TOWARD A NEW GENERATION OF "CAREGIVER STATUTES"

Jamie G. McWilliam

Probate law has long seen tension between protecting a testator's freedom of disposition and protecting them from fraud or undue influence. A handful of states have attempted to strike this balance, at least partially, using "caregiver statutes," which provide a presumption of undue influence for gifts to caregivers. Most academic critiques of these statutes occurred around the time of their enactment and focused on their restriction on testamentary freedom. However, years—in some cases, decades—have passed since their enactment. This paper uses this history to examine the strengths and weaknesses of each caregiver statute. This paper argues that caregiver statutes have proven to be a useful tool for probate practitioners, and shows how, with more nuanced definitions, a new generation of caregiver statutes can cure the weaknesses of their predecessors. In the end, this paper provides a concrete template for this "new generation" of caregiver statutes.

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Introduction

One in ten people over the age of 60 suffer abuse, neglect, or exploitation.[1] To protect them, the common law has evolved to include a number of defenses against exploitation, including the voiding of any transfer found to be caused by undue influence.[2] A few states have experimented with statutes to bolster this common law doctrine.[3] Called "caregiver statutes," these *presume* that gifts to caregivers are invalid because of undue influence.[4] With the relaxation of some terms and more nuanced exceptions, these statutes may prove to be a strong tool in the fight against elder abuse.

Probate courts regularly find a familiar scene playing out before them, as though the courtroom were a stage set to repeat. The story begins when a person creates a will. As she ages, the testator updates the will to reflect the chapters of her life. The will becomes a mirror-image will when she finds a spouse. Soon bequests are specified to children, and later, grandchildren. As the testator's family grows, so does the will.

Eventually, the testator grows old enough that she is unable to perform her daily tasks unassisted. So, she finds a caregiver to help her. Sometimes this person is a family member, but often they are professional care providers who make their living by caring for the elderly. The caregiver spends every day with the testator, helping her with daily tasks, perhaps even with her finances, and eventually becomes quite close with her.

All this time, the testator's family are happy with the situation. They come and visit their grandparent and find her doing well, even if grandma's memory is not what it once was. The family appreciates the caregiver's help, since they live too far away or have too demanding careers to provide the constant care the testator needs. When they receive the news that the testator passed away, they are in grief, but are not too surprised. The surprise comes later, when they find out that the

1. MARIE-THERESE CONNOLLY, BONNIE BRANDL & RISA BRECKMAN, U.S. DEP'T OF JUST., THE ELDER JUSTICE ROADMAP: A STAKEHOLDER INITIATIVE TO RESPOND TO AN EMERGING HEALTH, JUSTICE, FINANCIAL, AND SOCIAL CRISIS 3 (2014), http://www.justice.gov/file/852856/download.

2. Jane A. Black, *The Not-so-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 302 (2008).

3. *See id.* at 302–04.

4. *See id.* at 302–04.

family house, where they gathered every year for Thanksgiving, was given to the caregiver.

It is possible that the gift was the result of the volitional wish of the testator—that they wanted to give back to the person who cared for them when they could no longer care for themselves. However, it is also possible that in their weakened state, the testator was unduly influenced by the caregiver into changing their will.[5] It was this latter situation that spurred a handful of states—notably California, Nevada, and Illinois—to enact caregiver statutes, which place an evidentiary burden on caregiving devisees to show that their gift was *not* obtained by undue influence.[6]

These statutes have been lauded by some, and strongly critiqued by others, but very little comparative analysis has been performed.[7] Further, in a world in which the senior population is expected to double in the next forty years,[8] and in which the transferred wealth at stake is estimated to be around $65.3 trillion,[9] these issues are becoming increasingly pressing.

Part I of this paper places caregiver statutes in the context of the common law of undue influence. Part II examines the way these statutes influence real-world probate law. Finally, Part III uses the courts' and practioners' practical experience with the statutes to propose a new, more nuanced variation of the caregiver statute that resolves many of the current issues while maintaining the strong utility of the statute. A model statute that implements the suggestions of this paper is included in Appendix A.

5. *See id.* at 293.

6. *See, e.g.*, CAL. PROB. CODE § 21380(a)–(b) (West 2020); NEV. REV. STAT. § 155.097(2)–(3) (2015); 755 ILL. COMP. STAT. 5/4a-10(a) (2018).

7. *See* Black, *supra* note 2, at 306.

8. ADMIN. FOR CMTY. LIVING, U.S. DEP'T HEALTH &HUM. SERV., 2019 PROFILE OF OLDER AMERICANS, (2020), https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2019ProfileOlderAmericans508.pdf.

9. *See* John J. Havens & Paul G. Schervish, *Why The $41 Trillion Wealth Transfer Estimate is Still Valid: A Review of Challenges and Questions*, 7 J. GIFT PLAN. 11, 49 (2003) (predicting that beneficiaries will receive between $24 trillion and $65.3 trillion between 1998 and 2052).

I. Caregiver Statutes in Context

A primary purpose of probate law is to facilitate the disposition of property according to a testator's wishes.[10] However, exercising a testator's freedom of disposition is not always as simple as merely giving effect to the letter of their will.[11] Where a disposition is the result of fraud or undue influence, it is not the testator's freedom being exercised, but that of their influencer.[12] Thus probate is kept in tension between laissez-faire execution and protection against abuse.

A. Undue Influence

Elderly testators, in particular, are often in a unique position that opens them to abuse. Impaired physical and mental faculties can leave them dependent on caregivers.[13] This dependance makes them susceptible to the influence of their caregiver.[14] Yet people are always influenced to some extent by their relationships with others, so the law has had difficulty in determining the line where such influence becomes *undue*.[15] Compounding this issue is the fact that the circumstantiality of the evidence pointing to an instance of undue influence makes it difficult to definitively root out abuse.[16] Because of this, the common law has developed a sophisticated system for protecting elders from undue

10. *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS L.J. 643, 643–44 (2014) ("The American law of succession embraces freedom of disposition . . . a property owner may exclude his or her blood relations and subject his or her dispositions to ongoing conditions . . . ."); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975) ("[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life."); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) (suggesting that a probate court's priority should be to distribute a decedent's property according to their wishes).

11. *See* Archer v. Anderson, 556 S.W.3d 228, 236 (Tex. 2018) (noting that safeguarding freedom of disposition requires the invalidation of dispositions that are not volitional).

12. *See id*.

13. *See* Black, *supra* note 2, at 290.

14. *See* Black, *supra* note 2, at 294.

15. *See, e.g.*, Dominic J. Campisi, Evan D. Winet & Jake Calvert, *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*, 43 ACTEC L.J. 359, 371 (2018).

16. *See* In re Estate of Sharis, 990 N.E.2d 98, 102–04 (Mass. App. Ct. 2013) (describing some of the circumstances considered in finding the existence of undue influence).

influence.[17] Under this system, a donative transfer is void if a "wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."[18] To determine whether "such influence" was, in fact, exerted, courts often rely on the application of an inference or presumption of undue influence if certain criteria are met.[19] While the common law rules vary among the states, a court will generally apply a presumption of undue influence wherever a will contestant can show the existence of a confidential relationship between the testator and the alleged influencer,[20] as well as certain suspicious circumstances.[21]

While the doctrine of undue influence is an old one,[22] it continues to evolve. A relatively new development is the creation of caregiver statutes, which provide a presumption of undue influence for gifts to caregivers.[23] In doing so, they seek to provide clear standards for gifts involving a specific confidential relationship and particular suspicious circumstances. The relationship between a caregiver and their ward has many of the hallmarks of a "dominant-subservient" confidential

17. David Horton & Reid Kress Weisbord, *Inheritance Crimes*, 96 WASH. L. REV. 561, 571 (2021).

18. RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.3(b) (AM. L. INST. 2003).

19. *See* Horton & Weisbord, *supra* note 17, at 571; RES. PROP., *supra* note 18, § 8.3 cmt. e.

20. *See* RES. PROP., *supra* note 18, § 8.3(b) cmt. g. The restatement supplies three types of relationships that can be considered "confidential": a fiduciary relationship arising from a settled category of fiduciary obligation, a reliant relationship arising where the donor is accustomed to being guided by the advice of the influencer, and a dominant-subservient relationship where the donor is subservient to the dominant influence of a caregiver, child, or other stronger presence.

21. *See id.* § 8.3(b) cmt. h. The restatement offers a non-exhaustive list of "suspicious circumstances." These include, but are not limited to: "the extent to which the donor was in a weakened condition . . . and therefore susceptible to undue influence"; "whether the will . . . was prepared in secrecy or in haste"; "whether the donor's attitude toward others had changed by reason of his or her relationship with the alleged wrongdoer"; and "whether the disposition of the property is such that a reasonable person would regard it as unnatural, unjust, or unfair, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member."

22. *See* MARY JOY QUINN, EILEEN GOLDMAN, LISA NERENBERG & DIANA PIAZZA, UNDUE INFLUENCE: DEFINITIONS AND APPLICATIONS 3 (2010).

23. Robert Barton, Lisa M. Lukaszewski & Stacie T. Lau, *Gifts to Caretakers: Acts of Gratitude or Disguised Malfeasance? New Statutes May Decide for Us*, 29 PROB. & PROP. 22, 23 (2015).

relationship,[24] and the presence of a dependent adult or "unnatural"[25] bequest has long been recognized to give rise to a suspicion of undue influence.[26] Thus, the caregiver statutes seek to clarify and strengthen the existing common law standard as applied to a caregiving relationship by employing per se rules and enhanced safeguards. Rather than supplanting the common law presumption,[27] the statutes use the common law principles to stiffen the presumption's analytical framework[28] where a caregiving relationship places one in a unique position to exert undue influence.[29]

B. A Brief History of the Caregiver Statute

California, ironically a state that has historically skewed away from paternalism when it comes to testamentary freedom,[30] is the originator of the modern caregiver statute.[31] In 1992, an article was published in the *Los Angeles Times*, revealing that local attorney James Gunderson had obtained millions from his elderly clients by writing

24. RES. PROP., *supra* note 18, § 8.3(b) cmt. g.

25. David Horton, *The Uneasy Case for California's "Care Custodian" Statute*, 12 CHAPMAN L. REV. 47, 66 (2008).

26. RES. PROP., *supra* note 18, § 8.3(b) cmt. h (laying out a donor's weakened condition and the unnaturalness of a disposition as suspicious circumstances).

27. *See* NEV. REV. STAT. § 155.098 (2011) ("The provisions of NRS 155.097 and 155.0975 do not abrogate or limit any principle or rule of the common law . . . ."); 755 ILL. COMP. STAT. 5/4a-20 (2015) ("The provisions of this Article do not abrogate or limit any principle or rule of the common law . . . .").

28. The common law presumption applies to confidential relationships where one is able to overpower the will of the testator. *See* RES. PROP., *supra* note 18, § 8.3(b) cmt. g. Rather than creating a new category of relationship, the statutes simply apply per se rules to such relationships involving caregivers. This limits judicial discretion and narrows the analytical framework employed.

29. *See id.* § 8.3(b) cmt. h (noting that where a ward is in a weakened condition, undue influence becomes easier to accomplish).

30. *Compare* Estate of Sarabia, 270 Cal. Rptr. 560, 607 (Ct. App. 1990) (going against the national grain in holding that a bequest to a same-sex partner was valid even though it precluded gifts to "natural" family) *with* In re Kaufmann's Will, 247 N.Y.S.2d 664, 684–685 (App. Div. 1964) (expressing doubt that the testator would have bequeathed his fortune to an "unrelated" person—who happened to be his same-sex partner—rather than his living brothers). *In re Kaufmann* and the many cases like it across the States have caused some thinkers to suggest that the doctrine of undue influence serves "not to protect testators' autonomy, but rather to protect the testator's family against disinheritance." Ray D. Madoff, *Unmaking Undue Influence*, 81 MINN. L. REV. 571, 619 (1997).

31. Madoff, *supra* note 30, at 586 n.47.

himself into his clients' estate plans.[32] The response was quick: less than a year later, the California legislature passed A.B. 21,[33] which enacted § 21350 and prohibited transfers to disqualified persons.[34] This category was expanded in 1997 to include caregivers,[35] and this statutory presumption against gifts to caregivers survived the statutory transition from § 21350 to the current § 21380.[36]

In the years since California's enactment of § 21350, a handful of other states have followed suit.[37] Some, like California, have enacted a relatively thorough statutory scheme, while others have opted for more simple, narrower versions of the caregiver statute.[38] Idaho's single-paragraph prohibition on testamentary gifts to nursing home operators was expanded in 1994 to include a presumption against devises to all caregivers.[39] In 2004, Missouri enacted a similarly laconic statute applicable to unrelated, in-home health care providers.[40] On the other hand, Nevada established a more rigorous statutory scheme in 2011.[41] And in 2014, Rhode Island enacted a law that borrows language from California's comprehensive § 21380.[42] A year later, Illinois added its own complex statute presuming a transfer is "void if the transferee is a caregiver."[43]

32. *See* Davan Maharaj, *Lawyer Inherited Millions in Stock, Cash From Clients*, L.A. TIMES (Nov. 22, 1992), https://www.latimes.com/archives/la-xpm-1992-11-22-mn-2328-story.html.

33. A.B. 21, 1993-1994 Leg., Reg. Sess. (Cal. 1993) ("AB 21 was introduced in response to . . . the activities of a probate attorney, Mr. James D. Gunderson").

34. At the time, the law focused on the drafting attorney, those associated with them, or anyone in a confidential relationship who causes the will to be drafted. *See* CAL. PROB. CODE § 21350(a)(1)–(4) (repealed 2014).

35. *See id.* § 21350(a)(6).

36. *See* CAL. PROB. CODE § 21380(a)(3) (West 2020).

37. *See* CAL. PROB. CODE § 21380(a) (West 2020); IDAHO CODE § 15-2-616 (2000); NEV. REV. STAT. § 155.097(2) (2015); 33 R.I. GEN. LAWS § 33-19.1-3(a) (2015); 755 ILL. COMP. STAT. 5/4a-10(a) (2018).

38. *See* CAL. PROB. CODE § 21380(a) (West 2020); *see also* IDAHO CODE § 15-2-616 (2000); MO. REV. STAT. § 197.480 (2004).

39. *See* IDAHO CODE § 15-2-616 (2000).

40. MO. REV. STAT. § 197.480 (2004).

41. *See* NEV. REV. STAT. § 155.097 (2015).

42. *See* CAL. PROB. CODE § 21380(a)(3) (West 2020); 33 R.I. GEN. LAWS § 33-19.1-3 (2015).

43. 755 ILL. COMP. STAT. ANN. 5/4a-10 (2015).

C. The Anatomy of a Caregiver Statute

While these statutes vary in their details, there are several threads that seem to define the typical "caregiver statute." First is the ability to invoke the statute during a will contest to establish a presumption of undue influence by a caregiver.[44] Second is a type of exception for family members or caregivers with preexisting, close personal relationships with the testator.[45] Third is a dollar threshold below which transfers are allowed,[46] implicitly recognizing that gifts that would not overwhelm an estate would not egregiously violate the statutes' policy goal of protecting expectant heirs. Finally, there is the ability to rebut the presumption by clear and convincing evidence,[47] or in limited situations, by a preponderance of the evidence.[48] This last feature is integral to the proper functioning of a caregiver statute, as it establishes that the presumption is never conclusive for caregivers.[49] Rather than a bar on

44. *See* CAL. PROB. CODE § 21380(a) (West 2020); IDAHO CODE § 15-2-616 (2000); NEV. REV. STAT. § 155.097(2) (2015); 33 R.I. GEN. LAWS § 33-19.1-3(a) (2015); 755 ILL. COMP. STAT. ANN. 5/4a-10(a) (2018).

45. *See* CAL. PROB. CODE §§ 21362(a), 21382(a) (West 2023) (exempting family within the fourth degree and those with a personal relationship to the testator who provide services without renumeration); MO. REV. STAT. § 197.480 (exempting family within the third degree); NEV. REV. STAT. § 155.0975(1)-(2) (2015) (exempting spouses and heirs who receive not more than their intestate share); 33 R.I. GEN. LAWS §§ 33-19.1-2(1), 33-19.1-4(1) (2023) (mirroring California's exemption for family with the fourth degree and unpaid friends providing caregiving services); 755 ILL. COMP. STAT. 5/4A-5(1)–(2) (2023) (exempting "family members" as defined by a statutory list of relatives).

46. *See* CAL. PROB. CODE § 21382(e) (West 2023) (using a threshold of $5000 for estates over $166,250); MO. REV. STAT. § 197.480 (2023) (exempting gifts under 5% of the assets of the testator); NEV. REV. STAT. § 155.0975(6) (2023) (applying a threshold of $3000); 33 R.I. GEN. LAWS § 33-19.1-4(5) (2023) (using a threshold of $5000 where the value of the estate exceeds $50,000); 755 ILL. COMP. STAT. 5/4a-10(a) (2023) (applying a threshold of $20,000).

47. *See* CAL. PROB. CODE § 21380(b) (West 2023); IDAHO CODE § 15-2-616 (2023); NEV. REV. STAT. § 155.097(3) (2023); 33 R.I. GEN. LAWS § 33-19.1-3(b) (2023); 755 ILL. COMP. STAT. 5/4a-15(2) (2023).

48. Illinois allows a showing by a preponderance of the evidence that the transferee's share under the contested will is not more than they would have received under the will in effect before they become the testator's caregiver. 755 ILL. COMP. STAT. 5/4a-15(1) (2023).

49. *Compare* CAL. PROB. CODE § 21380(b) (West 2023) (describing how, when the statute is applied to caregivers, it simply creates a rebuttable presumption affecting the burden of proof), *with* CAL. PROB. CODE § 21380(c) (West 2023) (making the presumption conclusive when the statute is applied to the drafter of the instrument). The California legislature reveals through statutory language that it could have made the presumption conclusive with respect to caregivers, yet chose not to.

transfers to caregivers, these statutes merely allocate the burden of proof between parties.[50]

Maine has a statutory variant of the typical caregiver statute,[51] but is inapplicable after the testator dies,[52] and lacks both a family exception[53] and a financial threshold.[54] In addition, while this paper focuses on transfers through wills or will-substitutes, the expansiveness of the caregiver statute varies among the states.[55] For example, Illinois' applies only to transfers effectuated upon a transferor's death,[56] while Nevada's applies to any transfer for less than fair market value.[57]

These statutes are relatively new, and in several states their effects have yet to truly be felt in the appellate courts.[58] The lack of appellate caselaw in many states may be a symptom of a caregiver statute's youth or its strong settlement power.[59] In spite of this, many states have gained valuable experience with their caregiver statutes, both in the courts, and in the day-to-day of estate planning. The similarities between statutes may allow this experience to be extrapolated across states as similar issues arise in varying state courts.

II. Caregiver Statutes in the Real World

The general premise behind caregiver statutes is simple enough: caregivers are in a unique position to influence their wards, so transfers to them should have a higher bar for validity.[60] However, actually enacting this policy into a workable statute has proven to be a delicate task. Caregiver statutes have been subject to frequent revision as new

50. CAL. PROB. CODE § 21380(b) (West 2023).
51. ME. STAT. tit. 33 § 1022 (2023).
52. *See id.* (requiring the elderly person themselves to raise the presumption).
53. In fact, the Maine statute explicitly includes a family relationship in its non-exhaustive list of qualifying "confidential relationships." *Id.*
54. *See id.*
55. *See, e.g.*, 755 ILL. COMP. STAT. 5/4a-5(3) (2023); NEV. REV. STAT. § 155.0955 (2023).
56. 755 ILL. COMP. STAT. 5/4a-5(3) (2023).
57. NEV. REV. STAT. § 155.0955 (2023).
58. As of October 24, 2023, LexisNexis shows zero citing appellate decisions for the caregiver statutes of Idaho, Missouri, and Rhode Island. *See, e.g.*, IDAHO CODE § 15-2-616 (2023) (click "Citing Decisions"); 33 R.I. GEN. LAWS § 33-19.1-4(5) (2023) (click "Citing Decisions").
59. *See infra* Section II.A.
60. *See supra* Section I.A. (describing the confidential relationship and suspicious circumstances that make caregiving fertile ground for undue influence).

issues arise in the courts,[61] and scholarly critiques remain relevant in spite of recent updates.[62]

In evaluating the effects of the various caregiver statutes, it is important to recall that they are built upon the foundation of the common law presumption.[63] Rather than replacing the common law,[64] the statutes seek to provide clear rules for the application of the presumption to confidential relationships involving caregivers.[65] In this way, they strengthen the existing common law presumption in order to prevent egregious cases of undue influence. Thus, any evaluation of caregiver statutes and their terms should be performed in light of the prevailing common law presumption that informs them.

A. The Benefits of Caregiver Statutes

In spite of their issues, practitioners have generally found these statutes to be a useful tool in the will contest arena and in defending against undue influence.[66] For example, the California case *In re Estate*

61. California's statutes, the previous § 21350 and current § 21380 are prime examples. Section 21350 was amended four times before being repealed. CAL. PROB. CODE § 21350 (West 2023) (follow "History" hyperlink; then "Editor's and Revisor's Notes" hyperlink). Meanwhile, § 21380 has already been amended twice. CAL. PROB. CODE § 21380 (West 2023) (follow "History" hyperlink; then "Editor's and Revisor's Notes" hyperlink). For many years, courts declined to extend the definition of "care custodian" to "well-meaning friends." *See, e.g.*, In re Conservatorship of McDowell, 23 Cal. Rptr. 3d 10, 21–22 (Ct. App. 2004). Then, in 2006, the California Supreme Court decided *Bernard v. Foley*, in which it held that there was no reason to except preexisting personal friendships when the friend provided "substantial, ongoing health services." Bernard v. Foley, 139 P.3d 1196, 1197, 1202 (Cal. 2006). After all, friend caregivers are still in a unique position to exert undue influence—perhaps more so because of their friendship. The California legislature responded by enacting § 21380, which exempts those with a preexisting personal relationship to the testator so long as they receive no remuneration for their services. CAL. PROB. CODE § 21362(a) (West 2023).

62. *See generally* Grace Rehaut, *The Caregiver Conundrum*, 75 STAN. L. REV. 715, 715 (2023).

63. *See supra* Section I.A.

64. *See* NEV. REV. STAT. § 155.098 (2023) ("The provisions of NRS 155.097 and 155.0975 do not abrogate or limit any principle or rule of the common law . . . ."); 755 ILL. COMP. STAT. 5/4a-20 (2023) ("The provisions of this Article do not abrogate or limit any principle or rule of the common law . . . .").

65. *See* A.B. 1172, 1997–1998 Sen. Reg. Sess. (Cal. 1997).

66. Kenneth F. Berg, *The Presumptively Void Transfers to Caregivers Act in Illinois: Mercy with Justice*, 65 Tr. & Est. (Ill. State Bar Ass'n, Springfield, Ill.), no. 4, Oct. 2018, at 5; Zoom Interview with Thomas R. Grover, Att'y, Blackrock Legal (Sept. 10, 2021) [hereinafter Grover Interview].

of Cline[67] is illuminating of the power the statutes can have during a will contest. There, the testator initially executed a will leaving everything to his adopted daughter Doris.[68] Over the following decade, testator befriended Nersesian, a woman twenty-six years his junior.[69] As his health declined, she began to provide ongoing caregiving services for him, eventually entered into a romantic relationship with him, and took steps to cut Doris out of his life.[70] Prior to the testator's death, she was investigated for elder abuse, yet maintained her relationship with him.[71] It was subsequently revealed that Nersesian had set up an appointment with an attorney and had the testator's will changed so as to leave his entire estate to her.[72] The court applied the straightforward analysis found in the statute, and found Nersesian to be a "care custodian" under the statutory definition.[73] Since she failed to rebut the arising presumption, the estate was given to the testator's intended beneficiary, Doris.[74] The simplified statutory analysis streamlined the court's reasoning and gave the abusive Nersesian little room for argument.[75]

Cline and similar cases reveal the strength of caregiver statutes in a will contest proceeding,[76] yet the statutes may also protect against undue influence at the estate planning stage as well. In California, for example, an attorney may be disciplined for drafting a will that violates the caregiver statute if the attorney knew, or should have known, the facts leading to the violation.[77] This places a burden on the estate planner to closely scrutinize whether a "care custodian" relationship exists, and whether undue influence is being applied.[78] Placing this burden on the drafting attorney is a strong safeguard, since lawyers are in a unique position to discover financial abuse.[79] Likewise, California and

67. In re Estate of Cline, No. B296907, 2020 WL 3745941, at *1–8 (Cal. Ct. App. July 7, 2020).
68. *Id.* at *1.
69. *Id.*
70. *Id.* at *1–2.
71. *Id.* at *2–3.
72. *Id.* at *2.
73. *Id.* at *4.
74. *Id.*
75. *Id.*
76. *Id.*; In re Estate of Moretti, 69 Mass. App. Ct. 642, 659 (2007).
77. CAL. BUS. & PROF. CODE § 6103.6 (West 2023).
78. Barton et al., *supra* note 23, at 25.
79. Catherine A. Schraegle, *Keeping it Away from the Family: Defending Baby Boomers' Financial Interests from Their Own Children Breaching Fiduciary Duty*, 8 EST.

Nevada's use of a "certificate of independent review," in which an independent attorney reviews the proposed transfer for undue influence, accomplishes similar goals.[80] These features allow caregiver statutes to provide barriers to undue influence before a will is even introduced into probate.

Further, caregiver statutes have been found to exert a strong settlement power.[81] When faced with proving that they did *not* exert undue influence by clear and convincing evidence, many abusive caregivers see settlement as their only option against summary judgement.[82] On the flipside, the contestants of the will may wish to settle in order to save on legal fees that chip away at the mass of the estate.[83] The lack of reported decisions interpreting the statutes may provide further evidence of this settling power, as cases are resolved before opinions can be written.[84] Thus, the caregiver statutes protect testamentary freedom at three stages of a will's life-cycle: in estate planning, in litigation by pressuring for settlement, and finally through actual burden shifting in court if settlement is not reached.[85]

Caregiver statutes also respond to a scholarly critique of judicial discretion in implementing the common law safeguards of testamentary freedom.[86] They provide a level of certainty in situations involving

PLAN. & CMTY. PROP. L. J. 367, 381 (2015) ("Similar to society depending on health care professionals to report instances of child abuse due to the course of their job enabling them to notice such abuse, lawyers are in a position to discover financial abuse of elderly clients because lawyers are handling elderly clients' wills, power of attorney paperwork, and other financial documents.").

80. Under these provisions, a transfer may be exempted from the caregiver statute if an independent attorney reviews the nature of the transfer and determines that it is not the result of undue influence. The attorney must then attest to this on a statutorily provided form. CAL. PROB. CODE § 21384(a) (West 2023); NEV. REV. STAT. § 155.0975(4) (2023).

81. Grover Interview, *supra* note 66; *see also* Berg, *supra* note 66, at 5. This phenomenon may also explain the lack of reported decisions in some states. *See supra* Section I.C.

82. Berg, *supra* note 66, at 5.

83. *Id.* (noting a case where settlement reduced the cost of litigation to the testator's estate).

84. *See* sources cited *supra* note 58.

85. Berg, *supra* note 66, at 5–6; CAL. PROB. CODE § 21380(b) (West 2023).

86. *See* Horton & Weisbord, *supra* note 17, at 573 (showing that "the elasticity of incapacity and undue influence allows factfinders to resolve disputes according to their own biases"); Ben Chen, *Elder Financial Abuse: Capacity Law and Economics*, 106 CORNELL L. REV. 1457, 1514 ("[S]ubstantial judicial discretion . . . heightens the risk of judges acting in accordance with prejudices.") (internal quotation marks omitted).

caregivers, the statutory definitions of which do not constrain judges in cases applying the common law standard.[87] Scholars have noted that, because mental issues are nebulous and little-understood, promulgating sharp rules ex ante on mental capacity grounds would be "too complex and too costly."[88] Undue influence is not so constrained—certain confidential relationships can be defined in relatively concrete terms, and doing so has narrowed the bands of discretion within which judges' prejudice can influence their decisions.[89]

In spite of these general benefits, some are quick to critique existing caregiver statutes.[90] Attacks can be made from a freedom of disposition angle, since the statutes provide resistance to certain testamentary gifts.[91] On the other hand, the varying implementations of caregiver statutes among the few states who have tried them have revealed how the language employed can create unexpected loopholes, and in some areas make the statutes counterproductive.[92] The next section examines some critiques of and issues with existing caregiver statutes.

B. The Overbreadth Critique

While practitioners have generally found caregiver statutes to be an important tool in fighting undue influence,[93] some of their general attributes have been the subject of scholarly critique.[94] A recurring criticism is that they are overbroad and prohibit what would otherwise be valid testamentary gifts.[95] A testator of sound mind may sensibly wish to repay their attentive caregiver, after all. In fact, in a time when

87. Chen, *supra* note 86, at 1476 (discussing the use of common law mental incapacity standard).

88. *Id.* at 1486 (analyzing the necessity of the vague standards employed in the mental capacity doctrine).

89. *See id.* at 1478.

90. *See* Horton, *supra* note 25, at 49.

91. *See id.* at 50.

92. *See id.* at 55.

93. *See* Berg, *supra* note 66, at 6 ("As a practical litigation tool, [Illinois' caregiver statute] strikes the right balance between protecting seniors and permitting caregivers to receive bequests."); Grover Interview, *supra* note 66; Zoom Interview with Marci M. Shoff & Melinda L. Mannlein, Att'ys, Hasselberg, Rock, Bell & Kuppler LLP (Sept. 27, 2021) [hereinafter Shoff & Mannlein Interview].

94. *See, e.g.*, Horton, *supra* note 25, at 49 (suggesting that even after rectifying some of the issues with caregiver statutes, they would still likely cause "dubious results").

95. Barton et al., *supra* note 23, at 25.

"approximately 80% of the long-term care received by older Americans is provided by informal caregivers,"[96] some have argued that there is a strong policy argument for preferencing this type of remuneration.[97] Others have questioned courts' historical definition of "natural" objects being limited to family in arguing against caregivers statutes.[98] This line of argument suggests that it might be more natural to leave property to a caregiver with whom the testator has a close relationship, rather than neglectful family members.[99] Under this reasoning, categorically providing a presumption against gifts to caregivers does not comport with the testator's freedom of disposition.

However, it is worth noting that this is all that the caregiver statute provides: a *rebuttable presumption*.[100] It does not prohibit, criminalize, or apply any other legal standard that would categorically bar testators from leaving bequests to their caregivers.[101] One wishing to include a caregiver in their will can take steps at the estate planning stage that will rebut the presumption of undue influence, such as obtaining a certificate of independent review.[102] In some states, they can also get around the presumption though lifetime giving.[103]

Another avenue of general criticism has focused on the increased cost of ex ante review associated with caregiver statutes.[104] As noted

96. Adam Hofri-Winogradow & Richard L. Kaplan, *Property Transfers to Caregivers: A Comparative Analysis*, 103 IOWA L. REV. 1997, 2003 (2018).

97. *See* Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J. L. REFORM 761, 780 (2012) (suggesting that an elective share be given to family caregivers who provide substantial uncompensated in-home care to the decedent); Joshua Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 130 (2008) (noting how testamentary freedom allows the elderly to reward caregivers).

98. *See* Horton, *supra* note 25, at 50 (criticizing courts' use of undue influence rules to impose hegemonic norms).

99. *See id.* at 67–69.

100. CAL. PROB. CODE § 21380(b) (West 2023) ("The presumption created by this section is a presumption affecting the burden of proof."); NEV. REV. STAT. § 155.097(3) (West 2023) ("The presumption created by the section is a presumption concerning the burden of proof and may be rebutted . . . .").

101. *See* Berg, *supra* note 66, at 4–5 ("Evidentiary presumptions are common generally and a part of will contests in particular. They are not a 'presumption of guilt,' but rather a considered public policy decision by courts or the legislature to require that the party with the most personal knowledge of the facts come forward with evidence.").

102. *See* Barton et al., *supra* note 23, at 25 ("The most common method to overcome the presumption . . . is to obtain a certificate of independent review.").

103. Shoff & Mannlein Interview, *supra* note 93.

104. *See* Barton et al., *supra* note 23, at 25.

previously, a benefit of the statutes is that they force drafting attorneys to closely scrutinize transfers to caregivers[105] and, if a certificate of independent review is used, allow for third-party examination as well.[106] This benefit comes at the cost of increased legal fees at the time of drafting a testamentary instrument.[107] Because many, if not most, instruments will be uncontested,[108] this increased cost is viewed by some as unnecessary.[109] Resources might be better used during the contest stage, when an actual issue has been raised. However, given the scale of elder financial abuse in the United States,[110] it is likely that the majority of influenced instruments go uncontested.[111] In this case, injustice can be avoided only through some type of ex ante protection like the one provided by the caregiver statutes.

C. The Definition of "Caregiver"

Besides the general critiques just described, courts and practitioners have uncovered issues with specific terms of the caregiver statutes.[112] The first arises under the very definition of a "caregiver."

105. *Id.* at 25.

106. *See* CAL. PROB. CODE § 21384(a) (West 2023); NEV. REV. STAT. § 155.0975(4) (West 2023).

107. *See* Barton et al., *supra* note 23, at 25 (describing the increased burden, where an "attorney will need extra time to investigate whether a 'care custodian' relationship applies and, if it does, take measures to ensure that the gift does not fail, such as retaining an additional attorney to execute a certificate of independent review").

108. John Lewandowski, *Everything You Need to Know About Contesting a Will*, HEBAN, MURPHREE & LEWANDOWSKI (Apr. 9, 2021), https://www.hml-law.net/2021/04/contesting-a-will ("Research has shown that only 0.5% to 3% of wills in the United States undergo contests.").

109. *See* Barton et al., *supra* note 23, at 25.

110. Estimates of the cost of financial elder abuse vary. A study from MetLife and the National Committee for the Prevention of Elder Abuse estimated that the elderly lose $2.6 billion per year due to financial abuse. METLIFE MATURE MKT. INST., BROKEN TRUST: ELDERS, FAMILY, AND FINANCES 4 (Mar. 2009), https://www.giaging.org/documents/mmi-study-broken-trust-elders-family-finances.pdf. Meanwhile, the National Council on Aging claims elder financial abuse costs the elderly $36.5 billion per year. *Get the Facts on Elder Abuse*, NAT'L COUNCIL ON AGING (Feb. 23, 2021), https://www.ncoa.org/article/get-the-facts-on-elder-abuse.

111. Lewandowski, *supra* note 108.

112. *See* Barton et al., *supra* note 23, at 25.

California,[113] Nevada,[114] and Rhode Island's[115] statutes all include remuneration for services in their definition. This has the effect of excluding caregivers who act out of friendship or in expectation of inheritance.[116] While this would seem to satisfy a strong policy interest in promoting communal caregiving, it has also had perverse effects.

For example, in *In re Estate of Wilson*,[117] Gonzalez was a long-time friend of the testator. As the testator's health declined, she began providing services for him and eventually became his fiduciary through a power of attorney.[118] However, rather than financial remuneration for these services, she received free rent.[119] Shortly before the testator's death, he drafted a new will that left everything to Gonzalez, rather than to his living brother.[120] When his brother brought a will contest, seeking to apply the presumption of undue influence in California's caregiver statute, the court rejected the claim.[121] Instead, it found that Gonzalez was excluded from the definition of "care custodian" because she had a pre-existing relationship with the testator and provided her services without remuneration.[122] Had she received a paycheck for her services, the presumption would have applied regardless of her relationship to the testator,[123] yet because she received "only" free rent, she evaded the caregiver statute entirely.[124]

113. CAL. PROB. CODE § 21362(a) (West 2023) (defining "care custodian" to exclude those who provide services without remuneration and have had a pre-existing personal relationship with the testator).

114. NEV. REV. STAT. § 155.0935 (2023) ("Caregiver means a person who provides health or social services to a dependent adult for remuneration other than a donative transfer . . . .") (internal quotation marks omitted).

115. 33 R.I. GEN. LAWS § 33-19.1-2(1) (2023) (defining "care custodian" to exclude those who provide services without remuneration and have had a pre-existing personal relationship with the testator).

116. *See* Barton et al., *supra* note 23, at 24.

117. *See* In re Estate of Wilson, No. E070066, 2020 WL 1060237, at *3, *7 (Cal. Ct. App. Mar. 5, 2020).

118. *Id.* at *1–2.

119. *Id.* at *6.

120. *Id.* at *1.

121. *Id.* at *7.

122. *Id*.

123. *See* CAL. PROB. CODE § 21362(a) (West 2023). A lack of remuneration is a precondition for a court to consider the pre-existing relationship between the testator and the alleged wrongdoer.

124. *In re Estate of Wilson*, 2020 WL 1060237, at *6–8 ("[F]ree rent does not constitute "remuneration" under section 21362, subdivision (a) . . . . We therefore conclude the probate court did not err in finding that Gonzalez was not a care custodian under section 21362.").

D. The Family Exception

Another issue laid bare by the courts concerns the family or friends exception to caregiver statutes. California courts, who have provided by far the most judicial analyses of these statutes, have repeatedly found this exception to be a loophole for family influencers.[125] Family caregivers, who use their position of trust with a testator to exert undue influence over them, escape the statutory presumption of undue influence through the family exception only to be caught within the common law presumption of undue influence.[126]

This phenomenon is not simply an operational feature of the statute, but a malfunction of policy. The caregiver statute was born out of a need for heightened protection from egregious cases of undue influence.[127] Such cases do not run out at the threshold of the family home, however, as shocking and well-publicized situations of undue influence by family members abound.[128] Cases involving family are admittedly more complex than those with abusive outsiders.[129] However, to *categorically* exempt them[130] from the statutes ignores the foundational principle behind the statutes: to protect testators from undue influence by those who are in a particularly unique position to exert influence.[131] Family caregivers are in such a position—arguably more so than professional caregivers.[132] Thus, while gifts to family caregivers should perhaps receive a lighter touch in recognition of the heightened

125. *See* Masters v. Ries, No. D070963, 2017 WL 1075065, at *8 (Cal. Ct. App. Mar. 22, 2017).

126. *See id*. (applying the common law presumption of undue influence).

127. *See* A.B. 21, 1993-1994 Leg., Reg. Sess. (Cal. 1993) ("AB 21 was introduced in response to . . . the activities of a probate attorney, Mr. James D. Gunderson . . . .").

128. The infamous case of Brooke Astor is representative. Her son's heavy influence in the modification of her will resulted in him receiving tens of millions of dollars. *See* People v. Marshall, 961 N.Y.S.2d 447, 449–51 (N.Y. App. Div. 2013); Russ Buettner, *Appeals Exhausted, Astor Case Ends as Son Is Sent to Jail*, N.Y. TIMES (June 21, 2013), https://www.nytimes.com/2013/06/22/nyregion/astors-son-his-appeals-exhausted-goes-to-prison.html; John Eligon, *Settlement in Battle Over Astor Estate Is Reached*, N.Y. TIMES. (Mar. 28, 2012), https://www.nytimes.com/2012/03/29/nyregion/settlement-reached-in-battle-over-brooke-astors-estate.html.

129. *See* Horton, *supra* note 25, at 50–52 (describing the deference courts have historically afforded bequests to family members).

130. *See infra* Section III.B. (discussing how a lower burden of proof for family caregivers recognizes the increased complexity of family cases while satisfying the policy purpose of caregiver statutes).

131. *See supra* Section I.A.

132. *See infra* Section III.B.

complexity of the policy issues involved, a categorical family exception contravenes the caregiver statutes' background principle.

An illustrative case of the issue is that of *In re Estate of Antos*.[133] In this case, the testator had established a trust that divided his property equally between his two children.[134] One child, Janalee, moved back in with her father when she was 30, and from that point on, was largely unemployed and did not pay for "rent, food, transportation, or property taxes."[135] When her father's health declined, Janalee began to provide caregiving services for her father, in exchange for a small salary.[136] Around this same time, she became a joint owner of her father's bank accounts and was designated as successor trustee to the family trust.[137] The terms of the trust were also changed to leave the bulk of her father's property to her, leaving only life insurance proceeds to her brother.[138] After their father's death, Janalee's brother, unaware that any of these changes had been made, found that half of the proceeds of the life insurance policy had already been withdrawn by Janalee.[139] When he confronted her, she told him not to contest her or she would "take everything."[140]

Because Janalee was the child of the testator in addition to his caregiver, the court found that the caregiver statute did not apply.[141] However, the court then analyzed whether the common law presumption of undue influence could apply.[142] In California, the presumption applies if a confidential relationship exists between the testator and person, the person actively participated in the procurement of the instrument, and the person unduly benefited from the instrument.[143] The situations surrounding the amendments to the trust, and the original testamentary plan that favored both children equally, suggested to the

133. *See* In re Estate of Antos, No. G054116, 2017 WL 5185178, at *1 (Cal. Ct. App. Nov. 17, 2017).
134. *Id.* at *2.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.* at *3.
139. *Id.* at *4.
140. *Id.*
141. *Id.* at *6 (citing CAL. PROB. CODE § 21382(a), which excludes family within the fourth degree from the caregiver statute).
142. *Id.*
143. Bernard v. Foley, 139 P.3d 1196, 1199 (Cal. 2006).

court that Janalee's increased benefit under the new plan was undue.[144] Accordingly, the court applied the common law presumption that Janalee obtained the trust amendment through undue influence.[145] Thus, even though undue influence legally existed, and the influence was made achievable because of her role as caregiver, the caregiver statute failed to catch it.[146]

Masters v. Ries tells a similar story.[147] The parties' father initially had an estate plan that divided his property equally between his two daughters.[148] Ries, who lived closer to the testator than her sister, took care of her father in his final days.[149] While doing so, she contacted an attorney and instructed her to make changes to her father's estate plan that would leave the vast majority to herself.[150] Because Ries was the daughter of the testator, the court declined to apply the caregiver statute.[151] However, the court found that she unduly benefited from the changes to the trust, and so found the common law presumption applicable.[152] Just like *Antos*, *Masters* represents the failure of a caregiver statute to catch an instance of undue influence by a caregiver, because the alleged wrongdoer was a family member.[153]

At this point, a counter argument could be made that it matters little if a caregiver statute catches an abusive family member, because the common law doctrine of undue influence lays in wait to ensnare them once they pass the statutory gate.[154] Under this view, what *Antos* and *Masters* reveal is simply a harmless bug in the undue influence framework. Yet taking this argument to the extreme renders the entire statute redundant. If lawmakers found the common law presumption sufficient, then they would not have enacted the caregiver statute in the

144. *In re Estate of Antos*, No. G054116, 2017 WL 5185178, at *7–10 (Cal. Ct. App. Nov. 17, 2017).
145. *Id.* at *5–7.
146. *See id*. at 1.
147. *See generally* Masters v. Ries, No. D070963, 2017 WL 1075065, at *1 (Cal. Ct. App. Mar. 22, 2017).
148. *Id.* at *2.
149. *Id.* at *3.
150. *See id.* at *3.
151. *Id.* at *16 n.7.
152. *Id.* at *10. ("Because Masters presented sufficient evidence of Ries's undue benefit under Wolf's will and trust, the burden shifted to Ries to rebut the presumption.").
153. *See generally id.*
154. *See* In Re Estate of Antos, No. G054116, 2017 WL 5185178, at *5–7 (Cal. Ct. App. Nov. 17, 2017).

first place.[155] In reality, the common law presumption, while philosophically sound, has practical issues. It is an ex-post check on abuse, arising only after the harm has already occurred and when facts are rendered hazy by time.[156] Further, a contest must actually be raised for the common law presumption to apply.[157] Caregiver statute requirements—such as the certificate of independent review[158] or attorney sanctions[159]—can provide protections earlier in the estate planning process.[160] The requirements also provide clear guidelines, such as bright-line rules as to the relationships protected.[161] The caregiver statute stems from the same principle as the common law presumption—of protecting testators from undue influence by those who are in a particularly unique position to exert influence—yet determines the principle in a concrete way, providing definite protections. As such, it should not have to rely on the backstop common law.

The Illinois case *Durham v. Durham*[162] displays a different issue with the family exception to caregiver statutes. These exceptions are based on the protection of the family relationship.[163] Yet *Durham* reveals the difficulty that the definition of "family" can cause. While some states, like California, have an expansive view of family that includes any blood relative within a specified degree *and their spouses*,[164] Illinois instead applies a rigid statutory list.[165] In *Durham*, the testator's daughter-in-law, Allison, acted as his caregiver.[166] Because the statutory list of excepted family members did not explicitly include in-laws, Allison

155. *See generally* Horton, *supra* note 25; *see supra* Section I.B. (describing brief history of the remarkable failings that lead to the creation and development of the first caregiver statute). For a more comprehensive history of California's statute, *see* Horton, *supra* note 25.

156. *See generally* In re Estate of Antos, No. G054116, 2017 WL 5185178, at *11 (Cal. Ct. App. Nov. 17, 2017).

157. *See id.* at *4.

158. CAL. PROB. CODE § 21384(a) (West 2023); NEV. REV. STAT. § 155.0975(4) (2013).

159. CAL. BUS. & PROF. CODE § 6103.6 (West 2023).

160. *See supra* Section I.A.

161. CAL. PROB. CODE § 21362(a) (West 2013); NEV. REV. STAT. § 155.0935 (2013); 33 R.I. GEN. LAWS § 33-19.1-2(1) (2013).

162. *See generally* Durham v. Durham, No. 5-20-0140, 2021 Ill. App. LEXIS 567, at *1 (5th Dist. Mar. 31, 2021).

163. *See* Horton, *supra* note 25, at 55–56.

164. CAL. PROB. CODE § 21374(a) (West 2011).

165. *See* 755 ILL. COMP. STAT. 5/4a-5(2) (2018) ("Family member means a spouse, civil union partner, child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin, or parent of the person receiving assistance.") (internal quotations omitted).

166. *Durham*, 2021 Ill. App. LEXIS 567, at *3.

was found to be a caregiver within the meaning of the statute.[167] Had her husband, the testator's son, been the object of the challenged transactions, then the presumption could not have been applied.[168] This definition of "family" thus places two individuals of relatively equal ability to exert undue influence—a child-in-law of many decades may be viewed by an in-law like an actual child—on strikingly different statutory grounds.[169] One is completely free of the caregiver statute's reach, while the other is squarely within it.[170] Further, a spouse seeking to defraud their wealthy in-laws need only conspire with their spouse so that the caregiving and bequests are all in the name of the natural child to evade the statute's presumption of undue influence.[171]

For all of these reasons, some have suggested that the common law presumption better protects the elderly from financial abuse by family caregivers than do caregiver statutes.[172] The common law presumption lacks any family exception, thus acknowledging "the existence of questionable transfers to blood relations . . . to the elder."[173] While some argue that this flaw means caregiver statutes should be abandoned entirely in light of the already-functional common law presumption,[174] as previously noted, the caregiver statutes have several distinct advantages over the common law presumption,[175] and so reform should seek to rectify these flaws within the statutory framework.

Other issues have been raised by practitioners, but have yet to see the light of caselaw.[176] These include the use of dollar thresholds, which may produce the "odd result" of exempting or including transfers within the statutory presumption based solely on an extra dollar

167. *Id.* at 40–41.

168. *See* 755 ILL. COMP. STAT. 5/4a-5(2) (West 2018).

169. *See generally* Durham v. Durham, No. 5-20-0140, 2021 Ill. App. LEXIS 567, at *41 (5th Dist. Mar. 31, 2021) (citing 755 ILL. COMP. STAT. 5/4a-5(2) (West 2018)).

170. *See id.*

171. *See generally id.*

172. *See* Daniel D. Murphy, *Who's on First? Legislative Review Currently Underway of California's 1993 Statutory Protections for the Elderly from Financial Abuse*, PLAINTIFF (Jan. 2009), https://plaintiffmagazine.com/recent-issues/item/who-s-on-first-protecting-california-s-elderly-from-financial-abuse (arguing that in cases involving family influencers, the California caregiver statute "fails to provide any protection for the victim").

173. *Id.*

174. *See id.*

175. *See supra* Section II.A. Most notably, the caregiver statutes supplies a level of ex ante protection that the common law presumption fails to provide.

176. *See* Shoff & Mannlein Interview, *supra* note 93 (noting that Illinois voids the entire instrument).

transferred.[177] Others have critiqued lawmakers' decision to void either an entire instrument based on the statutory presumption, rather than a singular transfer within it.[178] The next section provides proposed solutions for these issues and more.

III. A Model for Future Caregiver Statutes

As previously discussed, the proper way to view caregiver statutes is as a method of providing clear standards for a certain type of relationship that would otherwise be covered by the prevailing common law presumption of undue influence.[179] Rather than applying a presumption to novel circumstances, these statutes create specialized rules for a type of "dominant-subservient" confidential relationship already encapsulated by the common law presumption,[180] but for which the heightened vulnerability of the victim drives lawmakers to seek enhanced safeguards and protections. The suspicious circumstances of the restatement are inferred from the fact of a dependent adult[181] and the potential for an unnatural bequest.[182] This framing of the caregiver statutes also provides insight into the reasoning behind certificates of independent review, since under the restatement, "independent advice from an attorney" may detract from the suspicious circumstances required for the common law presumption.[183] Below, suggestions are made for several caregiver statute terms that are faithful to the long-standing principles behind the common law presumption.[184]

177. Jeffrey R. Gottlieb, *A New Weapon Against Elder Abuse: Presumptively Void Transfers to Caregivers*, ILL. BAR J., Jan. 2015, at 1, 3.

178. Shoff & Mannlein Interview, *supra* note 93 (noting that Illinois voids the entire instrument).

179. *See supra* Section I.A.

180. *See* RES. PROP., *supra* note 18, cmt. g.

181. *See* CAL. PROB. CODE § 21366 (West 2011) (laying forth health and physical conditions in which a person is so weakened as to be a "dependent adult"); RES PROP., *supra* note 18, § 8.3(b) cmt. h (describing as a suspicious circumstance "the extent to which the donor was in a weakened condition . . . and therefor susceptible to undue influence").

182. *See* Horton, *supra* note 25, at 67–68 (noting that caselaw has historically treated bequests to unrelated persons such as professional caregivers as "unnatural"); RES PROP., *supra* note 18, § 8.3(b) cmt. h (describing as a suspicious circumstance "whether the disposition of the property is such that a reasonable person would regard it as unnatural").

183. RES PROP., *supra* note 18, § 8.3(b) cmt. h.

184. *See infra* App. A for a model statute that implements these suggestions.

A. The "Caregiver" Definition

The Illinois statute defines caregiver as "[a]nyone 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."[185] This relatively broad definition goes on to include others related to or employed by the caregiver, but excludes family members of the person receiving assistance.[186] As previously noted, other states have included requirements that the caregiver receive remuneration,[187] which stand in stark contrast with Illinois' explicit inclusion of volunteer caregivers. This inclusion better fulfills the policy objective of protecting the vulnerable elderly, and so should serve as our model moving forward.[188]

Making caregiver statutes inapplicable to volunteer caregivers is unnecessary for several reasons. Doing so ignores the entire category of people who are working in expectation of inheritance.[189] In fact, those whose sole compensation for caregiving comes through inheritance may be *more likely* to attempt to influence their ward in order to receive a larger payout. This sentiment can be seen in cases like *Masters*, where one child provides caregiving services to their parent, yet receives no salary.[190] Ries, the daughter who was found to have exerted undue influence, was noted as having told her brother-in-law that by having her father's estate plan changed, she was just "keep[ing] an eye out for [her] inheritance."[191] Those who receive compensation have a financial gain whether or not they can influence their way to a bequest, so they have a level of built-in protection that volunteer caregivers lack. The stakes are higher for the cunning volunteer caregiver, so giving them leeway to receive larger bequests makes little sense.

Further, the prevailing common law presumption—and the caregiver statute that builds upon it—relies on the nature of the relationship between caregiver and ward to suggest that susceptibility for undue

185. 755 ILL. COMP. STAT. 5/4a-5(1) (2018).
186. *Id.*
187. CAL. PROB. CODE § 21362(a) (West 2011); NEV. REV. STAT. § 155.0935 (2015); 33 R.I. GEN. LAWS § 33-19.1-2(1) (2015).
188. *See infra* App. A §1(1).
189. *See* Chen, *supra* note 86, at 1493 (describing how informal caregivers may work, not for a salary, but for the reward of inheritance).
190. *See* Masters v. Ries, No. D070963, 2017 WL 1075065, at *4 (Cal. Ct. App. Mar. 22, 2017).
191. *Id.* at *2.

influence exists.[192] In the caregiver context, it is the providing of care to a physically or mentally weaker person that tends to create a dominant-subservient relationship,[193] not whether the caregiver is compensated. Volunteer and professional caregivers share the same dominant position from which to exert undue influence over their ward.[194] Illinois' standard of "assuming responsibility" for the care of another person reflects this reality, placing emphasis on the dependent relationship between caregiver and ward.[195] This means that it operates in closer harmony to the common law standard than does any attempt to artificially distinguish between compensated and volunteer caregivers.

In 2015, Nevada changed its caregiver definition from one who provides services "regardless of whether the person is being compensated" to "a person who provides . . . services . . . for remuneration."[196] Some practitioners have expressed frustration with the new standard.[197] The current version of the statute makes it easier for people to target elders for an inheritance, since they can get close to them by providing casual services without having to establish a professional caregiving relationship.[198] Once they do, any bequests they receive are safely outside the scope of Nevada's caregiver statute.[199]

Requiring remuneration in the definition of "caregiver" neglects the reality that many who target the elderly do it primarily for an inheritance.[200] Statutes using this definition arbitrarily draw a policy distinction between paid and volunteer caregivers, although they are in

192. *See* RES. PROP., *supra* note 18, § 8.3(b) cmt. g; Bernard v. Foley, 139 P.3d 1196, 1199 (Cal. 2006) (describing how California's common law presumption first asks whether "the person alleged to have exerted undue influence had a confidential relationship with the testator"); In re Estate of Bethurem, 313 P.3d 237, 241 (Nev. 2013) (describing how Nevada's common law presumption applies if a fiduciary relationship exists); DeHart v. DeHart, 986 N.E.2d 85, 95–96 (Ill. 2013) (describing how Illinois' common law presumption depends in part on a dependent-dominant relationship between the testator and beneficiary).

193. *See* RES. PROP., *supra* note 18, § 8.3(b) cmt. g.

194. *See* A.B. 1172, 1997–1998 Reg. Sess. (Cal. 1997) (suggesting that the issue with caregivers is that they "are often working alone and in a position to take advantage of the person they are caring for"). The idea that this is true for both compensated and uncompensated caregivers was accepted by the California Supreme Court in Bernard, 139 P.3d at 1206.

195. 755 ILL. COMP. STAT. 5/4A-5(1) (2018).

196. S.B. 484, 2015 Leg., 78th Reg. Sess. (Nev. 2015).

197. *See, e.g.*, Grover Interview, *supra* note 66.

198. *Id.*

199. *See* NEV. REV. STAT. § 155.0935 (2013).

200. *See, e.g.*, Masters v. Ries, No. D070963, 2017 WL 1075065, at *2 (Cal. Ct. App. Mar. 22, 2017).

identical positions to exert undue influence. For these reasons, future caregiver statutes should look to Illinois' as a template for their caregiver definitions, and include both those who provide services voluntarily and those who do so for compensation.[201]

B. A More Nuanced Family and Friends Exception

When it comes to financial elder abuse, the perpetrators are most likely to be the victim's children, grandchildren, or other close family members.[202] The tension between this factual scenario and probate's favoring of bequests to family members can be seen in many caregiver statutes, which include a categorical exception for family caregivers[203] although, statistically, abusive caregivers are most likely to fall into this category.[204] These statistics are why, in probate's cousin, contract law, transfers to family members have historically been subject to *even greater* undue influence scrutiny than those to professional contracts.[205] While the tradition of viewing family as the natural object of bequests counsels against applying such radical treatment to probate, the statistics support including family caregivers within the reach of the statutes. Family members should not be categorically exempted from the caregiver statutes but should instead be held to a lower evidentiary standard in rebutting the presumption of undue influence.[206]

Not only are undue influencers statistically more likely to be family members, family is also *most able* to exert undue influence.[207] The familial relationship is a unique one, given the trust and confidence that exists within families—one might even call it a confidential

201. *See infra* App. A § 1(1).

202. Black, *supra* note 2, at 294 (citing Jeff D. Opdyke, *Intimate Betrayal: When the Elderly Are Robbed by Their Family Members*, WALL ST. J., Aug. 30, 2006, at D1).

203. *See e.g.*, CAL. PROB. CODE §21362(a) (West 2011) (exempting family within the fourth degree).

204. *See* Black, *supra* note 2, at 294. One recent survey of Westlaw cases in which expectant heirs hope to void a transaction on capacity or similar grounds has shown that the abusing party was a family member approximately 55% of the time. Chen, *supra* note 86, at 1485 fig. 2. It should be noted that while these statistics suggest that elder abusers are more likely to be family members, this does not imply that family members are likely to be elder abusers. *Id*. at 1490.

205. *See* Chen, *supra* note 86, at 1478 (noting that "while judicial opinions on mental capacity and neighboring principles were not uniform, judges tended to protect strangers who had no reason to suspect incapacity [yet] were generally reluctant to uphold contracts . . . in . . . family relationships").

206. *See infra* App. A §§ 1(2), 2(2).

207. *See* Black, *supra* note 2, at 294; Chen, *supra* note 86, at 1490.

relationship.[208] A parent would be inherently more likely to trust a child who tells them that they must change their will or risk losing the family farm[209] than they would a professional caregiver. For these reasons, practitioners have suggested that one of the largest issues with California's caregiver statute is that "people related to the elder by blood" are exempt even though "statistics reveal that [these people] are the most common predators."[210]

Nor can a categorical family exception be justified as a statutory application of historical jurisprudence. The common law presumption of undue influence does not exempt family members at all.[211] In fact, *Antos* and *Masters* have illustrated that the common law presumption often applies to influencers even where they have been found outside the reach of the caregiver statute because of their family status.[212] Because the common law presumption depends primarily on a confidential relationship, which may exist independent of blood relation, courts have repeatedly applied the presumption for undue influence between family members.[213] These same historical principles undergird the caregiver statutes, so a categorical family exception is contrary to the historical jurisprudential principles that led to the creation of the presumption in the first place.

Because informal caregivers, generally family members, make up approximately 80% of the long-term care for the elderly in the United States,[214] a categorical family exception places a staggering amount of caregivers outside the reach of the caregiver statutes. Certainly, probate's history reveals that most people structure their estate plans to benefit their family.[215] This is why courts have historically found family

208. *See* RES. PROP., *supra* note 18, § 8.3(b) cmt. g.

209. Durham v. Durham, No. 5-20-0140, 2021 Ill. App. LEXIS 567, at *11 (5th Dist. Mar. 31, 2021).

210. Murphy, *supra* note 172.

211. *See supra* Section II.D.

212. *See supra* Section II.D.

213. *See* Estate of Stephens, 49 P.3d 1093, 1100 (Cal. 2002) (applying a presumption of undue influence where a parent depends on their child, receives no independent advice, and gifts property to their child); Solon v. Lichtenstein, 244 P.2d 907, 911 (Cal. 1952) (applying a presumption of undue influence to gifts between parents and children).

214. Hofri-Winogradow & Kaplan, *supra* note 96, at 2003.

215. This can be seen from intestacy laws, which seek to apply the average testator's wishes, and which drastically favor descendants and spouses as objects of an estate. RES. PROP., *supra* note 18, §§ 2.2, 2.1.

to be the natural object of a bequest.[216] However, this historical tendency councils at most that gifts to family receive increased deference, not that they be exempted entirely, for that very history shows that gifts to family members are frequently tainted with undue influence.[217] It is for this reason that common law courts have often included family gifts within a presumption of undue influence.[218] So, while it may be wise not to hold family caregivers to the rigorous "clear and convincing" standard of rebuttal, categorically exempting them from caregiver statutes seems to go too far.

Along with the family exception, California[219] and Rhode Island[220] also include a similar exception for caregivers who are friends of the testator. These exceptions serve to protect good Samaritans, who might provide a service as small as picking up groceries for an elderly person.[221] They also provide for the reality that testators may be just as close with friends as with their family.[222] However, this reality also means that, like family members, close friends can use their intimate relationship as leverage to unduly influence a testator.[223] The trust and confidence shared by close friends thus counsels both for the inclusion of some type of exception for friend caregivers and against their total exclusion from a caregiver statute's rebuttable presumption.

A better solution than a categorical family or friend exception would be to merely lessen the evidentiary burden on the family or friend caregiver.[224] One of practitioners' main concerns with removing

216. *See, e.g.*, In re Kaufmann's Will, 247 N.Y.S.2d 664, 685 (App. Div. 1964).

217. *See* Black, *supra* note 2, at 294.

218. *See, e.g.*, In re Estate of Antos, No. G054116, 2017 WL 5185178, at *5–6 (Cal. Ct. App. Nov. 17, 2017).

219. CAL. PROB. CODE § 21362(a) (West 2011) (defining "care custodian" to exclude those with a pre-existing personal relationship with the testator if they provide services without remuneration).

220. 33 R.I. GEN. LAWS § 33-19.1-2(1) (2023) (including a provision mirroring California's).

221. *See* Conservatorship of Estate of Davidson, 6 Cal. Rptr. 3d 702, 711–12 (Cal. Ct. App. 2003) (deciding to not apply California's previous caregiver statute to the testator's good friend).

222. *See id.* at 713 (finding a contradiction where a caregiver statute draws a distinction between blood relatives and others, when both may be intimately and personally connected to the testator).

223. *See* Bernard v. Foley, 139 P.3d 1196, 1211 (Cal. 2006) (George, C.J., concurring) (noting that friend caregivers enjoy the same dominion over their wards as family or professional caregivers). It is worth noting that *Bernard* was statutorily overturned by § 21380. Even if it is no longer the law, however, the policy concern expressed by the California Supreme Court remains true.

224. *See infra* App. A § 2(2).

the family exception is that it may open almost every will to an insurmountable burden shifting contest.[225] However, such a contest need not be subject to the rigorous clear and convincing standard that is typically applied. Rather, as proponents of the family exception have noted, probate has historically treated gifts to family as presumptively more "natural" than other gifts.[226] This may act as inherent evidence in favor of the family caregiver, thus justifying a lower evidentiary standard as applied to them. Employing a lower burden, such as a preponderance of the evidence, for family caregivers solves many of the problems associated with a categorical family exception, while still recognizing the traditional respect given to gifts to family members.

The fear of a probate court overflowing with contests of gifts to family caregivers can also be alleviated in some other ways, without resorting to a categorical family exception. First is a feature adopted, in part, by Nevada and Illinois.[227] The former's unique family exception excludes heirs, unless they receive more than their intestate share.[228] Illinois has a similar clause, but instead excludes caregivers who receive less than they would have under a prior estate plan.[229] These provisions recognize that a primary concern behind undue influence is that the wrongdoer will benefit unduly at the cost of other beneficiaries.[230] If one influences an elder to give them *less* than they otherwise would have received, then this is hardly a concern. So, a nuanced family exception could exclude caregivers who receive less than they would have under a prior instrument, or if no prior instrument existed, then under the relevant intestacy laws.[231] Applying this threshold to family caregivers would lessen worries about overapplication of the caregiver statute to family bequests,[232] as well as relieve judicial burdens.[233]

225. Shoff & Mannlein Interview, *supra* note 93 (describing how difficult it is to overcome the clear and convincing standard of rebuttal in Illinois' caregiver statute).
226. *See* Horton, *supra* note 25, at 52.
227. *See* NEV. REV. STAT. § 155.0975(2) (2015); *see also* 755 ILL. COMP. STAT. 5/4a–15(1) (2015).
228. *See* NEV. REV. STAT. § 155.0975(2) (2015).
229. *See* 755 ILL. COMP. STAT. 5/4a–15(1) (2015).
230. *See* Bernard v. Foley, 139 P.3d 1196, 1199 (Cal. 2006).
231. *See infra* App. A § 2(2)(C).
232. *See* Barton et al., *supra* note 23, at 25.
233. *See* Shoff & Mannlein Interview, *supra* note 93 (expressing worries that removing Illinois' family exception would open the courts to a flood of will contests).

Friend caregivers are in a slightly different position, since they would not receive an intestate share.[234] Rather, their threshold question should be whether they do, in fact, share a close personal relationship with the testator. The states that apply an exception for friend caregivers typically require a showing that they had such a relationship for a certain timeframe before becoming the testator's caregiver.[235] Once they have made this showing, the rebuttable presumption should still apply, but they should be entitled to the lower evidentiary standard described above.

Another way to lessen a prospective influx of family contests is to only apply the statute to caregivers who are providing care at the time that the transfer instrument is modified to include them.[236] For example, if a parent executes a will in 2040 that leaves a bequest to their child, the fact that the child becomes their caretaker in 2070 would not open the will to a presumption of undue influence under the caregiver statute.[237] Further, such a provision would likely have little effect in the case of a professional caregiver, since the typical fear is that they will use their position as caregiver to influence the change to the instrument.[238] Such a provision would ease the issue of including family caregivers while maintaining the statute's overall strength.

Thus, instead of a categorical family or friend exception to caregiver statutes, a more nuanced alternative may provide better policy results. This can be achieved by including family and friend caregivers within the scope of the statute's presumption of undue influence, but subject to a lower standard of rebuttal. Family and friend caregivers may rebut the presumption by a mere preponderance of the evidence

234. *See* UNIF. PROB. CODE § 2–102–103, 105 (directing for intestate share for spouses and other relatives, but in their absence for the estate to pass to the state). While the intestate rules of the Uniform Probate Code do not represent every detail of every state's intestacy statute, they present the strong tradition of favoring gifts to family.

235. CAL. PROB. CODE § 21362(a) (West 2011) (requiring that they have 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 dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care"); 33 R.I. GEN. LAWS § 33–19.1–2(1) (2015) (imposing the same requirements as California).

236. *See infra* App. A § 2(1).

237. *See* Barton et al., *supra* note 23, at 25. The primary concern with gifts to caregivers is that they used their position as caregiver to influence the creation of the gift. If the gift existed before they had this position of influence, then undue influence is highly unlikely.

238. *See supra* Section I.A.

to show that either: 1) the gift was not the result of undue influence;[239] or 2) the gift was less than they would have been entitled to under a previous instrument or under intestacy laws.[240]

C. The Financial Threshold

Many caregiver statutes have a financial threshold—either a fixed dollar amount or a percentage of total estate assets (including both probate and non-probate transfers)—above which the statutes apply.[241] Having such a threshold provides several distinct benefits. It can save caregivers from being attacked over small gifts that do not burden the larger estate.[242] A financial threshold also allows the testator to avoid the additional cost of the independent review process for *de minimis* bequests to caregivers.[243] Finally, they alleviate judicial burdens by keeping small gifts out of court.[244]

Yet how a financial threshold is implemented can have a drastic impact on its success. Some states utilize a fixed-dollar threshold.[245] For example, Illinois uses $20,000[246] and Nevada uses $3,000.[247] If a gift to a caregiver rises above these values, then it is subject to the statutory presumption of undue influence.[248] While the fixed-dollar standard is easily administered, it may also produce some odd results.[249] The first is that of any fixed threshold: it applies the rule in absolute on one side of

239. *See infra* App. A § 2(2)(A)–(B).
240. *See infra* App. A § 2(2)(C).
241. *See* NEV. REV. STAT. § 155.0975(6) (2015) (using a threshold of $3,000); 755 ILL. COMP. STAT. 5/4a–10 (2018) (using a threshold of $20,000); CAL. PROB. CODE § 21382(e) (West 2020); CAL. PROB. CODE § 13100 (2023) (applying a threshold of $5,000 if the total estate exceeds $166,250); 33 R.I. GEN. LAWS § 33–19.1–4(5) (2015) (applying a threshold of $5,000 if the total estate exceeds $50,000); MO. REV. STAT. § 197.480 (2004) (applying a threshold of 5% of the testator's total assets).
242. Barton et al., *supra* note 23, at 24.
243. *Id.*
244. *Id.*
245. *Id.*
246. 755 ILL. COMP. STAT. 5/4a–10 (2018).
247. NEV. REV. STAT. § 155.0975(6) (2015).
248. Paul Peterson, *Presumptively Void Transfers to Caregivers—A Bit of Mercy Please?*, 65 TRUSTS & EST. (Ill. St. Bar Assoc., Springfield, IL), Oct., 2018, at 3 ("[Illinois' caregiver statute] presumes a caregiver receiving more than $20,000 is in essence guilty of fraud, duress, or undue influence.").
249. Gottlieb, *supra* note 177, at 3 (describing how Illinois' financial threshold "could lead to the potentially odd result of ignoring a $20,000 transfer while presumptively voiding a $20,001 transfer in its entirety, even in an otherwise identical situation").

what is a relatively arbitrary line, while discarding it on the other side.[250] This means, of two caregivers who both exert undue influence over their ward in identical situations, one dollar can make the difference between one unduly benefiting and the other losing their will contest.[251]

Another result that seems out of line with the statute's background principles may be seen by comparing the estates of a relatively wealthy and a relatively poor testator. If the former leaves his caregiver in Illinois $20,000, this might be equivalent to a rounding error from the point of view of the estate. If the latter does so, it may swallow up the gifts to the rest of his heirs. If one of the principles behind including a financial threshold in a caregiver statute is to balance cost savings[252] against protection of the testator's intended estate plan,[253] then the fixed-dollar threshold feels simultaneously under- and overinclusive. In some situations it could include bequests that the intended beneficiaries would hardly notice, while in others exempting gifts that defeat the testator's entire estate plan.[254]

To rectify some of the incongruities with the fixed-dollar threshold, some states, such as California and Rhode Island, have implemented a modified form of the threshold.[255] These apply a fixed-dollar threshold, but only if the testator's estate (including both probate and non-probate transfers) is above a certain size.[256] This resolves the relative size issue described above, but only in some situations. By applying a fixed-threshold to a fixed-threshold, it only solves the problem for estates below the statutory minimum—it still places estates in the tens of thousands in the same position as estates in the millions.[257] For example, Rhode Island's threshold of $5,000 is 10% of its estate minimum

250. *Id.*
251. *Id.*
252. *See* Barton et al., *supra* note 23, at 34.
253. *See* Horton, *supra* note 25, at 55.
254. *See* Gottlieb, *supra* note 177, at 3.
255. *See* CAL. PROB. CODE § 21382(e) (West 2020); *see also* CAL. PROB. CODE § 13100 (2023); *see also* 33 R.I. GEN. LAWS § 33–19.1–4(5) (2015).
256. CAL. PROB. CODE § 21382(e) (West 2020); CAL. PROB. CODE § 13100 (West 2023) (applying a threshold of $5,000 if the total estate exceeds $166,250); 33 R.I. GEN. LAWS § 33–19.1–4(5) (2015) (applying a threshold of $5,000 if the total estate exceeds $50,000).
257. Rhode Island's law treats all estates with assets over $50,000 alike. *See* 33 R.I. GEN. LAWS § 33–19.1–4(5) (2015). Meanwhile, California does the same for estates with assets above $166,250. *See* CAL. PROB. CODE § 13100 (West 2023).

of $50,000,[258] so for estates that just meet this minimum, a transfer that could escape the caregiver statute's presumption might be harshly felt, while being hardly noticed for larger estates. If Grandma dies leaving $50,000, and $4,999 is siphoned away by an abusive caregiver, that could be a drastic harm to the expectant heirs. If she dies leaving $50 million, the $4,999 might not even be noticed among the heightened estate fees and taxes. Further, an undue influencer who stays just below the threshold may still avoid the punishment of one who crosses it, even though they both engage in financial abuse.[259]

A better solution may be that adopted by Missouri. Rather than employing any type of fixed-dollar threshold, the Show-Me State exempts transfers only if they are smaller than 5% of the total estate size.[260] This percentage threshold exempts transfers only if they do not overwhelm an estate.[261] Further, unlike California or Rhode Island's threshold-on-a-threshold approach, this allows each estate to be evaluated on its own terms, rather than treating a $50,000 estate alike with a $50 million estate.[262] An effective threshold, then, could employ an appropriate percentage, coupled with a clear reference to the assets (probate or non-probate) that are to be included in the calculation of estate size.

The drafting clarity of the financial threshold clause can also drastically influence its effectiveness. The Illinois caregiver statute is vague as to whether its threshold applies to individual gifts to caregivers, or to them cumulatively.[263] This leaves estate planners unable to accurately predict which of their clients' gifts may render their instrument void.[264] Nevada's threshold language can provide an example of "clarity," through its inclusion of the clause:

> For the purposes of this subsection, regardless of the number of transfer instruments involved, the value of property transferred to a transferee pursuant to a transfer that is triggered by the transferor's death *must include the value of all property transferred to that transferee* or for such transferee's benefit after the transferor's death.[265]

258. 33 R.I. GEN. LAWS § 33–19.1–4(5) (2015)
259. *See* Gottlieb, *supra* note 177, at 3.
260. MO. REV. STAT. § 197.480 (2004).
261. *See id*.
262. *See* 33 R.I. GEN. LAWS § 33–19.1–4(5) (2015).
263. *See* 755 ILL. COMP. STAT. 5/4a–10 (2018) (saying only that an instrument is void if "the fair market value of the transferred property exceeds $20,000").
264. Shoff & Mannlein Interview, *supra* note 93 (expressing frustration with the vagueness of Illinois' financial threshold).
265. NEV. REV. STAT. § 155.0975(6) (2015) (emphasis added).

By explicitly including every transfer to the caregiver in determining whether the threshold has been reached, Nevada's statute provides a clear calculus to practitioners.[266] On the other hand, the same result—certainty—could be reached through the opposite legislative determination. Thus, regardless of whether a state chooses to adopt a cumulative or individual method, future caregiver statutes should utilize a percentage threshold with clear guidelines for which gifts will count towards the limit.[267]

D. Voiding Only the Suspect Transfer

When the statutory presumption of undue influence goes unrebutted, most states void only that specific gift, leaving the rest of the instrument intact.[268] Illinois stands alone in voiding the whole transfer instrument.[269] Illinois' rationale is simple: if a caregiver influences a testator to execute a new will, the new instrument may bear little resemblance to their previous estate plan—meaning that the entire instrument is tainted by undue influence.[270] However, voiding the entire instrument could have wide, and likely undesirable, consequences.[271]

If the instrument is a will, then voiding it may open the estate to intestate succession.[272] So, if the testator has consistently had an estate plan that differs materially from the intestate rules—perhaps by favoring others over his children—then voiding the instrument could frustrate not only the scheme of the influencing caregiver, but the testator's actual wishes.[273] Conversely, voiding only the challenged transfer may allow injustice on the periphery of the will, but will not open the will to the invalidation of otherwise valid bequests, executor assignments, or tax savings provisions.[274] Thus, on balance, voiding only the tainted transfer may produce more just results, more of the time.[275]

266. *See id.*
267. *See infra* App. A §§ 2(1), (3).
268. *See, e.g.*, NEV. REV. STAT. § 155.097 (2015); *see also* CAL. PROB. CODE § 21386 (West 2018); *see also* 33 R.I. GEN. LAWS §33-19.1-6 (2015).
269. Peterson, *supra* note 248, at 4; Barton et al., *supra* note 23, at 25.
270. *See* Berg, *supra* note 66, at 6.
271. Barton et al., *supra* note 23, at 25.
272. *Id.*
273. *See* Peterson, *supra* note 248, at 3; *contra* Berg, *supra* note 66 (arguing that where an influenced instrument varies greatly from a previous instrument, voiding the whole instrument is the only way to return to the testator's intended estate plan).
274. *See* Berg, *supra* note 66, at 6.
275. *See infra* App. A § 2(3).

E. Standards of Rebuttal

For a caregiver statute to have a real impact, it must have bite. That is why most prescribe that once a presumption of undue influence has been applied, the caregiver may rebut the presumption only by clear and convincing evidence.[276] Some have suggested that this standard makes the statutory presumption nearly impossible to overcome,[277] meaning that the statutes act as a *de facto* bar on all gifts to caregivers. However, other estate planners have noted that other avenues for giving exist, such as lifetime gifts,[278] holding property in joint tenancy,[279] or the use of a certificate of independent review.[280] Rather than a total bar, the high standard of clear and convincing evidence at the estate planning stage simply adds gravity to the decision to give to a caregiver.[281] This directly supports the policy objectives behind caregiver statutes.[282]

Further, the clear and convincing standard comports with many states' common law presumption.[283] Nevada has historically applied this standard,[284] as have Rhode Island[285] and Illinois.[286] So for many situations, the caregiver statute does not even change the applicable law when it comes to the standard of rebuttal.

Clear and convincing evidence is generally the appropriate standard for rebuttal, but policy suggests some general exceptions. First is the determination that a certificate of independent review *per se* satisfies

276. *See* CAL. PROB. CODE § 21380(b) (West 2020); IDAHO CODE § 15-2-616 (2023); NEV. REV. STAT. § 155.097(3) (2015); 33 R.I. GEN. LAWS § 33-19.1-3(b) (2015); 755 ILL. COMP. STAT. 5/4a-15(2) (2015).

277. Grover Interview, *supra* note 66 (noting that in his experience, he has never seen the statutory presumption overcome).

278. Shoff & Mannlein Interview, *supra* note 93; Zoom Interview with Josh Wang, Partner, Wang L. (Oct. 6, 2021) [hereinafter Wang Interview].

279. Wang Interview, *supra* note 278.

280. Barton et al., *supra* note 23, at 25.

281. *Id.* at 24 (describing the extensive questioning an attorney must engage in to determine whether a "caregiver" relationship exists and whether undue influence has occurred).

282. *See supra* Section II (describing how caregiver statutes provide barriers to undue influence before a will is even introduced into probate). Since the purpose of the caregiver statutes is to protect against undue influence in a specific relationship, providing ex ante protections directly comports with this purpose.

283. *See* Peterson, *supra* note 248, at 3.

284. In re Estate of Bethurem, 313 P.3d 237, 241 (Nev. 2013).

285. Lawton v. Higgins, No. PP: 05-2341, 2008 R.I. LEXIS 74, at *32–33 (R.I. June 13, 2008) (citing Passarelli v. Passarelli, 179 A.2d 330, 332 (R.I. 1962)).

286. In re Estate of Henke, 561 N.E.2d 314, 318 (Ill. App. Ct. 1990).

this evidentiary requirement.[287] These certificates have proven to be a powerful champion of testamentary freedom while still satisfying the policy objectives of the caregiver statutes.[288] A principle behind the statutes is to avoid undue influence,[289] and a third party preemptively reviewing the instrument can protect against undue influence before the instrument even reaches a court.[290] It may be argued that the certificates could be abused, that undue influencers could simply conspire with unscrupulous attorneys to obtain them. However, they will function as intended in many cases, and in others the problem can be alleviated in court by assessing the validity of a specific certificate.[291]

Policy may also suggest the use of a lower burden of proof in certain situations.[292] For example, if the categorical family exception is abandoned,[293] then perhaps a lower evidentiary standard can be used by family caregivers. Some applications of the common law presumption have already applied a preponderance of the evidence standard for rebuttal,[294] and as noted previously, the general desire of most testators to give to their families[295] can be treated as implicit evidence that supplements the lower standard.[296] So, applying a preponderance of the evidence standard to family caregivers[297] may be a fair way to solve many critiques of my earlier argument for abandoning a categorical family exception.

Another suitable application of the preponderance of the evidence standard may be where the recipient caregiver would have received the

287. *See infra* App. A § 2(2)(D). This is also the case in California and Nevada. CAL. PROB. CODE § 21384(a) (2018); NEV. REV. STAT. § 155.0975(4) (2015).

288. *See* Butler v. LeBouef, 203 Cal. Rptr. 3d 572, 582 (Cal. Ct. App. 2016) ("[P]robate expert, Attorney Marilyn Anticouni, testified that a certificate of independent review is a simple solution to a problem with big consequences.") (internal quotation marks omitted).

289. *See* Horton, *supra* note 25, at 55 (noting that lawmakers "saw the statute as a potent weapon against financial elder abuse").

290. *See* Barton et al., *supra* note 23, at 25–26 (describing the heightened scrutiny with which lawyers must view gifts to caregivers).

291. *See generally* Rhodes v. Gonzales, No. B2880577, 2019 Cal. App. LEXIS 5323, at *11–13 (Cal. Ct. App. Aug. 13, 2019) (evaluating the validity of a certificate of independent review).

292. *See infra* App. A § 2(2)(B).

293. *See supra* Section III.B.

294. *See, e.g.*, David v. Hermann, 28 Cal. Rptr. 3d 622, 631 (Cal. Ct. App. 2005).

295. *See* Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 281 (1963).

296. *See supra* Section III.B.

297. *See infra* App. A § 2(2)(B).

same amount, or more, under a previous, unchallenged instrument. Illinois has employed this standard since 2015.[298] Caregiver statutes, after all, aim to protect the elderly from undue influence exerted by their caretaker for financial gain.[299] If influence is exerted to receive *less* inheritance, then this would seem to be more of a quirk than a reason for concern. So, proving this situation by a relaxed standard does not endanger the effectiveness of the caregiver statute.

F. Putting It All Together

Thus far, arguments have been put forward about several distinct aspects of caregiver statutes. Yet it is one thing to make broad arguments and another to offer a concrete suggestion for future caregiver statutes. Thus, here is offered a template of sorts that seeks to keep the strongest components of existing caregiver statutes while strengthening their weaker terms.[300]

At its core, a caregiver statute should create a rebuttable presumption of undue influence for gifts to caregivers.[301] A caregiver should be defined as anyone who, voluntarily or for compensation, has assumed responsibility for all or a portion of the care of another person who needs assistance with activities of daily living.[302] There should be an exception for spouses and family members who receive less in the transfer than they would under the rules of intestacy.[303] There should also be an exception for *de minimis* gifts to caregivers, defined as a percentage of total estate assets, preferably less than 5%.[304] The standard of rebuttal for the presumption of undue influence should be clear and convincing evidence,[305] unless the caregiver is also a family member or close friend of the testator[306] or receives less than they would under a

298. 755 ILL. COMP. STAT. 5/4a-15(1) (2015).
299. *See* Horton, *supra* note 25, at 55.
300. *See infra* App. A for a statutory model implementing these suggestions.
301. *See infra* App. A § 2(1)-(2).
302. *See infra* App. A § 1(1). This definition tracks almost word-for-word that adopted by Illinois. 755 ILL. COMP. STAT. 5/4a-5(1) (2018); *see also supra* Section III.A.
303. *See infra* App. A §§ 1(2), 2(2)(C). Nevada and Illinois have adopted a very similar exception. NEV. REV. STAT. § 155.0975(2) (2015); 755 ILL. COMP. STAT. 5/4A-15(1) (2018). *See supra* Section III.B.
304. *See infra* App. A § 2(1). As noted in Section III.D., percentages much higher than 5% would have too great an effect on the total estate. Missouri's adoption of a 5% threshold appears to strike a reasonable balance between testamentary freedom and protection of the testator. MO. REV. STAT. § 197.480 (2023).
305. *See infra* App. A § 2(2)(A).
306. *See infra* App. A § 2(2)(B).

previous testamentary instrument.[307] In the latter cases, a preponderance of the evidence may be used to reflect the lessened policy concern over such gifts.[308] Finally, in the event that the caregiver is unable to rebut the presumption of undue influence, only the gift to the caregiver should be deemed void.[309]

Caregiver statutes necessarily have other terms and definitions. However, they do not appear to present as many immediate problems as the ones discussed here. Thus, experimentation by future legislators would likely lead to better results for these terms than this paper could offer.

Conclusion

The tension in testamentary freedom between affecting the words of the testator and protecting them from malicious, external influence has long plagued probate court opinions. Yet through caregiver statutes, some state legislators have offered a balance that, at least in the case of a caregiving relationship, shows much promise. These statutes, while criticized by early commentary, have come to be seen by many as an integral part of their probate toolkit.

Caregiver statutes' protections begin during estate planning, when attorney sanctions[310] and certificates of independent review[311] raise the standard of scrutiny for attorneys drafting wills in suspicious circumstances.[312] They also exert a settlement power by incentivizing undue influencers to avoid the uphill battle against the clear and convincing evidence standard.[313] Finally, they give contesting heirs a handicap in court by placing the initial evidentiary burden on the caregiver.[314] However, the benefit of the statutes' bright-line rules can be contravened by unclear language that allows family members, unpaid

307. *See infra* App. A § 2(2)(C).
308. *See infra* App. A § 2(2)(B)-(C); *see supra* Section III.D.
309. *See infra* App. A § 2(1); *see supra* Section III.E.
310. CAL. BUS. & PROF. CODE § 6103.6 (West 2011).
311. CAL. PROB. CODE § 21384(a) (West 2018); NEV. REV. STAT. § 155.0975(4) (2015).
312. *See supra* Section I.A.
313. *See* Berg, *supra* note 66, at 3.
314. CAL. PROB. CODE § 21380(b) (West 2020); IDAHO CODE § 15-2-616 (2023); NEV. REV. STAT. § 155.097(3) (2015); 33 R.I. GEN. LAWS § 33-19.1-3(b) (2015); 755 ILL. COMP. STAT. 5/4a-15(2) (2015). For an example of this playing out in court, *see* In re Estate of Cline, No. B296907, 2020 Cal. App. LEXIS 4302, at *13 (Cal. Ct. App. July 7, 2020).

caregivers, and others to escape justice.[315] Different financial thresholds may also cause disparate treatment among estates and incentivize triage by cunning abusers.[316] There are thus both real benefits *and* practical issues with today's caregiver statutes. However, their problems are not inherent to this class of statute and are not insurmountable.

The real problems of these caregiver statutes, borne out through practice and litigation, can be solved in many cases through more nuanced exceptions and definitions. Doing so may soften the harshness of the presumption while limiting its loopholes. Further research might focus on how other terms of the caregiver statutes can be improved, or on whether the suggestions offered in this paper stand up to the real-world results of future cases. Caregiver statutes have proven difficult to execute gracefully, but by reaching farther and with a lighter touch, they might alleviate some of the tension found within the freedom of disposition.

315. *See supra* Section I.C.–I.D.
316. Gottlieb, *supra* note 177, at 3.

Appendix A: A Model Caregiver Statute

§ 1 Definitions.

As used in this chapter:

1) "Caregiver" means 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. "Caregiver" includes a caregiver's family member or employee.
2) "Family member" means anyone who is:
    A) A spouse or domestic partner of the specified person;
    B) A relative of the specified person within the fourth degree of consanguinity; or
    C) The spouse or domestic partner of a person described in paragraph (B).
3) "Close friend" means a person who had a personal relationship with the specified person:
    A) At least ninety (90) days before assuming responsibility for all or a portion of the specified person's care;
    B) At least six (6) months before the specified person's death; and
    C) Before the specified person was admitted to hospice care, if the specified person was admitted to hospice care.
4) "Independent attorney" means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue under this chapter, and who would not 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 under this chapter.

§ 2 Presumption of Void Transfer

1) A provision of an instrument making a donative transfer is presumed to be the product of fraud or undue influence if the

transferee is a caregiver of the transferor at the time the provision is drafted and the transfer is greater than five percent (5%) of the transferor's total assets.

2) The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by:
    A) Proving, by clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence, if the caregiver is unrelated to the transferor;
    B) Proving, by a preponderance of the evidence, that the donative transfer was not the product of fraud or undue influence, if the caregiver is a family member or close friend of the transferor;
    C) Proving, by a preponderance of the evidence, that the transferee's share under the transfer instrument is not greater than the share the transferee was entitled to under the transferor's transfer instrument in effect prior to the transferee becoming a caregiver, or if no transfer instrument was in effect, than the transferee's intestate share, if the transfer is triggered by the transferor's death; or
    D) Producing a certificate of independent review in which an independent attorney attests that, prior to the execution of the transfer instrument, they:
        i) Counseled the transferor about the nature and consequences of the intended transfer; and
        ii) Attempted, to the best of their ability, to determine if the intended transfer was the result of fraud or undue influence.
3) For the purposes of this section, regardless of the number of transfer instruments involved, the value of property transferred to a transferee pursuant to a transfer that is triggered by the transferor's death must include the value of all property transferred to that transferee or for such transferee's benefit after the transferor's death.