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WEDNESDAY, JULY 1, 2015

Chicago Daily Law Bulletin®

Volume 161, No. 128

New law aims to stop financial elder abuse from caregivers

When Ernie Banks died in January, there was tremendous publicity regarding the legendary athlete's will and his relationship with his caretaker, Regina Rice. Just three months prior to his death, Banks signed estate-planning documents disinheriting his estranged wife and children and leaving all his assets to Rice.

The alleged coercion of Banks is not an uncommon occurrence and is often characterized as financial elder abuse.

Financial elder abuse occurs when a caregiver or acquaintance compels an elderly person to sign a deed, will or power of attorney through deception, coercion or undue influence. The elderly are an easy target for a perpetrator, as they may be unsophisticated about financial matters or dependent upon others.

The Centers for Disease Control and Prevention reported that more than 500,000 elder Americans suffer from financial abuse annually.

This number is likely higher because many elders do not — or cannot — report such abuse. Even so, in 2009 elderly Americans lost an estimated $2.9 billion to financial exploitation.

This year Illinois enacted the Presumptively Void Transfers to Caregiver Act to provide family members a means to challenge a transfer instrument that leaves more than $20,000 in property to a caregiver. If filed in a timely manner, there is a rebuttable presumption that the transfer instrument is void. This new legislation is aimed at preventing elder abuse.

But not all bequests to caregivers outside the family are improper. In many instances, clients at their own initiative express an interest in leaving property to caregivers who have helped them in a time of need. Thus, it is critical for clients and advisers to be mindful of the technicalities to ensure that the legislation intended to protect clients does not prevent their wishes from being met.

The act requires any action to be brought within two years of the individual's death. However, this statute of limitations may be decreased to the six-month creditor claims period in the event the property was transferred to the caregiver pursuant to the decedent's probate estate or if the gift passed under a living trust that receives the assets from a pour-over will.

Further, the act applies only to transfer instruments executed on or after Jan. 1 of this year, the effective date of the legislation.

The act defines "caregiver" as someone 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." However, the act does not apply to family members that provided assistance to the individual.

The act considers family members to include a spouse, child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin or parent of the person receiving assistance. However, family does not include spouses of the family members, non-married partners and step-relatives. Thus, such individuals would fall within the scope of the statute.

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While this statute does not apply to family members, nothing in the statute changes existing common-law principles of fraud, duress and undue influence that can still apply to both family and nonfamily members.

The act requires that the dispute arise from a legal document intended to execute a transfer upon the transferor's death. This may include a will, trust, deed, beneficiary designation under an IRA or life insurance policy, transfer-on-death designation, payable-on-death designation or contract. Furthermore, the law is only applicable to transfers intended to take effect upon death but not to gifts during the individual's lifetime.

The act only applies when the fair market value of the property at issue exceeds $20,000. If the total transferred property is $20,000 or less, the statute is not applicable. On the other hand, if the threshold is exceeded, then all of the transfer instruments in favor of the caregiver are presumptively void.

The rebuttable presumption is not automatic. To be invoked, a civil action must be initiated and the transfer instrument must be challenged. However, once the family member establishes that more than $20,000 was left to a caregiver through a transfer instrument, the burden of proof shifts from the family to the caregiver.

The act provides two exceptions to the rebuttable presumption:

- If the property the caretaker received was not greater than what the caregiver was entitled to under a transfer instrument in place prior to becoming a caregiver.
- If the caretaker can provide clear and convincing evidence that the transfer was not the product of fraud, duress or undue influence.

The statute further provides an attorney fees recovery clause. If the caregiver is unsuccessful in overcoming the presumption, the caregiver is responsible for the costs of the proceedings, including reasonable attorney fees.

The legislature's intent to protect individuals from abuse will now create legal challenges for nonfamily caregivers who inherit more than $20,000 from an individual they cared for.

The rebuttable presumption and requirement to prove a negative is indeed a challenge for caregivers, especially after the elderly person's death. Practitioners must be sensitive to fact patterns whereby a nonfamily beneficiary may be considered a caregiver and be diligent in documenting the testator's intentions.

A special thanks to Chuhak & Tecson P.C. law clerk Margaret Walsh for her contribution to this month's column.

THE BUZZ

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