GIFTS TO CARETAKERS: GRATITUDE OR DISGUISED MALFEASANCE?

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Legislatures in several states have enacted statutes appropriately making it more difficult for unscrupulous caregivers to extract gifts. This article examines the background and purpose of these statutory schemes, explores the applicability of the presumption of fraud or undue influence, discusses how to overcome the presumption, and concludes by providing tips for estate planners and attorneys representing fiduciaries and beneficiaries in jurisdictions with such statutes or which are considering such statutes.

Who is affected by the presumption? Recognizing the challenges and conflicts of interest inherent in the caregiver–dependent adult relationship and the difficulty drafting attorneys have in determining the propriety of such gifts, a number of states have enacted statutes creating a general presumption of fraud and undue influence for gifts to caretakers. These statutes act as a disincentive for caregivers to exert pressure on the dependent adult to make gifts in their favor and provide another layer of protection for those in potentially vulnerable situations.

California has prohibited gifts to people in a fiduciary relationship with an elder since 1993, expanded those protections to caretakers in 1997, and overhauled its statutory scheme in 2010. On January 1, 2014, California limited the period in which the presumption applies to gifts made within 90 days from when the caregiving services were provided. On January 1, 2015, Illinois' Presumptively Void Transfers Act took effect. This is the most recent codification of a rebuttable presumption voiding an underlying transfer instrument if it includes a transfer to a caregiver exceeding $20,000. Maine and Nevada have similar statutes.

SOME STATES HAVE CREATED A GENERAL PRESUMPTION OF FRAUD AND UNDUE INFLUENCE FOR GIFTS TO CARETAKERS.

To provide a simplified and uniform way for estate planners with elderly or dependent clients wishing to make legitimate gifts to their caregivers, both California and Nevada have enacted an independent review process to make the presumption inapplicable. This process consists of an independent attorney, with no affiliation with the beneficiary, who reviews the gift and counsels the client regarding the transfer outside of the presence of the proposed beneficiary. In addition to the independent review process, the California statute creates several other exceptions to the presumption. In Illinois, the presumption that transfers to caregivers in excess of $20,000 are void is latent until the underlying transfer document is "challenged." If the transfer document *is* timely challenged, the statute provides two exceptions to the presumption: (1) if the transfer is not greater than that the caregiver would have received before becoming the caregiver; or (2) if the gift or transfer was not the product of fraud, duress, or undue influence. In California, Nevada, and Illinois, if the caregiver attempts but fails to overcome the presumption, the statute shifts the costs and fees incurred in the proceeding, including reasonable attorney fees, onto the caregiver.

Who is a "caregiver"? In California, a "care custodian" is a person who provides "health and social services" to a "dependent adult." Although a "care custodian" who provides "health and social services" is presumptively disqualified, the definition of a "care custodian" excludes those 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, or (3) before the dependent adult was admitted to hospice care.

Nevada's definition of "caregiver" includes any person who has provided significant assistance or services to a person, regardless of age, or whether or not the person is incompetent, incapacitated, or of limited capacity and irrespective of whether the caregiver is being otherwise compensated.

Illinois defines a "caregiver" as a person who voluntarily or in exchange for compensation "has assumed responsibility for all or a portion of the care of another person who needs assistance with activities of daily living" and applies the term regardless of the transferor's capacity. Illinois excludes family members of

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the transferor as "caregivers."

What gifts are covered by the statute? The rebuttable presumption of undue influence is not applied to small gifts to avoid the additional cost created by the independent review process, which requires the retention of an independent lawyer.

In Illinois, the presumption only applies to the transfer of property in which the fair market value exceeds $20,000. Nevada imposes a lower threshold, creating a presumption of undue influence if the fair market value of the property is $3,000 or greater. In California, besides the exceptions discussed above, transfers less than $5,000 when the transferor's total estate is greater than or equal to $150,000 also are not affected.

Maine does not prescribe a specific amount but applies the presumption to the following three types of transfers: (1) real estate, (2) transfer of "major" personal property or money for less than full consideration, or (3) execution of a guaranty by an elderly person who is dependent on others with whom he or she has a confidential relationship.

Overcoming the presumption. *Evidentiary standard.* Because the presumption of fraud and undue influence is rebuttable, it can be overcome through proof of contrary evidence. In California and Nevada, a beneficiary may rebut the presumption "by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud, duress, or undue influence." In Illinois, if the beneficiary's share is less than what he or she would have received under an instrument in effect before the beneficiary became the transferor's caregiver, then the beneficiary needs to rebut the presumption only by a preponderance of the evidence. In all other instances, the beneficiary must prove that the transfer was not the product of fraud, duress, or undue influence by clear and convincing evidence.

Certificates of independent review. The most common method to overcome the presumption in both California and Nevada is to obtain a certificate of independent review. California's independent review procedure provides clear guidelines by exempting gifts when the transfer instrument is reviewed by an "independent attorney" who counsels the transferor, out of the presence of any heir or proposed beneficiary, about (1) the nature and consequences of the intended transfer; (2) attempts to determine if the intended transfer is the result of fraud or undue influence; and (3) signing and delivering to the transferor an original certificate in a form substantially similar to the sample form set forth in the statute.

The rule and independent review procedure in Nevada are substantially the same as California's approach. Although Illinois currently has no independent review process, it is likely that, as the statute matures and challenges work their way through the system, some form of an independent review process will need to be established.

Tips for estate planners and fiduciary's or beneficiary's attorneys. Estate planners who fail to comply with the requirements of these statutes may find themselves liable either to the individual whose gift has failed or to beneficiaries who have had their bequests improperly reduced or eliminated. Furthermore, attorneys representing both fiduciaries and beneficiaries must be aware of the statutory schemes to properly advise their clients on when to pursue certain transfers. Accordingly, attorneys confronted with these situations may want to consider the following practice tips: (1) determine the relationship; (2) document the transfers; (3) appreciate the scope of the presumption; (4) obtain the independent review; (5) recognize the limitations of independent review; (6) preserve client confidentiality; (7) seek out the unseen transfers; (8) understand the statute of limitation; and (9) know when to challenge.

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