CALIFORNIA TRUSTS AND ESTATES QUARTERLY

WHAT IS A CARE CUSTODIAN UNDER PROBATE CODE ' 21350?

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SUMMARY

Two cases interpreting the term "care custodian" have created a conflict about the proper breadth and scope of the prohibition against gifts to "care custodians" under Probate Code § 21350. The authors believe that "care custodian" should be broadly construed to maximize the protection of the elderly.

I. INTRODUCTION

Laws and institutions require to be adapted, not to good men, but to bad. - John Stuart Mill, 1869.

Every experienced estate planner has had an elderly client whose close family all moved away or died, whose physical needs were great, and whose wealth was ample. Complicating matters, that elderly client was befriended by someone in financial need, and the elderly client came to the estate planner's office to create an estate plan that would thank the friend for the generous help provided. The elderly client has told the estate planner that the new friend visits the client daily, and offered to run errands, to pay bills, to cook, to clean, to administer medication, and be there for any pressing need. Then, a few weeks or months after the elderly client has died, the perhaps distant family receives the first notice that things were not as they believed. The family receives the petition for probate of the elderly client's will, or the notice under Probate Code § 16061.7 indicating that the elderly client's trust became irrevocable. Then the lawsuit starts.

The disinherited heir or the disadvantaged beneficiary has contacted a lawyer. The lawyer believes that a claim under Probate Code Section 21350 lies because the beneficiary who befriended the elderly person was a "care custodian", and the gift is therefore presumptively invalid. The caregiver's lawyer believes that victory is assured because the caregiver was not a care custodian under Probate Code § 21350 so the statute has no bearing on the validity of the donor's gift.

The court then faces the dilemma of choosing which of two competing stories to believe: on the one hand, the elderly client was ignored, or worse, neglected by the family for a long time, and in response to the family's inaction, the elderly client bestowed his or her love, affection, and wealth on the helpful caregiver who visited, ran errands, paid the bills, cooked, cleaned, and administered medication. On the other hand, the seemingly helpful aide took advantage, insinuating him or herself into the client's life and abused the elderly client physically, mentally and financially, and arranged to scavenge the financial remains of the client after his or her death.

If the factual issues are not complicated enough, the legislature clumsily defined care custodian, resulting in conflicting Court of Appeals interpretations of the term. This issue is dispositive because being or not being a care custodian is often the difference between inheriting or not inheriting the deceased's client's estate.

This article examines some of the issues that the current version of Probate Code § 21350 presents. The authors believe that by first reviewing the history of § 21350, the differing judicial interpretations of "care custodian," and the rationale underlying those different interpretations, a clear solution is evident. The courts should adopt the very broad definition of "care custodian," a solution that will protect the elderly from abuse.

II. HISTORY AND STATUTORY FRAMEWORK OF PROBATE CODE ' 21350

In the early nineties, California lawyers and the public were shocked to learn of abuses by a Southern California attorney who had ensconced himself in a retirement community where he could draft estate plans for clients, many of whom felt so grateful to him that they included him as a beneficiary of their estates. When the number and extent of the gifts came to light, the legislature acted by proposing legislation to restrict the ability of attorneys to benefit in this way. At the same time, it also seemed to make sense to try to curb

similar abuses by non-attorneys who assisted donors in making gifts that resulted in benefits to those who assisted in procuring the gifts.

California attorneys became familiar with the expression "AB 21," the original assembly bill number for the statute that invalidated these gifts to drafters and others. The statute was first adopted as Probate Code § 21350 ("21350") in 1993. Trust and estate litigators were delighted to have a new weapon in their arsenal, and to have some specific statutory authority for attacking wills and trusts that appeared to be the product of undue influence exercised by those who were closest to testators and grantors who were very likely susceptible to undue influence.

The statute initially invalidated gifts not only to those who drafted documents but also to fiduciaries who drafted them, transcribed them, or caused them to be drafted or transcribed. In *Rice v. Clark*, the Supreme Court highlighted the distinction between the original 1993 version of the statute and 1995 amendments that eliminated the restriction on gifts to persons who "caused [an instrument] to be drafted."[i] It found that there was already sufficient case law to address general claims of undue influence, and that the legislature had adopted 21350 "to clearly and unambiguously prohibit the most patently offensive actions of [the attorney] while not unreasonably encumbering the practice of probate law."[ii]

Under the *Rice* ruling, a person is not presumptively disqualified from receiving a gift, even if he or she was a fiduciary who materially assisted a transferor to dictate the contents of a will and trust to an attorney, and to execute the instruments drafted by the attorney, so long as he or she did *not directly* participate in transcribing the instruments.[iii]

In similar retrenchments from the initial broad scope of the statute after its 1993 adoption, exceptions were added to the statutory scheme to allow for the very real circumstance where a relative with a law degree who would have been a natural beneficiary of the testator prepared a document that gave a gift to that lawyer or to another member of the lawyer's and the testator's common family.[iv]

Ultimately it became clear to the bar, and to the legislature, that a cottage industry seemed to be growing in which nurses, housekeepers and caregivers for the impaired and the elderly were insinuating themselves into the estate plans of their charges, and in many cases were being kind enough to give assistance, including legal advice, and transportation and referrals to lawyers, that resulted in them receiving the bulk of the estates of the testators. The Elder and Dependent Adult Civil Protection Act (EADACPA) had been adopted in the early eighties to curb such financial abuses as well as physical abuse of elderly persons and dependent adults.[v] In 1997, in furtherance of those goals, the legislature specifically engrafted provisions onto the 21350 statute that invalidated gifts to care custodians.

III. CASES INTERPRETING INCLUSION OF CARE CUSTODIANS IN PROBATE CODE § 21350

The provisions of § 21350 defining "care custodians" have been the subject of several cases in the last few years as courts have attempted to establish the appropriate contours of the statute, invalidating the gifts to those who seem to be preying on the elderly and the infirm, and protecting the gifts given to those who appear to have provided altruistic support, and might seem to have been honestly deserving of gratitude or compensation for their efforts, regardless of whether the donees were *professional* caregivers.

The focal point of the most recent case law disputes over how to interpret the 21350 statute is in the definition of "care custodian." Section 21350 provides, in relevant part, that "(a) [N]o 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." Section 21350 in turn specifically adopts the definition of care custodian from the elder abuse provisions in Welfare and Institutions Code § 15610.17. Finally, Section 15610.17 provides a twenty-five item laundry list of groups and individuals defined as "care custodians," including a final catchall *"[a]ny other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults."* (Emphasis added.) [vi]Thus, § 21350 appears to have a very broad definition for a care custodian. The breadth of this definition has divided the courts trying to give the appropriate measure of protection to the aged and infirm.

A. Estate of Shinkle

The starting point for any discussion about the meaning of "care custodian" is the case of *Estate of Shinkle*.[vii] In that case from the Sixth Appellate district, an elderly dependent woman who had been in a skilled nursing facility for three years, executed a trust which benefitted the facility's long-term-care ombudsman. The care custodian definition of 21350 as borrowed from the Welfare and Institutions Code Section 15610.17 *specifically* included a "long-term-care ombudsman" among the class of presumptively prohibited donees. The challenged beneficiary in that case claimed that he was no longer the long-term-care ombudsman because he was not occupying that particular role by the time the trust was executed: He had been transferred to a different facility, and the trustor had been discharged from the facility. In other words, he argued, the ongoing relationship between the trustor and the beneficiary was not still of a type that was defined within the statute.

The Court of Appeal disagreed with the beneficiary and found that the ombudsman-beneficiary was still a "care custodian" within the meaning of the statute even after the formal fiduciary and professional association with the trustor had ended because the trustor's initial fiduciary relationship with the ombudsman beneficiary is what had allowed the beneficiary to gain the trustor's trust, to acquire personal and financial information about the trustor, and to develop the personal relationship that ultimately resulted in the trustor's gift to the ombudsman.[viii]

B. Conservatorship of Davidson

The *Shinkle* case was followed by *Conservatorship of Davidson* from the First Appellate District.[ix] In *Davidson* the conservatee/decedent had executed a trust in favor of an unrelated friend whom she had known for many years. The record suggested that they were frequent visitors in each other's respective homes, and that the beneficiary had attended the trustor and her predeceased husband's birthday and anniversary celebrations, and entertained them in his own home for Thanksgiving, Christmas, and other occasions. As the trustor, Mrs. Davidson, became enfeebled by age and infirmity, the beneficiary and his long-time partner assumed more and more responsibility of caring for her. They cooked for her, shopped for her, and drove her when she needed transportation to the doctor or for other appointments. She had executed a power of attorney in favor of the beneficiary, who received her mail, paid her bills, and took care of her banking.[x]

After discussing the nature of the relationship between the trustor and the beneficiary, the *Davidson* court considered the genesis of § 21350 concluding that "when an individual becomes what is in effect a care custodian of a dependent adult as a direct result of a preexisting genuinely personal relationship rather than any professional or occupational connection with the provision of health or social services, that individual should *not* be barred by section 21350 from the benefit of donative transfers unless it can otherwise be shown that the subject transfer was the result of undue influence, fraud or duress. *In every case, the issue is whether the role of care custodian served as the primary basis of any other more personal relationship, or vice versa."* (Emphasis added).[xi] To determine the issue of whether the relationship arose out of the need for a care custodian or whether the care custodian relationship arose from a preexisting personal relationship, the court created a three-factor test: "1) the length of time the individuals had a personal relationship before assuming the roles of caregiver and recipient; 2) the closeness and authenticity of the personal relationship; and 3) whether any money was paid for the provision of care." [xii] The *Davidson* court stressed, however, that "[e]ach of these factors must be weighed in analyzing whether an individual is a care custodian for purposes of section 21350, even if none by itself is ultimately controlling in making that determination." [xiii]

After creating this three-factor test, the *Davidson* court considered the factual question of whether remuneration for services should be the hallmark for determining whether the care custodian relationship invalidates a gift. Although the Court acknowledged that compensation could be a factor in determining the nature of the care custodian relationship, the evidence as to the amounts and purposes of funds given to the caregiver was disputed. Thus, it deferred to the trial court's judgment that this factor did not indicate that the relationship was a "care custodian" relationship under 21350.

The *Davidson* court also discussed the public policy of encouraging friends to help the elderly. The *Davidson* court noted that the legislative intent of 21350 "was to place limitations on the ability of *professional* care custodians' to receive donative transfers from elderly

testators."[xiv] Without any explanation, the *Davidson* court stated further, "This intent is not advanced by imposing burdensome technical and procedural barriers on the ability of elderly individuals to recognize and reward services performed for them in their declining years by close personal friends, intimates and companions."[xv]

The *Davidson* court concluded, "It would be both tragic and ironic if the statute were interpreted so broadly as to result in effectively punishing such individuals for the self-sacrificing acts of care and companionship they provided to the aging."[xvi] According to the *Davidson* court, "This interpretation of the term 'care custodian' as used in section 21350 achieves the prophylactic purpose of the statute by protecting dependent adults from the predatory practices of individuals who misuse their professional positions to obtain personal favors, without doing violence to those authentic personal relationships in which care giving is the natural outgrowth of long-standing friendship, affection, and genuine charity."[xvii]

However, the *Davidson* court failed to recognize that Probate Code § 21351 already provides for exceptions to protect "close personal friends, intimates and companions" from the "burdensome technical and procedural barriers" created by § 21350. Section 21351 provides that § 21350 does not apply to presumptively invalidate gifts to certain family members, to spouses, and to spouse-like relationships. It also provides that a non-family member can always obtain a Certificate of Independent Review from another lawyer to protect the gift from invalidity under § 21350.

C. Conservatorship of McDowell

The *Davidson* decision created a hole in the statutory framework: How to treat gifts to people who became friends and caregivers over a short time, but were not *professional* caregivers. The case seemed to settle two issues: a "professional" caregiver was a "care custodian" under the statute regardless of when the formal relationship ended (*Shinkle*), but a long-time friend was not a "care custodian," even if some services provided were akin to a professional caregiver's services.

In *Conservatorship of McDowell*, the Sixth Appellate District, which had decided *Shinkle*, ruled consistently with *Davidson* in 2004.[xviii] In *McDowell*, the trial court had granted a petition by the public guardian for substituted judgment to create a new will and trust for a conservatee, on the ground that the will and trust executed by the conservatee were invalid because its beneficiaries were "care custodians" within the meaning of 21350. The trustor/conservatee, who was an elderly retiree, had become friends with the beneficiaries. They would bring her coffee and food sometimes. When Mrs. McDowell broke her hip and was hospitalized, they did not visit her there, but upon her release they would visit her often and bring her meals. They submitted bills for the meals they provided. Over time, the beneficiary started "taking care of Ms. McDowell's personal needs, i.e. bathing, hygiene, etc." leading the trial court to conclude that there was a "care custodian" relationship that was not based on a longstanding prior personal relationship as there had been in *Davidson*. The Appellate Court reversed and remanded. Citing *Shinkle* and *Davidson*, it found that a person is not a care custodian where the care custodian was initially a friend who began providing personal care services, including driving decedent to doctors, bringing food and drink to conservatee, bathing, diapering, etc. Where the caregiver was not professionally rendering services, and did not become involved with the conservatee through a professional caregiving relationship, the statutory definition is inapplicable, the Court found.[xix]

Interestingly, the facts in this case are significantly different from those in *Davidson* in that the appellant in *McDowell* had befriended conservatee approximately six months prior to her execution of the will as opposed to the decades-long relationship that existed in *Davidson*. In addition, the beneficiary in *McDowell* was the boyfriend of a gentleman who was residing in the house of the conservatee. Furthermore, the Conservatee was under temporary conservatorship at time the will was prepared, and the attorney who prepared the will was the third attorney consulted, since the first two attorneys consulted had refused to do the will, and the ultimate preparer was not even an estate planning attorney. Moreover, the conservatee, who clearly had diminished capacity, apparently indicated to her Probate Volunteer Panel counsel that she did not want the beneficiaries of the will to inherit![xx]

Read together *McDowell* and *Davidson* could completely eviscerate the prophylactic role that 21350 was enacted to address. Together these two cases make 21350 only apply to professionals hired to care for the elder. As long as the beneficiary is not a professional specifically identified under Welfare and Institutions

Code § 15601.17, a beneficiary is not a "care custodian" under 21350. With strict adherence to the reasoning of *Davidson* and *McDowell*, the language, "Any other . . .[p]erson providing health services or social services to elders or dependent adults, is a dead letter."[xxi]

D. Bernard v. Foley

The most recent case addressing 21350, which came out of the Second Appellate District, completely disagrees with the *Davidson* decision and gives a broad reading to the term "care custodian."[xxii] Because of the *Bernard* court and the *Davidson* court had conflicting opinions, the Supreme Court granted review in *Bernard*, making the decision not citable.

In *Bernard v Foley*, the beneficiaries were longtime friends of the elderly widow. She had originally established a trust in 1991 that left gifts to her extended family. Over the years, she made seven amendments to her Trust, the last of which was made in 2001, three days before she died. In that amendment, she gave the residue of her estate to her longtime friend, Foley and his girlfriend, even though they had never been beneficiaries of the earlier versions of the trust.

The *Bernard* court looked at the same Welfare and Institutions Code definition of "care custodian," but focused on the language of the catchall provision, "any other protective . . . agency or person providing care or services for elders or dependent adults, in § 15601.17" (y).

Between them, the Court noted, Foley and Erman did the grocery shopping, "prepared decedent's meals, spent every day with her, assisted decedent in getting to and from the bathroom, helped her into bed, fixed her hair, cleaned her bedroom and did her laundry. Further, Ann Erman administered oral medications to decedent, including liquid morphine administered from a dropper, when the home hospice nurses were not present. In addition, Ann Erman provided wound care. She applied salves and antibiotics to sores on decedent's legs and thereafter bandaged the affected area. Ann Erman also helped decedent apply ointments to her intimate areas. This care was somewhat akin to that which is rendered by practical nurses."[xxiii]

The *Bernard* court expressly rejected the *Davidson* court's logic, and declined to follow it. Its analysis of the statutory scheme is that in Section 21351, the Legislature went to the trouble to exempt certain persons from the disqualifying language of Section 21350. "Section 21350 does not apply if any of the following conditions are met: (a) The transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner,.. . .of the transferee or the person who drafted the instrument."[xxiv] The *Bernard* Court concluded that if the Legislature had wanted to exempt *preexisting friends* from the definition of care custodian it could have done so, but it did not, so the "preexisting friend" exemption to the care custodian definition found in *Davidson* does not exist.[xxv]

The *Bernard* court reasoned that it was the legislative function to create exceptions to 21350 statutory framework.[xxvi] However, the *Bernard* court's more persuasive policy analysis was found in a footnote:

> Davidson's concern that "[i]t would be both tragic and ironic if the statute were interpreted so broadly as to result in effectively punishing such individuals for the self-sacrificing acts of care and companionship they provided to the aging" . . . is unfounded. Section 21351 provides a clear pathway to avoiding section 21350. Section 21351, subdivision (b) provides section 21350 does not apply if: the 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 a "'CERTIFICATE OF INDEPENDENT REVIEW,'" in which counsel asserts the transfer that otherwise might be invalid under section 21350 is valid because the transfer is not the product of fraud, menace, duress, or undue influence.[xxvii]

Further buttressing its ruling, the *Bernard* court distinguished *Davidson* factually because of the nature of services that were provided by the care custodian. It separated the more general errand-running, cooking, shopping, banking activities performed by the beneficiary in *Davidson* from the health services including administering morphine and wound care.[xxviii] It is interesting that the Court added this holding based on the factual distinction between the types of services provided. Presumably the Court could have based its ruling on that distinction alone. But instead it chose to

take on *Davidson* head on, creating a split in appellate divisions leading to the granting of a petition for review to the California Supreme Court.

Because the *Bernard* court found 21350 applicable to presumptively invalidate the gift to the non-professional care custodian, it was faced with the shifting presumption of undue influence. The court also held that the beneficiaries failed to meet the burden of establishing that the transfer to them was *not* the product of fraud, menace, duress or undue influence.[xxix] Notably, that option exists for any recipient of a gift which is presumptively invalid under 21350.[xxx] However, the donee has to establish that the gift is free from undue influence upon clear and convincing evidence, *but not based solely upon the testimony of any person described in . . . 21350* (including the person who drafted the instrument, and a care custodian of the dependent adult/transferor.)[xxxi]

IV. THE FUTURE OF 21350

The California Supreme Court must now decide whether to follow *Bernard* or *Davidson*. The *Bernard* ruling is most concerned with protecting the elderly. The *Davidson* ruling is most concerned with protecting an elder person's ability to devise property to those who cared for him or her at the end of his or her life. Both concerns are important; the question facing the Supreme Court is which concern should be paramount.

The *Davidson* rule and its progeny are not based on the encyclopedic statutory language; the *Davidson* rule and its progeny ignore at best, or denigrate at worst, the statutory framework that the legislature has created. Given *McDowell*, the *Davidson* rule has been taken to the absurd, making the broad catchall provision of Welfare and Institutions Code § 15601.17 (y) a dead letter. Fairly reading these two cases, anything short of a gift arising from a specifically-defined professional relationship will not make the gift subject to § 21350. The problem with this interpretation is not that it disinherits an elder's family; the problem with this interpretation is that it dilutes the protection afforded to the elderly against abuse, undue influence, fraud, and duress. Proving abuse, undue influence, fraud, and duress is very difficult at best, even when the elder is still alive. It is almost impossible after the elder is dead. Often the only two witnesses to the elder and the donee's relationship are the elder and the donee. No one outside of the two are exactly sure of what was said and why the elder decided to make the questioned disposition, especially after the elder has died.

Thus, the *Bernard* rule is preferable. The *Bernard* rule follows the statutory framework created by the legislature in §§ 21350 and 21351. If *Bernard* becomes the law, a court could not rule a gift to a care custodian is valid, especially when the elder specifically told her Probate Volunteer Counsel that she did not want the donee to receive a gift after the challenged estate plan was rejected for a Certificate of Independent Review by two other estate planners. Thus, such gifts would be void under § 21350, unless the donee could prove by clear and convincing evidence the lack of fraud, duress, and undue influence. Simply put, following *Bernard* protects the elder from abuse-the stated purpose for 21350.

V. CONCLUSION

Estate planners are faced with elderly people wishing to leave their property to non-family members every day. They must create the estate plan while facing the prospect that the elder is being abused and is subject to undue influence. They face the two conflicting stories that the court and the litigants will ultimately face when the estate plans are challenged. However, estate planners face a different and simpler challenge than litigators face. Estate planners have the living elder sitting in their office; hence, estate planners do not have to recreate what the elder intends and whether the elder might be suffering from abuse and undue influence.

This distinction is the very reason the legislature created 21350. If an estate planner learns of circumstances that suggest the care custodian relationship under the broad definition of care custodian in the Welfare and Institutions code, the estate planner can refer the client to another planner to obtain a Certificate of Independent Review. Assuming that the elderly client truly desires to leave the estate as drafted, the certificate should be easily obtained. However, if the true nature or even the hint of the true nature of the transaction is one of abuse or undue influence, the second estate planner will simply refuse.

Remembering that §§ 21350 and 21351 were created to protect the elderly is critically important. Section 21350 admittedly can be unjust. All prophylactic rules can work injustice. The rule found in § 21350 is no

different, voiding gifts that were truly not the result of fraud, duress or undue influence, simply because the donee cannot establish the lack of fraud, duress, or undue influence by clear and convincing evidence. Yet this price is exactly the toll of protecting the elderly.

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i. (2002) 28 Cal. 4th 89.

ii. *Rice*, 28 Cal. 4th at 102-103 (Citing the legislative history of the statute).

iii. *Id.* at 103-104.

iv. *Cal. Prob. Code* ' 21351.

v. *Cal. Wel. & Inst. Code* '' 15600 to 15675.

vi. *Cal. Wel. & Inst. Code* ' 15601.17 provides in full:

> >Care custodian= means an administrator or an employee of any of the following public or private facilities or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff: [&](a) Twenty-four-hour health facilities, as defined in Sections 1250, 1250.2 and 1250.3 of the Health and Safety Code. [&](b) Clinics. [&](c) Home health agencies. [&](d) Agencies providing publicly funded in-home supportive services, nutrition services, or other home and community-based support services. [(e) Adult day health care centers and adult day care. (f) Secondary schools that serve 18-22-year-old dependent adults and postsecondary educational institutions that serve dependent adults or elders. (g) Independent living centers (h) Camps. (i) Alzheimer=s Disease day care resource centers. (j)Community care facilities, as defined in Section 1502 of the health and Safety Code, and residential care facilities for the elderly, as defined in Section 1569.2 of the Health and safety Code. (k) Respite care facilities. (l) Foster homes. (m) Vocational rehabilitation facilities and work activity centers. (n) Designated area agencies on aging. (o) Regional centers for persons with developmental disabilities. (p)State Department of Social Services and State Department of Health Services licensing divisions., (q) County welfare departments. (r) Offices of patients= rights advocates and clients= rights advocates, including attorneys. (s) The office of the long-term care ombudsman (t) Offices of public conservators, public guardians, and court investigators. (u) Any protection or advocacy agency or entity that is designated by the Governor to fulfill the requirements and assurances of the following: (1) The federal Developmental Disabilities Assistance and Bill of Rights Act of 2000, contained in Chapter 144 (commencing with Section 15001) of Title 42 of the United States Code, for protection and advocacy of the rights of persons with developmental disabilities. (2) The Protection and Advocacy for the Mentally Ill Individuals Act of 1986, as amended, contained in Chapter 114 (commencing with Section 10801) of Title 42 of the United States Code, for the protection and advocacy of the rights of persons with mental illness (v) Humane societies and animal control agencies. (w) Fire departments. (x) Offices of environmental health and building code enforcement. (y) Any other protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults.@

vii. (2002) 97 Cal. App. 4th 990.

viii. *Id.* at 1006.

ix. (2003) 113 Cal. App. 4th 1035.

x. *Davidson*, 113 Cal. App. 4th at 1042.

xi. *Id.* at 1053.

xii. *Id.* at 1054.

xiii. *Id.*

xiv. *Id.* at 1051.

xv. *Id.*

xvi. *Id.*

xvii. *Id.* at 1053.

xviii. (2004) 125 Cal. App. 4th 659.

xix. *McDowell*, 125 Cal. App. 4th at 673-674.

xx. *Id.* at 664.

xxi. *Cal. Wel. & Inst. Code* ' 15601.17 (y).

xxii. *Bernard v Foley* (2005) 30 Cal. Rptr. 3rd 716, *Rev. Granted and Opinion Superceded* by ___ Cal. Rptr. 3rd ___, 2005 LOL 2483349 (Cal. Sep. 21, 2005) (No. 513607.

xxiii. *Id.* at 722.

xxiv. *Id.* at 724.

xxv. *Id.*

xxvi. *Id.*

xxvii. *Id.* at fn 7.

xxviii. *Id.* at 724-725.

xxix. *Id.* at 725.

xxx. *Cal. Prob. Code* ' 21351 (d).

xxxi. *Cal. Prob. Code* ' 21351 (d); *see also*, *Bernard*, 30 Cal. Rptr. 3d at 725.