

A new section of the Illinois Probate Act presumptively voids testamentary gifts to unrelated caregivers. Though it's a powerful tool for combatting financial abuse of the elderly, estate planning lawyers must be prepared to address the unintended consequences.

## A New Weapon Against Elder Abuse: Presumptively Void Transfers to Caregivers

By Jeffrey R. Gottlieb

**O**n August 26, 2014, Governor Quinn signed into law a new section of the Illinois Probate Act,<sup>1</sup> entitled “Presumptively Void Transfers.”<sup>2</sup> Following on the heels of similar statutes<sup>3</sup> enacted in recent years in California<sup>4</sup> and Nevada,<sup>5</sup> the law, applicable to documents executed on or after January 1, 2015, aims to target unrelated caregivers who take advantage of their positions to convince an elderly or disabled person to change their estate plan to the caregiver’s benefit.

While the intent of the new law is aimed squarely at unrelated caregivers who may abuse their positions, it will have an even wider reach, including some legitimate testamentary gifts. This article provides a tour of the new statute and suggests critical new considerations for both estate planning and probate practitioners.

1. 755 ILCS 5/4a *et seq.*

2. Pub. Act 098-1093 (eff. Jan. 1, 2015) (adding 755 ILCS 5/4a *et seq.*).

3. To the author’s knowledge, California and Nevada are the only states that have enacted similar, though not identical, statutes.

4. See California Probate Code § 21381.

5. See Nevada Revised Statutes §§ 155.093-155.098.



## A new rebuttable presumption

The new statute provides that if, in any civil action, a “transfer instrument” is challenged, there is a rebuttable presumption that the transfer instrument is void if the transferee is a “caregiver” and the transferred property exceeds \$20,000.<sup>6</sup>

Once the presumption applies, it can then be rebutted by the caregiver in one of only two ways:

(1) The caregiver-beneficiary proves by clear and convincing evidence that the transfer was not the product of fraud, duress, or undue influence;<sup>7</sup> or

(2) By showing that the beneficiary’s share under the transfer instrument is not greater than the beneficiary’s share already in effect prior to becoming a caregiver.<sup>8</sup>

If the presumption applies and the caregiver fails to rebut the presumption, the transfer instrument is void.

## Key provisions and definitions

**Statute does not apply to “family members.”** Family members are specifically excluded from the definition of a caregiver.<sup>9</sup> Therefore, a gift to a family member cannot be presumptively void under this statute.<sup>10</sup> A “family member” is defined as a spouse, child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin or parent of the person receiving assistance.<sup>11</sup>

Individuals who may commonly be considered family, such as unmarried partners,<sup>12</sup> stepchildren, and in-laws, are not actually “family members” under this law and would fall within the purview of this statute.

While the statute does not apply to family members, nothing in it changes or limits existing common law rules or principles of fraud, duress, and undue influence that can still apply to both family and non-family members.<sup>13</sup>

**Who is a “caregiver?”** A caregiver is defined 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.”<sup>14</sup> This is a fairly broad definition.

The law applies equally to both paid and un-

paid caregivers, so we’re not only scrutinizing employed caregivers, among whom some of the more insidious examples of caregiver undue influence occur.

There is no specific requirement that the person receiving assistance be disabled or elderly, but merely that the individual need assistance with activities of daily living. Neither the specific “activities of daily living”<sup>15</sup> nor the extent of the “need” is further defined within this statute, and so this

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**The law could produce the odd result of ignoring a \$20,000 transfer while presumptively voiding a \$20,001 transfer in its entirety, even on otherwise identical facts.**

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issue will be left to the courts to determine.

Although the label “caregiver” is used repeatedly, there is no requirement that the person giving assistance ever consider or label themselves as a caregiver – a helpful friend or neighbor could very well be deemed a caregiver.

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6. 755 ILCS 5/4a-10(a).

7. *Id.* § 5/4a-15(2).

8. *Id.* § 5/4a-15(1).

9. *Id.* § 5/4a-5(1).

10. It is interesting to contrast the polar opposite treatment of custodial care provided by certain family members – spouse, child, parent or sibling – whereby the family caregiver may be entitled to an additional claim against the estate over and above the gift designated in the decedent’s estate plan. See 755 ILCS 5/18-1.1.

11. 755 ILCS 5/4a-5(2).

12. Both same-sex married couples as well as those in a civil union are defined under Illinois law as a “spouse”, and therefore, would be excluded from the statute as family members. See 750 ILCS 75/5.

13. 755 ILCS 5/4a-20.

14. *Id.* § 5/4a-5(1).

15. For purposes of the Assisted Living and Shared Housing Act, “activities of daily living” means eating, dressing, bathing, toileting, transferring or personal hygiene. 210 ILCS 9/10.

The definition of caregiver further extends to include a spouse, cohabitant, child, or employee of a covered caregiver.<sup>16</sup>

**What is a “transfer instrument?”** A transfer instrument is any legal document intended to effectuate a transfer on or after the transferor’s death, and includes, without limitation, a will, trust, deed, form designated as payable on death, contract, or other beneficiary designation form.<sup>17</sup>

While the statute is inside the Probate Act, its reach extends well beyond probate assets to include most forms of non-probate assets. Query whether and in what circumstances a joint tenancy agreement might be a transfer instrument. While joint tenancy could have been, but was not, specifically included within the non-exhaustive list of transfer instruments, at least in some situations the intent of a joint tenancy is to effectuate a transfer upon death.<sup>18</sup>

The law only applies to transfers intended to take effect upon death, but not to lifetime gifts.

**The \$20,000 threshold.** The statute

only applies when the fair market value of the transferred property (to the caregiver) exceeds \$20,000.<sup>19</sup>

While the statute describes a transfer instrument (in the singular) being challenged, the dollar threshold applies to “transferred property”<sup>20</sup> (which is not a defined term). The statute is not entirely clear on this point, but apparently the reference to transferred property is intended to combine the amounts passing to a particular caregiver under all challenged transfer instruments, and if the total exceeds \$20,000, then all of the transfer instruments with respect to the caregiver are presumptively void.

If the total transferred property is \$20,000 or less, the statute has no application. On the other hand, if the threshold is exceeded, then all of the transfer instruments in favor of the caregiver-beneficiary are presumptively void – including the first \$20,000. This could lead to the potentially odd result of ignoring a \$20,001 transfer while presumptively voiding a \$20,001 transfer in its entirety, even in an otherwise identical situation.

**Challenging, defending, and attorney**

**fee-shifting.** The rebuttable presumption is not automatic, but only arises if a transfer instrument is actually challenged in a civil action.<sup>21</sup>

The statute refers only to a transfer instrument “being challenged,”<sup>22</sup> but doesn’t specify who does the challenging. The typical challenger is likely to be an interested person<sup>23</sup> whose share under the transfer instrument in question would be increased by a successful challenge.

What about a fiduciary (e.g., the executor or trustee)? The law clarifies that it does not create or impose an independent duty on any financial institution, trust company, trustee, or similar entity or person related to any transfer instrument.<sup>24</sup>

16. 755 ILCS 5/4a-5(1).

17. *Id.* § 5/4a-5(3).

18. This question may run parallel to an argument that a joint tenancy bank account is merely a “convenience account” that should be returned as an estate asset. See, e.g., *Murgic v. Granite City Trust & Savings Bank*, 31 Ill.2d 587 (1964) and its progeny.

19. 755 ILCS 5/4a-10(a).

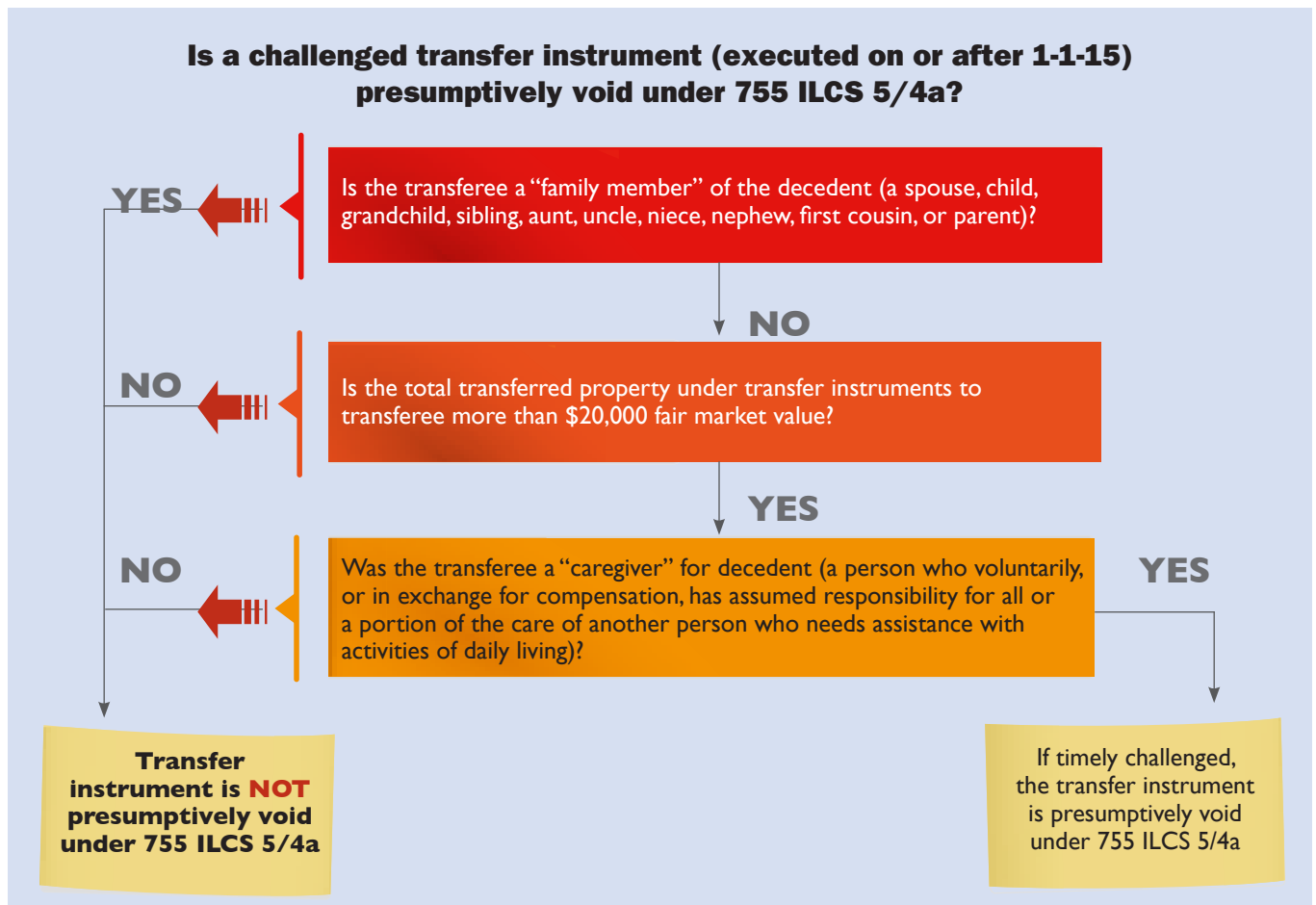
20. *Id.*

21. *Id.*

22. *Id.*

23. See 755 ILCS 5/1-2.11 (defining “interested person” for purposes of the Probate Act).

24. 755 ILCS 5/4a-30.



The job of defending against a will or trust contest typically rests with the fiduciary,<sup>25</sup> but the new statute describes the caregiver attempting to overcome the presumption.<sup>26</sup> More specifically, the law provides that if the caregiver attempts and fails to overcome the presumption, the caregiver must bear the costs of the proceedings, including reasonable attorney's fees.<sup>27</sup> This fee-shifting provision gives the caregiver-beneficiary much to consider — not only would caregivers need to pay their own attorney to attempt to overcome the presumption, they would also run the substantial risk of having to pay all fees of the challenger's attorney as well (while receiving \$0 as beneficiary).

**Effect of presumption and burden of proof.** Presumptions and burdens of proof are very powerful and often drive case results. In this case, once the presumption applies, the heavy “clear and convincing” burden shifts to the caregiver to prove the absence of fraud, duress, or undue influence.<sup>28</sup>

This issue is discussed below in terms of estate planning considerations, but note for now that proving a negative, especially after the death of the person whose intent is in question,<sup>29</sup> is a formidable hurdle.

**Statute of limitations.** Any civil action pursuant to this statute must be brought within two years after the date of death, or sooner if required by probate.<sup>30</sup> If the challenged gift is in a will, then the shortened contest period is within six months after admission of the will to probate.<sup>31</sup> Likewise, if the gift is under a living trust that receives a gift from a pour-over will, then the shorter six-month limitation period also applies.<sup>32</sup> The possible shortened limitations period, however, should not apply to other types of transfer instruments.

**Effective date of statute.** This statute applies only to transfer instruments executed on or after January 1, 2015.<sup>33</sup> Existing common law principles and rules of law can still apply (both before and after the effective date) to defeat improper transfers.<sup>34</sup>

## Estate planning considerations

The impetus for the new law involved situations where caregivers have swooped in and manipulated a susceptible elderly or disabled individual to alter their estate plan.<sup>35</sup> Yet estate planning attorneys must not assume that the new statute will apply only in such nefarious

situations. Indeed, some perfectly appropriate testamentary gifts will now be presumptively void.

For example, your client may be an elderly individual who lacks any remaining close family but who enjoys the loving care of an unmarried partner or longtime close friend who provides needed daily support and comfort during a prolonged or final illness. If the gifts to such a caregiver exceed \$20,000, they will be presumptively void.

Consequently, we must now learn to identify these presumptively void transfers in everyday estate planning so that we may first evaluate the propriety of the potential bequest, and when appropriate, actively document the testator's legitimate intent and the lack of fraud, duress, and undue influence in order to allow the caregiver an opportunity to overcome the presumption of void transfer. Scrivener beware: the failure to properly document and plan for a testamentary transfer that is presumptively void ab initio will likely doom the validity of the transfer instrument and subject the drafting attorney to a possible malpractice claim.

**Spotting a presumptively void transfer.** The threshold question is whether the beneficiary is a non-family member. Any proposed testamentary gift to non-family should be scrutinized as a possible presumptively void transfer. Non-family members include unmarried partners, a child's spouse, and stepchildren that have not been adopted.

A client will probably not describe a beneficiary as their caregiver. Rather, they may simply tell us that the beneficiary is a good friend. In such situations, it will be incumbent on the estate planning attorney to actively inquire into whether the proposed non-family beneficiary provides any personal care to the testator that may render the individual a deemed “caregiver” under the new statute.

The \$20,000 threshold provides a de minimis exception, but it's worth noting that the limit aggregates gifts to the caregiver-beneficiary under all transfer instruments — including beneficiary designations that may be executed without the attorney's knowledge after the will or trust is created. Therefore, even caregiver gifts that are less than \$20,000 in a will or trust should generally be handled as a possible presumptively void transfer.

The decision-tree sidebar on page 26 provides a tool for spotting a presumptively void transfer.

**Planning for a presumptively void**

**transfer.** When faced with a proposed testamentary transfer that may be presumptively void, the first step is to privately interview the client to ascertain whether he or she might be under duress or subject to undue influence. Estate planning attorneys are familiar with this type of inquiry more typically in the context of disinheritance or unequal gifts among children.

If you are comfortable that your client has testamentary capacity and is expressing his or her own free will, then the issue turns to how to contemporaneously document and memorialize the client's legitimate wishes and the lack of fraud, duress, or undue influence. While there is no surefire method for preemptively validating a testamentary instrument during life,<sup>36</sup> a number of steps and procedures may be appropriate on a case-by-case basis.

First, after interviewing the client, the attorney (and possibly the attorney's staff) should consider memorializing the interview by preparing a memorandum summarizing the facts, circumstances, and reasoning surrounding the client's situation and decisions.

Second, the Illinois legislature considered adding an additional provision to the statute that would have created a third alternative for rebutting the statutory presumption through an attorney's “certificate of independent review.”<sup>37</sup> While legislators ultimately chose not to include this express exception, the form provided within the draft legislation (see sidebar below) can serve as a useful tool as part of documenting the attorney's review process, including specific consideration and acknowledgment of the statute.

Third, the attorney should consider having the client execute an affidavit

25. 755 ILCS 5/8-1(e).

26. 755 ILCS 5/4a-25.

27. *Id.*

28. *Id.* § 5/4a-15(2).

29. The Dead-Man's Act presents significant hurdles. See 735 ILCS 5/8-201.

30. 755 ILCS 5/4a-10(b).

31. *Id.*

32. *Id.*; see also 755 ILCS 5/8-1(f); 735 ILCS 5/13-223.

33. 755 ILCS 5/4a-35.

34. *Id.* § 5/4a-20.

35. For several examples, see Janan Hanna, *When Caregivers Take*, 102 Ill. B.J. 368 (Aug. 2014).

36. There are seven states (Alaska, Arkansas, Delaware, New Hampshire, Nevada, North Dakota and Ohio) that do allow so-called pre-mortem probate to judicially validate a will during a testator's lifetime.

37. Senate Floor Amendment No. 1 filed by Sen. Don Harmon on April 4, 2014. The text is available online at <http://legiscan.com/IL/text/SB1048/id/1004966>.



(attested with the same formalities as a will, but separate from the transfer instrument) setting out the client's circum-

stances and intentions from the client's point of view. provide a verbal recitation of his or her intentions and circumstances to the attesting witnesses just prior to signing.

A professionally recorded and preserved video may also be useful, though any recordings will be discoverable so counsel should carefully weigh the pros and cons of this approach.

stances and intentions from the client's point of view. specifically invoking the statute – rather than relying solely on existing common law – provides substantial benefit due to the statutory presumption, elevated burden of proof, and attorney fee-shifting provisions.

Questionable gifts may be contained not only in a will, but also hidden inside beneficiary designation forms or a private living trust (where perhaps the caregiver is also the trustee). Particularly for non-probate assets, swift action may help prevent situations where funds are unable to be recovered because the devious caregiver has absconded with the money. In such situations, best practice may be to immediately put the asset holder on notice that a civil action invoking this statute will be filed. A financial institution will often respond to such an adverse claim by freezing the assets and, where necessary, filing an interpleader action.

In any case, the short limitations period requires timely action, and applies whether or not the aggrieved interested persons had actual notice of the presumptively void transfer.

**Conclusion**

The new Presumptively Void Transfers section in the Probate Act is an important development that provides a valuable tool for combating insidious cases of undue influence by unrelated caregivers. At the same time, estate planning practitioners need to be aware that the statute will ensnare some legitimate testamentary gifts and that careful documentation will be necessary to protect these gifts. ■

**Don't assume that the new statute will apply only in abusive situations. Indeed, some perfectly appropriate testamentary gifts will now be presumptively void.**

**Estate administration considerations**

Fiduciaries and beneficiaries alike should be on the lookout for transfers to non-family who might be deemed a caregiver.

The statute provides a valuable enhanced tool to combat caregiver fraud and undue influence. When applicable,

**Certificate of Independent Review form**

*The following form, which appeared in a draft version of the "presumptively void transfers" law, can help you make the case that your client's transfer to a caretaker is in fact valid.*

I, (attorney's name), have reviewed (name of transfer instrument) prior to its execution, and have counseled my client, (name of client), on the nature and consequences of the transfer or transfers of property to (name of transferee) contained in the transfer instrument. I am dissociated from the interest of the transferee to the extent that I am in the position to advise my client independently, impartially and confidentially as to the consequences of the transfer. On the basis of this counsel, I conclude that the transfer or transfers of property in the transfer instrument that otherwise might be invalid pursuant to Section 4a-10 of the Probate Act of 1975 are valid because the transfer or transfers are not the product of fraud, duress or undue influence.

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