third party. The court recognized that there might be circumstances in which the presence of a third party would be necessary to effect the counseling. It concluded that, at a minimum, the disqualified person and any person associated with the disqualified person must be absent during the counseling session.

Further, any person whose presence might discourage the testator from speaking frankly with the attorney must also be absent. If any person other than the certifying attorney is present during a counseling session, the court imposed a burden on the disqualified person to demonstrate that the counseling session was confidential by showing that the presence of third parties was either necessary to accomplish the counseling session, or did not interfere with the transferor's full and honest conversations with the drafting attorney regarding the transfer to the disqualified person.[25]

With respect to "independence," the *Winans* court focused on ensuring that the attorney's personal circumstances permitted the rendering of a disinterested judgment about the validity of the request. Dissociation from the beneficiary's interests alone was insufficient to constitute independence. Relationships with the transferor and the drafting attorney were also considered in the determination.[26]

Failure to Obtain Certificate of Independent Review

In *Osornio v. Weingarten*, the drafting attorney failed to obtain a Certificate of Independent Review for a plan in which the entire estate was left to a care custodian. When the care custodian was unable to overcome the statutory presumption against the bequest, the bequest failed. The care custodian then sued the drafting attorney, contending that the failed bequest was a result of the attorney's negligence in failing to obtain a Certificate of Independent Review.

The *Osornio* court found that the drafting attorney owed a duty to advise the transferor that, absent taking certain steps, the subject transfer, if challenged, had a significant likelihood of failure because of presumptive disqualification and to recommend that the client seek independent counsel in an effort to obtain a Certificate of Independent Review. This counseling is clearly intended to occur prior to the client's decision to obtain a Certificate of Independent Review.[27]

The four elements to a legal malpractice claim are duty, breach of duty, proximate cause, and damage. The *Osornio* court found that the caregiver could have alleged that the attorney breached a duty owed to her by failing to advise the testator of the caregiver's presumptive disqualification and referring the testator to independent counsel to advise her and to provide a Certificate of Independent Review. Additionally, in the absence of a certificate, the caregiver would be required to prove by clear and convincing evidence (not including her own testimony) that the transfer was not the product of fraud, menace, duress, or undue influence, which is a high burden.[28]

In *Osornio*, the court identified six factors to be evaluated when determining the existence of an attorney's duty to a non-client. One of those factors queries whether the extension of liability to a non-client, here the care custodian, would "impose an undue burden on the profession." In extending liability, the court found that the care custodian was a third party beneficiary of the contract to provide legal services.[29] Hence, third-party liability could reasonably be imposed.

The *Osornio* court, in analyzing the duty of a drafting attorney, also found that an attorney is expected to possess a knowledge of "plain and elementary principles of law," to undertake reasonable research, and "to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem."

The court went on to say that the attorney **must** (emphasis added) assist his client in making the transfer "in a manner that does not unduly expose the transfer to attack." Imposing a duty does not create a situation where the attorney would have conflicting loyalties. Imposing a duty in cases such as this would only encourage attorneys to "devote their best professional efforts on behalf of their clients." The attorney's duty was to take appropriate actions to carry out the testator's wishes that were expressed and formalized in a signed estate planning instrument.[30]

Other Methods to Render Probate Code §21380 Inapplicable

As the *Osornio* court commented, in the absence of a Certificate of Independent Review, a presumptively disqualified donee may rebut the presumption where the court determines on clear and convincing evidence, not based solely on his or her own testimony, that the transfer was not the product of fraud, menace, duress, or undue influence. This burden of proof requires the care custodian to persuade the court that it is "highly probable that the fact is true."

Framed differently, the care custodian must demonstrate that there is no substantial doubt that the transfer was not the product of fraud, menace, duress, or undue influence. If the proposed donee fails to meet this burden, he or she shall bear all costs of the proceedings, including reasonable attorney's fees. However, the converse is not true. A proposed donee who establishes the validity of the donative transfer by successfully rebutting the presumption is not entitled to an award or costs and reasonable attorney's fees.[31]

If the transferor is also a conservatee, the court may issue an order on a substituted judgment petition which seeks authority to execute an estate planning instrument containing a presumptively disqualified transfer after full disclosure of all of the relationships involved.[32]

Finally, it is worth mentioning that lifetime transfers not made on written instruments are not subject to the presumptive disqualification statute. These gifts would exclude gifts evidenced by a deed, a bank or securities account transfer, a vehicle transfer, or similar transfers. These exempt lifetime transfers are still subject to issues of fraud, duress, and undue influence.

The Gift Has Failed

If the proposed transfer is subject to the statute and none of the above approaches are either available or can be satisfied, the gift will fail. If the gift fails, the instrument operates as if the beneficiary had predeceased the transferor without a spouse, domestic partner, or issue.[33] The invalid transfer will pass to the donor's intestate successors or beneficiaries under a prior instrument if no provision has been made for an alternative or residuary beneficiary. Under the doctrine of dependent relative revocation, a will that is revoked by a later will in the belief that

the later document is effective remains in effect to the extent that the later will is invalid.[34]

In addition to the potential malpractice liability imposed under *Osornio* which is discussed above, Business and Professions Code §6103.6 makes an attorney's violation of part 3.5 commencing with Probate Code §21350 (the predecessor statute) or part 3.7 commencing with Probate Code §21360 grounds for discipline "if the attorney knew or should have known of the facts leading to the violation." This section is only applicable to violations that occur on or after January 1, 1994.[35]

Practice Pointers

In an effort to avoid the potential failure of the client's expressed proposed transfer, the potential imposition of malpractice liability and risk of discipline by the State Bar, the attorney should consider the adoption of practice pointers raised by the applicable statutes and case law.

First, the drafting attorney should revise his or her estate planning questionnaire to aid in the identification of all care custodian issues. The questionnaire should closely follow all statutory definitions so as to assist in the identification of all possible disqualified transfers. The questionnaire should be used with each and every estate planning engagement.

Second, to the extent that the drafting attorney will not prepare a Certificate of Independent Review for a gift to a care custodian (which review is specifically authorized by statute in this very limited circumstance), it is recommended that the drafting attorney specifically excludes this service in their written Agreement of Representation. There is no statutory duty imposed on the drafting attorney to perform this service.

Third, the authors recommend extreme caution in making referrals to attorneys for preparation and execution of the Certificate of Independent Review. The *Winans* court has expanded the definition of "independent attorney." Query how far a court may go in its analysis of independence and whether the landlord/officemate situation in *Winans* might also be expanded to other relationships such as friendships, referral relationships, or the like. The authors recommend the use of a lawyer referral service such as the service provided by the San Fernando Valley Bar Association in an effort to ensure as much independence as possible.

Fourth, in keeping with *Osornio* and *Winans*, the drafting attorney should document the risk that the contemplated gift will fail and that he or she recommends the client seek independent counsel to procure a Certificate of Independent Review. This letter should be sent to the client multiple times and copious notes maintained regarding discussions with the client.

Fifth, in further keeping with *Osornio* and *Winans*, the certifying attorney should prepare a Certificate of Independent Review that is both statutorily compliant and considers the *Osornio* issues such as discussed above.

Strict adherence to the statute and case law will help ensure that the client's testamentary wishes are carried out and that the attorney's risk of discipline and malpractice are minimized.

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[1] CAL. PROB. CODE §§21350(6) and 21380(a)(3).
[2] CAL. PROB. CODE §21355.
[3] CAL. PROB. CODE §21355(a).
[4] *Bernard v Foley*, 39 Cal.4th 794, 47 Cal.Rptr.3d 248 (2006).
[5] *Id.*
[6] Id.
[7] Id.
[8] CAL. PROB. CODE §21380(b).
[9] CAL. PROB. CODE §21380(d).
[10] CAL. PROB. CODE §21362(a).
[11] CAL. PROB. CODE §21362(b).
[12] *Conservatorship of Davidson*, 113 Cal.App.4th 1035 (2003).
[13] CAL. PROB. CODE §21366.
[14] *Estate of Shinkle*, 97 Cal.App.4th 990 (2002).
[15] CAL. PROB. CODE §21382.
[16] *Estate of Pryor*, 177 Cal.App.4th 1466 (2009).
[17] *Estate of Lira*, 212 Cal.App.4th 1368 (2012).
[18] CAL. PROB. CODE §21384.
[19] CAL. PROB. CODE §21370.
[20] *Estate of Eugene Winans*, 183 Cal.App.4th 102 (2006).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Osornio v. Weingarten*, 124 Cal.App.4th 304 (2004).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] CAL. PROB. CODE §§2580 and 21380.
[33] CAL. PROB. CODE §21386.
[34] *Estate of Anderson*, 56 CA 4th 235 (1997).
[35] CAL. BUS. & PROF. Code §6103.6.

Test No. 102

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Tom signed his trust containing a gift to his caregiver on December 3, 2010. Tom had a stroke on January 15, 2011, causing him to go into a coma, and died on January 15, 2016, never regaining consciousness since his stroke. In a lawsuit to invalidate the gift to Tom's caregiver, it would be appropriate to use Probate Code §21350 for the analysis.
❑ True ❑ False

2. In 2017, Tim's brother-in-law, Sam, was asked to leave his job in order to care for Tim, who was diagnosed with dementia. Tim paid Sam $50 per day to help with the administration of Tim's medication and to drive Tim to the doctor. Two weeks after Sam started providing these services, Tim contacted his attorney and changed his trust to leave Sam a substantial gift. One month later, Tim died. PC §21380 does not apply to this situation.
❑ True ❑ False

3. In Estate of *Shinkle*, the court determined that, under certain conditions, a person can provide the donor with health and social services without being considered a care custodian.
❑ True ❑ False

4. PC §21350 was designed to supplement, not replace, the common law doctrine establishing a presumption of undue influence for gifts to those who share a confidential relationship with the donor.
❑ True ❑ False

5. A properly executed Certificate of Independent Review cannot rescue a gift to care custodian made in a trust which became irrevocable on January 2, 2008.
❑ True ❑ False

6. Under *Bernard v. Foley*, a person with a pre-existing friendship with the donor falls outside of the statutory definition of a care custodian.
❑ True ❑ False

7. There is no way to overcome the presumption of undue influence once it is established under PC §21380.
❑ True ❑ False

8. In 2017, Sam establishes a friendship with John, who was receiving hospice care when they became friends. This genuine friendship lasts until John's death 11 months later. Four months into the friendship, John changes his trust to leave everything to Sam. If Sam provided John with health or social services without remuneration starting one month before John's death, Sam is not a care custodian.
❑ True ❑ False

9. A Table of Consanguinity is used to determine the degree of kinship between two related people.
❑ True ❑ False

10. PC §21384 sets out the statutory requirements for a Certificate of Independent Review. Under §21384, the independent attorney must counsel the transferor on the nature and consequences of the intended transfer.
❑ True ❑ False

11. "Care custodians" is defined as persons who provide health or social services to dependent adults, including those individuals who provide such services without remuneration under certain circumstances.
❑ True ❑ False

12. In *Estate of Eugene Winans*, the California Supreme Court adopted a rule prohibiting the presence of a third party at confidential counseling sessions.
❑ True ❑ False

13. In *Bernard v. Foley*, the California Supreme Court concluded that whether the personal care services were provided with no expectation of compensation was immaterial to the outcome of the case.
❑ True ❑ False

14. Dissociation from a beneficiary's interests alone is insufficient to constitute independence.
❑ True ❑ False

15. In certain circumstances, an "independent attorney" is permitted to have a legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue.
❑ True ❑ False

16. In *Conservatorship of Davidson*, the court found that a variety of activities—including cooking, gardening, driving the transferor to the doctor, running errands, and grocery shopping—qualified as health and social services.
❑ True ❑ False

17. PC §21384 fails to set out the statutory requirements of a Certificate of Independent Review.
❑ True ❑ False

18. The best practice is for a reviewing attorney to hold a counseling session with a testator and the certifying attorney in a public venue so that witnesses can corroborate whatever counsel is given.
❑ True ❑ False

19. The three elements to a legal malpractice claim are breach of duty, proximate cause, and damage.
❑ True ❑ False

20. The relationship between a dependent adult and their care custodian is not considered a confidential relationship under the provisions of PC §21350.
❑ True ❑ False

MCLE Answer Sheet No. 102

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

San Fernando Valley Bar Association
5567 Reseda Boulevard, Suite 200
Tarzana, CA 91356

METHOD OF PAYMENT:

❑ **Check or money order payable to "SFVBA"**
❑ **Please charge my credit card for $_____.**

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Credit Card Number **Exp. Date**

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Authorized Signature

5. **Make a copy of this completed form for your records.**
6. **Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.**

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City_____
State/Zip_____
Email_____
Phone_____
State Bar No._____

ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 21.

Certificate of Independent Review: A Must-Have Protection

By Nancy A. Reinhardt, Sarah S. Broomer and Mark A. Lester

A Certificate of Independent Review is strongly recommended in any instance in which a gift is intended to a non-family member who might be found to be the donor's care custodian. In addition to carefully documenting any advice given to a client in the case file, only by recommending the Certificate can the risk of discipline and/or a charge of malpractice be avoided.

THE STATUTES GOVERNING GIFTS TO A prohibited transferee in the California Probate Code (PC) apply to instruments which became irrevocable on or after January 1, 2011.[1]

For purposes of these sections, an instrument that is otherwise revocable or amendable is deemed to be irrevocable if, on or after January 1, 2011 the transferor by reason of incapacity was unable to change the dispositive provisions and did not regain capacity prior to his or her death.[2]

Instruments that became irrevocable prior to that date are governed by PC §§ 21350 *et seq*. which contains the predecessors to the current statutes. They apply to instruments which became irrevocable between September 1, 1993 and January 1, 2011.[3]

Under PC § 21350(a)(6), no provision of any instrument shall be valid to make any donative transfer to a care custodian of a dependent adult who is the transferor.

Refer to *Bernard v. Foley* which is one of the seminal opinions in the area of prohibited transfers.[4] That 2006 California Supreme Court decision found that the statutes then in effect did not have a "substantial personal relationship" or a "no compensation for services" exception to the definition of a "care custodian" as seemingly found in prior lower court decisions and therefore invited the Legislature to correct those omissions in PC §§ 21350 *et seq*., if that had in fact been intended. That invitation was clearly accepted and the omissions corrected in the current statutes.

Presumption of Fraud or Undue Influence

If the instrument containing the transfer was executed during the period in which the care custodian provided services to the transferor or within 90 days before or after that period, a donative transfer to the care custodian of a dependent adult is presumed to be the product of fraud or undue influence.

Once applicable, this presumption can be rebutted if the beneficiary can prove, by clear and convincing evidence, that the donative transfer was not the product of undue influence or fraud.[5]

Several key terms are critical to the analysis.

The first term that is important to understand is "care custodians"—the persons who provide health or social services to dependent adults. Excepted from that definition are persons who provided those services without remuneration if they had a personal relationship with the dependent adult…

- At least 90 days before providing those services;
- At least 6 months before the dependent adult's death; and,
- Before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.[6]

Remuneration does not include the donative transfer at issue under this chapter or the reimbursement of expenses.[7]

In *Estate of Shinkle*, which was decided before enactment of the current statutory scheme, the Court of Appeal determined that a person with a genuine, pre-existing personal relationship with the donor can provide health and social services without being a care custodian "if the services naturally flow from the relationship."[8]

Under the current statutory scheme, the result might differ if the donee is compensated. The result might also differ if the services are provided because of the donor's dependent condition or as a result of the personal relationship.

The second important term to understand is health or social services—services provided to a dependent adult because of his or her dependent condition, which may include activities such as administration of medication, medical testing, care of wounds, help with personal hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.[9]

Several cases decided under the former statute may prove insightful, though not determinative, when considered under the current statute.

In *Conservatorship of Davidson*, for example, the Court of Appeal concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking, where the service providers were not being compensated, did not qualify as "health or social services."[10]

But, compare that case with the *Estate of Odian* in which a live-in, paid caregiver providing similar services was found to be providing health and social services.[11] In yet another case, *Estate of Austin*, the court concluded that driving the transferor to doctor's appointments and meal preparation were not substantial ongoing health or social services qualifying the donee as a care custodian.[12]

The third important term in the analysis is "dependent adult."

A dependent adult is a person who, at the time of execution of the instrument, is either 65 years of age or older

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and has "*difficulty* managing his or her own financial resources or resisting fraud or undue influence, and is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code Section 811"; or, is 18 years of age or older and has "*substantial difficulty*" managing the same activities for the same reasons as described above.[13]

Rendering Probate Code §21380 Moot

There are a number of ways to render PC § 21380 inapplicable or to rebut the presumption that the transfer was the product of fraud or undue influence.

A review by an independent attorney that results in the execution of a Certificate of Independent Review (CIR) is the primary methodology to help ensure that a gift to a care custodian does not fail as a result of applying the statutory provisions discussed above. But, if there isn't a CIR, can the transfer be salvaged?

In such a case, a presumptively disqualified donee may rebut the presumption where the court determines on clear and convincing evidence that the transfer was not the product of fraud, menace, duress, or undue influence.[14] That burden of proof requires the care custodian to persuade the court that it is "highly probable" that the fact is true.

Setting Aside or Defending the Prohibited Transfer

If you are the party attacking the donative transfer as being the product of undue influence, there are several evidentiary hurdles to overcome before the burden of proof shifts to the proponent of the document to establish that it was not the product of undue influence, each of which must be established by a preponderance of the evidence.

The first is that there was a "donative transfer" involved. In *Jenkins v. Teegarden*, a transfer is "donative" if it is for inadequate consideration.[15] The transfer can still be donative even if good consideration is given that would otherwise be sufficient to support a contract.[16]

Next, the attacking party must prove that the recipient was a care custodian at the time of the execution of the instrument or donative transfer. A careful examination of the definition of care custodian in PC § 21362(a) reveals that there is an exclusion for persons who provide care services without remuneration. Though remuneration is not defined as compensation nor does it include either the donative transfer at issue or the reimbursement of expenses, existing records should be carefully examined to see if others are being paid for "caregiver" services on a regular and substantial basis.

Also, what is the effect of the forgiveness of debt on the applicability of this section? Is the forgiveness of indebtedness remuneration?

Another element that should be established by the attacking party is that the services actually provided constitute

"health or social services." This element raises issues of the timing and nature of the relationship, whether payment was involved, what was the nature of the services provided, and whether or not the services provided were the result of the dependent adult's condition.

When considering how to attack the transfer, one must carefully examine the definition of what makes an individual an "dependent adult."

The key is the PC § 811 mental function deficit criteria and/or inability to provide for his or her personal needs for physical health, food, clothing or shelter. To establish those criteria or lack thereof, medical records will be needed. In addition to medical records, it will be important to identify witnesses with observational information current with the time of the execution of the documents containing the donative transfer.

Further, an examination of whether or not the deficits are isolated and temporary incidents such as might be caused by a UTI, a medication or other brief illness from which the transferor has or will recover, is important. In the unreported decision of *Stover v. Padayao*, because the decedent was not shown to be a "dependent adult," his friends, by definition, did not qualify as care custodians.[17]

Rebutting When Attacking the Gift

Probate Code § 21380(b) provides that the presumption is one which affects the burden of proof. It may be rebutted "by proving, by clear and convincing evidence, that the donative transfer, was not the product of fraud or undue influence."[18]

Probate Code § 86 provides that undue influence has the same meaning as in Section 15610.70 of the Welfare and Institutions Code.[19] The intention of the Legislature is that this Section supplement the common law meaning of "undue influence" without superseding it or without interfering with the operation of that law.

"Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.[20]

When determining whether a result was produced by undue influence, *all* of the following need to be considered: vulnerability of the victim; the influencer's apparent authority; actions or tactics used by the influencer; and equity of the result.

When considering the first factor, evidence includes such things as incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

Evidence of apparent authority includes status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual advisor or other expert, while evidence of actions or tactics.

Evidence of actions or tactics used may embrace controlling the necessities of life, medication, the victim's interactions with third parties, access to information or sleep; use of affection, intimidation or coercion; and, initiation of changes in personal or property rights, use of quick changes or secrecy in making those changes, making changes at inappropriate times and places, and claims of expertise in making those alterations.

Evidence of the equity of a result may include the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, and the appropriateness of the change in light of the nature and length of the relationship.

Evidence of an inequitable result, without more, is not sufficient to prove undue influence.[21]

Clear and Convincing Evidence Standard

The proponent of a valid gift to a prohibited transferee having been unsuccessful in defeating his or her client's classification as a care custodian of a dependent adult has one final chance to save the gift, namely, to show by clear and convincing evidence that the donative transfer was not the product of undue influence.

The function of the standard of proof is to instruct the fact finder concerning the degree of confidence society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision.[22]

Here, the Legislature decreed that protecting our most vulnerable adults is so important that only if a care custodian can show by clear and convincing evidence that a donative transfer was not the product of undue influence will that gift be valid.

In *In re the Conservatorship of Wendland*, the California Supreme Court stated that, "The 'clear and convincing evidence' test requires a finding of high probability, based on evidence'"'so clear as to leave no substantial doubt' [and] 'sufficiently strong to command the unhesitating assent of every reasonable mind'"[23]

So, given this extremely high threshold of proof required to validate the donative transfer to a care custodian, the appellate courts—in the only reported case and two unreported cases—have yet to find a care custodian who has been able to meet this stringent level.

The following three cases are illustrative of the difficulty in meeting this level of proof.

Estate of Odian

Estate of Odian was decided under a former statute that dealt with a paid, live-in caregiver who became the primary beneficiary of a decedent's estate.[24]

The donor had never married, had no children or family within 3 degrees that she knew of, and had been preceded in death by her only sibling several years earlier. Both the decedent and her sister had identical wills, both prepared by an attorney they never met, that left their estates to the surviving sibling and then to charities neither sister had had any contact with, but had been recommended by their financial adviser.

Several years after her sister died, Ms. Odian hired a caregiver who lived with her and provided cooking, cleaning, assistance with paying bills, driving to appointments, and other services that fell under the "health or social services" umbrella.

During her final years, however, and as described by her longtime friend and dance companion of twenty-plus years, Ms. Odian emerged from her previously depressed and isolated state, becoming completely integrated into the caregiver's family and life, attending weddings and birthday parties, hosting holiday meals, re-engaging with old friends, and regaining a zest for life.

The decedent then prepared her own will that left her estate to the caregiver or her children if she failed to survive. When the charities under the prior will contested Decedent's last will, the court still found that the caregiver had not demonstrated by clear and convincing evidence that the will was not the product of undue influence.[25]

Estate of Savic

In *Estate of Savic* (unreported) a friend who provided social services including daily visitations, the control of finances, and taking care of other daily needs was found to be care custodian under former statute.[26]

Again, the caregiver didn't meet the clear and convincing threshold. Instead, the decedent's son who lived out of country and hadn't seen decedent in years prevailed under the terms of a will executed 13 years earlier.

Estate of Schmitt

Finally, in *Estate of Schmitt* (also unreported) the caregiver/beneficiary who worked five days a week for 17 years for a decedent was found to meet the definition of a care custodian.[27]

The care custodian didn't meet the clear and convincing threshold despite evidence from the longtime financial adviser that the decedent executed the beneficiary designation without claimant around or even being aware of the gift; instead, the account went to the estranged half-brother of the decedent.

It likely didn't help that the claimant tried admitting into evidence as the decedent's will a handwritten letter allegedly signed by decedent that bequeathed the house to her.

As it later turned out, it was revealed in a separate sub-trial that the signature on the document was not that of the decedent, but was likely a forgery.

The Impossibility of Proving a Negative

There is no published or unpublished case in which a person who has been found to be a care custodian has met the "clear and convincing evidence" burden of proof that the gift/transfer to that person was NOT the product of presumed undue influence.

In *Estate of Odian*, the only published case focusing on this specific issue, a paid caregiver who had become essentially the only family the decedent knew could not show by clear and convincing evidence that her designation as primary beneficiary—instead of charities the decedent was unaware of and to which she had never made a lifetime gift—was not the product of presumptive undue influence.[28]

In all other similar cases, most of which are unpublished decisions—*In re Estate of Pryor*,[29] *Estate of Winans*,[30] *Estate of Clementi*,[31] *Stover v. Padayao*, *Estate of Savic, Estate of Barrow*,[32] *Estate of Schmitt, Hernandez v. Kieferle*,[33] *In re Estate of Wisner*,[34] *Halverson v. Vallone*,[35] and *Silicon Valley Community Foundation v. Beltran*[36]—the appellate court avoided finding that the proponent of the "donative transfer" proved that the gift was "not the product of undue influence;" instead they found either that decedent was not a "dependent adult," that the nature of the services did not make the beneficiary a "care custodian" or that some other exception applied.

The takeaway from all of these cases is that there has never been a set of facts where a care custodian beneficiary overcame the presumption of undue influence, because proving a negative is simply impossible.

Therefore, unless it can be shown that a client is not a "care custodian," that the donor was not a "dependent adult" or that some other exception applies, it is highly unlikely that you will prevail in protecting the donative transfer.

Given the apparent impossibility of "proving a negative" (i.e., no undue influence was involved in the donative transfer), the authors of this article strongly recommend securing a Certificate of Independent Review in any instance in which a gift is intended to a non-family member who might be found to be the donor's care custodian.

In short, in addition to thoroughly documenting any advice given to a client in the case file, only by recommending the Certificate of Independent Review can the risk of discipline and/or a charge of malpractice be avoided.[37]

The authors would like to thank and acknowledge Yevgeny L. Belous not only for his contributions to "Gifts to Care Custodians and Certificate of Independent Review" which was published in the April 2017 edition of Valley Lawyer but more importantly for his friendship.

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[1] CAL. PROB. CODE §§ 21360 – 21392.
[2] CAL. PROB. CODE § 21392 (a).
[3] CAL. PROB. CODE § 21350 *et seq.*
[4] *Bernard v. Foley* (2006) 39 Cal.4th 794, See also Reinhardt, Nancy and Belous, Yevgeny L. "Gifts to Care Custodians and Certificate of Independent Review." *Valley Lawyer*. April 2017.
[5] CAL. PROB. CODE § 21380(b).
[6] CAL. PROB. CODE § 21362(a).
[7] *Id.*
[8] *Estate of Shinkle* (2002) 97 Cal. App. 4th 990.
[9] CAL. PROB. CODE § 21362(b).
[10] *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035.
[11] *Estate of Odian* (2006) 145 Cal.App.4th 152.
[12] *Estate of Austin (2010)* 188 Cal.App.4th 512.
[13] CAL. PROB. CODE § 21366. It is important to note the addition of the term "substantial" when comparing the "difficulty" necessary to find a person 18 to 64 years of age "dependent" as opposed to the "difficulty" required of someone 65 years of age or older.
[14] CAL. PROB. CODE § 21380(b).
[15] *Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128.
[16] *Id at 1131.*
[17] *Stover v. Padayao*, 2016 WL 5092760, Unreported in Cal.Rptr.3d (September 20, 2016).
[18] CAL. PROB. CODE § 21380(b).
[19] CAL. PROB. CODE § 86.
[20] CAL. WELFARE AND INSTITUTIONS CODE §15610.70(a).
[21] CAL. WELFARE AND INSTITUTIONS CODE §15610.70(b).
[22] *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487; accord, *Addington v. Texas* (1979) 441 U.S. 418, 423.
[23] *Conservatorship of Wendland* (2001) 26 Cal. 4th 519 at 552 (quoting In re Angelia P., supra, 28 Cal.3d 908, 919). Accord, *Sheehan v. Sullivan* (1899) 126 Cal. 189).
[24] *Estate of Odian* (2006) 145 Cal.App.4th 152.
[25] *Id.*
[26] *Estate of Savic, 2018* WL 2214714, Unreported in Cal.Rptr.3d (May 15, 2018).
[27] *Estate of Schmitt,* 2012 WL 4498447, Unreported in Cal.Rptr.3d (October 2, 2012).
[28] *Estate of Odian* (2006) 145 Cal.App.4th 152.
[29] *Estate of Pryor* (2009) 177 Cal.App.4th 1466.
[30] *Estate of Winans* (2010) 183 Cal.App.4th 102.
[31] *Estate of Clementi* (2008) 166 Cal.App.4th 375.
[32] *Estate of Barrow,* 2015 WL 5610453, Unreported in Cal.Rptr.3d (September, 24, 2015).
[33] *Hernandez v. Kieferle,* 2014 WL 1338100, Unreported in Cal.Rptr.3d (April 3, 2014).
[34] *In re Estate of Wisner,* 2010 WL 3769806, Unreported in Cal.Rptr.3d (September 29, 2010).
[35] *Halverson v. Vallone,* 2009 WL 1101240, Unreported in Cal.Rptr.3d (April 24, 2009).
[36] *Silicon Valley Community Foundation v. Beltran,* 2008 WL 2737428 (July 11, 2008).
[37] *Osornio v. Weingarten* (2014) 124 Cal.App.4th 324.

Test No. 132

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Milton became Judith's care custodian due to her diagnosis of dementia. Judith's family wishes to challenge the validity of the donative transfer from Judith to Milton by establishing that the transfer was the result of undue influence. Milton has the initial burden of proving that the donative transfer was not the product of undue influence by a preponderance of the evidence.
❑ True ❑ False

2. An individual may only be considered a "dependent adult" if he or she is 65 years or older, and unable to properly provide for his or her own personal needs for physical health, food, clothing or shelter.
❑ True ❑ False

3. In *Conservatorship of Davidson*, the Court concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking, did not qualify as health and social services if the service were provided without compensation.
❑ True ❑ False

4. Courts shall consider the following in determining whether a donative transfer was the product of undue influence: 1) The vulnerability of the victim; 2) The influencer's need for the donative transfer; 3) The actions or tactics used by the influencer; and, 4) The equity of the result.
❑ True ❑ False

5. A review of a donative transfer from a dependent adult to a care custodian by an independent attorney who prepares and executes a Certificate of Independent Review helps to ensure that the donative transfer does not fail.
❑ True ❑ False

6. If an individual provided health and social services to a dependent adult and was only compensated by the donative transfer at issue after the dependent adult's death, they fall within the exception of *Probate Code* Section 21362(a) for those persons who provide care services without remuneration.
❑ True ❑ False

7. Margaret is a personal assistant to Howard. Margaret shops for and provides assistance with finances to Howard, who is over the age of 65 years. Howard is able to perform the tasks himself, but prefers to delegate the work. Margaret is providing "health or social services" to Howard under *Probate Code* Section 21362(b).
❑ True ❑ False

8. The party challenging the validity of a donative transfer and alleging that the transfer is the product of undue influence must establish their case by a preponderance of the evidence.
❑ True ❑ False

9. If an instrument includes a gift to a prohibited transferee and became irrevocable on June 1, 2011, *Probate Code* Sections 21360 – 21392 apply.
❑ True ❑ False

10. Jacqueline is classified as a care custodian because she provided health or social services to her maternal aunt Gladys, who was a dependent adult receiving hospice care, and was not paid for said services.
❑ True ❑ False

11. In *Estate of Odian*, a live-in, paid caregiver who was cooking, cleaning, assisting with paying bills, and driving to appointments, among other services was deemed to be providing "health and social services."
❑ True ❑ False

12. An individual is not considered dependent adult if their deficits are isolated and temporary incidents such as might be caused by a medication or other brief illness from which the individual has recovered.
❑ True ❑ False

13. In order to establish the vulnerability of a victim for undue influence, evidence may include the victim's isolation and dependency, as well as whether the influencer knew or should have known of the alleged victim's vulnerability.
❑ True ❑ False

14. The donative transfer to an individual who is classified as a care custodian of a dependent adult is invalid even if the individual shows by clear and convincing evidence that the donative transfer was NOT the product of undue influence.
❑ True ❑ False

15. Tony is a 50 year old man who is unable to provide for his own personal needs. Tony also has deficits in mental function as a result of a rare neurological disorder. As a result, he has substantial difficulty managing his own financial resources, and is unable to resist fraud or undue influence. Tony is a dependent adult.
❑ True ❑ False

16. *Probate Code* 21350 et. seq., which are the predecessors to the current statutes, control all instruments that became irrevocable prior to January 1, 2011.
❑ True ❑ False

17. Undue influence means the application of excessive persuasion by one individual against another person which causes the latter to act or refrain from acting by overcoming the latter's free will, and results in inequity.
❑ True ❑ False

18. *Probate Code* Section 86 provides that undue influence has the same meaning as the definition provided in *Welfare and Institutions Code* Section 15610.70, and the Legislature intended *Probate Code* Section 86 to supplement the common law meaning of undue influence without superseding it or without interfering with the operation of that law.
❑ True ❑ False

19. On January 15, 2009, Carrie began to care for Edward, who had been diagnosed with advanced Alzheimer's. Edward paid Carrie $20 per hour for 8 hours of work, 5 days of week. Carrie was to provide companionship, assist with medication, transportation, cooking, cleaning, and hygiene. Carrie provided these services for two months before Edward died on March 17, 2009. After Edward's death, Edward's children discovered that Edward had amended his Trust to leave 1/3 of the trust estate to Carrie. *Probate Code* Sections 21360 – 21392 apply.
❑ True ❑ False

20. The standard by which to rebut the presumption that a donative transfer to a care custodian of a dependent adult is the product of fraud or undue influence is by a preponderance of the evidence.
❑ True ❑ False

MCLE Answer Sheet No. 132

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

San Fernando Valley Bar Association
20750 Ventura Blvd., Suite 140
Woodland Hills, CA 91364

METHOD OF PAYMENT:

❑ **Check or money order payable to "SFVBA"**
❑ **Please charge my credit card for**
$_____.

Credit Card Number

CVV code **Exp. Date** ___/___/___

Authorized Signature

5. **Make a copy of this completed form for your records.**
6. **Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0495.**

Name _____
Law Firm/Organization _____
_____
Address _____
City _____
State/Zip _____
Email _____
Phone _____
State Bar No. _____

ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

145 Cal.App.4th 152
Court of Appeal, Fourth District, Division 2, California.

ESTATE OF Helen L. ODIAN, Deceased.
Catharina Vulovic, Petitioner and Appellant,
v.
Richard L. Robinson et al., Contestants and Respondents.

No. E036685.
|
Nov. 28, 2006.
|
Certified for Partial Publication.*

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part II of the Discussion.

Synopsis
Background: In probate proceedings, the Superior Court, Riverside County, No. RIP83388, Stephen D. Cunnison, J., found that elderly testator's paid live-in companion had exercised undue influence to make herself sole beneficiary of testator's trusts, wills, and annuities. The trial court also found that companion was a "care custodian" within the meaning of statute that presumptively barred specified donative transfers, and ruled that she was disqualified as a beneficiary of testator's testamentary instruments. Companion appealed.

Holdings: The Court of Appeal, McKinster, Acting P.J., held that:

[1] companion was a "care custodian," and

[2] companion failed to rebut presumption that transfers were the result of undue influence.

Affirmed.

West Headnotes (11)

[1] **Wills**
Personal, confidential, or fiduciary relations in general

409Wills
409IVRequisites and Validity
409IV(F)Assent of Testator
409k162Evidence
409k163Presumptions and Burden of Proof
409k163(2)Personal, confidential, or fiduciary relations in general

Paid live-in companion of elderly testator was a "care custodian" within the meaning of statute that presumptively barred specified donative transfers, where it was undisputed that companion's relationship with testator resulted from her employment rather than personal friendship. West's Ann.Cal.Prob.Code § 21350(a)(6); West's Ann.Cal.Welf. & Inst.Code § 15610.17.

Cases that cite this headnote

[2] **Appeal and Error**
Statutory or legislative law

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)2Particular Subjects of Review in General
30k3169Construction, Interpretation, or Application of Law
30k3173Statutory or legislative law
(Formerly 30k893(1))

Interpretation of the meaning of a statute is reviewed by the appellate court de novo.

Cases that cite this headnote

[3] **Wills**
Personal, confidential, or fiduciary relations in general

409Wills
409IVRequisites and Validity
409IV(F)Assent of Testator
409k162Evidence
409k163Presumptions and Burden of Proof
409k163(2)Personal, confidential, or fiduciary relations in general

Paid live-in companion of elderly testator was a "care custodian" within the meaning of statute that presumptively barred specified donative transfers, notwithstanding that companion had not previously worked as a caregiver and was arguably not a "professional"; nothing in the statute's structure, terms, or language authorized imposition of a professional or occupational limitation on the definition of "care custodian." West's Ann.Cal.Prob.Code § 21350(a)(6); West's Ann.Cal.Welf. & Inst.Code § 15610.17.

7 Cases that cite this headnote

[4] **Wills**
Personal, confidential, or fiduciary relations in general

409Wills
409IVRequisites and Validity
409IV(F)Assent of Testator
409k162Evidence
409k163Presumptions and Burden of Proof
409k163(2)Personal, confidential, or fiduciary relations in general

Paid live-in companion of elderly testator was a "care custodian" within the meaning of statute that presumptively barred specified donative transfers, inasmuch as she provided "social services" to testator within meaning of definitional statute; "social services" was interpreted expansively to promote Legislature's objective of protecting vulnerable dependent adults from exploitation, and evidence showed that companion cooked, cleaned, and drove testator to appointments, meetings, and shopping, and took care of both testator and her home. West's Ann.Cal.Prob.Code § 21350(a)(6); West's Ann.Cal.Welf. & Inst.Code § 15610.17.

See 14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, § 303; Cal. Jur. 3d, Wills, § 429; Ross, Cal. Practice Guide: Probate (The Rutter Group 2006) ¶ 16:517.16d (CAPROBTE Ch. 16-G).

5 Cases that cite this headnote

[5] **Statutes**
Purpose and intent; determination thereof
Statutes
Plain, literal, or clear meaning; ambiguity

361Statutes
361IIIConstruction
361III(C)Clarity and Ambiguity; Multiple Meanings
361k1103Resolution of Ambiguity; Construction of Unclear or Ambiguous Statute or Language
361k1105Purpose and intent; determination thereof (Formerly 361k184)
361Statutes
361IIIConstruction
361III(H)Legislative History
361k1242Plain, literal, or clear meaning; ambiguity (Formerly 361k217.4)

If statutory terms are unclear or ambiguous, courts may consider various extrinsic aids to help ascertain the Legislature's intent, including legislative history and the ostensible objects to be achieved.

Cases that cite this headnote

[6] **Statutes**
Purpose and intent; determination thereof
Statutes
Relation to plain, literal, or clear meaning; ambiguity

361Statutes
361IIIConstruction
361III(C)Clarity and Ambiguity; Multiple Meanings
361k1103Resolution of Ambiguity; Construction of Unclear or Ambiguous Statute or Language
361k1105Purpose and intent; determination thereof (Formerly 361k184)
361Statutes
361IVOperation and Effect
361k1402Construction in View of Effects, Consequences, or Results

361k1405Relation to plain, literal, or clear meaning; ambiguity
(Formerly 361k181(2))

When construing statutory terms that are unclear or ambiguous, courts select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.

Cases that cite this headnote

[7] **Wills**
Personal, confidential, or fiduciary relations in general

409Wills
409IVRequisites and Validity
409IV(F)Assent of Testator
409k162Evidence
409k163Presumptions and Burden of Proof
409k163(2)Personal, confidential, or fiduciary relations in general

Paid live-in companion of elderly testator, who was found to be a "care custodian" within the meaning of statute that presumptively barred specified donative transfers, failed to rebut the presumption that the transfers were the result of undue influence; once companion's status as a care custodian was established, the burden shifted to her to rebut the presumption of undue influence, and, in opposition to testimony by psychiatrist and psychologist supporting the conclusion that testator was acting under undue influence, it could not be said as a matter of law that companion's evidence was sufficient to overcome the presumption. West's Ann.Cal.Prob.Code § 21350(a)(6); West's Ann.Cal.Welf. & Inst.Code § 15610.17.

3 Cases that cite this headnote

[8] **Wills**
Presumptions and Burden of Proof

409Wills
409IVRequisites and Validity
409IV(F)Assent of Testator
409k162Evidence
409k163Presumptions and Burden of Proof
409k163(1)In general

Under statute presumptively barring specified donative transfers, the burden is on the presumptively disqualified transferee to rebut the presumption. West's Ann.Cal.Prob.Code § 21350.

1 Cases that cite this headnote

[9] **Wills**
Undue influence and fraud
Wills
Scope and mode of review

409Wills
409VProbate or Contest of Will
409V(N)Hearing or Trial
409k324Questions for Jury in General
409k324(3)Undue influence and fraud
409Wills
409VProbate or Contest of Will
409V(P)Review
409k393Review of Decisions in Actions Relating to Wills or Probate
409k400Scope and mode of review

Under statute presumptively barring specified donative transfers, the trier of fact determines whether the burden of rebutting a presumption has been satisfied, while the appellate court reviews the finding that the burden has not been satisfied under the substantial evidence rule.

4 Cases that cite this headnote

[10] **Wills**
Presentation and reservation in lower court of grounds of review

409Wills
409VProbate or Contest of Will
409V(P)Review
409k393Review of Decisions in Actions Relating to Wills or Probate

409k396Presentation and reservation in lower court of grounds of review

On appeal from trial court's finding that paid live-in companion of elderly testator was a "care custodian" within the meaning of statute that presumptively barred specified donative transfers, companion waived any objection to admissibility of expert testimony regarding testator's mental capacity, where trial counsel failed to obtain a ruling on a motion in limine to exclude the expert testimony, withdrew the motion in limine, and then made no objection during the testimony. West's Ann.Cal.Evid.Code § 353.

3 Cases that cite this headnote

[11] **Appeal and Error**
Judge as factfinder below
Appeal and Error
Credibility and Number of Witnesses
Evidence
Sufficiency to support verdict or finding

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)10Sufficiency of Evidence
30k3452Credibility and Number of Witnesses
30k3455Judge as factfinder below
(Formerly 30k1008.1(4))
30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)10Sufficiency of Evidence
30k3474Conflicting or Disputed Evidence
30k3483Credibility and Number of Witnesses
30k3483(1)In general
(Formerly 30k1011.1(6))
157Evidence
157XIVWeight and Sufficiency
157k597Sufficiency to support verdict or finding

The testimony of a witness whom the trier of fact believes, whether contradicted or uncontradicted, is substantial evidence, and the appellate court must defer to the trial court's determination that the witness was credible.

14 Cases that cite this headnote

Attorneys and Law Firms

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Bill Lockyer, Attorney General, Belinda Johns, Senior Assistant Attorney General, James M. Cordi, Supervising Deputy Attorney General, Tania M. Ibanez, Deputy Attorney General; Rodriguez, Horii & Choi, Reynolds T. Cafferata, Los Angeles; Swan, Carpenter, Wallis & McKenzie, Kevin A. McKenzie, Sun City; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon, Los Angeles, for Contestants and Respondents.

****392 *154** OPINION

McKINSTER, Acting P.J.

Eighty–seven–year–old Helen L. Odian died in January 2003, leaving her entire estate to appellant Catharina Vulovic, who ***155** had been her paid live-in companion for approximately two years before Ms. Odian moved into a nursing home. The trial court found that Ms. Vulovic (hereafter sometimes appellant) exercised undue influence to make herself the sole beneficiary of Ms. Odian's trusts, wills and annuities, and that Ms. Odian lacked legal capacity when she executed the trusts and the annuity contracts. The court also found that appellant was a care custodian within the meaning of Probate Code section 21350, and as such, was disqualified as a beneficiary of Ms. Odian's testamentary instruments.

In the published portion of this opinion, we address appellant's contention that she was not a care custodian within the meaning of section 21350. We conclude that the undisputed evidence demonstrates that appellant was a care custodian. Because she failed to rebut the presumption of undue influence which arises from that fact, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Helen Odian and her older sister, Ruth, lived together their entire adult lives. Neither married, and neither had children. Although the sisters had modest incomes, they invested wisely. With the help of their financial advisor, Richard Robinson, who advised them from 1976 until 2002, they amassed significant wealth. At the time of her death, Helen's estate was worth approximately $3 million.[1]

[1] We refer to the Odian sisters by their first names in this part of the opinion merely for simplicity. No disrespect is intended. Elsewhere, we refer to Helen Odian as Ms. Odian.

In 1997, the sisters executed wills leaving their estates to each other and then to the seven charities which are parties to this action. In 1997, Ruth Odian died. Helen Odian continued to rely on Richard Robinson for financial advice and tax preparation. He had a power of attorney for her bank account and wrote checks for certain items, such as estate tax and income tax payments. Robinson and his wife, Jessie, also had a social relationship with the Odian sisters. After Ruth's death, their contact with Helen increased. Ruth had been the dominant sister and had made most of the decisions. After her death, the Robinsons felt that they had to take care of Helen "to some degree" and to reassure her that they would assist her if any problems arose.

Helen had designated Ruth the beneficiary of her IRA's (individual retirement accounts). After Ruth's death, Mr. Robinson advised Helen to designate another beneficiary in order to avoid taking increased distributions from the IRA's. Helen designated Mrs. Robinson. Mrs. Robinson agreed that she would donate the IRA's to charity after Helen's death.

***156** In the spring of 2000, Jessie Robinson suggested to Helen that she get someone to help her. Her home was cluttered and needed cleaning. In February 2000, Helen had hurt her back, and she had also lost her driver's license. A mutual acquaintance told Catharina Vulovic that Helen needed help with household tasks and transportation and encouraged her to contact Helen. Ms. Vulovic called Helen and then met with her to discuss arrangements.

Helen hired Ms. Vulovic to do housework and laundry, cook, and drive her to appointments and on shopping trips. Helen ****393** asked her to work from noon to 6:00 p.m. seven days a week, for $9 an hour. Ms. Vulovic began working for Helen on March 1. The initial plan was for Ms. Vulovic to work only for one month. However, toward the end of March, Helen asked Ms. Vulovic to move in with her. Jessie Robinson liked Ms. Vulovic and encouraged the arrangement. Ms. Vulovic agreed to do so and to stay on for an additional four months. Her rate of pay remained the same, as did the services she was to provide and the number of hours she was paid to work each day. At the end of the four-month period, Helen asked Ms. Vulovic to stay permanently. After discussing it with her family, Ms. Vulovic agreed. Thereafter, Helen paid her $500 a week.

Helen was very appreciative of Ms. Vulovic's assistance. She told friends and acquaintances that Ms. Vulovic "did everything" for her and she appeared to look to Ms. Vulovic "more or less for help and guidance." She told her friend David Gibson that she would not have lived as long if she had not had Ms. Vulovic's assistance and that she wanted to leave her estate to Ms. Vulovic.[2] Helen became acquainted with Ms. Vulovic's family and was invited to family gatherings, including the wedding of Ms. Vulovic's son. Ms. Vulovic celebrated some holidays with Helen and David Gibson. Ms. Vulovic's children and grandchildren visited Helen at home frequently, and Helen enjoyed their visits. When Helen was hospitalized, Ms. Vulovic visited her every day. After Helen was moved to a residential care facility, Ms. Vulovic and her family visited her. However, Helen never gave Ms. Vulovic a birthday or Christmas gift.

[2] David Gibson died before the trial. The trial court reviewed his deposition transcript in lieu of testimony. Appellant's motion to augment the record with the transcript of David Gibson's deposition is granted.

Beginning in 2001, Ms. Vulovic began helping Helen pay her bills. At first, Ms. Vulovic merely wrote the checks at Helen's direction and Helen signed them. Eventually, Helen gave her a power of attorney and Ms. Vulovic began writing checks on Helen's account and signing them. In the middle of 2001, Helen accepted $250,000 as payment in full of two promissory notes from Kirk Brown. However, Helen and Ruth had lent Brown $500,000, and the ***157** notes were for $250,000 each. When Richard Robinson learned that Brown had paid Helen $250,000 for both notes, he reminded her that the loan was for $500,000. Helen became very upset and said that she would not have accepted the money if she had known that. Mr. Robinson prevailed upon Brown to return the notes, and returned the $250,000 to him. Helen remained upset about the incident for several weeks, and had to be reminded several times that it had been resolved.

Both Robinsons had noticed that Helen's memory was failing. Richard Robinson had noticed that Helen could carry on a normal conversation but that within a few minutes, she would not remember what they had talked about. Jessie Robinson also began to notice that Helen was having difficulty expressing herself. If she was asked a "yes or no" question, she could respond, but if she was asked a more complex question, she had greater difficulty responding.

In the summer of 2001, Mr. Robinson suggested to Helen that she create a living trust to avoid probate of her estate. She agreed, and told him that she wanted the trust proceeds to go to the seven charities that were the beneficiaries of her 1997 will. Mr. Robinson was concerned about Helen's capacity to make a trust, but he concluded ****394** that he could proceed because Helen was not changing beneficiaries but merely avoiding probate. Late in 2001, Helen told him that she wanted to leave her mobile home to Ms. Vulovic. Mr. Robinson did not question that, because the mobile home was a small part of Helen's estate.

Mr. Robinson arranged to have the trust and pour-over will prepared by the attorney who prepared Helen's earlier will. He made an appointment with Helen for March 2, 2002, for her to sign the trust documents and the will and to discuss her taxes. However, on March 1, Mr. Robinson received a faxed letter from Helen cancelling the appointment and stating that Helen intended to write her own will. Ms. Vulovic wrote the letter and Helen signed it. The Robinsons' subsequent efforts to contact Helen failed. She did not respond to any of their letters or return any of their telephone calls. Helen directed her mutual fund company to cease sending statements to Mr. Robinson, as they had for 26 years.

On February 28, 2002, Helen executed a will, trust, power of attorney and durable power of attorney and living will using fill-in-the-blank forms. Ms. Vulovic filled in all of the information and Helen signed the documents. The will and trust left Helen's entire estate to Ms. Vulovic. The will was witnessed by Helen's friend David Gibson and by her neighbor, Carolyn McMullen. However, when Helen took the documents to Mail Depot Plus to ***158** be notarized, the witnesses' signatures could not be notarized because they were not present. Two customers at the store re-witnessed the will and their signatures were notarized. The witnesses and the notary all testified that Helen appeared to be in control of the situation and did not appear to be acting under the influence or at the direction of Ms. Vulovic.

In March 2002, a representative of Family First Advanced Estate Planning Services (Family First), called Helen's home, asking for Ruth. Ms. Vulovic took the call, and made an appointment to have a representative visit Helen to discuss estate planning. Sean Perry, a commissioned salesman with little training in estate planning, visited Helen shortly thereafter. Helen told him that she did not understand or thought there might be some problem with the will and trust she had executed on February 28. She told him that she needed help getting money back from Kirk Brown, even though Mr. Robinson had resolved that matter months earlier. Helen purchased a group legal services plan and submitted an estate planning application to Family First, along with the February 28 will and trust, to be reviewed by an attorney.

Despite concerns about Helen's competence, a group legal services attorney prepared a new pour-over will and a restated trust for Helen. A representative of Family First delivered the documents to Helen on April 18, 2002. After he reviewed the will with her, Helen executed the will. On May 2, the Family First representative visited Helen and went over the restated trust, which she then executed, along with documents transferring assets to the trust.

During the April 18 meeting, the Family First representative discussed with Helen the safety of her mutual fund IRA investment in American Funds. Helen told him she was concerned about the market and potential loss of value of the funds and that she needed additional income. He suggested that she transfer the IRA to fixed annuities. Helen agreed, and he helped her prepare an application for the annuities. Ultimately, Helen transferred her American Funds mutual fund IRA, amounting to nearly $1 million, to two annuities. Helen made Ms. Vulovic the ****395** successor beneficiary of the annuities, followed by Ms. Vulovic's three children.

In late April 2002, Richard Robinson reported his concerns about Helen to Adult Protective Services. He spoke to investigator Larry Smith. Smith's job was to do initial assessments to determine whether a person has the mental capability to make his or her own decisions. He had done approximately 1350 such assessments, approximately half of which resulted in the conclusion that the person did not need further evaluation.

***159** Smith visited Helen on the morning of May 2. He spent 30 to 60 minutes with her. He initially was unable to converse with Helen. It appeared that she had no difficulty hearing him, but when she tried to respond to his questions, she appeared to be unable to do so. She was able to ask him to sit down and to say "OK, I guess" when he asked how she was. After a few minutes, Ms. Vulovic

joined them. Thereafter, she responded to all of the questions Smith directed to Helen. She told him, "You'll have to excuse Helen. She has a hard time completing sentences and explaining what she wants." Smith concluded that a professional evaluation was necessary in order to determine Helen's mental capacity. He set up an appointment with Helen's physician for an evaluation. However, Helen did not keep the appointment. Smith contacted the county public guardian and requested a professional evaluation.

Dr. Robert Sawicky, a psychologist with approximately 20 years of experience in performing forensic evaluations to assess mental capacity, was asked by the office of the Riverside County Public Guardian to conduct a conservatorship evaluation on Helen, including issues of undue influence and legal and testamentary capacity. He was qualified to assess dementia. On May 16, 2002, he visited Helen in her home. The visit was unannounced. Dr. Sawicky spent about two and a half hours observing Helen, conversing with her and conducting the formal assessment. He observed that she appeared to be very dependent. Ms. Vulovic was with her the entire time she was getting dressed and groomed, and although he did not directly observe their activities, he had the sense that Helen needed assistance with her grooming and hygiene activities. When she came into the kitchen, she said she was hungry. Pat Puliafico, a public guardian probate investigator who was present, prepared a Pop Tart and fed it to Helen. Helen passively accepted being fed, as though it was a commonplace occurrence.

Helen was initially uncomfortable and guarded in speaking to Dr. Sawicky, but after some conversation and explanation as to the purpose of the visit, she warmed up and became comfortable enough for him to conduct the evaluation. He observed that her speech was a bit disjointed, that she was not capable of "real goal-directed discourse." She would sometimes "derail" herself midsentence, and would sometimes "shift gears and make what seems like a bit of a tangential statement in the context of what she was saying." She sometimes appeared to refrain from answering a question if she found it too difficult to answer. She did not give direct responses to Dr. Sawicky's questions about where she grew up, where she went to school and about her family. She later volunteered that she had a sister, Ruth, who had died recently. She could not remember, or could not produce, Ms. Vulovic's name until Dr. Sawicky prompted her. She volunteered the information that ***160** she had had a stroke. She did not appear to have any difficulty hearing him. Helen was aware of her difficulties in completing sentences and retrieving words and was frustrated ****396** by it. However, she could still make herself understood.

Helen told Dr. Sawicky that Ms. Vulovic "does everything for me." She said that Ms. Vulovic had wanted to take charge of bill-paying and money management, and that she had let her do so. She said that the Robinsons used to be in charge, but that they stopped coming around and didn't give her any records. When Dr. Sawicky first mentioned the Robinsons, Helen's spontaneous reaction was to "gush," i.e., display a spontaneous positive emotional response. She said that Mr. Robinson had made her a lot of money. However, she said that after Ms. Vulovic came to her, she came to believe that Mr. Robinson had overcharged her.

Helen was aware that she had a checking account and a savings account, but could not tell Dr. Sawicky the name of her bank. She did not know the amount of money in either account. She did not know of any other investments or the amount of money involved in any investments. She was unable to perform arithmetic. When asked if she had a will or a trust, she replied that she had a trust. She said that the proceeds of the trust were to go to charity. She said that the trust "was made in accordance with my wishes." Dr. Sawicky was startled to hear her use such a formal phrasing and found it hard to imagine that Helen had come up with that statement independently.

Dr. Sawicky concluded that Helen suffered from mild to moderate expressive aphasia—a difficulty in retrieving words—as well as difficulty in organizing information. She also had attention and concentration problems, and both long-term and short-term memory problems. He concluded that she suffered from moderate dementia. He also concluded that she was very dependent and that as a result of that, along with her cognitive impairments, she was vulnerable to undue influence. Finally, he concluded that she lacked testamentary and legal capacity and needed a probate conservatorship of her person and of her estate. Based on his contact with her in May 2002, he did not believe that she had legal or testamentary capacity when she executed the wills, trusts and annuity contracts.

Dr. Sawicky acknowledged that Helen's friends and acquaintances did not believe that she was cognitively impaired, and that people who had witnessed her wills or notarized her signatures had testified that Helen did not appear to be impaired. However, he doubted that such people had asked her pointed questions to elicit her level of functioning, and that people would normally be ***161** tolerant of deficiencies in word retrieval and other communication difficulties in an 86–year–old woman. He pointed out that Helen was capable of casual conversation and had even made a joke, which both he and she found funny, during his conversation with her. Thus, her

communication abilities might appear normal in casual conversation.

Dr. James Spar, a geriatric psychiatrist, reviewed Helen's medical records, Dr. Sawicky's reports and other documents, but did not interview Helen. He generally agreed with Dr. Sawicky's conclusions, assuming that his observations were correct. He disagreed that Helen was totally dependent, but concluded from all the material that he read that she was moderately dependent. He concluded that Helen was "extremely vulnerable" to undue influence and that her impairment began "way before" February 2002. He did not disagree with Dr. Sawicky's conclusions that Helen lacked testamentary and legal capacity at least as early as February 2002. He disagreed with the testimony of Ms. Vulovic's expert, Dr. Victoroff, that Dr. Sawicky's methodology in conducting his evaluation ****397** of Helen was seriously flawed. He concluded that Dr. Victoroff assumed that Helen's aphasia was more severe than it actually was. He also concurred that Helen's ability to appear normal in casual conversations or brief interactions would be expected at her level of cognitive impairment.

On May 29, 2002, Helen's regular doctor, Dr. Raja, administered a mental examination, which showed that Helen had moderate cognitive impairment. Dr. Raja was surprised, based on his interactions with Helen. CAT scans Dr. Raja had ordered previously showed that Helen probably had a stroke in 2000 but had not had any additional strokes since then.

The Riverside County Public Guardian was appointed Helen's conservator in June 2002. In August 2002, Helen was hospitalized, and then moved to a residential care facility. She died on January 3, 2003.

Ms. Vulovic filed a petition to probate Helen's will dated February 28, 2002, as well as her pour-over will, dated April 18, 2002. Richard Robinson filed a petition to probate Helen's 1997 will and contested the 2002 wills and sought to invalidate the 2002 trusts and the annuities. The seven charities that were beneficiaries of Helen's 1997 will joined. Ms. Vulovic and her sons contested the petitions. Robinson, the charities and the Attorney General answered the contest.

The court found that the February 28, 2002 form will, the February 28, 2002 trust, the April 18, 2002 pour-over will, the May 2, 2002 restated trust ***162** and the two annuities were invalid as the products of undue influence on Helen Odian by Catharina Vulovic; that the February 28, 2002 trust, the May 2, 2002 restated trust and the two annuities were invalid because Helen Odian lacked legal capacity to execute them; and that Catharina Vulovic and her family were disqualified as beneficiaries by operation of Probate Code section 21350 et seq. The court denied Ms. Vulovic's petition for probate of the 2002 wills and granted the petitions to probate the 1997 will and to invalidate the 2002 trusts and annuities.

Ms. Vulovic filed a timely notice of appeal.

DISCUSSION

I.

PROBATE CODE SECTION 21350, SUBDIVISION (a)(6) BARS ALL DONATIVE TRANSFERS TO APPELLANT AND HER SONS

A. Appellant Was a Care Custodian Within the Meaning of Probate Code Section 21350, Subdivision (a)(6)

[1] Probate Code section 21350,[3] subdivision (a) provides that "no provision, or provisions, of any instrument[4] shall be valid to make any donative transfer to any of the following: [¶] ... [¶] (6) A care custodian of a dependent adult who is the transferor." (§ 21350, subd. (a)(6).) Section 21350 does not apply if "[t]he court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence." (§ 21351, subd. (d).) Thus, if appellant was a care custodian, all donative transfers to her were presumptively barred by ****398** Probate Code section 21350, subdivision (a)(6). (*Bernard v. Foley* (2006) 39 Cal.4th 794, 800, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) Transfers to her sons as successor beneficiaries of the annuities would be barred as well. (§ 21353.)[5]

[3] All further statutory references will be to the Probate Code unless otherwise indicated.

[4] "Instrument" is broadly defined in section 45 as "a will,

trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property."

[5] As pertinent, section 21353 provides: "If a transfer fails under this part, the transfer shall be made as if the disqualified person predeceased the transferor without spouse or issue...."

[2] Because our analysis requires us to interpret the meaning of section 21350, we review the matter de novo. ***163** (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 430, 101 Cal.Rptr.2d 200, 11 P.3d 956 [appellate courts independently determine the proper interpretation of a statute].)

"The term 'care custodian' has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code." (§ 21350, subd. (c).) As pertinent to this case, the Welfare and Institutions Code defines "care custodian" as "any ... person providing health services or social services to elders or dependent adults." (Welf. & Inst.Code, § 15610.17, subd. (y).)

Appellant does not dispute that Ms. Odian was a dependent adult within the meaning of section 21350, subdivision (a).[6] However, appellant contends that she was not a care custodian as a matter of law for three reasons: because she had a personal relationship with Ms. Odian, because she was not a professional caregiver, and because she did not provide the kind of services which define a care custodian's role.

[6] Subdivision (c) of section 21350 provides that "the 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 (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64." The Welfare and Institutions Code defines "dependent adult" as "any person between the ages of 18 and 64 years who resides in this state and 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 abilities have diminished because of age." (Welf. & Inst.Code, § 15610.23, subd. (a).)

Appellant relied primarily on *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 6 Cal.Rptr.3d 702 (*Davidson*) to contend that her personal relationship with Ms. Odian excluded her from disqualification. In *Davidson,* the Court of Appeal held that in enacting section 21350, subdivision (a) (hereafter section 21350(a)), the Legislature did not intend to apply the presumption of undue influence to individuals who have assumed the role of care custodian to a dependent adult, if that role evolves naturally out of a personal relationship with the dependent adult which preexisted the care-giving role. However, if the personal relationship is "entirely incidental, secondary to, and derived from the preexisting professional or occupational connection" as caregiver, section 21350(a) presumptively bars any donative transfer. (*Davidson, supra,* 113 Cal.App.4th at p. 1052, 6 Cal.Rptr.3d 702; accord, *Conservatorship of McDowell* (2004) 125 Cal.App.4th 659, 667–668, 673, 23 Cal.Rptr.3d 10.)

After the conclusion of briefing but before oral argument in this case, the California Supreme Court issued its opinion in *Bernard v. Foley, supra,* 39 Cal.4th 794, 47 Cal.Rptr.3d 248, 139 P.3d 1196 (*Bernard*). In *Bernard,* the court analyzed the purpose underlying ***164** section 21350(a) and concluded that the Legislature did not intend to exclude caregivers who had preexisting personal relationships with the decedent ****399** from the classes of individuals to whom the presumption of undue influence applies. (*Bernard,* at pp. 801–816, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) Accordingly, it disapproved *Davidson* as well as *Conservatorship of McDowell, supra,* 125 Cal.App.4th 659, 23 Cal.Rptr.3d 10, and *Estate of Shinkle* (2002) 97 Cal.App.4th 990, 119 Cal.Rptr.2d 42, "to the extent they interpreted section 21350 as allowing for a preexisting personal friendship exception." (*Bernard,* at p. 816, fn. 14, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) We note, however, that even under *Davidson,* the transfers to appellant were presumptively barred because it was undisputed that appellant's relationship with Ms. Odian resulted from her employment by Ms. Odian, and not the converse. (*Davidson, supra,* 113 Cal.App.4th at p. 1054, 6 Cal.Rptr.3d 702.)

[3] *Bernard* also addressed appellant's contention that section 21350(a)(6) was intended to apply only to professional caregivers, and concluded that "nothing in the statute's structure, terms or language authorizes us to impose a professional or occupational limitation on the definition of 'care custodian' " as defined in Welfare and Institutions Code section 15610.17. (*Bernard, supra,* 39 Cal.4th at pp. 806–809, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) The court further concluded that the legislative history of section 21350 buttressed its conclusion. (*Bernard,* at pp. 809–813, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) Thus, the fact that appellant had never previously worked as a caregiver and was arguably not a professional caregiver, even though she was being paid for her services

to Ms. Odian, is immaterial to her claim that she was not a care custodian within the meaning of section 21350(a)(6).

[4] Finally, we address appellant's contention that the services she provided to Ms. Odian were not of the type which define the function of a care custodian.

As noted above, section 21350(a)(6) adopts the definition of "care custodian" found in Welfare and Institutions Code section 15610.17. (§ 21350, subd. (c).) As pertinent here, subdivision (y) of Welfare and Institutions Code section 15610.17 defines "care custodian" as "[a]ny ... person providing health services or social services to elders or dependent adults." Appellant contends that *Davidson, supra,* 113 Cal.App.4th 1035, 6 Cal.Rptr.3d 702 holds that services such as cooking, cleaning, shopping and driving "do not amount to health or social services of a care custodian." Based on that understanding of *Davidson,* she contends that the services she provided do not amount to health or social services within the meaning of Welfare and Institutions Code section 15610.17, subdivision (y).[7]

[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." (*Bernard, supra,* 39 Cal.4th at p. 816, fn. 14, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) Thus, *Davidson* remains citable authority with respect to its discussion of the social services issue.

***165** Leaving aside, for the moment, the fact that the trial court found that appellant provided significantly greater services than cooking, cleaning and shopping, we note that the court in *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. (*Davidson, supra,* 113 Cal.App.4th at pp. 1050–1054, 6 Cal.Rptr.3d 702, discussed *ante.*) Secondarily, the court *questioned* whether services such as cooking, gardening, running errands, providing ****400** transportation, grocery shopping and providing assistance with banking could be equated with social services. It concluded that "[e]ven if the kind of unsophisticated care and attention" that the beneficiary provided "*could* be described as constituting health and social services" (*id.* at p. 1050, 6 Cal.Rptr.3d 702, italics added), the beneficiary in that case was nevertheless not a care custodian because (1) the unpaid services he provided allowed the decedent to continue to live independently, in her own home (while the beneficiary maintained his own home), and (2) the beneficiary "had no professional expertise or occupational experience in providing such services." (*Ibid.*) For the latter reason alone, the court held, the beneficiary did not qualify as a care custodian under section 21350 and Welfare and Institutions Code section 15610.17.[8] (*Davidson, supra,* 113 Cal.App.4th at p. 1050, 6 Cal.Rptr.3d 702.) In reaching this conclusion, the *Davidson* court did not seek to ascertain the meaning of the term "social services" as it is used in section 21350 and Welfare and Institutions Code section 15610.17, nor did it hold that services such as the ones provided by the beneficiary in that case did not amount to social services within the meaning of Welfare and Institutions Code section 15610.17. It is therefore not authority on the question before us. (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1176, 119 Cal.Rptr.2d 903, 46 P.3d 372 [a case is not authority for a point which it does not address].)

[8] As discussed above, *Bernard* held that the application of section 21350(a) is not limited to professional caregivers. (*Bernard, supra,* 39 Cal.4th at p. 809, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) It thus implicitly overruled *Davidson* on this point as well.

Similarly, in *Bernard, supra,* 39 Cal.4th 794, 47 Cal.Rptr.3d 248, 139 P.3d 1196, the court discussed the nature of the services provided by the beneficiary and concluded that they amounted to "substantial, ongoing health services." (*Id.* at pp. 797, 805–806, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) However, Welfare and Institutions Code section 15610.17, subdivision (y) provides that a care custodian includes any person who provides either health services *or* social services. 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 ***166** custodian within the meaning of section 21350(a)(6). Accordingly, we must determine the meaning of "social services" in the context of section 21350(a)(6) as a question of first impression.

[5] [6] Neither section 21350 nor Welfare and Institutions Code section 15610.17 defines "social services." If statutory terms are unclear or ambiguous, we may consider various extrinsic aids to help us ascertain the Legislature's intent, including legislative history and "the ostensible objects to be achieved." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) In such circumstances, "we ' "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd

consequences." [Citation.]' [Citations.]" (*Ibid.*)

Even though this is a question of first impression, we do not write on a completely blank slate. In *Bernard,* the court analyzed the legislative history of section 21350(a). After first noting that section 21350 was originally enacted for the purpose of preventing " 'unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue **401 influence or other overbearing behavior[,]' " the court determined that the underlying problem the Legislature sought to remedy by amending section 21350(a) to add care custodians to the list of presumptively barred transferees was that " 'care custodians are often working alone and in a position to take advantage of the person they are caring for.' [Citation.]" (*Bernard, supra,* 39 Cal.4th at pp. 809–810, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) Moreover, the court recognized that in enacting the Elder Abuse and Dependent Adult Civil Protection Act of 1994, of which Welfare and Institutions Code section 15610.17 is a part, the Legislature intended to create "an expansive class of individuals obligated to report elder abuse to the proper authorities." (*Bernard,* at p. 813, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) In enacting Welfare and Institutions Code section 15610.17, the Legislature declared that its intent was "very broad, specifically, 'to provide that [proper authorities] shall receive referrals or complaints from public or private agencies, from any mandated reporter submitting reports pursuant to [Welfare and Institutions Code] Section 15630, *or from any other source having reasonable cause to know that the welfare of an elder or dependent adult is endangered* ....' [Citation.]" (*Bernard, supra,* at p. 813, 47 Cal.Rptr.3d 248, 139 P.3d 1196 [with the exception of the omitted citation, the bracketed material and italics appear as in *Bernard*].) Thus, the court recognized that the Legislature intended the definition of "care custodian" as used in Welfare and Institutions Code section 15610.17 to apply expansively to protect vulnerable elders. There is no reason to believe that it intended a narrower application of the identical term when it enacted section 21350(a)(6). On the contrary, an expansive interpretation of "social services" to include personal services *167 provided by an in-home caregiver best promotes the Legislature's objective of protecting vulnerable dependent adults from exploitation.

Here, the trial court found that appellant was employed "to provide in-home care." In that capacity, she "cooked, cleaned and drove [Ms. Odian] to appointments, meetings and shopping" *and* "took care of [Ms. Odian's] home, took care of [Ms. Odian] and was [Ms. Odian's] paid live-in caregiver." Appellant does not dispute those findings. A "paid live-in caregiver" clearly provides social services within the meaning of section 21350(a) and is, therefore, a care custodian. Thus, based on the trial court's undisputed findings, we conclude that appellant was a care custodian within the meaning of section 21350(a)(6).

B. Appellant Failed to Prove That the Transfers Were Not the Result of Undue Influence

[7] [8] [9] Section 21350 does not apply if "[t]he court determines, upon clear and convincing evidence, but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence." (§ 21351, subd. (d).) Thus, the burden is on the presumptively disqualified transferee to rebut the presumption. (*Bernard, supra,* 39 Cal.4th at p. 800, 47 Cal.Rptr.3d 248, 139 P.3d 1196.) The trier of fact determines whether the burden of rebutting a presumption has been satisfied. The appellate court reviews the finding that the burden has not been satisfied under the substantial evidence rule. (*Estate of Shinkle, supra,* 97 Cal.App.4th at p. 1008, 119 Cal.Rptr.2d 42 [disapproved on other grounds in *Bernard, supra,* at p. 816, fn. 14, 47 Cal.Rptr.3d 248, 139 P.3d 1196].)

Appellant contends that there was not substantial evidence to support the trial **402 court's finding because there was no competent evidence that Ms. Odian was cognitively impaired. She asserts that the testimony of respondents' two expert witnesses, Dr. Sawicky and Dr. Spar, should have been excluded, and that there was no other evidence of cognitive impairment. She asserts (based on the testimony of Dr. Spar, whose testimony she asserts should have been excluded) that "unless there is cognitive impairment and dependency, there can be no susceptibility to undue influence."

[10] We reject appellant's contention that the court abused its discretion in admitting the expert testimony of Dr. Sawicky and Dr. Spar. She contends that she objected to the admissibility of their testimony, based on Dr. Sawicky's lack of expertise with regard to expressive aphasia. Dr. Spar's opinion was based solely on his review of Dr. Sawicky's report and was not competent evidence in its own right. We can dispose of this contention summarily. *168 Although trial counsel filed a motion in limine seeking to exclude the experts' testimony, he did not obtain a ruling. Indeed, when the court questioned whether a motion in limine was the proper vehicle to challenge anticipated evidence in a bench trial, counsel withdrew the motion, saying he

would address the deficiencies in Dr. Sawicky's testimony on cross-examination. During the testimony of the two experts, counsel made no objection to the admissibility of their opinions but merely challenged the basis for their opinions. Thus, any objection to the admissibility of the experts' opinions was waived. (Evid.Code, § 353.)

[11] The balance of appellant's argument consists of assailing the professional competence of Dr. Sawicky's evaluation of Ms. Odian and the credibility of the Robinsons. She points out that they were the only witnesses whose testimony supports a finding of undue influence. However, the testimony of a witness whom the trier of fact believes, whether contradicted or uncontradicted, is substantial evidence, and we must defer to the trial court's determination that these witnesses were credible. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614, 122 Cal.Rptr. 79, 536 P.2d 479; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631, 85 Cal.Rptr.2d 386.) More importantly, however, appellant's argument inverts the burden of proof: Once her status as a care custodian was established, the burden shifted to her to rebut the presumption of undue influence. (*Estate of Shinkle, supra,* 97 Cal.App.4th at p. 1007, 119 Cal.Rptr.2d 42.) The presumption renders any deficiencies in the respondents' affirmative evidence of undue influence irrelevant. (*Estate of Auen* (1994) 30 Cal.App.4th 300, 313, 35 Cal.Rptr.2d 557.) Appellant discusses the evidence she presented to rebut the presumption and argues, in effect, that her evidence was more persuasive. However, the weight and persuasiveness of the evidence is a matter exclusively for the trier of fact, and we cannot say as a matter of law that appellant's evidence was sufficient to overcome the presumption of undue influence. (*Howard v. Owens Corning, supra,* 72 Cal.App.4th at p. 631, 85 Cal.Rptr.2d 386.)

II.**

** See footnote *, *ante*.

***169** DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to respondents.

GAUT and KING, JJ., concur.

All Citations

145 Cal.App.4th 152, 51 Cal.Rptr.3d 390, 06 Cal. Daily Op. Serv. 10,884

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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Estate of BERNARDINE BARROW, Deceased.	B253958 (Los Angeles County Super. Ct. No. BP121262, BP118944)
KAREN L.G. O'NEILL et al., Petitioners and Appellants, v. RICHARD SORRENTINO, Objector and Respondent.	
RICHARD SORRENTINO, Petitioner and Respondent, v. KAREN L.G. O'NEILL et al., Objectors and Appellants.	B253958 (Los Angeles County Super. Ct. No. BP121262, BP118944)

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Balisok & Associates, Russell S. Balisok; Beltran, Beltran, Smith, Oppel & Mackenzie and Thomas E. Beltran for Petitioners, Claimants and Appellants Karen L.G. O'Neill and Allan B. DeMille.

Loeb & Loeb, David C. Nelson, Gabrielle A. Vidal and Amy L. Koch for Claimant, Petitioner and Respondent Richard Sorrentino.

This case concerns the deceased Ms. Bernardine Barrow (Barrow) and specifically who will receive the bulk of her estate: a house worth millions of dollars as well as substantial stock holdings. The possible contenders are: (1) Richard Sorrentino (Sorrentino), who was initially hired by Barrow for some construction work for the house and then over 13 years became her closest and most trusted friend and caretaker, (2) Karen O'Neill (O'Neill), who Barrow met while vacationing and talked with on the phone frequently but drifted from after 30 years, or (3) Allan DeMille (DeMille), a distant relative with whom Barrow had not spoken in many decades and about whom Barrow frequently complained. The trial court found for Sorrentino, specifically that Barrow's December 6, 2007 declaration of trust (2007 Trust), July 16, 2008 restated amendment to Bernardine Barrow revocable trust dated December 6, 2007 (2008 Restatement), and July 16, 2008 last will and testament (2008 Will), are all valid and not the product of undue influence by Sorrentino. O'Neill and DeMille appeal. We affirm.

BACKGROUND

I. Facts of the case

At her death in 2008, Barrow was a widow and had no surviving parents. She had no close friends. She had distant relatives but did not like or want anything to do with them. She had no interaction with her family and felt they had taken advantage of her. For example, DeMille is a first cousin, once removed, and had no contact with Barrow for many decades before she died. DeMille was one of many relatives about whom Barrow complained. The chronology below discusses how Barrow met O'Neill and Sorrentino as well as key facts concerning Barrow's health and estate planning efforts.

In 1978, Barrow (then age 62) and her husband met O'Neill (age 22) and her husband while vacationing in Yosemite. O'Neill and her husband worked at the hotel where the Barrows lodged. The four socialized together during the O'Neill's off hours. Over the years, Barrow sent gifts to O'Neill and her family.

In 1995, Barrow (age 77) hired Sorrentino to complete some construction work on her house. After completion of that project, he continued to work on other construction projects as requested by Barrow and assumed increasing responsibilities for daily personal tasks such as retrieving packages and carrying in groceries. Eventually, he became a salaried employee for house maintenance as well as a personal assistant and thus was responsible for managing and hiring other employees in the house (such as the housekeeper, gardener, and caregivers), obtaining personal items such as medicine, dry cleaning, and groceries, and driving Barrow to appointments. For the next 13 years until her death, Sorrentino was in Barrow's life on a near daily basis. Sorrentino took good care of Barrow; he was not only her employee but also her friend.

In 1996, Dr. Terry Jerge (a board certified internist with a large portion of his practice treating the elderly) began treating Barrow. He found her proactive in her medical care and in good health.

Sometime in 1996 or 1998, Barrow was involved in a car accident. The accident did not injure Barrow in any way.

In 1997, Barrow provided in her will that her home and substantial Chevron stock holdings (the bulk of her estate) would pass to Mr. and Mrs. Linn T. Hodge III, her insurance agent and friend, but if they were both deceased then to O'Neill. The remaining items (e.g., a car, $25,000, personal property) were left to O'Neill. Barrow did not leave anything to DeMille.

In 1998, Barrow nominated Sorrentino as her attorney-in-fact for health care decisions. She also nominated him as her conservator.

In 1999, Barrow executed a will providing the bulk of her estate to Sorrentino. Barrow did not provide in her will that O'Neill would receive any substantial gifts.

Barrow did not leave anything to DeMille. Consistent with that will, sometime between 1997 and 2000, Barrow told O'Neill that Sorrentino was going to receive the bulk of her estate. All wills after this date continued to leave the bulk of Barrow's estate to Sorrentino.

In 2001, Barrow broke her wrist and thereafter had trouble writing. Thus, she began having some physical limitations.

In 2002, Barrow again executed a will that gave the bulk of her estate to Sorrentino. Barrow did not leave anything to DeMille.

In 2004, O'Neill visited Barrow for an afternoon. O'Neill and Barrow never lived in the same city, and, while O'Neill visited Barrow at least four times, Barrow never visited O'Neill in return. O'Neill and Barrow did speak on the phone about every two weeks until Barrow's death.

In 2005, Barrow started complaining to Dr. Jerge about some memory problems. In June, Dr. Jerge opined that Barrow was suffering from "some level of dementia" but that this mild dementia would not have been so serious as to impede Barrow's ability to make intelligent decisions. In July, Barrow suffered from hallucinations over a weekend and spoke to Dr. Jerge about them. She knew that the hallucinations were not real; Dr. Jerge concluded that Barrow was "fine" and "rationale." He prescribed Barrow with Aricept. Also in 2005, O'Neill visited Barrow for a few hours (visit No. 2). Also around 2005, Barrow began making a number of substantial gifts to Sorrentino, including a tractor, a car, architectural plans, and paying his credit card bills, which may have been work-related expenses.

The wills and trusts at issue in this case were executed in 2007 and 2008. Barrow was 89 years old in 2007. Barrow executed at least 10 trusts and wills: the first six drafted by attorney Lambert Michael Javelera (Javelera) from 1997 to 2006,[1] and the last

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[1] June 11, 1997 will (1997 Will), April 19, 1998 will, January 17, 1999 codicil, February 7, 1999 will, January 5, 2002 will, and April 6, 2006 codicil.

four drafted by attorney Christopher Botti (Botti) from 2007 to 2008.[2] The new attorney took over because Javelera had health issues that made him unavailable. Sorrentino referred Barrow to Botti.

In December 2007, Barrow again left the bulk of her estate to Sorrentino, specifically, in the 2007 Trust and a 2007 will, prepared by Botti. Barrow did not leave anything to DeMille. Botti's law partner, Paul Morrison, contacted an old college friend, attorney Seth Friedman, to interview Barrow and prepare a certificate of independent review (CIR). Friedman met with Barrow two months after she executed the 2007 Trust. Only Friedman and Barrow were in the room when they discussed the 2007 Trust. The counseling session lasted 60 to 90 minutes. After meeting with Barrow, Friedman drafted and executed the CIR. He billed Barrow $750 for his services.

In 2008, Barrow executed the 2008 Restatement and 2008 Will, again leaving the bulk of her estate to Sorrentino. Barrow did not leave anything to DeMille. Also in 2008, O'Neill visited Barrow (visit No. 4). Unlike the other three visits, this one lasted two nights. Sorrentino suggested some alone time for the two women, but Barrow emphatically said no. Toward the end of 2008, Barrow was cognitively impaired. On December 23, Barrow passed away at age 90.

II. Procedural history

Several petitions were filed before the trial court. O'Neill and Sorrentino each filed separate petitions to admit to probate Barrow's 1997 Will and 2008 Will, respectively, in case No. BP118944. O'Neill and Sorrentino then each filed separate petitions to determine the validity of the 2007 Trust, in case No. BP121262. The trial court related the two cases and heard them together.

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[2] 2007 Trust, December 6, 2007 will (2007 Will), 2008 trust, and 2008 Will.

The trial court held a bench trial and heard testimony from several witnesses, including Sorrentino, Dr. Jerge, Botti, Friedman, Javelera's son (Javelera passed away in 2009), Mr. Hodge, and O'Neill.

In an organized and comprehensive opinion, the trial court explained its findings. Probate Code former section 21350[3] presumptively prohibits donative transfers from a dependent adult to her care custodian, such as the 2007 Trust and 2008 Restatement. But, the trial court found two exceptions in former section 21351 apply to remove that presumption: subdivision (b), because Friedman provided a valid CIR, and subdivision (d), because it found clear and convincing evidence that the donative transfers were not the product of undue influence. The trial court also decided that even though it already found the statutory exception applies, it would proceed to determine whether there was undue influence under common law; on that issue, the trial court concluded O'Neill and DeMille had failed to meet their burden of proof. The trial court also found that Sorrentino was not the transcriber of the 2007 and 2008 wills and trusts.

O'Neill and DeMille then filed a request for a statement of decision. Sorrentino responded. The trial court issued a statement of decision, adopted Sorrentino's response as the court's response to O'Neill and DeMille's objections, and deemed its tentative ruling to be the statement of decision.

DISCUSSION

I. Substantial evidence supports the trial court's finding that there is clear and convincing evidence of no undue influence.

A. Standard of review

If, on the entire record, there is substantial evidence to support the finding of the probate court, we uphold those findings. (*Estate of Odian* (2006) 145 Cal.App.4th 152, 167.) We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or evaluate the weight of the evidence. (*Id.* at p. 168.) Rather, we draw all

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[3] All further statutory references are to the Probate Code unless otherwise indicated.

reasonable inferences in support of the findings, view the record most favorably to the probate court's order, and affirm even if other evidence supports a contrary conclusion. (*Estate of Young* (2008) 160 Cal.App.4th 62, 76.) Appellants have the burden of showing there is *no* substantial evidence supporting the probate court's order.

B. Applicable Probate Code sections

Former sections 21350 and 21351 provide the legal framework for this case. Former section 21350 presumptively prohibits a dependent adult (such as Barrow in 2007 and 2008) from making a donative transfer (such as the 2007 and 2008 wills and trusts at issue) to her care custodian (such as Sorrentino). But there are several exceptions, recited in former section 21351. Under subdivision (b), the transferor can obtain a CIR. Under subdivision (d), a court can determine upon clear and convincing evidence that the transfer was not the product of undue influence.

C. Substantial evidence supports the trial court's finding no undue influence

Here, the record shows substantial evidence to support the trial court's finding of no undue influence. In a well-reasoned opinion, the trial court explained that it relied on testimony from Dr. Jerge, Mr. Hodge, Friedman, Barrow's long-time housekeeper, Javelera's son, Sorrentino, and even O'Neill, plus stipulated facts from the parties and documentary evidence.

First, there is substantial testimony from essentially all the key witnesses (Dr. Jerge, Friedman, Mr. Hodge, and Sorrentino) that Sorrentino provided excellent care to Barrow, that Barrow and Sorrentino were close friends, and that Sorrentino was in Barrow's life on a near daily basis for the last 13 years of Barrow's life. That testimony is confirmed in documents such as Ms. Hodge's note to Sorrentino after Barrow died, which recites that Sorrentino provided "wonderful care" for Barrow. Other supporting documentary evidence includes legal documents in which Barrow nominated Sorrentino as her conservator and her attorney-in-fact for health care decisions in 1998, long before Barrow had cognitive issues.

In addition, there is substantial testimony from witnesses (Friedman, Javelera, Barrow's long-time housekeeper, and even O'Neill) that Barrow repeatedly expressed her intent to gift the bulk of her estate to Sorrentino. That testimony is confirmed in documents such as Barrow's 1999 and 2002 wills executing that intent.

Further, the only medical evidence before the trial court was Dr. Jerge's testimony. He opined that Barrow had no memory problems until 2005 and, even then, the mild dementia would not impede her ability to make intelligent decisions. Dr. Jerge opined that it was not until three months before her death that Barrow's decisionmaking ability was impaired. That testimony is confirmed in documents, specifically his contemporaneous notes describing Barrow's mental and physical health. Even testimony from O'Neill confirmed that there was no decline in Barrow's mental acuity until 2005. The trial court noted that even by that point, Barrow had already executed wills providing the bulk of her estate to Sorrentino (in 1999 and 2002).

Second, in contrast to Sorrentino, DeMille was not involved in Barrow's life. The parties stipulated that DeMille had no contact with Barrow for many decades. Even O'Neill testified that DeMille was one of many relatives about whom Barrow complained. Generally, several witnesses (Mr. Hodge, Sorrentino, and O'Neill) testified that Barrow did not like and had no interaction with her family.

Third, while O'Neill may have had a closer relationship to Barrow than DeMille, she was not as close to Barrow as Sorrentino. The trial court relied on O'Neill's own testimony that she only visited four times in four years, the visits did not last long, and during the last visit Barrow refused to spend alone time with O'Neill.

D. The testimony of trial witness Friedman, who the trial court found credible, can be substantial evidence supporting the trial court's decision.

O'Neill and DeMille argue at length that the trial court erred in relying on Friedman's testimony *for any purpose*. But, O'Neill and DeMille are essentially asking this court to reassess Friedman's credibility. That is not our role. A party's "lengthy arguments as to the credibility and effect of the testimonies" of witnesses "are not

appropriately addressed to this court"; "[t]he trier of fact was the exclusive judge of those matters." (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 587.) "[T]he testimony of a witness whom the trier of fact believes, whether contradicted or uncontradicted, is substantial evidence, and we must defer to the trial court's determination that these witnesses were credible." (*Estate of Odian*, *supra*, 145 Cal.App.4th at p. 168.) Here, the trial court was entitled to credit entirely Friedman's testimony and discredit entirely any witness testimony proffered by O'Neill and DeMille. This problem—seeking an appellate court to perform the role of a trial court—runs throughout appellants' briefs and is the crux (and downfall) of its appeal.

E. Trial court can consider Barrow's 1997 and 1999 wills giving the bulk of her estate to Sorrentino and Barrow's statements that she intended the same

O'Neill and DeMille argue that the trial court erred in considering certain evidence of Barrow's actions (which the trial court found as showing Barrow intended to give the bulk of her estate to Sorrentino) because those actions, according to O'Neill and DeMille, were also the product of undue influence by Sorrentino. Specifically, (a) Barrow's 1997 and 1999 wills (in which, like the 2007 and 2008 wills and trust at issue, Barrow also gave the bulk of her estate to Sorrentino) and (b) Barrow's statements that she intended to give the bulk of her estate to Sorrentino.

1. 1997 and 1999 wills

O'Neill and DeMille's arguments are contradictory to Sorrentino's argument as to how the trial court should consider this evidence. Specifically, though all parties agree the former section 21350 presumption against a donative transfer from a "dependent adult" to her care custodian would apply to the 2007 and 2008 wills, they disagree as to the 1997 and 1999 wills. O'Neill and DeMille argue Barrow was a "dependent adult" due to her age of 77 and because she gave substantial gifts to Sorrentino. Sorrentino argues Barrow was not a "dependent adult" because Barrow did not have any physical limitations until she broke her wrist in 2001 nor cognitive decline until 2005.

The issue is not one of admissibility, as O'Neill and DeMille stipulated the documents could enter into evidence before the trial court, and they made no objection during trial. Instead, the issue is one of weight, and the trial court has complete discretion to credit (or discredit) this evidence. (See *Estate of Odian*, *supra*, 145 Cal.App.4th at p. 167.) The trial court found Sorrentino's argument more persuasive. Substantial evidence supports that finding, such as Dr. Jerge's medical testimony and notes, which the trial court pointed to.

2. Barrow's statements

O'Neill and DeMille argue the trial court should not have found credible the testimony from Sorrentino, Friedman, and even O'Neill, that Barrow told each of them she planned on giving the bulk of her estate to Sorrentino. Assessing the credibility of witness testimony is the role of the trial court. (See *Estate of Odian*, *supra*, 145 Cal.App.4th at p. 168.) Thus, the trial court was entitled to credit their testimony.

Further, O'Neill and DeMille argue that former section 21351, subdivision (d) precludes the trial court from considering Sorrentino's testimony *at all*. They misread the code provision, which only precludes the trial court from "solely" relying on the testimony of Sorrentino. Here, the trial court also relied on the testimony of Friedman, O'Neill, and Barrow's long-time housekeeper. The trial court expressly recognized that it was not solely relying on Sorrentino's testimony, in light of the Probate Code prohibition.

F. Trial court can consider Barrow's substantial gifts to Sorrentino as consistent with Barrow's later gift of the bulk of her estate to him.

O'Neill and DeMille argue the trial court failed to consider Barrow's substantial gifts to Sorrentino as evidence of undue influence. But, the trial court did, in fact, consider this evidence. Specifically, the trial court concluded these gifts did not show undue influence because were Barrow to gift the bulk of her estate to Sorrentino then only Sorrentino would ultimately be affected as Barrow spent down her estate with substantial gifts to him. While O'Neill and DeMille argue the trial court should have

come to a different conclusion, as an appellate court, we do not reweigh the evidence. (See *Estate of Odian*, *supra*, 145 Cal.App.4th at p. 168.)

G. Trial court can consider Sorrentino the natural object of Barrow's bounty.

O'Neill and DeMille argue that Sorrentino cannot be the natural object of Barrow's bounty for two reasons: (i) Sorrentino had undue influence on Barrow and (ii) only a descendent, surviving spouse, or parent can be the natural object of one's bounty. O'Neill and DeMille's first argument assumes the conclusion and therefore is rejected. As to their second argument, they cite *Estate of Nolan* (1938) 25 Cal.App.2d 738, but that case contains no bright-line rule that nonrelatives can never become the natural object of one's bounty. Instead, *Nolan* only concerned relatives: a beneficiary who was a cousin and contestants who were nephews and nieces. (*Id.* at p. 740.) *Nolan* merely explained that descendents, spouse, and parents, are assumed to be such "natural objects," merely by the close relationship, but that collateral heirs such as siblings and nephews or nieces, at least based on such relationship alone, are not so assumed. (*Id.* at p. 742.) Thus, we also reject O'Neill and DeMille's second argument.

H. Trial court's finding under the common law is also affirmed.

Because we decide there is sufficient evidence to support the trial court's finding of clear and convincing evidence of no undue influence, we do not reach O'Neill and DeMille's alternative arguments as to whether there was sufficient evidence of no undue influence under the common law. The statute supplements the common law. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 800.) Thus, clear and convincing evidence of no undue influence satisfies both former section 21351, subdivision (d) and the common law.

II. O'Neill and DeMille's other arguments are moot

An appeal is moot when it is """"impossible for this court, if it should decide the case in favor of plaintiff, to grant any effectual relief whatever."""" (*City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958.)

A. O'Neill and DeMille's argument on former section 21351, subdivision (b)

Because we agree with the trial court that the exception in subdivision (d) applies, we need not decide whether another exception (subdivision (b)) also applies. As the opening paragraph to former section 21351 recites, the presumption against donative transfer "does not apply if *any* of the following conditions are met." (Italics added.)

B. O'Neill and DeMille's argument on former section 21350, subdivision (a)(4)

The trial court already held that the presumption against a donative transfer in former section 21350 applies, pursuant to subdivision (6), where the transferor is a dependent adult and the recipient is the care custodian of that dependent adult. O'Neill and DeMille argue that subdivision (4), where the recipient transcribes the trust or will, also applies. Were this court to determine whether subdivision (4) also applies, however, there would be no effectual relief for O'Neill and DeMille, as they have what they seek: the presumption has been applied. Further, as discussed above, we affirm the trial court's finding that an exception applies to remove that presumption.

C. O'Neill and DeMille's argument on California Rules of Court, rule 3.1590.

O'Neill and DeMille argue the trial court failed to provide a tentative decision pursuant to California Rules of Court, rule 3.1590, and therefore they did not have the opportunity to make objections and request a statement of decision to address the principal controverted issues. Here, the trial court did issue a proposed statement of decision, and then O'Neill and DeMille made objections and requested a statement of decision, to which the trial court responded. Thus, again, O'Neill and DeMille already have what they seek.

DISPOSITION

The order is affirmed. Costs are awarded to Richard Sorrentino.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

Filed 12/26/23

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

LISA ROBINSON et al., Plaintiffs and Appellants, v. ELVIRA GUTIERREZ, Individually and as Trustee, etc., Defendant and Respondent.	C097301 (Super. Ct. No. STK-PR-TR-2020-0000916)

APPEAL from a judgment of the Superior Court of San Joaquin County, Carter P. Holly, Judge. Reversed.

Law Office of Kristi Barnard and Kristi Barnard for Plaintiffs and Appellants.

Kroloff, Belcher, Smart, Perry & Christopherson, Rebecca H. Sem and Kelsea A. Carbajal for Defendant and Respondent.

A provision of a dependent adult's testamentary instrument that makes a donative transfer to the adult's "care custodian" is presumed to be the product of fraud or undue influence if the adult executed the instrument during the period when the care custodian provided services to the adult or within 90 days before or after that period. (Prob. Code, § 21380, subd. (a)(3) [subsequent undesignated references to statutes are to the Probate Code].) A "care custodian" is a person who provides health or social services to a dependent adult. (§ 21362, subd. (a).)

For purposes of section 21380's presumption, however, a "care custodian" does not include a person "who provided services without remuneration if the person had a personal relationship with the dependent adult" as established by criteria in the statute. (§ 21362, subd. (a).)

In this matter brought by a decedent's intestate heirs at law, the trial court determined that defendant Elvira Gutierrez was not a care custodian for purposes of section 21380's presumption. Gutierrez was residing with the decedent receiving free room and board in exchange for providing care services when the decedent executed instruments transferring her entire estate to Gutierrez. The trial court ruled that Gutierrez was not a care custodian because room and board did not constitute remuneration for her services and she had a prior personal relationship with the decedent that met the other criteria set forth in section 21362, subdivision (a).

Plaintiffs contend on appeal that the trial court erred by determining Gutierrez was not a care custodian. They argue that Gutierrez's receipt of free room and board in exchange for her services for decedent constituted remuneration. They also assert that the record does not support the court's finding that Gutierrez and the decedent had a prior personal relationship.

We reverse. Free room and board in exchange for care services are remuneration for purposes of section 21362.

FACTS AND PROCEDURAL HISTORY

In 2015, the decedent, Gwyneth A. Robinson, expressed to an acquaintance her desire to have a housemate to assist her on an as-needed basis. The acquaintance arranged for the decedent to meet the acquaintance's sister, defendant Gutierrez. As a result of this meeting, Gutierrez moved into the decedent's residence in 2015 and received free room and board in exchange for performing household duties of cleaning and laundry, and driving the decedent as needed. When Gutierrez moved in, the decedent was able to maintain her personal needs, pay her bills and expenses, purchase her own food, prepare her meals, and administer her medications. Gutierrez provided companionship, which the decedent needed. This relationship lasted for nearly three years. There was no evidence Gutierrez received remuneration for her services other than free room and board.

In September 2018, the decedent executed a joint tenancy deed naming Gutierrez as a joint tenant on the title to her residence. In October 2018 and while a patient in a hospital, the decedent directed an attorney to prepare her estate plan. She wanted her entire estate to go to Gutierrez and to have Gutierrez be the trustee of her trust.

The attorney prepared a trust instrument, a will, and an individual grant deed. In the revokable inter vivos trust agreement, the decedent named Gutierrez as the trustee of the trust, and she transferred her property into the trust. Decedent transferred her residence by grant deed to Gutierrez as trustee of the trust. The trust and the will declared that upon the decedent's death, all of decedent's property passed to Gutierrez free of trust.

The decedent executed the estate instruments at her home on October 18, 2018. She died 10 days later.

Plaintiffs are the surviving children of the decedent's brother, who predeceased her.[1] They brought this action in 2020 by petition in the probate court to determine the validity of the trust and the will. In their first amended petition, they also alleged causes of action for elder financial abuse and undue influence. They sought a constructive trust and other forms of relief.

Following a three-day court trial, the trial court denied plaintiffs' petition and entered judgment in favor of Gutierrez. The court stated that based on the evidence presented, Gutierrez was a "care custodian" unless the evidence showed that the exception under section 21362 applied: that she had a preexisting personal relationship with the decedent, who was a dependent adult, and she provided services to the decedent without remuneration. The court found the exception applied. The court ruled that Gutierrez's receipt of free room and board did not constitute remuneration for purposes of section 21362 because room and board did not constitute taxable income. The court also found that the decedent and Gutierrez had the requisite personal relationship before Gutierrez began providing services. As a result of these findings, the instruments' donative transfers were not presumed under section 21380 to be the result of fraud or undue influence.

The court also found there was insufficient evidence that Gutierrez exercised undue influence over the decedent's execution of the instruments or that the donative transfers were the result of undue influence or fraud. There also was no financial elder abuse.

Plaintiffs on appeal challenge the court's findings that Gutierrez did not receive remuneration for her services and that Gutierrez and the decedent had a prior personal relationship.

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[1] Plaintiffs are Lisa Robinson, Renee Robinson, Russell Robinson, Richard Robinson, and Ashley Robinson.

DISCUSSION

I

Evidentiary Arguments

Plaintiffs did not submit a reporter's transcript of the trial as part of the record. As a result, and because no factual error is apparent on the face of the record, plaintiffs are barred from challenging the sufficiency of the evidence. We conclusively presume the evidence supports the judgment. (*Estate of Fain* (1999) 75 Cal.App.4th 973, 992.) This includes our conclusively presuming that sufficient facts support the trial court's determination that Gutierrez and the decedent had the prior personal relationship required by section 21362 for Gutierrez not to be a "care custodian" for purposes of section 21380.

Also, the briefs filed by both sides do not comply with the Rules of Court. The Rules require briefs to support any reference to a matter in the record with a citation to a place in the record where the matter appears. (Cal. Rules of Court, rule 8.204(a)(1)(c).) Each of the briefs filed in this appeal omit citations to the record in support of factual assertions and arguments. We deem arguments not supported by citations to the record to have been waived. (*Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5th 1003, 1021.)

II

Meaning of "Remuneration" in Section 21362

The trial court determined that the free room and board Gutierrez received for her services did not constitute "remuneration" as that term is used in section 21362. The court stated: "No evidence was presented at trial that [Gutierrez] received remuneration for the services [she] provided to the Decedent other than the receipt of free rent and board. This is not remuneration as used in Probate Code § 21362. Petitioners in their Post-Trial Brief have cited various court opinions arising out of an employer-employee

relationship to argue that free rent and board is a form of compensation and hence is remuneration. The logic of these cases cannot be applied to the relationship between the Decedent and [Gutierrez]. If free rent and board is remuneration, then any parent who allows an adult child to return to live at the parent's residence would have imputed rental income from the adult child or the child would have to pay income taxes on the value of the room and board received. It is appropriate to look at how the Internal Revenue would characterize the relationship between the Decedent and [Gutierrez]. There was no dollar value placed on the room and board that [Gutierrez] received, and hence there was no taxable income received by [Gutierrez] such that free room and board is not remuneration." The trial court did not cite any federal tax statutes, regulations, or cases to support its reasoning.

Plaintiffs contend the trial court erred. They argue that the free room and board Gutierrez received in exchange for her services qualified as remuneration for purposes of section 21362. They and Gutierrez acknowledge that no statute or reported opinion has defined "remuneration" as it is used in section 21362. But plaintiffs argue that the trial court's analogizing the decedent and Gutierrez's relationship to a parent/child relationship is misplaced and defeats the statute's purpose of protecting vulnerable dependent adults from exploitation while at the same time allowing them to make donative transfers to long-time friends who assist them for no compensation. Plaintiffs rely on employment compensation and workers' compensation cases, discussed below, where the Courts of Appeal determined that forms of noncash benefits in exchange for services qualified as compensation or remuneration to argue that "remuneration" as used in section 21362 encompasses noncash forms of compensation. In exchange for her services, Gutierrez could have received money and then rented a room and paid for food on her own, but she and the decedent made a different arrangement for remuneration.

The meaning of the word "remuneration" as it is used in section 21362 is a question of law which we review de novo. (*Weatherford v. City of San Rafael* (2017)

2 Cal.5th 1241, 1247.) "Our role in interpreting statutes is to ascertain and effectuate the intended legislative purpose. (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 849 []; *Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332 [].) We begin with the text, construing words in their broader statutory context and, where possible, harmonizing provisions concerning the same subject. (*926 North Ardmore Ave., LLC v. County of Los Angeles* (2017) 3 Cal.5th 319, 328 []; *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, 155-156 []; *Fluor Corp. v. Superior Court* (2015) 61 Cal.4th 1175, 1198 [].) If this contextual reading of the statute's language reveals no ambiguity, we need not refer to extrinsic sources. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 713 []; *Gomez v. Superior Court* (2012) 54 Cal.4th 293, 300 [].)" (*United Riggers & Erectors, Inc. v. Coast Iron & Steel Co.* (2018) 4 Cal.5th 1082, 1089-1090.) If the statutory language permits more than one reasonable interpretation, we may consider extrinsic sources, such as the statute's purpose, legislative history, and public policy. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608, 616-617.)

We begin with the word itself. "Remuneration" has been defined as "[p]ayment; compensation, esp[ecially] for a service that someone has performed." (Black's Law Dict. (11th ed. 2019) p. 1550.) Remuneration is a "[r]eward, recompense; (now usually) money paid for work or a service; payment, pay." (Oxford English Dist. (2023), remuneration (https://perma.cc/7K48-497V accessed Nov. 22, 2023).) "Remuneration" is "something that remunerates: recompense, pay." (Merriam-Webster Unabridged Dict. (2023), remuneration (https://perma.cc/2YWS-C9DB accessed Nov. 22, 2023).) To "remunerate" means "to pay an equivalent for (as a service, loss, expense)" or "to pay an equivalent to (a person) for a service, loss, or expense." (Merriam-Webster Unabridged Dict. (2023), remunerate (https://perma.cc/2WA8-G4DS accessed Nov. 22, 2023).)

In turn, "payment" can mean the "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation," or "[t]he money or other valuable thing so delivered in satisfaction of an

obligation." (Black's Law Dict. (11th ed. 2019) p. 1363.) "Pay" as a noun refers to "[c]ompensation for services performed; salary, wages, stipend, or other remuneration given for work done." (Black's Law Dict. (11th ed. 2019) p. 1362.) And "compensation" means "[r]emuneration and other benefits received in return for services rendered; esp[ecially] salary or wages." (Black's Law Dict. (11th ed. 2019) p. 354.)

These definitions show that the terms "remuneration," "pay," and "compensation" can be interchangeable. As used in section 21362, "remuneration" refers to a form of compensation given in exchange for the provision of care services. The dictionary sources indicate that "remuneration" refers to compensation in the form of money or some other thing of equivalent value. Thus, on its face, the term includes compensation in the form of room and board or other noncash benefits in exchange for the provision of care services.

Turning to the word's broader statutory context, we see that the Legislature expressly excluded certain payments from being considered to be remuneration for purposes of section 21362. The statute states that as used in the definition of a care custodian, " 'remuneration' does not include the donative transfer at issue under this chapter or the reimbursement of expenses." (§ 21362, subd. (a).) "It is a settled rule of statutory construction that 'where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.' " (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 970.) Had the Legislature intended to exclude room and board from being considered as remuneration for purposes of section 21362, it would likely have listed them in the quoted sentence as additional types of payment or compensation that do not constitute remuneration. Its silence implies it did not intend to exclude room and board as remuneration for purposes of determining whether a person is being remunerated or compensated for rendering care services.

But because "remuneration" as used in section 21362 can reasonably be read to encompass money, other types of benefits, or both, we turn to the statute's legislative

history and purposes to discern legislative intent. This review further convinces us that the Legislature in this instance intended that remuneration would include room and board given in exchange for care and social services.

Responding to reports that an attorney who drafted numerous wills and trusts for seniors had named himself as a major or exclusive beneficiary, the Legislature in 1993 adopted statutes to prevent such abuse. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 809.) Former section 21350 presumptively invalidated testamentary donative transfers to the instrument's drafter, fiduciaries of the transferor, and persons close to them. (*Id*. at p. 810; former § 21350, subd. (a)(1)-(5).) A transferee other than the instrument's drafter could rebut former section 21350's presumption of disqualification by showing upon clear and convincing evidence that the transfer was not a product of fraud, menace, duress, or undue influence. (Former § 21351, subd. (d); *Rice v. Clark* (2002) 28 Cal.4th 89, 97-98.) The purpose of section 21350 was " 'to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior.' " (*Bernard*, at p. 809.)

In 1997, the Legislature broadened the presumption's scope. It amended former section 21350 to presumptively disqualify donative transfers by dependent adults to their care custodians. (Former § 21350, subd. (a)(6); *Bernard*, *supra*, 39 Cal.4th at p. 810.) A "care custodian" was defined to include any person providing health or social services to elders or dependent adults. (Former § 21350, subd. (c); Welf. & Inst. Code, § 15610.17, subd. (y); *Bernard*, at pp. 799-800 & fn. 4.) The amendment attempted to address the problem that care custodians often worked alone and in positions from which they could take advantage of the person they were caring for. (*Bernard*, at p. 810.)

In *Bernard*, the California Supreme Court held that the definition of "care custodian" was not limited to persons who provided services to dependent adults on an occupational or professional basis. The definition included a dependent adult's preexisting personal friends who provided services without compensation. (*Bernard*,

supra, 39 Cal.4th at pp. 810-812, 816 (conc. opn. of George, C.J.).) Neither the statutory language nor the legislative history supported a preexisting personal friendship exception to former section 21350's presumptive ban of transfers to care custodians. (*Id*. at p. 813.) The Legislature was aware that personal friendship was no guarantee against the exercise of fraud or undue influence over dependent adults. (*Id*. at p. 811.) Individuals acting as "unpaid care custodians" who were not related to the dependent adult they cared for could potentially exercise undue influence over the adult as readily as professional or occupational care custodians. (*Id*. at p. 816 (conc. opn. of George, C.J.), fn. omitted.)

In his concurrence, however, the Chief Justice asked the Legislature to consider excluding a dependent adult's preexisting personal friends from the transfer ban who, motivated by long-term friendship, moral obligation, or other personal incentive, provide substantial, ongoing health care services to the dependent adult without compensation for an extended period. (*Bernard, supra,* 39 Cal.4th at p. 819 (conc. opn. of George, C.J.).) The Chief Justice stated, "In my view, it is questionable whether the uncompensated individual who in a nonoccupational capacity provides substantial, ongoing health services to a dependent adult for an extended period and eventually is made his or her beneficiary, should be subject to the identical presumptive disqualification and burden of proof imposed upon an individual who assumes the role of an unpaid caregiver for a relatively brief period preceding the dependent adult's favorable modification of a testamentary disposition, at a time that is fairly proximate to death.

"As a practical matter, the justification for presuming an exercise of undue influence is less compelling when an individual having a preexisting personal relationship with the dependent adult renders health care and other services over a relatively lengthy period of time. First, the likelihood is less that a personal friend gratuitously providing substantial, ongoing health care services over a lengthy term is motivated by the prospect of obtaining undue economic benefit by coercing a testamentary modification. Second, an uncompensated but well-established caregiving

relationship affords greater opportunity to the donor's relatives and other interested parties to observe the course of the relationship and to resolve any concerns occasioned by the caregiver's position of trust and potential ability to exert undue influence.

"As a matter of policy, it is of doubtful social efficacy to apply the statutory presumption and evidentiary burden to an individual who in a nonprofessional capacity undertakes the serious responsibilities attending the long-term care of a dependent adult. To do so is counterintuitive to our sense that the uncompensated efforts of such an individual, benefiting the dependent adult in question and society in general, should be recognized and encouraged.

"[A]pplying the statute to those persons who have undertaken the long-term care of a dependent adult without compensation does not appear to take full measure of the importance to the individual or the benefits to society of such efforts born of preexisting personal relationships.

"Accordingly, I would suggest legislative modification of the relevant statutes to exempt or otherwise limit application of the statutory presumption of undue influence in the case of uncompensated care custodians who provide long-term health care and other services for dependent adults." (*Bernard, supra,* 39 Cal.4th at pp. 819-820.)

The Legislature directed the California Law Revision Commission to study the operation and effectiveness of the donative transfer statutes. (Stats. 2006, ch. 215 (Assem. Bill No. 2034), § 1.) The study was to address, among other matters, whether the definition of "care custodian" should include "long time family friends, nonprofessional caregivers who have a preexisting relationship with the transferor, or other 'good Samaritans.' " (*Id*. at § 1, subd. (b)(3).)

The Law Revision Commission released its recommendation in 2008. (38 Cal. Law Revision Com. Rep. (2008) p. 107.) It recommended limiting the definition of "care custodian" to "a person who provides health or social services for remuneration, as a profession or occupation (thereby excluding personal friends and other volunteers)." (*Id*.

at p. 110.) Although both occupational and nonoccupational care givers had opportunity to exert undue influence over a dependent and often vulnerable adult, a gift to a friend or Good Samaritan may appear more natural, such as a gift to a family member, and not "unnatural," such as a large gift to a paid employee. An unnatural gift is a recognized indicia of undue influence. (*Id*. at p. 124.) The Commission thus recommended "that volunteer caregivers be excluded from the definition of 'care custodian.' A gift to a volunteer caregiver could still be challenged under the common law on fraud and undue influence, but would not be presumed to be the product of fraud and undue influence." (*Id*. at pp. 125-126.)

The Legislature responded to the Law Revision Commission's report by adopting Senate Bill No. 105 in 2010. As originally drafted, the bill mirrored the Law Revision Commission's recommendations. It defined a care custodian as "a person who provides health or social services to a dependent adult for remuneration, as a profession or occupation." (Sen. Bill No. 105 (2009-2010 Reg. Sess.), as introduced January 27, 2009.) The Senate Judiciary Committee report explained that a "care custodian" under the proposed legislation would be limited to "someone who is paid to provide health and social services . . . to a dependent adult for remuneration[.]" (Sen. Judiciary Com., Rep. on Sen. Bill No. 105 (2009-2010 Reg. Sess.) May 5, 2009, p. 7.)

The legislation also proposed that a dependent adult's donative transfer to a care custodian was presumed to be the product of fraud or undue influence if the instrument was executed during the period when the care custodian provided services to the transferor. (Sen. Bill No. 105 (2009-2010 Reg. Sess.), as introduced January 27, 2009, adding section § 21380, subd. (a)(3).)

The Assembly Committee on Judiciary amended Senate Bill No. 105. It narrowed the definition of "dependent adult" and broadened the definition of "care custodian" to better balance the need to protect vulnerable and dependent adults from financial abuse and the ability of legally competent adults to make testamentary gifts freely. (Assem.

Com. on Judiciary, Rep. on Sen. Bill No. 105 (2009-2010 Reg. Sess.) June 29, 2010, p. 6.) Of relevance here, the amendment expanded the definition of a care custodian by removing the proposed requirement that a care custodian be a person who provides services as a profession or occupation. The amendment also set forth elements that would help establish whether the dependent adult and the care custodian had a prior personal relationship. These amendments were ultimately adopted by the Legislature in the enacted statute. (Stats. 2010, ch. 620 (Sen. Bill No. 105), § 7.)

A "care custodian" is defined in the statute as "a person who provides health or social services to a dependent adult, except that 'care custodian' does not include a person who provided services without remuneration if the person had a personal relationship with the dependent adult (1) at least 90 days before providing those services, (2) at least six months before the dependent adult's death, and (3) before the dependant adult was admitted to hospice care, if the dependent adult was admitted to hospice care. As used in this subdivision, 'remuneration' does not include the donative transfer at issue under this chapter or the reimbursement of expenses." (§ 21362, subd. (a); Sen. Bill No. 105 (2009-2010 Reg. Sess.) as amended June 22, 2010.) A dependent adult's donative transfer to a care custodian is presumed to be the product of fraud or undue influence "if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period." (§ 21380, subd. (a)(3).)

The Assembly Committee on Judiciary explained it amended the definition of care custodian to exclude donative transfers by dependent adults to their friends from the presumption of undue influence. The Committee report states: "This bill seeks to exclude friends from the definition of care custodian, but still protect vulnerable adults from those who might prey upon them. The existing definition of care custodian includes unpaid friends who provide services as part of a true friendship with the dependent adult, such as a long-term friend and neighbor who may start bringing in meals to help his or

her friend. Under this bill, the definition of 'care custodian' is revised to exclude those who provide services without pay as long as the caregiver has a personal relationship with the dependent adult that [meets the time requirements set out in the amended statute]. These exemptions from the unpaid friend exception to the donative transfer presumption are designed to weed out unscrupulous individuals who pretend to befriend vulnerable dependent adults in order to, effectively, steal from them." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 105, *supra,* p. 6.) The unpaid friend exception and Senate Bill No. 105's presumption against donative transfers to care custodians were designed to protect vulnerable adults from financial abuse by unethical caregivers, while still giving them the freedom to make donative transfers as they see fit. (*Ibid*.)

This history indicates that the Legislature's primary concern was to protect dependent adults from unethical caregivers as much as reasonably possible. It concluded that a dependent adult's personal friends who rendered care for a substantial time without compensation would be least likely to take advantage of the adult. The Legislature decided that an objective way for determining whether a caregiver was such a friend was if he or she rendered services voluntarily without expectation or agreement of any remuneration. Interpreting "remuneration" to mean any form of compensation or pay best furthers the Legislature's intent to declare that all donative transfers by dependent adults to care providers are presumptively the result of fraud or undue influence except those transfers made to true, personal friends, as best as such friends can be objectively determined. The Legislature implicitly agreed with Chief Justice George that "the likelihood is less that a personal friend gratuitously providing substantial, ongoing health care services over a lengthy term is motivated by the prospect of obtaining undue economic benefit by coercing a testamentary modification." (*Bernard, supra,* 39 Cal.4th at p. 819 (conc. opn. of George, C.J.).)

This interpretation of "remuneration" is consistent with interpretations of the term in other employment-related cases. In cases cited by plaintiffs, courts have defined

"compensation" and "remuneration" in employment and workers' compensation contexts as including noncash benefits in exchange for services. In *Sturgeon v. County of Los Angeles* (2008) 167 Cal.App.4th 630, the Court of Appeal held that a county's providing judges with employment benefits in addition to the compensation prescribed by the Legislature violated the state constitution's requirement that the Legislature prescribe "compensation" for judges. (*Id*. at p. 635; see Cal. Const., art. VI, § 19.) As used in the constitution, the term "compensation" was broad. It was payment for value received or service rendered and could be defined as "remuneration." (*Sturgeon*, at p. 645.) "[I]n its common understanding the term 'compensation' is not restricted to any particular method or mode of payment: '[T]he ordinary meaning of the term "compensation," as applied to officers, is remuneration in whatever form it may be given, whether it be salaries and fees, or both combined.' (*State v. Bland* (1913) 91 Kan. 160, 167 [].)" (*Sturgeon*, at p. 645, italics omitted.) Given the term's breadth, any common understanding of it included the type of employment benefits the county provided. (*Id*. at p. 646.)

In *Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637 (*Barragan*), the Court of Appeal held that a student who was injured while performing services at a hospital as part of an unpaid externship was an employee for purposes of workers' compensation and was entitled to benefits. Courts have long held that when determining whether the injured person is an employee for purposes of workers' compensation, the consideration or compensation for an employment contract need not be in the form of wages or money and may be nonmonetary. (*Id.* at p. 646.) In this case, the unpaid student was compensated in the form of training and instruction from the hospital staff to become a physical therapist. (*Id*. at p. 648.)

The *Barragan* court recognized that by statute, any person who performed voluntary service at a private, nonprofit organization who received "no remuneration for the services other than meals, transportation, lodging or reimbursement for incidental expenses" was not an employee and thus not entitled to workers' compensation coverage.

(*Barragan, supra*, 195 Cal.App.3d at pp. 648-649; see Lab. Code, former § 3352, subd. (i) [Stats. 1979, ch. 76, § 1]; now Lab. Code, § 3352(a)(9).) The Court of Appeal held that this provision did not exclude the student from coverage. The student did not gratuitously volunteer her services to the hospital out of the goodness of her heart. She did it in order to receive training necessary to get a degree. (*Barragan*, at p. 649.) The Legislature also did not intend to exclude instruction and training from the definition of remuneration in section 3352. The definition of remuneration is not limited to cash payment, although the court stated that is one possible interpretation. (*Id.* at p. 650.) Case law held that training and instruction were adequate compensation for an employment contract for purposes of workers' compensation. (*Ibid*.) And workers' compensation cases have used the words compensation and remuneration interchangeably; thus, the use of the word remuneration in the Labor Code statute did not mean the Legislature was speaking only of cash payment. (*Id*. at pp. 650-651.)

In *Arriaga v. County of Alameda* (1995) 9 Cal.4th 1055, the California Supreme Court held that a person injured while performing community service in lieu of paying a fine for a criminal conviction was an employee for purposes of workers' compensation, and her exclusive remedy was under the Workers' Compensation Act. (*Id*. at p. 1059.) The person was not performing voluntary service, and she received remuneration in the form of credit against the court-imposed fine. (*Id*. at pp. 1064-1065.) The court stated that if the person had received money with which to pay her fine, "she unquestionably would have received sufficient remuneration. The same result must obtain in this case, where [the person] simply received credit against the fine instead." (*Id*. at p. 1065, fn. 7.)

A panel of this court encountered the term "remuneration" in *Motheral v. Workers' Comp. Appeals Bd.* (2011) 199 Cal.App.4th 148. By statute, when determining an employee's average weekly earnings for calculating temporary total disability, the market value of room and board that an employee receives as part of his or her "remuneration" which can be estimated in money must in general be included as

earnings. (Lab. Code, § 4454.) " ' "Lodging is remuneration if an employee is provided with lodging in exchange for services and that lodging is an economic advantage to the applicant." ' " (*Motheral*, at p. 155, quoting *Burke v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 359, 363 [2009 Cal.Wrk.Comp.LEXIS 55].) Applying those standards, we concluded that lodging an employee received as part of his employment as a camp ranger was remuneration and should have been considered in calculating the employee's disability payment. (*Ibid*.)

In similar fashion, the Labor Code defines "wages" for its purposes as "all amounts for labor performed by employees of every description[.]" (Lab. Code, § 200, subd. (a).) Courts have interpreted "wages" to include benefits to which an employee is entitled as part of his or her compensation, including room and board. (*Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.)

These cases indicate that appellate courts and the Legislature, at least in the context of employment and workers' compensation, have interpreted the terms compensation and remuneration interchangeably, and that remuneration includes noncash benefits including room and board where it is economically quantifiable and given in exchange for services rendered. They also show that when the Legislature adopted Labor Code section 3352 as discussed in *Barragan*, the Legislature considered room and board to be types of remuneration. For purposes of that statute, they were insufficient forms of remuneration by themselves to qualify a volunteer at a private, nonprofit organization for workers' compensation benefits.

The term "remuneration" is also interpreted broadly in employment discrimination law. Title VII of the Civil Rights Act of 1964 protects "employees" and applicants for employment. (42 U.S.C. §§ 2000e-2(a)(1), (2); 2000e(f).) Compensation is an essential condition to establish an employer-employee relationship, but "remuneration" for that purpose is interpreted to be more than just cash compensation. " '[R]emuneration need not be a salary, but must consist of "substantial benefits not merely incidental to the

activity performed." ' " (*Juino v. Livingston Parish Fire Dist. No. 5* (5th Cir. 2013) 717 F3d 431, 439-440.)

The California Fair Employment and Housing Act (FEHA) similarly protects employees. (Gov. Code, § 12900 et seq.) An individual cannot be deemed an employee for purposes of FEHA "absent the existence of remuneration." (*Talley v. County of Fresno* (2020) 51 Cal.App.5th 1060, 1083.) To qualify as remuneration, the benefit need not be monetary, but it "must be of a quantifiable, financial nature that is significant and not merely incidental to the work activities performed." (*Id*. at p. 1084.) We found no cases determining whether room and board qualify as remuneration under FEHA, but the cases illustrate that remuneration and compensation can include more than just cash payments. Our interpreting "remuneration" in section 21362 to include room and board is not inconsistent with how the term has been interpreted in other employment contexts.

We are not persuaded by the trial court's reliance on federal tax law to define remuneration for purposes of section 21362 as taxable income. In general, "taxable income" means gross income or adjusted gross income *less* allowable deductions. (26 U.S.C. § 63(a), (b).) By definition, "taxable income" does not necessarily include all remuneration, or even all cash remuneration, an employee receives as compensation. Care providers could be compensated and, if they have enough in deductions, reduce their taxable income to zero. Narrowing the definition of remuneration to taxable income would thus thwart the Legislature's ability to protect dependent adults from unethical caregivers who are compensated for their services. It would also thwart the Legislature's intent to exclude from the presumption of undue influence only donative transfers made to close, personal friends who most likely would render care services voluntarily and without any compensation over a significant amount of time. There is no indication the Legislature intended remuneration as used in section 21362 to be limited to taxable income.

For all the above reasons, we hold that the Legislature intended the term "remuneration" as used in section 21362 to include free room and board. Because Gutierrez received remuneration in exchange for her care services, she qualifies as a care custodian, and the decedent's donative gift to her is subject to the presumption of fraud or undue influence under section 21380.

III

Finding of No Undue Influence

Gutierrez argues that even if she was a care custodian under section 21362, there was no evidence of undue influence. While the trial court concluded there was no undue influence, it made that determination based on the preponderance of the evidence. That standard of proof does not apply when the transfer was made to a care custodian and the presumption of fraud or undue influence arises.

Because the donative transfer is presumed to be the result of fraud or undue influence under section 21380, the presumption may be rebutted by Gutierrez proving "by clear and convincing evidence" that the transfer was not the product of fraud or undue influence. (§ 21380, subd. (b).) The trial court expressly did not apply that burden of proof or make that determination when it resolved plaintiffs' claims. It will be obligated to apply that burden of proof on remand.

DISPOSITION

The judgment is reversed and the matter is remanded for further proceedings consistent with this opinion. Costs on appeal are awarded to plaintiffs. (Cal. Rules of Court, rule 8.278(a).)

HULL, J.

We concur:

EARL, P. J.

ROBIE, J.

KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Chang v. Lederman, Cal.App. 2 Dist., March 16, 2009

124 Cal.App.4th 304
Court of Appeal, Sixth District, California.

Simona OSORNIO, Plaintiff and Appellant,
v.
Lawrence WEINGARTEN, as Personal Representative, etc., Defendant and Respondent.

No. H027258.
|
Nov. 22, 2004.
|
As Modified on Denial of Rehearing Dec. 16, 2004.

Synopsis
Background: Prospective beneficiary of will, which was contested by beneficiary of previous will, brought negligence action against attorney who executed subsequent will. The Superior Court, Monterey County, No. M65034, Michael S. Fields, J., sustained attorney's demurrer without leave to amend. Prospective beneficiary appealed.

Holdings: The Court of Appeal, Walsh, J., held that:

[1] prospective beneficiary failed to allege that attorney owed duty of care to her as a nonclient, as required to state claim for negligence, but complaint could be amended to include such allegation, and

[2] as matter of first impression, attorney owed duty of care to prospective beneficiary, who was care custodian of testator, to ensure that statutory presumptive disqualification of care custodian as donee would be overcome.

Reversed and remanded.

West Headnotes (11)

[1] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

45Attorney and Client
45IThe Office of Attorney
45I(B)Privileges, Disabilities, and Liabilities
45k26Duties and liabilities to adverse parties and to third persons

Will and trust beneficiaries may sue the attorney whose negligent preparation of a will caused them to lose their testamentary rights, where the attorney's engagement was intended to benefit the nonclient, and the imposition of liability would not place an undue burden upon the legal profession.

7 Cases that cite this headnote

[2] **Appeal and Error**
Negligence in general

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)22Substantive Matters
30k3726Torts in General
30k3728Negligence in general
(Formerly 30k893(1))

The existence of duty of care as an element of a negligence action is a question of law, which is subject to a de novo standard of review on appeal.

6 Cases that cite this headnote

[3] **Appeal and Error**
Particular Cases and Contexts

30Appeal and Error
30XVIReview
30XVI(J)Waiver of Error in Reviewing Court
30k4094Failure to Assert or Adequately Discuss Error
30k4098Particular Cases and Contexts
30k4098(1)In general
(Formerly 30k1078(1))

Attorney waived, for purposes of opposing prospective will beneficiary's appeal of trial court's grant of demurrer to attorney in negligence action, argument that beneficiary's claim was collaterally estopped by probate court's previous ruling against beneficiary in will contest, by failing to advance collateral estoppel argument on appeal.

14 Cases that cite this headnote

[4] **Gifts**
Validity

191Gifts
191IInter Vivos
191k46Evidence
191k47Presumptions and Burden of Proof
191k47(3)Validity

The intent of statute providing for presumption against validity of donative transfers to certain specified individuals was to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior. West's Ann.Cal.Prob.Code §§ 21350(a), 21351(b).

2 Cases that cite this headnote

[5] **Attorney and Client**
Elements of malpractice or negligence action in general

45Attorney and Client
45IIIDuties and Liabilities of Attorney to Client
45k105.5Elements of malpractice or negligence action in general

A legal malpractice action is composed of the same elements as any other negligence claim, i.e., duty, breach of duty, proximate cause, and damage.

9 Cases that cite this headnote

[6] **Pleading**
Insufficiency of facts to constitute cause of action

302Pleading
302VDemurrer or Exception
302k193Grounds for Demurrer to Declaration, Complaint, Petition, or Statement
302k193(5)Insufficiency of facts to constitute cause of action

While other elements of a legal malpractice claim are generally factual and thus cannot be challenged on demurrer, the existence of the attorney's duty of care owing to the plaintiff is generally a question of law that may be addressed by demurrer.

9 Cases that cite this headnote

[7] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

45Attorney and Client
45IThe Office of Attorney
45I(B)Privileges, Disabilities, and Liabilities
45k26Duties and liabilities to adverse parties and to third persons

An attorney's liability for professional negligence does not ordinarily extend beyond the client, with whom the attorney stands in privity of contract, except in limited circumstances.

See Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2004) ¶ 6:240 (CAPROFR Ch. 6-D).

2 Cases that cite this headnote

[8] **Attorney and Client**
Duties and liabilities to adverse parties and to

third persons
Pleading
Amendment or Further Pleading After Demurrer Sustained

45Attorney and Client
45IThe Office of Attorney
45I(B)Privileges, Disabilities, and Liabilities
45k26Duties and liabilities to adverse parties and to third persons
302Pleading
302VDemurrer or Exception
302k219Operation and Effect of Decision on Demurrer
302k225Amendment or Further Pleading After Demurrer Sustained
302k225(1)In general

Prospective will beneficiary failed to allege that attorney who drafted will for testator owed duty of care to beneficiary as a nonclient, as required to state claim for negligence, but complaint could have been amended, such that sustaining of demurrer without leave to amend was inappropriate, to include allegation that attorney owed duty of care to prospective beneficiary, who was care custodian of testator, to ensure that statutory presumptive disqualification of care custodian as donee would be overcome. West's Ann.Cal.Prob.Code §§ 21350(a)(6), 21351(b).

11 Cases that cite this headnote

[9] **Appeal and Error**
Taking judicial notice in reviewing court
Evidence
Public statutes

30Appeal and Error
30XVIReview
30XVI(E)Material Considered on Review
30XVI(E)1In General
30k3816Evidence or Other Material Not Considered Below
30k3819Taking judicial notice in reviewing court (Formerly 30k837(4))
157Evidence
157IJudicial Notice
157k27Laws of the State
157k29Public statutes

In reviewing a trial court's ruling on a demurrer, Court of Appeal may consider any matter that is judicially noticeable, including statutes, which are matters of which judicial notice shall be taken. West's Ann.Cal.Evid.Code §§ 451(a), 452.

5 Cases that cite this headnote

[10] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

45Attorney and Client
45IThe Office of Attorney
45I(B)Privileges, Disabilities, and Liabilities
45k26Duties and liabilities to adverse parties and to third persons

Attorney who drafted will owed duty of care to prospective will beneficiary, who was care custodian of testator, to advise and assist testator to ensure that statutory presumptive disqualification of care custodian as donee would be overcome, and thus attorney could have been negligent in failing to advise testator of statutory consequences and in failing to refer testator to independent counsel for advice and preparation of certificate of independent review, where will preparation was intended to benefit prospective beneficiary, damages were clearly foreseeable and in fact certain, as beneficiary of previous will engaged care custodian in will contest, attorney's conduct was sufficiently close to injury to support duty, and imposition of duty would promote public policy, but it would not impose undue burden on attorney. West's Ann.Cal.Prob.Code §§ 21350(a)(6), 21351(b); Restatement (Third) of Law Governing Contracts § 51.

See 1 Witkin, Cal. Procedure (4th ed. 1997) Attorneys, § 323; Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2003) ¶ 6:246 (CAPROFR CH. 6-D); Annot., Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties (1988) 61 A.L.R.4th 615.

10 Cases that cite this headnote

[11] **Attorney and Client**
Duties and liabilities to adverse parties and to third persons

45Attorney and Client
45IThe Office of Attorney
45I(B)Privileges, Disabilities, and Liabilities
45k26Duties and liabilities to adverse parties and to third persons

Evaluating the existence of an attorney's duty of care to a nonclient involves balancing (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to the plaintiff, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the lawyer's conduct and the injury suffered, (5) the policy of preventing future harm, and (6) whether the imposition of liability would impose an undue burden on the profession.

14 Cases that cite this headnote

Attorneys and Law Firms

****248** David A. Fulton, Cartwright, Fulton & Adams, Santa Cruz, for Plaintiff and Appellant.

Louis H. Castoria, Debra S. Blum, Wilson, Elser, Moskowitz, Edelman & Dicker, San Francisco, for Defendant and Respondent.

Opinion

WALSH, J.*

* Judge of the Santa Clara County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] ***312** In *Lucas v. Hamm* (1961) 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685 (*Lucas*), our Supreme Court rejected the traditional rule that an attorney owed no duty to nonclients. The court held that beneficiaries could sue the attorney whose negligent preparation of a will caused them to lose their testamentary rights, where the attorney's engagement was intended to benefit the nonclient, and the imposition of liability would not place an undue burden upon the legal profession. (*Id.* at p. 591, 15 Cal.Rptr. 821, 364 P.2d 685.)

Our case is one of first impression involving a potential extension of *Lucas.* Simona Osornio, a nonclient, was the named executor and sole beneficiary under a will. Because she was care custodian to the testator, a dependent adult, Osornio was a presumptively disqualified donee under Probate Code section 21350, subdivision (a)(6).[1] Accurately anticipating that a probate court would decide that she could not overcome that presumption by clear and convincing proof, Osornio claimed that the bequest to her failed because of the negligence of Saul Weingarten, the attorney who drafted the will on behalf of the testator.

1 All statutory references are to the Probate Code unless otherwise indicated.

Though Osornio's allegations are less than clear, her theory of negligence is apparently that Weingarten owed her a duty of care as the testator's intended beneficiary, and that, at the time the will was drawn, Weingarten: (1) failed to advise the testator that her intended beneficiary, Osornio, would be presumptively disqualified unless the testator obtained a certificate of independent review from another attorney, under section 21351, subdivision (b) (hereafter section 21351(b)); and (2) failed to take appropriate measures to ***313** ensure that the testator's wishes were carried out by referring her to counsel to obtain such a certificate. The trial court sustained Weingarten's demurrer to the complaint without leave to amend, and Osornio appeals.

We conclude that the complaint, as drafted, did not state a cause of action. We find further, however, that nonclient Osornio could have readily amended the complaint to state a cause of action for professional negligence against attorney Weingarten under *Lucas* and its progeny. Accordingly, the trial court abused its discretion by sustaining the demurrer without ****249** leave to amend, and we reverse the judgment.

FACTS

I. *Complaint*

The facts recited below are from the allegations made in the complaint. In reviewing the propriety of the trial court's sustaining of the demurrer, we, of course, accept as true the factual allegations properly pleaded in the complaint. (See *Construction Protective Services, Inc. v. TIG Specialty Ins. Co.* (2002) 29 Cal.4th 189, 193, 126 Cal.Rptr.2d 908, 57 P.3d 372; *Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152, 2 Cal.Rptr.3d 396.)

Weingarten was a licensed California attorney practicing law in the County of Monterey.[2] In the early 1990's the testator, Dora Ellis, retained Weingarten to draft a will. On or about September 19, 2001, Ellis requested that Weingarten prepare a new will that would (a) revoke her prior wills and codicils, and (b) name Osornio as the executor and sole beneficiary under Ellis's new will.

[2] In the briefing on appeal, we were advised that Weingarten passed away on February 18, 2004, shortly before judgment was entered below. Accordingly, we entered an order in this appeal on September 14, 2004, substituting, as defendant and respondent, Lawrence A. Weingarten as personal representative of the estate of Saul Weingarten. This substitution of parties notwithstanding, for convenience, we refer to defendant and respondent as "Weingarten" throughout this opinion.

The September 19, 2001 will (2001 Will) prepared by Weingarten on behalf of Ellis "failed to include a Certificate of Independent Review as required by California Probate Code Section 21350 et seq." Therefore (the complaint alleges), Weingarten failed to exercise reasonable care in performing legal services for Ellis.

Osornio was the intended sole beneficiary of Ellis, and she would have received the entire value of Ellis's estate had Weingarten exercised reasonable care, skill, and diligence in preparing the 2001 Will. Osornio alleges ***314** that, as a direct and proximate result of Weingarten's negligence, she was precluded from receiving the value of the estate under the 2001 Will and was thereby damaged.

II. *Other Relevant Facts*

There are facts other than those alleged in the complaint that both appear undisputed and are material to our consideration of this appeal. These undisputed facts are disclosed in a written decision after trial in the probate court involving the Ellis estate.[3] That decision was attached to a request for judicial notice filed by Weingarten in support of his demurrer and was properly considered in connection with the demurrer. (See Evid.Code, § 452, subd. (d); *Frommhagen v. Board of Supervisors* (1987) 197 Cal.App.3d 1292, 1299, 243 Cal.Rptr. 390 [in ruling on demurrer, "court may take judicial notice of the official acts or records of any court in this state"].)

[3] *In re the Estate of Dora J. Ellis,* Monterey County Superior Court, case numbers MP16152 and MP16195.

Peggy Williams was the beneficiary under Ellis's prior will, dated October 7, 1993 (1993 Will); the prior will contained two codicils dated June 29, 1994, and July 10, 1997, respectively. Ellis died in May 2002. Williams filed a petition to probate the 1993 Will. Osornio objected to the Williams petition and filed a separate petition to probate the 2001 Will. Williams objected to the Osornio petition on the grounds of lack of capacity and undue influence. The dispute proceeded to trial in the probate court in June 2003.

****250** The parties to the probate proceeding stipulated that Osornio "was a care custodian of a dependent adult, Dora Ellis, in September 2001 and that the provisions of Probate Code Section 21350[, subdivision] (a)(6) applied." Similarly, Osornio admitted in her opposition to the demurrer that she was Ellis's care custodian, "thus triggering the provisions of Probate Code Section 21350[, subdivision] (a)(6)." It is further apparent that, at the time Ellis consulted Weingarten in September 2001, he was aware that Osornio was Ellis's care custodian.[4] The probate court concluded after trial—in its tentative decision dated August 29, 2003[5]—that Osornio had failed to satisfy her burden of establishing by clear and convincing evidence that the transfer of ***315** property to Osornio in the 2001 Will was not the product of fraud, menace, duress, or undue influence, as provided in section 21351, subdivision (d) (hereafter section 21351(d)).[6]

[4] In the probate proceeding, both Weingarten and his paralegal, Anne Fingold, testified that Osornio accompanied Ellis to Weingarten's office on September 19, 2001. Fingold testified further that "it appeared to her that Ms. Ellis was dependent on her caretaker, Ms. Osornio."

[5] The tentative decision directed that counsel for Williams prepare a statement of decision consistent with the court's ruling. The parties have not provided us with any pleadings reflecting that the decision of the probate court is final. This fact notwithstanding, the arguments on appeal strongly suggest that both parties believe that the probate court has rendered a final decision adverse to Osornio. Therefore, any potential lack of finality of the probate court's decision is of no consequence to our consideration of the issues in this appeal.

[6] The actual finding of the probate court was: "Osornio has failed to satisfy her burden of rebutting the presumption of undue influence created by Probate Code Section 21351 (d). Viewing the evidence as a whole, the Court finds the evidence before the Court is not sufficiently 'clear and convincing' to overcome the presumption that the will executed by Ms. Eillis on September 19, 2001, leaving all her estate to her caretaker, was not [*sic*] a product of undue influence."

PROCEDURAL HISTORY

Osornio filed her complaint on May 20, 2003. Weingarten filed a general and special demurrer to the complaint. Weingarten contended, inter alia, that the complaint (a) failed to state facts sufficient to constitute a cause of action, (b) was uncertain, and (c) contained allegations that were heard and decided previously by the court. Osornio opposed the demurrer. After hearing, on December 3, 2003, the trial court sustained the general demurrer without leave to amend. The court entered a judgment of dismissal nunc pro tunc as of March 1, 2004.

Osornio filed a notice of appeal from the judgment on March 12, 2004. The appeal from the judgment was filed timely (Cal. Rules of Court, rule 2(a)(1)) and is a proper subject for appellate review. (Code Civ. Proc., § 904.1, subd. (a)(1); *Castro v. State of California* (1977) 70 Cal.App.3d 156, 158, 138 Cal.Rptr. 572.)

DISCUSSION

I. *Standard Of Review*

A general demurrer is appropriate where the complaint "does not state facts sufficient to constitute a cause of action." (Code Civ. Proc., § 430.10, subd. (e).) There are "long-settled rules" that appellate courts follow in addressing the merits of a challenge to a complaint by demurrer: " 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint ****251** a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court abused its discretion and we reverse; if ***316** not, there is no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58.)

[2] A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. (See Code Civ. Proc., § 589; *Schmidt v. Foundation Health* (1995) 35 Cal.App.4th 1702, 1706, 42 Cal.Rptr.2d 172.) On a question of law, we apply a de novo standard of review on appeal. (*Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 937, 29 Cal.Rptr.2d 669.) While negligence is ordinarily a question of fact, the existence of duty is generally one of law. (*Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1033, 40 Cal.Rptr.2d 744 (*Meighan*); *Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 612–613, 116 Cal.Rptr. 919 (*Banerian*).) Thus, a demurrer to a negligence claim will properly lie only where the allegations of the complaint fail to disclose the existence of any legal duty owed by the defendant to the plaintiff. (*Banerian, supra,* at p. 613, 116 Cal.Rptr. 919.)

II. *Issues On Appeal*

[3] The single issue raised on appeal is whether the court erred in sustaining Weingarten's general demurrer without leave to amend. This order was apparently founded upon the conclusion that Weingarten as a matter

of law owed no duty to Osornio, a nonclient.[7] The issue on appeal contains two subquestions: (a) whether the court properly sustained the demurrer because the complaint, as drafted, failed to state a cause of action for professional negligence; and (b) whether the court abused its discretion by refusing Osornio leave to amend—i.e., that the court correctly concluded that there was no reasonable possibility that Osornio could amend the complaint to state a viable cause of action.

[7] In addition to contending that he owed no duty to Osornio, Weingarten argued below that her claim was barred by collateral estoppel; he asserted that the probate court's previous ruling against Osornio's petition to probate the 2001 Will barred the malpractice claim. Weingarten does not advance this collateral estoppel argument on appeal. We therefore deem the contention waived. (See *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99, 31 Cal.Rptr.2d 264: "Issues do not have a life of their own: if they are not raised or supported by argument or citation to authority, we consider the issues waived.") The claim of collateral estoppel, in any event, is patently without merit. (See *Garcia v. Borelli* (1982) 129 Cal.App.3d 24, 30–32, 180 Cal.Rptr. 768 (*Garcia*) [determination of right of heirship and distribution in probate court did not act as collateral estoppel to beneficiary's legal malpractice claim against testator's attorney].)

We first review: sections 21350 and 21351, concerning the presumptive disqualification of certain donees (including care custodians of dependent ***317** adults); the elements of a legal malpractice claim; the Supreme Court's decisions in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 320 P.2d 16 (*Biakanja*), and *Lucas, supra,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, the latter case having extended negligence claims to persons not in privity with attorneys in limited instances; and other California authorities addressing an attorney's duty of care to nonclients. Following this ****252** review, we address whether the trial court erred in sustaining Weingarten's demurrer, and whether it abused its discretion by denying Osornio leave to amend her complaint.

III. *Probate Code Sections 21350 And 21351*

Section 21350, subdivision (a) (hereafter, section 21350(a)), reads in relevant part: "Except as provided in Section 21351 [governing exceptions], no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following: [¶] ... [¶] (6) A care custodian of a dependent adult who is the transferor."[8] A "disqualified person" under the statute "means a person specified in subdivision (a) of Section 21350, but only in cases where Section 21351 does not apply." (§ 21350.5.) Other presumptively disqualified donees under section 21350(a), include: the drafter of the instrument;[9] the drafter's relative, domestic partner, cohabitant, or employee; the drafter's law partner or shareholder; an employee of the law partnership or corporation in which the drafter has an interest; one having a fiduciary relationship with the donor (including a conservator or trustee), who transcribes or causes the instrument to be transcribed; such fiduciary's relative, employee, domestic partner, or cohabitant; and a relative of, domestic partner of, employee of, or a cohabitant with, a care custodian of the donor who is a dependent adult. (§ 21350(a).)

[8] The statute defines the terms "dependent adult" and "care custodian" as follows: "For purposes of this section, the 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 (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64. The term 'care custodian' has the meaning as set forth in Section 15610.17 of the Welfare and Institutions Code." (§ 21350, subd. (c).) As noted in our recitation of facts (part II, *ante*) Osornio has admitted that she was a care custodian of Ellis, a dependent adult.

[9] " 'Instrument' is broadly defined in [Probate Code] section 45 as 'a will, trust, deed, or other writing that designates a beneficiary or makes a donative transfer of property.' " (*Rice v. Clark* (2002) 28 Cal.4th 89, 97, fn. 4, 120 Cal.Rptr.2d 522, 47 P.3d 300.)

The presumption of invalidity of donative transfers to specified individuals under section 21350(a)—including transfers to care custodians of dependent adults—does not apply, inter alia, where "[t]he instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original ***318** certificate ... with a copy delivered to the drafter." (§ 21351(b).)[10] This "Certificate of Independent Review" must state that the attorney: reviewed the instrument; counseled the client/transferor concerning the nature and consequences of the subject transfer of property to the presumptively disqualified person under section 21350; was disassociated from any interest in the transferee; and concluded that the transfer to the presumptively disqualified person was valid

because it was "not the product of **253 fraud, menace, duress, or undue influence." (§ 21351(b).)

[10] Although not relevant to the issues on appeal, other instances in which donative transfers to persons identified in section 21350(a) are not presumed invalid are: where the transferee or the drafter is the transferor's relative, cohabitant, or registered domestic partner (§ 21351, subd. (a)); or where, "[a]fter full disclosure of the relationships of the persons involved, the instrument is approved" by the court in a special proceeding. (§ 21351, subd. (c).)

Presumptively disqualified donees under section 21350(a)—even without the transferor having obtained a certificate of independent review under section 21351(b)—may rebut this presumption under very limited circumstances, where "[t]he court determines, *upon clear and convincing evidence,* but not based solely upon the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence." (§ 21351(d), italics added.)[11] This "elevated proof burden" (*Rice v. Clark, supra,* 28 Cal.4th at p. 98, 120 Cal.Rptr.2d 522, 47 P.3d 300) requires the proposed donee to "persuade [the trier of fact] that it is highly probable that the fact is true." (CACI No. 201 (2004 ed.); see also former BAJI No. 2.62 (2004 ed.); *In re Asia L.* (2003) 107 Cal.App.4th 498, 510, 132 Cal.Rptr.2d 733 ["evidence must be so clear as to leave no substantial doubt"].)[12] Furthermore, in such proceeding, if the proposed donee fails to meet this heightened burden of proving that the transfer was not the product of fraud, menace, duress, or undue influence, he or she "shall bear all costs of the proceeding, including reasonable attorney's fees." (§ 21351(d).) These costs in many instances will be substantial. (See *Estate of Shinkle* (2002) 97 Cal.App.4th 990, 1001, fn. 2, 119 Cal.Rptr.2d 42 [care custodian/beneficiary, after being determined a disqualified donee under section 21350(a), ordered to pay over $114,000 in costs and attorney's fees].)

[11] This option, however, is not available to the *drafter* of the instrument, where the transferor has failed to obtain a certificate under section 21351(b). (§ 21351, subd. (e)(1).)

[12] This placement of the burden of proof upon the proponent of the instrument is, in effect, the converse of the typical will contest, where the contestant bears the burden of proving a basis to invalidate the instrument. (See § 8252, subd. (a); *Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 255, fn. 5, 256, 43 Cal.Rptr.2d 407.)

[4] The intent of section 21350 was "to prevent unscrupulous persons in fiduciary relationships from obtaining gifts from elderly persons through undue influence or other overbearing behavior. [Citation.]" (*Bank of* **319 *America v. Angel View Crippled Children's Foundation* (1999) 72 Cal.App.4th 451, 456, 85 Cal.Rptr.2d 117.) The statute arose in response to reports of significant abuse of the attorney-client relationship by an attorney in Southern California who, inter alia, "reportedly drafted wills and trusts for thousands of elderly clients, naming himself as beneficiary. [Citations.]" (*Estate of Swetmann* (2000) 85 Cal.App.4th 807, 819, fn. 9, 102 Cal.Rptr.2d 457; see also *Rice v. Clark, supra,* 28 Cal.4th at p. 97, 120 Cal.Rptr.2d 522, 47 P.3d 300.)[13]

[13] "The primary purpose of [Assembly Bill No.] 21 [which, inter alia, added sections 21350 to 21355 of the Probate Code] is to strictly forbid attorneys from drafting (or causing to be drafted) wills that leave themselves, or relatives or business partners, gifts of more than insubstantial value, i.e., $500." (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 21 (1993–1994 Reg. Sess.) as amended Feb. 4, 1993, p. 3.)

As originally enacted in 1993, section 21350(a) did not include care custodians of dependent adults among the class of presumptively disqualified donees. (See former § 21350, added by Stats.1993, ch. 293, § 8, p.2021.) In 1997, the Legislature amended section 21350(a) to include care custodians of dependent adults as presumptively disqualified donees. (See Stats.1997, ch. 724, § 33; see also *Conservatorship* **254 *of Davidson* (2003) 113 Cal.App.4th 1035, 1051 [6 Cal.Rptr.3d 702] [1997 amendment to section 21350 "was intended to apply to gifts made 'to practical nurses or other caregivers hired to provide in-home care.' [Citation.]"].)

IV. *Required Elements Of A Professional Negligence Claim*

In evaluating the sufficiency of Osornio's complaint, we note preliminarily that there are four essential elements of a professional negligence claim: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence. [Citations.]" (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200, 98 Cal.Rptr. 849, 491

P.2d 433; see also *Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 523, 50 Cal.Rptr. 592.)

[5] [6] A legal malpractice action is thus composed of the same elements as any other negligence claim, i.e., "duty, breach of duty, proximate cause, and damage. [Citation.]" (*Chavez v. Carter* (1967) 256 Cal.App.2d 577, 579, 64 Cal.Rptr. 350, disapproved on another ground in *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 190, fn. 29, 98 Cal.Rptr. 837, 491 P.2d 421.) While other elements of a legal malpractice claim are generally factual and thus cannot be challenged on demurrer, the existence of the attorney's duty of care owing to the plaintiff is generally a question of law that may be addressed by demurrer. ***320** (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 342, 134 Cal.Rptr. 375, 556 P.2d 737 (*Goodman*); *Banerian, supra,* 42 Cal.App.3d 604, 612–613, 116 Cal.Rptr. 919.)

V. *The Biakanja And Lucas Decisions*

[7] We start with the undisputed proposition that, in California, "[a]n attorney's liability for professional negligence does not ordinarily extend beyond the client except in limited circumstances." (*St. Paul Title Co. v. Meier* (1986) 181 Cal.App.3d 948, 950, 226 Cal.Rptr. 538; see also Vapnek et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2004) ¶ 6:240, p. 6–38 [attorney generally has no professional obligation to nonclient].) The Supreme Court very recently reiterated that "the general rule [is] that an attorney owes a duty of care, and is thus answerable in malpractice, only to the client with whom the attorney stands in privity of contract. [Citation.]" (*Borissoff v. Taylor & Faust* (2004) 33 Cal.4th 523, 530, 15 Cal.Rptr.3d 735, 93 P.3d 337.) Indeed, until 1958, California followed the traditional view that a nonclient could not maintain an action against an attorney for malpractice.[14] Thus, under former California law, a named beneficiary who was damaged as a result of the negligence of the attorney who drafted the will could not recover, due to the absence of any duty owed by the attorney to the nonclient/intended beneficiary. (See *Buckley v. Gray* (1895) 110 Cal. 339, 42 P. 900 (*Buckley*).)

[14] For extensive reviews of multijurisdictional authorities on an attorney's duty to third parties, see generally, Annot., What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client (1988) 61 A.L.R.4th 464; Annot., Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties (1988) 61 A.L.R.4th 615.

In *Biakanja, supra,* 49 Cal.2d 647, 320 P.2d 16, the Supreme Court disapproved of *Buckley's* strict privity requirement. A will failed in *Biakanja* because, although notarized, its execution was not properly ****255** witnessed. (*Biakanja, supra,* 49 Cal.2d at p. 648, 320 P.2d 16.) The beneficiary under the failed will sued the notary public, who—engaging in the unauthorized practice of law—negligently drafted and supervised the will's execution. (*Ibid.*) The court held that a defendant's liability to a third person not in privity in a particular case "is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm. [Citations.]" (*Id.* at p. 650, 320 P.2d 16.) Applying these factors, the Supreme Court concluded that the notary owed a duty of care to the beneficiary, even in the absence of privity. (*Id.* at pp. 650–651, 320 P.2d 16.)

***321** In *Lucas, supra,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, the Supreme Court faced a similar question of duty to intended beneficiaries, but in the context of an attorney's negligence. The beneficiaries sued the attorney who drafted the will and codicils in a manner that caused the instruments to fail because they ran afoul of statutory restraints on alienation and the rule against perpetuities. (*Id.* at pp. 586–587, 15 Cal.Rptr. 821, 364 P.2d 685.) After noting that it had previously rejected *Buckley's* "stringent privity test" in *Biakanja* (*Lucas, supra,* at p. 588, 15 Cal.Rptr. 821, 364 P.2d 685), the court held that "intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third-party beneficiaries." (*Id.* at p. 591, 15 Cal.Rptr. 821, 364 P.2d 685.)

In so concluding, the court utilized the balancing test it enunciated previously in *Biakanja* to determine whether the attorney defendant owed a duty to the beneficiaries with whom defendant was not in privity. (*Lucas, supra,* 56 Cal.2d at p. 588, 15 Cal.Rptr. 821, 364 P.2d 685.)[15] The court added a factor not present in its discussion in *Biakanja,* namely, "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." (*Lucas, supra,* 56 Cal.2d at p. 589, 15 Cal.Rptr. 821, 364

P.2d 685.)[16]

15 The Supreme Court in *Lucas* actually recited only five of the six *Biakanja* factors, omitting factor number 5 quoted above, i.e., "the moral blame attached to the defendant's conduct." (*Lucas, supra,* 56 Cal.2d at p. 588, 15 Cal.Rptr. 821, 364 P.2d 685; see also 1 Mallen & Smith, Legal Malpractice (5th ed. 2000) Liability to Nonclient—Negligence, § 7.8, p. 694 [identifying criteria considered in California as consisting of six factors—five *Biakanja* factors, excluding "moral blame" factor, and the *Lucas* factor of "burden on the profession"].) Our conclusion from a review of the California cases addressing the issue of an attorney's duty to third parties is that courts often recite this "moral blame" factor mentioned in *Biakanja* but rarely apply it as a part of their analysis. (See, e.g., *Goodman, supra,* 18 Cal.3d 335, 343, 134 Cal.Rptr. 375, 556 P.2d 737; *Heyer v. Flaig* (1969) 70 Cal.2d 223, 227, 74 Cal.Rptr. 225, 449 P.2d 161 (*Heyer*), disapproved on other grounds in *Laird v. Blacker* (1992) 2 Cal.4th 606, 617, 7 Cal.Rptr.2d 550, 828 P.2d 691; *Morales v. Field, DeGoff, Huppert & MacGowan* (1979) 99 Cal.App.3d 307, 315, 160 Cal.Rptr. 239 (*Morales*).)

16 The Supreme Court later enunciated another factor to consider in determining the existence of duty—a factor related to the question of "undue burden on the profession," namely, whether imposing liability would impinge upon the attorney's ethical duties to his or her client. (See *Goodman, supra,* 18 Cal.3d at p. 344, 134 Cal.Rptr. 375, 556 P.2d 737; see also *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287, 1295, 135 Cal.Rptr.2d 888 (*Moore*).)

****256** The court determined that the first factor strongly favored the plaintiffs, since "one of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs." (*Lucas, supra,* 56 Cal.2d at p. 589, 15 Cal.Rptr. 821, 364 P.2d 685.) It likewise concluded that it was foreseeable that plaintiffs would be harmed if the bequest was determined to be invalid, that the harm would not occur but for defendant's negligence, and that the harm would become certain upon the testator's death. (*Ibid.*) The court also held that denying recovery to plaintiffs/intended ***322** beneficiaries under these circumstances would impair the policy of preventing future harm: "[I]f persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so and the policy of preventing future harm would be impaired." (*Ibid.*) Finally, it concluded that the imposition of liability under these circumstances "does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss." (*Ibid.*)[17]

17 Somewhat ironically, the Supreme Court—despite announcing that the intended beneficiaries had the *theoretical* right to recover against the attorney—ultimately rejected plaintiffs' claims. It concluded that, because of uncertainties in the law regarding the rule against perpetuities and restraints on alienation, "it would not be proper to hold that defendant failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise." (*Lucas, supra,* 56 Cal.2d at p. 592, 15 Cal.Rptr. 821, 364 P.2d 685.)

VI. *Decisions Subsequent To Lucas*

In the near half-century since the Supreme Court decided *Lucas,* California courts have considered numerous variations of the attorney's potential liability to nonclients. Some instances have involved an attorney's duty of care in the estate planning context, while others have addressed negligence claims by nonclients in other business settings. In order to address fully the parties' respective contentions herein, we first review these California decisions.

A. *Estate Planning Cases*

In *Heyer, supra,* 70 Cal.2d 223, 74 Cal.Rptr. 225, 449 P.2d 161, the Supreme Court addressed a legal malpractice claim brought by intended beneficiaries of a will. The two daughters of the testator—who were the sole beneficiaries—claimed that the attorney negligently failed to advise the mother that omitting a provision in the will concerning her intended marriage could result in the spouse asserting a claim to a portion of her estate in the event she predeceased him, under former section 70. (*Heyer, supra,* 70 Cal.2d at pp. 225–226, 74 Cal.Rptr. 225, 449 P.2d 161.)[18]

18 Former section 70, which was repealed effective 1985 (Stats.1983, ch. 842, § 18, p. 3024), provided as follows: "If a person marries after making a will, and the spouse survives the maker, the will is revoked as to the spouse, unless ... the spouse is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation can be received." (Stats.1931, ch. 281, § 70, p. 590; see also

§§ 6560 to 6562.)

Before addressing the central question before it (i.e., commencement of the statute of limitations), the *Heyer* court reiterated its holdings in *Biakanja* and *Lucas* that permitted, as a matter of policy, intended ****257** beneficiaries to recover in the absence of privity with the defendant: "When an attorney undertakes to fulfill the testamentary instructions of his client, he ***323** realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's [testamentary] scheme; and thus the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary. In some ways, the beneficiary's interests loom greater than those of the client. After the latter's death, a failure in his testamentary scheme works no practical effect except to deprive his intended beneficiaries of the intended bequests ... only the beneficiaries suffer the real loss. We recognized in *Lucas* that unless the beneficiary could recover against the attorney in such a case, no one could do so and the social policy of preventing future harm would be frustrated." (*Heyer, supra,* 70 Cal.2d at p. 228, 74 Cal.Rptr. 225, 449 P.2d 161.)[19] Applying *Lucas,* the court concluded that "[a] reasonably prudent attorney should appreciate the consequences of a post-testamentary marriage, advise the testator of such consequences, and use good judgment to avoid them if the testator so desires." (*Heyer, supra,* 70 Cal.2d at p. 229, 74 Cal.Rptr. 225, 449 P.2d 161.)

[19] The Supreme Court also noted that, while it held in *Lucas* that the intended beneficiary under a will could bring suit against the testator's attorney under both a theory of negligence and under a contractual theory of third party beneficiary, "[t]his latter theory of recovery, however, is conceptually superfluous since the crux of the action must lie in tort in any case; there can be no recovery without negligence." (*Heyer, supra,* 70 Cal.2d at p. 227, 74 Cal.Rptr. 225, 449 P.2d 161.)

Similarly, an attorney was held to owe a duty of care to intended beneficiaries to properly advise the testator of the law governing the property he intended to dispose of through his will. (See *Garcia, supra,* 129 Cal.App.3d 24, 180 Cal.Rptr. 768.) The testator told his attorney that certain property in which he had a community property interest, as a matter of convenience, was held by his wife and him in joint tenancy. (*Id.* at p. 27, 180 Cal.Rptr. 768.) After the testator's death, his widow "terminated all joint tenancies in her favor, thus depriving the estate, and ultimately [plaintiffs], of Testator's community interest in this property." (*Id.* at p. 28, 180 Cal.Rptr. 768.) The plaintiffs alleged that the attorney was negligent, inter alia, in failing to advise the testator of legal presumptions governing title to his property and in failing to advise him of potential estate planning measures to ensure that his property would receive proper recognition upon his death. (*Id.* at p. 29, 180 Cal.Rptr. 768.) While the appellate court focused mainly on a collateral estoppel issue,[20] it concluded that the plaintiffs alleged a viable theory of recovery against the testator's attorney. (*Id.* at p. 32, 180 Cal.Rptr. 768.)

[20] See footnote 7, *ante.*

An estate planning attorney's duty of care to nonclients, under *Lucas* and *Heyer,* was extended to trust beneficiaries in *Bucquet v. Livingston* (1976) 57 Cal.App.3d 914, 129 Cal.Rptr. 514 (*Bucquet*). In that case, the beneficiaries under an inter vivos trust claimed that the attorney for the trustors (husband and wife) negligently drafted the trust; he allegedly failed to advise the trustors of potential tax consequences resulting from including a general ***324** power of appointment in the trust. (*Id.* at p. 917, 129 Cal.Rptr. 514.) The beneficiaries claimed that this negligence resulted in the wife's estate incurring unnecessary tax liability, which, in turn, reduced ****258** the share of the trust ultimately received by the beneficiaries. (*Id.* at p. 920, 129 Cal.Rptr. 514.) The court held that the principles of *Lucas* and *Heyer* "are equally applicable to *inter vivos* trusts, like the instrument here in issue, as there is no rational basis for any distinction." (*Bucquet, supra,* at p. 922, 129 Cal.Rptr. 514.)[21] It concluded that the complaint stated a cause of action, because the creation of the trust "was directly intended to affect the beneficiaries and the avoidance of federal estate tax and state inheritance tax was directly related to the amounts that [husband] intended the beneficiaries to receive after [wife's] death." (*Bucquet* at p. 923, 129 Cal.Rptr. 514.)

[21] See also *Morales, supra,* 99 Cal.App.3d 307, 160 Cal.Rptr. 239 (counsel for trustee/executor owed duty to unrepresented remainderman beneficiary to disclose attorney's dual representation of parties in transaction involving trust).

Several cases have rejected unwarranted extensions of *Lucas/Heyer* in other estate planning contexts. In *Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 115 Cal.Rptr. 464 (*Ventura*), the court rejected a malpractice claim by a class of potential beneficiaries (charities). They alleged that, as a result of the attorney's negligence, they were unable to take under

the testator's will because the bequest—although containing the name selected by the testator—did not have a properly named beneficiary. (*Id.* at p. 901, 115 Cal.Rptr. 464.)[22] The court refused to extend *Lucas,* holding that "no good reason exists why the attorney should be held accountable for using certain words suggested or selected by the testator which later prove to be ambiguous.... The duty thus created would amount to a requirement to draft litigation-proof legal documents. This unlimited liability ... would result in a speculative and almost intolerable burden on the legal profession indeed." (*Ventura, supra,* at p. 905, 115 Cal.Rptr. 464.)

22 The will provided that 25 percent of the residuary estate would go to the " 'Society for the Prevention of Cruelty to Animals (Local or National),' " an entity that, as named, did not exist. (*Ventura, supra,* 40 Cal.App.3d at p. 901, 115 Cal.Rptr. 464.)

Likewise, we rejected the malpractice claim of a *potential* beneficiary identified in an *unsigned* will. (See *Radovich v. Locke–Paddon* (1995) 35 Cal.App.4th 946, 41 Cal.Rptr.2d 573 (*Radovich*).) There, the attorney prepared a draft will—which made specific bequests to plaintiff and named him as an income beneficiary under a charitable remainder trust—and delivered it to the testator. (*Id.* at p. 952, 41 Cal.Rptr.2d 573.) Approximately two months after the attorney delivered the draft will, the testator died without having executed it. (*Ibid.*) Plaintiff asserted, inter alia, that the executor's counsel was negligent in failing to obtain the testator's signature on the will. (*Id.* at p. 953, 41 Cal.Rptr.2d 573.)

We refused to expand the attorney's duty to nonclients under *Lucas/ Heyer* to a potential beneficiary under an unsigned draft will. ***325** (*Radovich, supra,* 35 Cal.App.4th at pp. 965–966, 41 Cal.Rptr.2d 573.)[23] In so concluding, we noted that most of the *Biakanja* factors did not suggest the imposition of duty ****259** (*Radovich, supra,* 35 Cal.App.4th at pp. 963–965, 41 Cal.Rptr.2d 573), and "that imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent." (*Id.* at p. 965, 41 Cal.Rptr.2d 573; see also *Goldberg v. Frye* (1990) 217 Cal.App.3d 1258, 266 Cal.Rptr. 483 [rejecting legatees' negligence claim against attorney for administrator, holding that principal purpose of attorney's engagement was to counsel fiduciary and not to benefit legatees, and attorney owed duty to administrator only].)

23 Another appellate court rejected a negligence claim under which the plaintiff asserted that he was deprived of a bequest that he would have otherwise received had the testator's attorney not prepared a subsequent will that was validly executed. (See *Hiemstra v. Huston* (1970) 12 Cal.App.3d 1043, 1048, 91 Cal.Rptr. 269 [case—unlike *Biakanja, Lucas,* or *Heyer*—involved a valid will that "contained no legal deficiency which prevented [testator's] wishes expressed therein from being carried out"].)

In a recent case, the First Appellate District, Division Two, similarly refused to extend an attorney's duty to a nonclient in the estate planning context. (See *Moore, supra,* 109 Cal.App.4th 1287, 135 Cal.Rptr.2d 888.) In *Moore,* the testator's children alleged that the attorney who had drafted amendments to their father's estate plan, which reduced the children's share, was negligent in failing to ascertain his client's testamentary capacity. (*Id.* at p. 1290, 135 Cal.Rptr.2d 888.) The children alleged that as a result of the attorney's failure to determine their father's testamentary capacity and to document that evaluation, they received less through their settlement of ensuing estate litigation than they would have received under their father's estate plan prior to execution of the questioned amendments. (*Ibid.*)

After extensive review of the relevant authorities and discussion of the *Biakanja/Lucas* factors, the court held that the testator's attorney owed no such duty to the beneficiaries. (*Moore, supra,* 109 Cal.App.4th at p. 1307, 135 Cal.Rptr.2d 888.) The court concluded: "It may be that prudent counsel should refrain from drafting a will for a client the attorney reasonably believes lacks testamentary capacity or should take steps to preserve evidence regarding the client's capacity in a borderline case. However, that is a far cry from imposing malpractice liability to nonclient potential beneficiaries for the attorney's alleged inadequate investigation of evaluation of capacity or the failure to sufficiently document that investigation." (*Ibid.*)

Weingarten relies heavily on *Radovich* and *Moore* in support of his assertion that he owed no duty to Osornio as a matter of law. As we discuss in detail, (see pt. VIII C, *post*), neither case supports Weingarten's position. In *Radovich,* plaintiff was merely a *potential* beneficiary under an *unsigned* draft will. We rejected his claim against the attorney who drafted the ***326** unsigned will, based in large part upon our concern that imposing liability would undermine the attorney's duty of loyalty to the client, (*Radovich, supra,* 35 Cal.App.4th at p. 965, 41 Cal.Rptr.2d 573), a circumstance not presented here. Likewise, the appellate court in *Moore* concluded that requiring an attorney to ascertain and document his or her client's testamentary capacity "would place an intolerable burden on attorneys [because n]ot only would the attorney

be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries." (*Moore, supra,* 109 Cal.App.4th at p. 1299, 135 Cal.Rptr.2d 888.) As we discuss, *post,* no such problem of conflicting loyalties arises here; imposing a duty upon Weingarten under the circumstances presented promotes the objectives of the client to transfer the client's estate to the nonclient/beneficiary.

B. *Malpractice Cases by Nonclients in Other Settings*

Several California decisions have followed *Lucas* in finding a duty of care owed by the attorney to a nonclient outside of the estate planning context. One appellate court extended *Lucas* to a nonclient who ****260** made a loan to the attorney's client. (See *Roberts v. Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 Cal.App.3d 104, 128 Cal.Rptr. 901.) In *Roberts,* the plaintiff/lender alleged that he relied upon the attorney's letter opining that the client was a duly organized general partnership. (*Id.* at p. 107, 128 Cal.Rptr. 901.) The appellate court held that the attorney owed a duty to plaintiff, and thus concluded that plaintiff stated a cause of action for negligent misrepresentation: "[T]he issuance of a legal opinion intended to secure benefit for the client ... must be issued with due care, or the attorneys who do not act carefully will have breached a duty owed to those they attempted or expected to influence on behalf of their clients." (*Id.* at p. 111, 128 Cal.Rptr. 901; see also *Courtney v. Waring* (1987) 191 Cal.App.3d 1434, 1443–1444, 237 Cal.Rptr. 233 [franchisor's attorneys who prepared misleading prospectus held liable to franchisees].)

In *Meighan, supra,* 34 Cal.App.4th 1025, 40 Cal.Rptr.2d 744, the attorney failed to advise the client's wife of the existence of a loss of consortium claim arising out of the client's injuries, and the couple did not learn of the existence of such claim until after the statute of limitations had run. (*Id.* at pp. 1029–1030, 40 Cal.Rptr.2d 744.) The court, applying the six-part analysis under *Biakanja* and *Lucas,* concluded that the attorney owed the couple—client and nonclient alike—a duty to inform them "of the existence of their rights under the consortium tort." (*Meighan, supra,* 34 Cal.App.4th at p. 1044, 40 Cal.Rptr.2d 744; see also *Donald v. Garry* (1971) 19 Cal.App.3d 769, 772, 97 Cal.Rptr. 191 [attorney for collection agent who brought suit on obligation owed duty to creditor/assignor of claim to prosecute action diligently].)

Other cases, however, have rejected attorney negligence claims brought by nonclients. For instance, in *Goodman, supra,* 18 Cal.3d 335, 134 Cal.Rptr. 375, 556 P.2d 737, the plaintiffs ***327** alleged that they were damaged as a result of negligent advice given by the attorney to his clients concerning the issuance of stock. Plaintiffs ultimately purchased the stock from the clients; the sale was alleged to have violated certain securities laws, the result of which was that the stock purchased by plaintiffs was ultimately rendered valueless. (*Id.* at pp. 341–342, 134 Cal.Rptr. 375, 556 P.2d 737.)

The Supreme Court rejected the negligence claim, concluding that the attorney had no relationship with the plaintiffs from which a duty of care arose. (*Goodman, supra,* 18 Cal.3d at pp. 343–344, 134 Cal.Rptr. 375, 556 P.2d 737.) It noted that the advice was neither communicated to plaintiffs, nor was it given to enable the clients to satisfy any obligations to the plaintiffs. (*Id.* at p. 343, 134 Cal.Rptr. 375, 556 P.2d 737.) The complaint did not allege "that plaintiffs had any relationship to defendant's clients or to the corporation as stockholders or otherwise when the advice was given." (*Id.* at p. 344, 134 Cal.Rptr. 375, 556 P.2d 737.) The court also reasoned that plaintiffs were not parties upon whom the clients intended to confer a benefit when defendant provided the advice; they were only "parties with whom defendant's clients might negotiate a bargain at arm's length." (*Ibid.*) Moreover, the court concluded that a finding of duty under the circumstances presented would impose " 'an undue burden on the profession' [citation] and a diminution in the quality of legal services received by the client. [Citation.]" (*Ibid.,* fn. omitted.)[24]

[24] In various contexts, California appellate courts have similarly held—after balancing the *Biakanja/Lucas* factors—that the attorney owed no duty of care to a nonclient. (See, e.g., *Mattco Forge, Inc. v. Arthur Young & Co.* (1995) 38 Cal.App.4th 1337, 1355–1357, 45 Cal.Rptr.2d 581 [attorney not liable to accounting firm hired as expert witness for attorney's client]; *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692, 706–707, 282 Cal.Rptr. 627 [attorney for close corporation owed no duty of care to minority shareholder]; *Burger v. Pond* (1990) 224 Cal.App.3d 597, 606, 273 Cal.Rptr. 709 [no liability to future wife of client for alleged negligence in handling of client's divorce from first wife]; *Sooy v. Peter* (1990) 220 Cal.App.3d 1305, 1313–1314, 270 Cal.Rptr. 151 [attorney for junior lienholder not liable to counsel for third party (senior lienholder)]; *Schick v. Lerner* (1987) 193 Cal.App.3d 1321, 1331, 238 Cal.Rptr. 902 [attorney advising psychologist not liable to psychologist's patient]; *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 961–962, 226 Cal.Rptr. 532 [attorney not liable for negligence to unrepresented party in attorney's handling of real estate transaction for his client]; *St. Paul Title Co. v. Meier, supra,* 181

Cal.App.3d 948, 952, 226 Cal.Rptr. 538 [attorney for purchaser of real estate not liable to escrow agent]; *Mason v. Levy & Van Bourg* (1978) 77 Cal.App.3d 60, 67–68, 143 Cal.Rptr. 389 [attorney not liable to referring attorney for former attorney's negligence in failing to properly prosecute case under contingency referral agreement]; *Held v. Arant* (1977) 67 Cal.App.3d 748, 751, 134 Cal.Rptr. 422 [second attorney for client not liable for indemnity to first attorney sued by client for legal malpractice]; *Norton v. Hines* (1975) 49 Cal.App.3d 917, 921, 123 Cal.Rptr. 237 [attorney not liable to adverse party in litigation]; *National Auto. & Cas. Ins. Co. v. Atkins* (1975) 45 Cal.App.3d 562, 564–565, 119 Cal.Rptr. 618 [attorney who obtained an attachment and attachment bonds in prior action owed no duty to insurance company that issued the attachment bonds to prosecute action diligently]; *De Luca v. Whatley* (1974) 42 Cal.App.3d 574, 575–576, 117 Cal.Rptr. 63 [attorney not liable for calling nonclient to testify as witness in client's criminal proceeding, even where witness thereby incriminated himself]; *Haldane v. Freedman* (1962) 204 Cal.App.2d 475, 478–480, 22 Cal.Rptr. 445 [attorney representing mother in divorce proceeding not liable to children].)

****261 *328** It is against the foregoing backdrop of California decisions concerning questions of the attorney's duty to nonclients that we now address the question on appeal. We first consider whether the complaint, on its face, stated a cause of action for professional negligence. We then discuss whether the court properly denied Osornio leave to amend her complaint.

VII. *Sufficiency Of The Osornio Complaint*

[8] As discussed above, the four elements of a legal malpractice claim are: "duty, breach of duty, proximate cause, and damage." (*Chavez v. Carter, supra,* 256 Cal.App.2d 577, 579, 64 Cal.Rptr. 350.) It is not disputed that Osornio properly pleaded the latter three elements of negligence. The sole question—viewing only the four corners of the pleading—is whether the complaint alleged that Weingarten owed a legal duty to Osornio.

The complaint alleged that the 2001 Will "failed to include a Certificate of Independent Review as required by California Probate Code Section 21350 et seq." Osornio claimed in the next sentence of the complaint that, "[a]s such, Defendants failed to exercise reasonable care and skill" in representing Ellis. The complaint alleged that Osornio "was the intended sole beneficiary of the Estate of Dora Ellis," and that Osornio would have inherited the entirety of the Ellis estate, but for Weingarten's negligence in preparing the 2001 Will.

[9] We may consider in connection with Weingarten's demurrer "any matter that is judicially noticeable under Evidence Code section 451 or 452. [Citation.]" (*Cryolife, Inc. v. Superior Court, supra,* 110 Cal.App.4th 1145, 1152, 2 Cal.Rptr.3d 396, citing Code Civ. Proc., § 430.30, subd. (a).) California statutes are, of course, matters of which judicial notice *shall* be taken. (Evid.Code, § 451, subd. (a).) Thus, a complaint, while facially adequate, may fail to state a cause of action by referring to matters upon which judicial ****262** notice may be taken. (*Childs v. State of California* (1983) 144 Cal.App.3d 155, 159, 192 Cal.Rptr. 526.)

We readily conclude that the complaint failed to allege that Weingarten owed a duty of care to nonclient Osornio. Even assuming, arguendo, that the bare bones allegations of duty are facially sufficient, any claim of duty is directly refuted by sections 21350 and 21351, of which we take judicial notice. (See Evid.Code, § 451, subd. (a).) As we have seen, a certificate of independent review is a document that is signed by independent counsel representing the transferor, who then "delivers to the transferor [the] original certificate ... with a copy delivered to the drafter." (§ 21351(b).) Contrary to the allegations of Osornio's complaint, the certificate is not "included" in the testamentary instrument. Similarly, contrary to the implication in Osornio's pleading, the drafter of the instrument is not the person who *supplies* the certificate as part of his or her duties to the transferor. ***329** We therefore conclude that the trial court properly held that Osornio's complaint was subject to demurrer because of the failure to allege a legal duty on the part of Weingarten.

VIII. *Whether Osornio Should Have Been Granted Leave To Amend*

A. *Allegations of Proposed Amended Complaint*

In determining whether the court should have granted leave to amend, we disregard Osornio's inartful pleading and examine whether there was a reasonable possibility that she could have amended her complaint to state a claim for legal malpractice. (See *Blank v. Kirwan, supra,* 39 Cal.3d 311, 318, 216 Cal.Rptr. 718, 703 P.2d 58; *Okun v. Superior Court* (1981) 29 Cal.3d 442, 460, 175

Cal.Rptr. 157, 629 P.2d 1369.) This requires us to first enunciate—as it appears from the opposition to demurrer and appellate briefs—Osornio's *unpleaded* theory of negligence.

Irrespective of the wording of the complaint, it is readily apparent that Osornio *could have alleged* that Weingarten breached a duty of care owed to her: Weingarten negligently failed to advise Ellis that the intended beneficiary under her 2001 Will, Osornio, would be presumptively disqualified because of her relationship as Ellis's care custodian.[25] Under this theory, Weingarten was negligent not only by failing to advise Ellis of the consequences of section 21350(a); he was also negligent in failing to address Osornio's presumptive disqualification by making arrangements to refer Ellis to independent counsel to advise her and to provide a Certificate of Independent Review required by section 21351(b).[26]

[25] As noted in our discussion of facts, *ante,* it is apparent that Weingarten knew at the time he drafted the 2001 Will that Osornio was, in fact, Ellis's care custodian.

[26] This theory is borne out by the probate court's tentative decision. The court noted that Weingarten testified that "he did not refer [Ellis] to an independent attorney to counsel her about the nature and consequences of the intended transfer [of her estate to Osornio] and did not obtain a Certificate of Independent Review in compliance with Probate Code Section 21351."

Osornio could have alleged that, as a proximate result of this negligence, she—as third party beneficiary to Ellis's engagement of Weingarten to draft the 2001 Will—was damaged. The damage was Osornio's failure to inherit under the 2001 Will. Osornio could have alleged further that this failure to inherit occurred because: (a) there was no certificate of independent review concerning the proposed donative transfer to Osornio under the 2001 Will; (b) said certificate would have ****263** been obtained but for Weingarten's negligence in failing to advise Ellis and in failing to refer her to independent counsel; (c) absent this certificate, Osornio was required to prove by clear and ***330** convincing evidence (disregarding her own testimony) that the transfer of the estate to her under the 2001 Will was "*not* the product of fraud, menace, duress, or undue influence" (§ 21351(d), italics added); and (d) she was unable to meet this high burden of overcoming the presumption that she was a disqualified person under section 21350(a).

[10] Having framed the potential amended complaint in this fashion, we must now address whether this proposed pleading sufficiently alleges a legal duty owed by Weingarten to the nonclient, Osornio. If we answer this question in the negative, we must affirm the trial court. If, however, we answer the question in the affirmative, we must necessarily find that the court abused its discretion by sustaining Weingarten's demurrer without granting Osornio leave to amend.

B. *Balancing of Six Biakanja/Lucas Factors*

[11] Evaluating the existence of an attorney's duty to a nonclient as "a matter of policy" (*Lucas, supra,* 56 Cal.2d 583, 588, 15 Cal.Rptr. 821, 364 P.2d 685), we must balance the six *Biakanja*/*Lucas%* factors. To reiterate, these factors are: "[1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury ... [5] the policy of preventing future harm" (*ibid.*), and [6] "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession." (*Id.* at p. 589, 15 Cal.Rptr. 821, 364 P.2d 685.)[27]

[27] As we indicate in footnote 15, *ante,* in determining an attorney's duty to a nonclient, courts have generally not addressed the additional *Biakanja* factor, namely, "the moral blame attached to the defendant's conduct." (*Biakanja, supra,* 49 Cal.2d 647, 650, 320 P.2d 16.) We agree that the "moral blame" factor is of limited usefulness in any analysis of duty. It suffices for us to say here that the balancing of the six relevant *Biakanja/Lucas* factors supports a finding that Weingarten owed a duty of care to Osornio.

1. *Transaction intended to affect plaintiff*

As we have seen from our discussion, *ante,* "[i]n the cases finding duties owed to nonclients, the nonclients were the intended beneficiaries of the attorney's work or were relying on that work or were to be influenced by it (and the attorney knew or should have known this). [Citation.]" (*Assurance Co. of America v. Haven* (1995) 32 Cal.App.4th 78, 91, 38 Cal.Rptr.2d 25.) In balancing the factors to resolve the question of duty, "[t]he predominant inquiry ... is whether the principal purpose of the

attorney's retention [was] to provide legal services for the benefit of the plaintiff." (*Goldberg v. Frye, supra,* 217 Cal.App.3d 1258, 1268, 266 Cal.Rptr. 483; see also ***331** *Meighan, supra,* 34 Cal.App.4th 1025, 1041, 40 Cal.Rptr.2d 744 ["presence or absence of a client's intent that the plaintiff benefit from or rely upon the attorney's services is particularly significant in the determination of duty"]; 1 Mallen & Smith, Legal Malpractice, *supra,* § 7.8, pp. 701–702 ["predominant inquiry" is whether principal purpose of client's retention of attorney was to benefit third party].)

Unquestionably, this factor supports Osornio. Here, there is no doubt that "the ****264** 'end and aim' of the transaction [i.e., the drafting of the 2001 Will] was to provide for the passing" of Ellis's estate to Osornio. (*Biakanja, supra,* 49 Cal.2d at p. 650, 320 P.2d 16.) The engagement of Weingarten by Ellis was clearly intended to benefit Osornio. In this respect, the Supreme Court's analyses in *Biakanja, Lucas,* and *Heyer* directly apply.

2. *Foreseeability of harm to plaintiff*

We have no trouble concluding that this factor similarly supports Osornio. It was clearly foreseeable at the time Weingarten drafted the 2001 Will that, if he failed to exercise due care to effectuate the testamentary transfer that Ellis intended upon her death, Osornio would be damaged. Again, the circumstances the Supreme Court addressed in *Biakanja, Lucas,* and *Heyer* are indistinguishable from this case.

In addition, the 2001 Will was a revocation of Ellis's prior 1993 Will, under which another person, Williams, was beneficiary. This relevant fact increased the foreseeability of harm to Osornio in the event that there was no certificate of independent review of the 2001 Will. It concomitantly decreased the likelihood that Osornio would be able to meet her heavy burden (under § 21351(d)) of proving by clear and convincing evidence that the bequest was not the product of fraud, menace, duress, or undue influence.

3. *Degree of certainty of plaintiff's injury*

It is clear that Osornio sustained injury. Although Ellis intended under the 2001 Will that Osornio receive the entire estate, she will receive nothing if she is unable to rebut her presumptive disability under section 21350(a). Osornio's efforts to rebut the presumption have been unsuccessful. (See tentative decision *In re the Estate of Dora J. Ellis,* Monterey County Super. Ct. case nos. MP 16152, MP16195, Aug. 29, 2003.) Assuming these efforts are ultimately unsuccessful, Osornio will sustain the definite injury of being deprived of the estate she would have received, but for her disqualification.

4. *Closeness between defendant's conduct and plaintiff's injury*

We acknowledge that Weingarten's conduct as might be alleged in a proposed amended complaint does not have the same degree of closeness to ***332** Osornio's injury found in many of the authorities, *ante,* finding a duty owed by the attorney to a nonclient. This is admittedly not a case—such as *Lucas, supra,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685, or *Heyer, supra,* 70 Cal.2d 223, 74 Cal.Rptr. 225, 449 P.2d 161—where there are no possible intervening factors that might break the causal connection between the attorney's conduct and the nonclient's damage. Here, the facts may ultimately disclose that it would have been unlikely for a variety of reasons that Ellis would have obtained a certificate of independent review, even had Weingarten advised her of the importance of seeking counsel to obtain it.[28] Under at least one scenario, however, Osornio may be able to establish that, but for Weingarten's failure to advise Ellis and refer her to independent counsel to address Osornio's presumptive disqualification ****265** under section 21350(a), Osornio would not have been damaged.

[28] Weingarten also asserts that Osornio "nowhere alleges that she retained (or paid) Mr. Weingarten to prepare the Independent Certification." This argument misses the mark, and, indeed, makes no sense because it is the *client,* not the beneficiary, who is required to retain independent counsel under section 21351(b).

As is evident, the closeness of Weingarten's conduct to the injury here is one resolvable only after the presentation of significant evidence. It suffices to say that we conclude here that the absence of an extreme closeness between conduct and injury, by itself, should not trump a finding of an attorney's duty to a nonclient in a case that otherwise—applying the remaining five factors—warrants it.

5. *Policy of preventing future harm*

The case before us is similar to other cases in which courts have imposed a duty of care upon attorneys where beneficiaries are deprived of intended transfers of property as a result of failed wills or trusts. (See *Heyer, supra,* 70 Cal.2d 223, 74 Cal.Rptr. 225, 449 P.2d 161; *Lucas, supra,* 56 Cal.2d 583, 15 Cal.Rptr. 821, 364 P.2d 685; *Bucquet, supra,* 57 Cal.App.3d 914, 129 Cal.Rptr. 514.) Here, unlike the circumstances in *Ventura, supra,* 40 Cal.App.3d 897, 115 Cal.Rptr. 464—where the bequest failed due to the testator's inaccurate description of the beneficiary—the transfer of the estate failed through no fault of Ellis. If testamentary beneficiaries who are presumptively disqualified under section 21350(a)—such as Osornio—are deprived of the right to bring suit against the attorney responsible for the failure of the intended bequest, no one would be able to bring such action. The policy of preventing harm would thus be impaired. (See *Lucas, supra,* 56 Cal.2d at p. 589, 15 Cal.Rptr. 821, 364 P.2d 685.)

We conclude that this fifth factor supports Osornio's claim. The imposition of duty under the circumstances before us would thus promote public policy: it would encourage the competent practice of law by counsel representing ***333** testators, trustors, and other clients making donative transfers to persons presumptively disqualified under section 21350(a).

6. *Extent of burden on profession*

Consistent with *Lucas,* an important factor we must consider in evaluating Weingarten's potential duty to Osornio under the facts before us is whether the extension of liability here would "impose an undue burden on the profession." (*Lucas, supra,* 56 Cal.2d at p. 589, 15 Cal.Rptr. 821, 364 P.2d 685.) We conclude that the extension of liability here will not impose such an undue burden. In making this determination, we are mindful that it is the general rule that attorneys will not be held liable to nonclients for their negligence, and that "[e]xceptions have been recognized only rarely, and then only when the specific facts of the case showed that the beneficiaries who sought standing to sue the fiduciary's attorney were intended, third party beneficiaries of the contract to provide legal services. [Citations.]" (*Borissoff v. Taylor & Faust, supra,* 33 Cal.4th 523, 530, 15 Cal.Rptr.3d 735, 93 P.3d 337.)

An attorney "is expected ... to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques. [Citations.] ... [E]ven with respect to an unsettled area of the law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." (*Smith v. Lewis* (1975) 13 Cal.3d 349, 358–359, 118 Cal.Rptr. 621, 530 P.2d 589, disapproved on another ground in ****266** *In re Marriage of Brown* (1976) 15 Cal.3d 838, 851, fn. 14, 126 Cal.Rptr. 633, 544 P.2d 561.) Thus, the estate planning attorney owes a "duty to act with due care as to the interests of the intended beneficiary" (*Heyer, supra,* 70 Cal.2d 223, 229, 74 Cal.Rptr. 225, 449 P.2d 161), which duty arises out of the agreement to provide legal services to the testator.

As one practice guide has explained: "An attorney who undertakes to assist a client in transferring property is necessarily assuming a duty to assist the client in making the transfer in a manner that does not unduly expose the transfer to attack." (1 Cal. Estate Planning (Cont.Ed.Bar 2004) Property Transfer Obstacles, § 3.8, p. 106.) For instance, the Supreme Court in *Heyer* held that "[a] reasonably prudent attorney should appreciate the consequences of post-testamentary marriage, advise the testator of such consequences, and use good judgment to avoid them if the testator so desires." (*Heyer, supra,* 70 Cal.2d at p. 229, 74 Cal.Rptr. 225, 449 P.2d 161.) Similarly, in *Bucquet,* the court held that the attorney responsible for drafting inter vivos trusts owed a duty ***334** to the trust beneficiaries to take appropriate steps known to competent attorneys to avoid federal estate tax and state inheritance tax, where such tax avoidance would directly impact the amounts the beneficiaries would receive after the trustors' deaths. (*Bucquet, supra,* 57 Cal.App.3d at pp. 922–923, 129 Cal.Rptr. 514; see also *Garcia, supra,* 129 Cal.App.3d 24, 180 Cal.Rptr. 768 [attorney owed duty to intended beneficiaries to explain to testator statutory presumptions governing title to property and measures that might be taken to assure that property's true character was recognized upon testator's death].)

The existence of statutory limitations on donative transfers to certain classes of people is a matter known to

competent estate planning practitioners. One practice guide devotes an entire chapter to a discussion of donees who are presumptively disqualified under section 21350(a). (See 1 Cal. Trust and Probate Litigation (Cont.Ed.Bar 2004) Statutorily Disqualified Donees and Trustees, § 6A.1–6A.40, pp. 145–175.) Other guides for California estate planning practitioners discuss donees who are presumptively disqualified under section 21350(a). (See, e.g., 1 Cal. Will Drafting (Cont.Ed.Bar 2002) Professional Responsibility § 1.35, pp. 28–30; 1 Cal. Estate Planning, *supra,* Property Transfer Obstacles, § 3.8, p. 106; 2 Ross, Cal. Practice Guide: Probate (The Rutter Group 2001) ¶¶ 16:517.15 to 16:517.28, pp. 16–149 to 16–153.) Indeed, the Legislature deemed the subject of such importance that, at the time it enacted section 21350 in 1993, the Assembly bill included a separate statute under the Business and Professions Code, making an attorney's violation of section 21350 "grounds for discipline, if the attorney knew or should have known of the facts leading to the violation." (Bus. & Prof.Code, § 6103.6.)

An attorney drafting instruments on behalf of the transferor-client—the dispositive provisions of which include a proposed transfer to a presumptively disqualified person under section 21350(a)—must "assist the client in making the transfer in a manner that does not unduly expose the transfer to attack." (1 Cal. Estate Planning, *supra,* § 3.8, p. 106.) We therefore hold that the attorney owes a duty of care: (1) to advise the client that, absent steps taken under section 21351(b), the subject transfer to the proposed transferee, if challenged, will have a significant likelihood of failing because of the proposed transferee's presumptive disqualification under section 21350(a); and (2) to recommend that the client seek independent counsel in an effort to obtain a certificate of independent review provided under ****267** section 21351(b). Consistent with the authorities discussed, *ante*—including *Lucas, Heyer, Garcia,* and *Bucquet, supra*—this duty of care is owed to both the transferor-client and to the prospective transferee. In so holding, we conclude that this area of the law is *not* one—such as the *Lucas* court found to be the case with restraints on alienation and the rule against perpetuities—that is "a question of law on which reasonable doubt may be entertained by well-informed lawyers. [Citations.]" (*Lucas, supra,* 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 364 P.2d 685.)

***335** Further—as a matter related to the question of undue burden upon the profession—we find that the imposition of liability here would not result in the attorney becoming unduly preoccupied with the possibility of negligence claims from third parties who might have dealings with his or her clients. (See *Goodman, supra,* 18 Cal.3d 335, 344, 134 Cal.Rptr. 375, 556 P.2d 737.) Under the facts presented here, at the time Ellis engaged Weingarten, he clearly knew of his client's desire that her care custodian, Osornio, be her sole beneficiary under the 2001 Will. This case does not present a situation where the attorney would be faced with conflicting loyalties in representing the client. (See, e.g., *St. Paul Title Co. v. Meier, supra,* 181 Cal.App.3d 948, 952, 226 Cal.Rptr. 538 [attorney for purchaser owed no duty to incidental third party, escrow agent, because, inter alia, attorney's duty of loyalty to client should not be divided].) Thus, imposing liability here does not burden the attorney with concerns that " 'would prevent him from devoting his entire energies to his client's interests.' [Citation.]" (*Goodman, supra,* at p. 344, 134 Cal.Rptr. 375, 556 P.2d 737.) To the contrary, imposing a duty upon attorneys preparing instruments containing donative transfers to presumptively disqualified persons under section 21350(a) would promote public policy: it would encourage attorneys to devote their best professional efforts on behalf of their clients to ensure that transfers of property to particular donees are free from avoidable challenge.

Moreover, our holding does not suggest that an attorney must "draft litigation-proof legal documents." (*Ventura, supra,* 40 Cal.App.3d 897, 905, 115 Cal.Rptr. 464.) We do not imply from our ruling here that that a transferor's attorney guarantees the success of the client's intended transfer. (See *Lucas, supra,* 56 Cal.2d 583, 591, 15 Cal.Rptr. 821, 364 P.2d 685 [absent express agreement, attorney is not "insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft"].) Thus, there may be cases (including, possibly, the one before us) in which the attorney is ultimately held not liable for the failed transfer, despite the attorney's failure to advise the client concerning the potential impact of section 21350(a). For instance, the attorney might avoid liability if the intended beneficiary is unable to establish that the attorney's negligence was the cause of the failed transfer (e.g., because it was unlikely that the client could have obtained a certificate of independent review).

We thus conclude that imposition of duty upon an attorney toward third parties here "does not place an undue burden on the profession, particularly when taking into consideration that a contrary conclusion would cause an innocent beneficiary to bear the loss." (*Lucas, supra,* 56 Cal.2d at p. 589, 15 Cal.Rptr. 821, 364 P.2d 685.)

C. *The Radovich and Moore decisions*

In arguing against a finding of duty under the narrow circumstances presented here, Weingarten relies primarily upon our decision in ****268** *Radovich,* ***336** *supra,* 35 Cal.App.4th 946, 41 Cal.Rptr.2d 573, and on *Moore, supra,* 109 Cal.App.4th 1287, 135 Cal.Rptr.2d 888. Neither case supports Weingarten's position in support of affirmance of the judgment.

In *Radovich*—a case factually distinguishable—we refused to extend an attorney's duty to a nonclient who was a mere *potential* beneficiary under an *unsigned* draft will. (*Radovich, supra,* 35 Cal.App.4th at pp. 965–966, 41 Cal.Rptr.2d 573.) In that instance, there was no plain expression of the testator's intention to benefit the plaintiff: "Although a potential testator may also change his or her mind *after* a will is signed, we perceive significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents for signature." (*Id.* at p. 964, 41 Cal.Rptr.2d 573.) In contrast, here we have a clear expression of Ellis's intention that Osornio be her sole beneficiary under the signed 2001 Will.

Likewise, in *Radovich,* we expressed concern that the imposition of liability by an estate planning attorney to *potential* beneficiaries under *unsigned* estate planning documents "could improperly compromise an attorney's primary duty of undivided loyalty to his or her client." (*Radovich, supra,* 35 Cal.App.4th at p. 965, 41 Cal.Rptr.2d 573.) Here, there is none of the ambiguity concerning the testator's donative intent as was presented in *Radovich.* Imposing liability in this instance would not compromise the attorney's duty of undivided loyalty to the testator. The attorney's duty here was to take appropriate action to carry out the testator's wishes—that were *expressed and formalized* in her signed will—that her intended beneficiary, Osornio, inherit her entire estate.

Moore, supra, also involved circumstances entirely distinct from those presented here. As noted, *ante,* the question in *Moore* was whether an attorney owed "a duty to beneficiaries under a will to evaluate and ascertain the testamentary capacity of a client seeking to amend the will or to make a new will and ... to preserve evidence of that evaluation." (*Moore, supra,* 109 Cal.App.4th at p. 1290, 135 Cal.Rptr.2d 888.) *Moore,* in essence, involved a challenge by beneficiaries to the last formalized expression of the client's testamentary intentions, and a claim of malpractice against the attorney for failing to investigate and document his own client's testamentary capacity. (*Ibid.*) Here, however, Osornio makes no such claim. Instead, she asserts that the 2001 Will *did* contain an accurate expression of Ellis's testamentary intentions, but the proposed transfer failed due to Weingarten's negligence in his representation of Ellis.

The *Moore* court rejected the beneficiaries' contention that the attorney owed them a duty to evaluate and document his client's testamentary intent, concluding that "[f]irst and foremost, we believe the duty of loyalty of the attorney to the client may be compromised by imposing a duty to beneficiaries in these circumstances." (*Moore, supra,* 109 Cal.App.4th at p. 1298, 135 Cal.Rptr.2d 888.) It ***337** reasoned that, unlike cases such as *Biakanja, Lucas,* or *Heyer*—where there was no potential for a conflict between the attorney's duty to the client and any duty owing to the beneficiaries—there would be a clear conflict in imposing a duty where the intent of the testator was later challenged by the beneficiaries. (*Id.* at p. 1299, 135 Cal.Rptr.2d 888.)[29] Accordingly, the court held that ****269** imposing such liability "would place an intolerable burden upon attorneys." (*Ibid.*)

[29] The Second District, Division One, has recently rejected negligence claims of beneficiaries against estate planning attorneys in two recent cases; neither case is final at this time. (See *Boranian v. Clark* (2004) 123 Cal.App.4th 1012, 20 Cal.Rptr.3d 405; *Featherson v. Farwell* (2004) 123 Cal.App.4th 1022, 20 Cal.Rptr.3d 412.) In each case, Justice Vogel, writing for the court, relied upon *Moore* in concluding that the imposition of duty would place the attorney in a position of having divided loyalties between his or her client, the testator, and the beneficiary. In our case, as we have discussed, imposing a duty upon the attorney here raises no such conflict issues; the interests of the testator, Ellis, in disposing of her estate to the person named in her duly executed will, Osornio, do not conflict with Osornio's interests as beneficiary.

Here, as we have discussed, *ante,* the imposition of liability upon attorneys to advise their transferor-clients concerning the potential disqualifying effects of transfers to persons identified in section 21350(a) does not impose an undue burden on the legal profession. Further, such a finding of duty—unlike the circumstances in either *Moore* or *Radovich*—will not compromise the attorney's duty of undivided loyalty to the client-transferor. Moreover, unlike the duty theory rejected in *Moore,* our holding does not require the attorney to evaluate or document the capacity of his or her transferor-client. Instead, it imposes a duty upon the attorney to advise the client of section 21350(a) 's effect of potentially disqualifying the proposed donee, and to assist the client in attempting to eliminate those consequences to effectuate the client's donative intentions.

The *Moore* court cited section 51 of the Restatement Third of Law Governing Lawyers as a basis for its rejection of attorney liability. (*Moore, supra,* 109 Cal.App.4th at pp. 1301–1302, 135 Cal.Rptr.2d 888.) The Restatement supports our conclusion in this case. It provides in part: "[A] lawyer owes a duty to use care ... [¶] ... [¶] (3) to a nonclient when and to the extent that: [¶] (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient; [¶] (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and [¶] (c) the absence of such a duty would make enforcement of those obligations to the client unlikely." (Rest.3d Law Governing Lawyers, § 51.) Plainly, each of these factors is satisfied here.

***338** Furthermore, the comment explaining subsection (3) of section 51 of the Restatement—a comment which was also quoted by the *Moore* court (*Moore, supra,* 109 Cal.App.4th at pp. 1301–1302, 135 Cal.Rptr.2d 888)—similarly supports our holding: "When a lawyer knows ... that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has died. [¶] A nonclient's claim under Subsection (3) is recognized only when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the representation." (Rest.3d Law Governing Lawyers, § 51, com. f, p. 361.) Clearly, Osornio was the "third person" that Ellis intended to benefit through the services Weingarten performed. It is equally clear that finding the existence of a duty owed by Weingarten to nonclient Osornio under the circumstances presented here will promote the attorney's "effective pursuit of the client's objectives." (*Ibid.*) Moreover, were we to conclude ****270** otherwise here, no one would be left to enforce the testator's right to be effectively represented.

We thus disagree with Weingarten that "*Moore* is on all fours" with the case before us. We conclude that neither *Moore* nor our decision in *Radovich* is controlling here.

D. *Conclusion*

We have balanced the factors that must be considered in evaluating the question of an attorney's potential liability to third parties. As a matter of public policy, we must conclude that Weingarten owed a duty of care to Osornio under the facts as may be alleged in an amended complaint. Because Osornio could have amended her pleading to state a cause of action for professional negligence, the trial court abused its discretion by failing to grant Osornio leave to amend when it sustained the demurrer.

***339** DISPOSITION

The judgment is reversed and, on remand, the trial court is directed to grant Osornio leave to file an amended complaint.

WE CONCUR: PREMO, Acting P.J., and BAMATTRE–MANOUKIAN, J.

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