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## Private Caregiver Presumption For Elder Caregivers

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## PRIVATE CAREGIVER PRESUMPTION FOR ELDER CAREGIVERS

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Raymond C. O'Brien\*

### ABSTRACT

*The percentage of older Americans increases each year, with a corresponding percentage increase of those considered the older old. Many older persons will develop chronic conditions, decreasing their ability to manage the activities of daily living and requiring many to move into assisted living facilities or group homes. When surveyed, a majority of people expressed that they wish to age in their own homes, and government programs are increasingly supportive of this option. This is a viable option for many if they have the assistance of private caregivers—who provide a vast array of support services—and essential person-to-person human contact during the last years of life. Not all caregivers are family; many are friends, partners, and former colleagues. Whether family or nonfamily, private caregivers often provide a recipient with self-sufficiency for many years, and for some until death.*

*This Article discusses the statistics of aging and the obstacles faced by private caregivers who suffer economic deprivation as a result of the time and expense expended on behalf of an elder recipient. Presumptions, statutes, and the process of estate devolution work against compensation for a private caregiver. There is far too little recognition of what is contributed when a person feeds, bathes, administers medications, provides companionship, and confronts the bureaucracy meant to help the old. The common sentiment of all caregivers would be that they do it because they feel they must. But upon the death of the recipient, one person should not walk away with the benefits of the decedent's estate and the other with nothing except the recognition of what they must do and did.*

*To better provide for the equal treatment of private caretakers, this Article posits the creation of a private caretaker presumption in favor of elder caregivers. This presumption would apply to any person who dedicates himself or herself another's care for a period of time sufficient to engender economic benefit to the recipient's estate and a concomitant loss to the caregiver. Then, based upon the estate assets available, the parameters of the claim, and defined mitigating factors, a presumption is raised that the caregiver may file a creditor claim against the estate in an amount that would make the caregiver equal to the other objects of the decedent's bounty. Existing remedies are insufficient; more is needed to promote equity.*

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## INTRODUCTION

As of this writing, every day from now until 2030 an additional 10,000 persons will celebrate their 65<sup>th</sup> birthday.<sup>1</sup> These persons will join a cohort of others, a group whose percentage share of the population has quadrupled since 1900—reaching 17% of the population in 2020—and expanded numerically more than seventeen times, from 3.1 million to 545.7 million people.<sup>2</sup> Current projections indicate that the number of Americans over the age of 85, called the older old, will “more than double from 6.7 million in 2020 to 14.4 million in 2040 (a 117% increase).”<sup>3</sup>

The prescient adage is correct: old age does not arrive unaccompanied. First, many older adults are poor. In 2020, for example, nearly one in ten adults over the age of 65 (five million) lived below what is

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1. *Cost of Care Survey*, GENWORTH, <https://www.genworth.com/aging-and-you/finances/cost-of-care.html> [<https://perma.cc/3CG4-658P>] (last visited Nov. 21, 2022); see also John Harrison & Tim McCurdy, *An Introduction to Medicaid Planning for Long-Term Care Costs*, 47 EST. PLAN. 3 (2020).

2. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUM. SERVS., 2021 PROFILE OF OLDER AMERICANS 4 (2022) [hereinafter 2021 PROFILE OF OLDER AMERICANS], [https://acl.gov/sites/default/files/Profile%20of%20OA/2021%20Profile%20of%20OA/2021ProfileOlderAmericans\\_508.pdf](https://acl.gov/sites/default/files/Profile%20of%20OA/2021%20Profile%20of%20OA/2021ProfileOlderAmericans_508.pdf) [<https://perma.cc/TJ3X-JH2V>].

3. *Id.* at 5. As of 2020, the three states with the highest percentage of persons over 65 are Maine (22%), Florida (21%), and West Virginia (21%). *Id.* at 8.

considered the poverty level.<sup>4</sup> The poverty rate applies to each gender, defining 10.1% of women and 7.6% of men as poor.<sup>5</sup> Second, for most older Americans, increasing age is accompanied by at least one chronic condition. Many have multiple conditions: “[l]eading chronic conditions among adults age 65 and older in 2020 include arthritis (47%); coronary heart disease (14%); myocardial infarction (9%); angina (4%); any cancer (26%); COPD, emphysema, or chronic bronchitis (11%); and diagnosed diabetes (21%).”<sup>6</sup> Many adults over age 65—18% in 2020—also reported trouble with their vision (21%), hearing (29%), walking or climbing stairs (39%), communicating with others (8%), remembering or concentrating (28%), and self-care (8%).<sup>7</sup>

In 2020 nearly 94% of non-institutionalized persons over the age of 65 were covered by Medicare, which covers most of any medical and prescription drug costs.<sup>8</sup> For those who meet state and federal poverty eligibility requirements, Medicaid pays for health care.<sup>9</sup> Medicaid even pays for residential long-term care in nursing facilities.<sup>10</sup> “Keep in mind: 70% [of Americans] over the age of 65 will need some form of [long-term-care]. Twenty percent will need such care for five years or more.”<sup>11</sup> Statistics indicate that the need for nursing home care increases dramatically with age, ranging from 1% for persons ages 65–74, to 2% for persons ages 75–84, to 8% for persons over the age of 85.<sup>12</sup> Costs related to nursing home long-term-care are significant and must be met through self-payment, hybrid insurance coverage, or through meeting Medicaid’s strict eligibility standards.<sup>13</sup>

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4. 2021 PROFILE OF OLDER AMERICANS, *supra* note 2, at 12.

5. *Id.* at 13.

6. *Id.* at 17.

7. *Id.* at 18.

8. *Id.*; Mark Miller, *Medicare: The Next Frontier*, WEALTH MGMT. (June 17, 2019), <https://www.wealthmanagement.com/estate-planning/medicare-next-frontier> [<https://perma.cc/5RWE-56EY>]; see *What Medicare covers*, MEDICARE.GOV, <https://www.medicare.gov/what-medicare-covers> [<https://perma.cc/3D46-85ZX>] (last visited Dec. 4, 2022); see also *Prescription drugs (outpatient)*, MEDICARE.GOV, <https://www.medicare.gov/coverage/prescription-drugs-outpatient> [<https://perma.cc/ZBC7-NGTY>] (last visited Dec. 4, 2022).

9. See generally *Medicaid Eligibility*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/eligibility/index.html> [<https://perma.cc/8AFU-WEL5>] (last visited Nov. 28, 2022); see e.g., *Medicaid Eligibility Requirements*, MARYLAND.GOV, <https://health.maryland.gov/mmcp/Pages/Medicaid%20Eligibility%20Requirements.aspx> [<https://perma.cc/VNR8-SQSZ>] (last visited Nov. 28, 2022).

10. *Nursing Facilities*, MEDICAID.GOV, <https://www.medicaid.gov/medicaid/long-term-services-supports/institutional-long-term-care/nursing-facilities/index.html> [<https://perma.cc/785A-URTR>].

11. Michael Gilfix, *Aging in Place*, WEALTH MGMT. (July 22, 2021), <https://www.wealthmanagement.com/estate-planning/aging-place> [<https://perma.cc/RR6S-ZH94>].

12. 2021 Profile of Older Americans, *supra* note 2, at 7.

13. See Harrison & McCurdy, *supra* note 1, at 3 (providing a basic introduction to the legal issues that arise for families and individuals that plan to use Medicaid to cover their long-term care costs).

Chronic conditions and increasing vulnerability precipitate a third accompaniment: most older persons desire to remain in their homes, not in institutional settings. As of 2019, more than a quarter—approximately 28%—of older persons lived alone, with almost twice as many women living alone as men.<sup>14</sup> Although living alone is associated with significantly better self-rated health,<sup>15</sup> an increasing number of chronic conditions may be exacerbated by solitary living, and even if chronic conditions can be accommodated, commentators warn of other dangers that result from solitary living.<sup>16</sup> In spite of warnings, some elders may be sufficiently independent to manage their activities of daily living (ADLs) with minimal assistance from others, especially if paid personal assistants are available to help with housekeeping and meals.<sup>17</sup>

In response to the desire of most elders to remain at home and to avoid significant long-term care institutional costs, which are often borne by Medicaid support,<sup>18</sup> there has been a shift in federal and state initiatives; one example being home and community-based assistance programs.<sup>19</sup> To support people who wish to remain in their homes, government programs increasingly finance in-home support networks. To coordinate these programs, though, there must be a cadre of unpaid caregivers, most often family members, who move the elder recipient into their home. Alternatively, the caregiver can move into the home of the recipient.

A statistical snapshot exposes an enormous group of caregivers. In 2020 there were an estimated fifty-three million private unpaid caregivers in the U.S., and nearly 79% of these persons cared for an adult over the age of 50.<sup>20</sup> Since 2015, the number of caregivers for all ages has

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14. See Esther O. Lamidi & Sue P. Nash, *Two Decades of Change in Living Arrangements and Health of Middle-Aged and Older Adults in the U.S., 1997–2018*, 41(5) J. OF APPLIED GERONTOLOGY 1407, 1412 tbl.2 (2022).

15. See *id.* at 1408, 1412 tbl.2.

16. See *id.*

17. See Phyllis Talley, *The Elderly Disabled: The Applicability of Disability Rights for Age-Related Disability*, 40 J. LEGAL MED. 115, 121 (2020). For examples of the salary and tax ramifications of personal assistants see 108 AM. JUR. 3D *Proof of Facts* § 2 (2022) (“independent contractor or employee status”).

18. See Talley, *supra* note 17, at 117; See also Melissa Biederman Zubi, *Preserving the Golden Years*, 40 L.A. LAW. 12, 13 (June 2017).

19. See, e.g., Letha Sgritta McDowell, *Legislative Update for Seniors*, 160 TRS. & ESTS. 39, 41 (2021) (referencing the proposed Better Care Better Jobs Act that provides services to seniors living independently in the community). Services include: (1) case management, (2) personal care services, (3) respite care services, (4) adult day care services, (5) homemaker/home health care aide, (6) rehabilitation, (7) any other services requested by state or federal offices. A. KIMBERLY DAYTON, JULIE ANN GARBER, ROBERT A. MEAD & MOLLY M. WOOD, *Home and Community-Based Waiver Services*, in *ADVISING THE ELDERLY CLIENT* § 30.4 (2022).

20. NAT'L ALL. FOR CAREGIVING & AARP, *CAREGIVING IN THE U.S.* 4 (2020) [hereinafter NAT'L ALL. FOR CAREGIVING & AARP, 2020 REPORT], <https://www.caregiving.org/wp-content/uploads/2021/01/full-report-caregiving-in-the-united-states-01-21.pdf> [<https://perma.cc/H9K3-MMYL>].

increased by 7.6 million, with one in six Americans now providing care to someone age 50 or older.<sup>21</sup> Characteristically, 61% of all caregivers are women,<sup>22</sup> and 60% of caregivers have full time jobs outside the home.<sup>23</sup> More than half (56%) of caregivers are over the age of 50 themselves (“elder caregivers”),<sup>24</sup> and they often provide care to a relative, usually a parent, who is on average 74.8 years old and suffering from multiple health conditions.<sup>25</sup> Increasingly, these caregivers provide care for longer periods of time, such as five years or more (28% in 2020 versus 24% in 2015).<sup>26</sup>

In 2020, 37% of elder caregivers reported that the elder recipient lived in the caregiver’s home, meaning that “the caregiver often takes on more tasks and hours of care, resulting in declining health and financial impacts.”<sup>27</sup> The tasks performed include assisting with activities of daily living such as washing, eating, and dressing. An increasing number of caregivers report serving as an advocate for the care recipient with healthcare providers, community service agencies, and government programs.<sup>28</sup> Not surprisingly, “[c]aregivers’ health has been declining since 2015, with a decrease in those reporting their health as very good or excellent (42 percent [in 2020] versus 48 percent in 2015). In addition, one in five caregivers of adults ages 50+ say that their role as a caregiver made their health worse (21 percent).”<sup>29</sup> Similarly, 32% of all caregivers in 2020 reported that caretaking had depleted their financial savings in some form, and 10% reported an inability “to afford basic expenses like food.”<sup>30</sup>

The ominous increase in the number of elder persons in the U.S., coupled with the corresponding increase in the number of caregivers, prompts the question of whether caregivers are being treated fairly. If a caregiver sacrifices career opportunities, financial compensation, and social and personal prospects, while at the same time serving as nurse,

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21. *See id.*

22. *See id.* at 10.

23. *See id.* at 62. An additional 15% of employed caregivers work between 30 and 39 hours per week, while just 25% of all employed caregivers work less than 30 hours per week. *See id.* “Employed caregivers” are caregivers who provide care in addition to working outside of the home. *Id.* at 62 n.50.

24. *See* NAT’L ALL. FOR CAREGIVING & AARP, 2020 COMPANION REPORT: CAREGIVING IN THE U.S. 2020: A FOCUSED LOOK AT FAMILY CAREGIVERS OF ADULTS AGE 50+ 2 (2020) [hereinafter NAT’L ALL. FOR CAREGIVING & AARP, 2020 COMPANION REPORT], [https://www.caregiving.org/wp-content/uploads/2021/05/AARP1340\\_RR\\_Caregiving50Plus\\_508.pdf](https://www.caregiving.org/wp-content/uploads/2021/05/AARP1340_RR_Caregiving50Plus_508.pdf). [<https://perma.cc/7EBW-8V2X>].

25. *See id.*

26. *See id.*

27. *Id.*

28. *See* NAT’L ALL. FOR CAREGIVING & AARP, 2020 REPORT, *supra* note 20, at 35.

29. NAT’L ALL. FOR CAREGIVING & AARP, 2020 COMPANION REPORT, *supra* note 24, at 3.

30. *See id.*

advocate, and homemaker, should a mode of compensation be devised to balance the equities involved? Through a statute, Illinois initiated a means to permit a defined relative who has provided care to a disabled relative for at least three years to file a compensatory “custodial claim” against the disabled relative’s estate upon death.<sup>31</sup> Compensation may vary in accordance with the claimant’s “lost employment opportunities, lost lifestyle opportunities, and any emotional distress experienced as a result of caregiving.”<sup>32</sup> Further, any compensation may be reduced by a court if the claimant received physical or financial benefits in return for care.<sup>33</sup>

Other remedies available to a claimant include enforcement of an express contract between the caregiver and the recipient, but express contracts are rare.<sup>34</sup> Nonetheless, the National Caregiver Alliance offers guidance on drafting caregiver contracts.<sup>35</sup> Because Medicaid eligibility depends upon strict income and asset levels, there is the concern that any contract between a caregiver and care recipient may be an asset transfer scam seeking to impoverish the care recipient by enriching the caregiver at the expense of Medicaid.<sup>36</sup> At a minimum, any express contract invites scrutiny by courts given the presumption of gratuitous care.<sup>37</sup> Any implied oral contract is tenuous because an expectation of compensation by the caregiver does not equal an agreement of compensation between the parties; plus, testimony is barred concerning the intent of the decedent recipient.<sup>38</sup>

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31. 755 ILL. COMP. STAT. ANN. 5/18–1.1 (West 2015); see also *In re Estate of Jolliff*, 71 N.E.2d 346, 354–57 (finding that the custodial claim statute neither violates the special legislation clause, equal protection clause, due process clause, nor the separation of powers provision of the Illinois Constitution).

32. *Id.*

33. *Id.*

34. See, e.g., *Johnson v. N. Am. Life & Cas. Co.*, 241 N.E.2d 332 (Ill. App. Ct. 1968) (finding that an inference of an implied-in-fact contract for care-based compensation between a caregiver wife and her disabled husband was reasonable and reversing the dismissal of caregiver wife’s complaint); see generally Nina A. Kohn, *For Love and Affection: Elder Care and the Law’s Denial of Intra-Family Contracts*, 54 HARV. C.R.-C.L. L. REV. 211, 237–54 (2019).

35. See *Personal Care Agreements*, FAMILY CAREGIVER ALLIANCE, <https://www.caregiver.org/resource/personal-care-agreements/> [https://perma.cc/2MR5-6GKD] (last visited Nov. 30, 2022); see also Adam Hofri-Winogradow & Richard L. Kaplan, *Property Transfers to Caregivers: A Comparative Analysis*, 103 IOWA L. REV. 1997, 2020–24 (2018) (discussing family caregiver arrangements).

36. For an example of a Massachusetts intermediate appellate decision scrutinizing a transfer of wealth from a parent to their children for its potential to defraud the Medicaid system, see *Andrews v. Div. of Med. Assistance*, 861 N.E.2d 483 (Mass. App. Ct. 2007).

37. See generally Sheena J. Knox, Note, *Eldercare for the Baby-Boom Generation: Are Caregiver Agreements Valid?*, 45 SUFFOLK L. REV. 1271 (2012) (encouraging the use of caregiver agreements and for state agencies to clearly delineate guidelines for enforceable agreements); see Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 815–65 (2014) (distinguishing gifts from contracts).

38. See, e.g., S.C. CODE ANN. § 19-11-20.

The common practice among states is to treat the caregiver's support of a family member as a presumptive gift, rebutted only by a valid express contract or, as an alternative, filing the Illinois custodial claim.<sup>39</sup> Any contract must include specified compensation for caregiving services and a sufficient factual basis so that the contract may avoid any accusation that it perpetrates Medicaid fraud.<sup>40</sup> Two threshold requirements must be met: a "claimant must be an immediate family member and must have dedicated himself or herself to the care of the disabled person by living with and personally caring for the disabled person for three years."<sup>41</sup> The presumption of gratuity that must be overcome, referred to as the "family member rule,"<sup>42</sup> is based on the premise that the nature of family inhibits the execution of caregiving contracts, certainly express and even implied. The rationale for this presumption of gift between family members, rebuttable only with clear and convincing evidence of an express contract, avoids "odious" suits among relatives affording opportunities for "fraud against the estates of deceased persons, and great temptation to perjury, by disappointed or avaricious relatives."<sup>43</sup>

Responding to the facts, which illustrate severe inequities, some commentators<sup>44</sup> and a few courts have crafted legal theories that seek to compensate family caregivers who have made substantial sacrifices by providing dedicated care for an elder relative that resulted in the caregiver's mental distress, lost wages, sacrificed career advancement, and sudden and miscellaneous expenses. For example, *In re Estate of Macias* involved two sons who cared for their father during the several months immediately prior to his death.<sup>45</sup> They "bought food and medicine for him, rubbed lotion on him, bathed him, changed his diaper, and gave him suppositories. They also paid his bills and took care of the rental

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39. See e.g., Kohn, *supra* note 34, at 221 n.45 (2019); see also 755 ILL. COMP. STAT. ANN. 5/18-1.1 (West 2015).

40. See, e.g., *In re Estate of Garza*, No. 1-19-2324, 2020 Ill. App. Unpub. LEXIS 1594 at \*12-13 (Ill. App. Ct. Sept. 23, 2020) (describing the family gift presumption); see also *People v. Porter*, 123 N.E. 59 (Ill. 1919) (specifying rebuttal can occur if there's an existing express or implied contract).

41. *In re Estate of Garza*, No. 1-19-2324, 2020 Ill. App. Unpub. LEXIS 1594 at \*3 (Ill. App. Ct. Sept. 23, 2020).

42. See 66 AM. JUR. 2d *Restitution and Implied Contracts* § 52 (2022).

43. *Hinkle v. Sage*, 65 N.E. 999, 1001 (Ohio 1902); see also 32 OHIO JURIS. 3D DECEDENTS' ESTS. § 449.

44. See, e.g., Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J.L. REFORM 761 (2012) (proposing that an elective share for the caregiver is analogous to a spouse's elective share). Elective share takes the place of dower and curtesy. It provides the statutory share to which a spouse is entitled upon the death of the other spouse. See Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617 (2010).

45. *In re Estate of Macias*, No. 08-CA-1734, 2009 WL 498075, at \*1 (Ohio Ct. App. Feb. 27, 2009).



properties that he owned. They sometimes purchased needed items with their own money."<sup>46</sup> When the father died, the sons each brought claims against their father's estate seeking payment for the services rendered.<sup>47</sup> Their claims were challenged based on the family member rule and the lack of any express contract. Reasoning that "household residence is a strong indicator of whether a mutuality of benefits . . . exists," the Ohio Court of Appeals narrowed the scope of the presumption to encompass only one of the siblings, Reynaldo, who lived with his father, and not his brother Luis, who lived sixty miles away and drove to his father's home nearly every day to provide care.<sup>48</sup> The son who lived with his father was barred by the family member presumption of gratuity.<sup>49</sup>

Other courts have found similar ways to avoid the family member rule. For example, in *Markland v. Harley*, the Ohio Court of Appeals held that the presumption did not apply when the decedent, the care recipient, lacked mental capacity.<sup>50</sup> The court reasoned that since the presumption implies a "reciprocity or mutuality of benefits," which is lacking when one of the parties is mentally incompetent, the presumption does not apply.<sup>51</sup> Likewise, *In re Bowman's Estate* involved a caregiver who provided all of the elder recipient's maintenance and support while the recipient provided no financial contribution to the household whatsoever.<sup>52</sup> Based upon this lack of financial contribution, the court held that the family member rule did not apply since there was an absence of mutuality of benefits, an integral part of what legally constitutes the state of being in a family.<sup>53</sup>

To address the inequities shouldered by private caregivers, this Article discusses the parameters of the issue: the increasing number of elders, their increasing chronic caretaking needs, and the expanding number of family caregivers. Indeed, government policy increasingly supports in-home care and the use of private and public caregivers. Based on perceived financial inequities accompanying private caretaking, as well as the paucity of statutory or contractual redress, this Article argues for a new and positive presumption, described here as the private caregiver presumption. Specifically, this Article argues that a positive presumption arises in favor of a private person, relative or not, who can establish that they provided dedicated caregiving service to a

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46. *Id.*

47. *Id.*

48. *Id.* at \*18-19.

49. *Id.* at \*3-4.

50. *Markland v. Harley*, 158 N.E.2d 209, 215 (Ohio Ct. App. 1958).

51. *Id.*

52. *In re Bowman's Estate*, 141 N.E.2d 499, 503 (Ohio Ct. App. 1956).

53. *See id.*

disabled person, resulting in a creditor claim against the estate of the deceased disabled recipient. The caregiver's level of compensation will depend upon the services rendered and opportunities lost, in tandem with other individuals taking from the decedent's estate and defined as the decedent's objects of bounty. Obviously, the caregiver, no matter how meritorious the services rendered may be, may only derive benefit based on the totality of the decedent's estate. Based upon the premise that the decedent intended equality among his or her object of bounty, the proposed presumption applies this premise to the distribution of decedent's estate. Once established, the presumption may be rebutted in one of two ways: first, by clear and convincing evidence that the services provided were intended by both parties to be gratuitous, equality of all not being the intent of the decedent. In the alternative, the presumption may be rebutted by evidence that the caregiver is a part of a scheme of fraud, duress, or undue influence exerted upon the disabled or elderly recipient.

Current remedies cannot meet contemporary needs. Family is more than consanguineous relatives; it embraces both function and form. The objective rigidity of a statute such as the Illinois custodial claim statute restricts both claimants and compensation, which the proposed presumption avoids. Instead, the presumption's emphasis on equality in the distribution of a decedent care recipient's estate allows a court flexibility when establishing a verified claimant, the extent of the services rendered, dismissal of minimal caregiving services, and distribution of assets in accordance with the goal of establishing equality among decedent's objects of bounty. The private caregiver presumption is similar in objective to the traditional common law doctrine of advancement, which seeks to "make whole" any sibling who would be disadvantaged if a parent died intestate and one or more of the other siblings already received significant family assets during the parent's lifetime.<sup>54</sup> The difference between advancement and this presumption is that the caregiver is the one giving value to the decedent, rather than the reverse.

By creating a private caregiver presumption, we recognize, through the use of a creditor claim, that the private caregiver has saved the decedent's estate money, which would have otherwise been expended on institutional care. Likewise, we recognize in a manner similar to advancement, that the private caregiver should presumptively share in the

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54. See THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 716 (2d ed. 1953) ("If an intestate transfers land or a substantial amount of personalty to one child, this will be presumed to be an advancement, and the value of the property so given will be deducted from the child's share upon distribution of the estate in order to equalize the shares of the other children or their descendants.")

distribution of the decedent's enhanced estate. The private caregiver presumption surpasses the traditional family limitation of parent-child, even decedent-heir.<sup>55</sup> It acknowledges that any private caregiver may provide significant services to a disabled decedent, often for a significant period of time. Such services, objectified to through a creditor claim, most often warrant compensation from the decedent's estate that would permit equality among all of the decedent's objects of bounty.

In support of this private caregiver presumption, this Article first discusses the increasing need for long-term care among America's aging population with data on care recipients, caregivers, and alternatives. Second, there is a discussion of the family member presumption and the disjointed judicial response to this bar to recovery for an increasing number of private family caregivers. Third, existing modes of establishing compensation, contractual and statutory, are described and analyzed as either overly scrutinized or underutilized. Finally, the Article concludes by explaining how the proposed presumption provides a reasonable and flexible solution to the inequities foisted upon a caregiver who sacrifices emotionally and financially to provide care for a chronically dependent elder recipient.

## II. PROVIDING AND RECEIVING CARE

### A. Recipients

In November 1997, President Clinton signed the first National Family Caregivers Presidential Proclamation, recognizing and honoring family caregivers.<sup>56</sup> Every president since has continued this practice.<sup>57</sup> The proclamation focuses attention on a largely unnoticed group of people: unpaid private caregivers, an estimated fifty-three million individuals in 2020, 79% of whom care for persons 50 or older.<sup>58</sup> The number of caregivers of older adults has increased by 7.6 million since

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55. See UNIF. PROB. CODE § 2-109 (amended 2019) (encompassing decedent-heir, rather than parent-child, in the latest version of the doctrine of advancement).

56. Press Release, U.S. Census Bureau, Nat'l Family Caregivers Month: November 2022 (Nov. 2022), <https://www.census.gov/newsroom/stories/family-caregivers-month.html> [<https://perma.cc/M6KQ-5ATC>].

57. *Id.*; see, e.g., Proclamation No. 10488, 87 Fed. Reg. 66,527 (Nov. 3, 2022) (President Biden's 2022 proclamation recognizing National Family Caregivers Month).

58. See Proclamation No. 10488, 87 Fed. Reg. 66,527 (Nov. 3, 2022); NAT'L ALL. FOR CAREGIVING & AARP, 2020 COMPANION REPORT, *supra* note 24, at 1.

2015, with one in six Americans now providing care to an older person.<sup>59</sup> By 2026, this number is expected to increase even more when baby-boomers begin turning 80 years-old.<sup>60</sup>

Care is needed. Elder care recipients were more likely in 2020 than in 2015 to report long-term physical conditions, emotional or mental health issues, and memory deficiencies including Alzheimer's or dementia.<sup>61</sup> Oftentimes, recipients have multiple chronic conditions—often termed comorbidities—indicating that caregivers often confront “increasingly complex medical or support needs,”<sup>62</sup> which require the recipient and caregiver to navigate the complex and often brutal health care system for seniors in the U.S.<sup>63</sup> One federal court described Medicare letters sent to Medicare recipients as “bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurances, and doublespeak. It does not qualify as English.”<sup>64</sup> Yet in 2019, nearly 94% of non-institutionalized persons aged 65 and older were covered by Medicare.<sup>65</sup> Having to adjust to the complexities of the Medicare and Medicaid systems in piecemealing insurance coverage for varying medical conditions undoubtably exacerbates the strain on both caregivers and care recipients alike.

Furthermore, disabilities associated with physical functioning are significant among people aged 65 and older. Statistics indicate that in 2020, 18% of adults 65 and older reported they could not function at all or had difficulty with seeing (21%), hearing (29%), walking or climbing stairs (39%), understanding or being understood by others (8%), remembering or concentrating (28%), and dressing or washing all over (8%).<sup>66</sup> Additionally, the COVID-19 pandemic exacerbated symptoms of

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59. *Id.* at 3.

60. *Id.* at 1.

61. NAT'L ALL. FOR CAREGIVING & AARP, EXECUTIVE SUMMARY: CAREGIVING IN THE U.S. ES-2 (2020) [hereinafter NAT'L ALL. FOR CAREGIVING & AARP, 2020 EXECUTIVE SUMMARY], [https://www.caregiving.org/wp-content/uploads/2020/08/AARP1316\\_ExecSum\\_CaregivingintheUS\\_508.pdf](https://www.caregiving.org/wp-content/uploads/2020/08/AARP1316_ExecSum_CaregivingintheUS_508.pdf) [<https://perma.cc/SQ35-46V7>]; see also 2021 PROFILE OF OLDER AMERICANS, *supra* note 2, at 17 (“Leading chronic conditions among adults age[d] 65 and older in 2020 include[d] arthritis (47%); coronary heart disease (14%); myocardial infarction (9%); angina (4%); any cancer (26%); COPD, emphysema, or chronic bronchitis (11%); [and] diagnosed diabetes (21%)”).

62. NAT'L ALL. FOR CAREGIVING & AARP, 2020 EXECUTIVE SUMMARY, *supra* note 61.

63. See, e.g., *Bd. of Trs. of Univ. of Ark. v. Sec'y of Health & Hum. Servs.*, 354 F. Supp. 2d 924, 927–34 (E.D. Ark. 2005) (illustrating the complex bureaucratic elements of what is a reasonable and necessary medical treatment under Medicare requirements); *Vorster v. Bowen*, 709 F. Supp. 934, 947 (C.D. Cal. 1989) (holding the Due Process Clause requires Medicare to provide notice to Medicare recipients that coverage may be denied).

64. *David v. Heckler*, 591 F. Supp. 1033, 1043 (E.D.N.Y. 1984).

65. 2021 PROFILE OF OLDER AMERICANS, *supra* note 2, at 17.

66. *Id.* at 18.

anxiety or depression among older adults, especially in those older than 80.<sup>67</sup>

### B. Caregivers

In 2020, there were an estimated 41.8 million caregivers for recipients over the age of 50, an increase over the 2015 total of 34.2 million caregivers.<sup>68</sup> Many of these caregivers care for more than one person, most care for a parent or parent-in-law (50%) or a grandparent or grandparent-in-law (8%),<sup>69</sup> almost all assist with ADLs and nearly 60% assist with medical/nursing tasks.<sup>70</sup> The statistics often do not take into account caregiving tasks associated with shopping, food preparation, housekeeping, laundry, transportation, and giving medications. Additionally, dealing with state and federal support programs can be confusing, tiresome, and harsh.

More than 75% of caregivers are female, who are more likely than males to handle sensitive tasks such as “bathing, toileting, and dressing.” Males are “more likely to help with finances [and] arrangement of care . . .”<sup>71</sup> A common misconception is that caregivers are young; in reality many caregivers are older themselves. “In 2019, among the 5.37 million people with intellectual and developmental disabilities (I/DD) living with a family caregiver, 24% had caregivers who were age 60 and older (1.3 million). The percentage of people with I/DD living with older caregivers ranged from 13% in Utah to 24% in Florida.”<sup>72</sup> There is an economic value provided by these unpaid caregivers. In 2017, unpaid caregivers provided an estimated \$470 billion in economic value of unpaid services, up from \$450 billion in 2009 and \$375 billion in 2007.<sup>73</sup>

Caregivers bear a cost too. Many caregivers provide care to the same person for more than four years; with some (15%) providing care for ten years or more.<sup>74</sup> Family caregivers who reside with care recipi-

67. See ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUM. SERVS., 2020 PROFILE OF OLDER AMERICANS 2020 (2021), [https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2020ProfileOlderAmericans.Final\\_.pdf](https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2020ProfileOlderAmericans.Final_.pdf) [<https://perma.cc/S3RH-MEKE>].

68. NAT'L ALL. FOR CAREGIVING & AARP, 2020 EXECUTIVE SUMMARY, *supra* note 61, at ES-1.

69. *Id.* at ES-1-2.

70. *Id.* at ES-3.

71. *Caregiver Statistics: Demographics*, FAMILY CAREGIVER ALL. (2016), <https://www.caregiver.org/resource/caregiver-statistics-demographics/> [<https://perma.cc/8HBB-GCYW>].

72. 2021 PROFILE OF OLDER AMERICANS, *supra* note 2, at 20.

73. SUSAN C. REINHARD, LYNN FRISS FEINBERG, ARI HOUSER, RITA CHOULA & MOLLY EVANS, AARP PUB. POL'Y INST., VALUING THE INVALUABLE: 2019 UPDATE, (2019), <https://www.aarp.org/content/dam/aarp/ppi/2019/11/valuing-the-invaluable-2019-update-charting-a-path-forward.doi.10.26419-2Fppi.00082.001.pdf> [<https://perma.cc/Q4GH-DCRU>].

74. FAMILY CAREGIVER ALL., *supra* note 71.

ents spend 40.5 hours each week providing care,<sup>75</sup> and regardless of the employment status of the caregiver, unpaid caregivers report that “outside positive activities in their respective daily lives are reduced by 27.2% as a result of caregiving responsibilities.”<sup>76</sup> Oftentimes, caregivers report that they prioritize care recipient needs over their own self-care, “resulting in a decline in their own health status” and making them more at risk for developing “chronic illness, compromised functional status, disability, morbidity, and mortality.”<sup>77</sup> Many caregivers “report high levels of stress, physical fatigue, sleep disturbances, financial worries, and loss of social relationships, resulting in social isolation and lack of social support.”<sup>78</sup>

A significant proportion of caregivers providing care for a person over the age of 50 may be described as “no choice caregivers.” That is, for a variety of reasons, they have concluded there is no viable alternative to taking on the responsibility of providing care. The National Alliance for Caregiving and AARP have described this “no choice caregiver” as someone typically over 50 years-old, married or partnered, with at least \$50,000 in annual income, and caring for a parent with a long-term physical condition who is around 70 years-old.<sup>79</sup> Usually, the caregiver and the recipient live together without any outside assistance to aid the caregiver in providing help for the recipient’s activities of daily living or medical tasks.<sup>80</sup> While providing the recipient with care, the caregiver is usually employed outside the home 36.6 hours a week on average.<sup>81</sup> Caretaking duties for no choice caregivers often diminish financial savings and can result in the accumulation of debt for the caregiver.<sup>82</sup> Additionally, caregivers report that caregiving impacts their own wellness, reporting high emotional stress, high physical strain, and loneliness. When surveyed, caregivers often anticipate that care will be required for at least five more years.<sup>83</sup> Not surprisingly, these individuals report that they need help “managing their emotional and physical stress,” all while completing paperwork for services or support for their recipient and “managing their recipient’s challenging behavior.”<sup>84</sup>

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75. *Id.*

76. *Id.*

77. See Kathryn Sabo & Elizabeth Chin, *Self-Care Needs and Practices for the Older Adult Caregiver: An Integrative Review*, 42 GERIATRIC NURSING 570, 570 (2021).

78. *Id.*

79. See NAT’L ALL. FOR CAREGIVING & AARP, FACT SHEET: THE “TYPICAL” NO CHOICE CAREGIVER 1 (2020), [https://www.caregiving.org/wp-content/uploads/2020/05/AARP1316\\_CGProfile\\_NoChoice\\_May7v8.pdf](https://www.caregiving.org/wp-content/uploads/2020/05/AARP1316_CGProfile_NoChoice_May7v8.pdf) [<https://perma.cc/P92U-A3QX>].

80. *Id.*

81. *See id.*

82. *See id.*

83. *Id.* at 2.

84. *Id.*

### C. Alternatives

There are alternatives to the caregivers described previously. When a caregiver is unavailable or the recipient's needs are too extensive, institutional long-term care is an expensive alternative. In 2021, the estimated annual median yearly cost for a private room at an assisted living facility was \$108,405.<sup>85</sup> Although many people think that Medicare, a federal program, pays for long-term residential care, it does not.<sup>86</sup> Part A of Medicare will provide full partial payment for "reasonable and necessary"<sup>87</sup> medical care provided in hospitals and skilled nursing homes, as well as hospice care (generally when life expectancy is six months or less).<sup>88</sup> There are, however, multiple strictly construed restrictions. To have inpatient services paid for by Medicare one must have a prescription specifying that the enrollee requires care that can only be provided in a hospital and must avoid a finding of disapproval from the physician members of the hospital's review committee.<sup>89</sup> Furthermore, except for what are called the "lifetime reserve days," coverage is only for ninety days for each "spell of illness,"<sup>90</sup> and these lifetime reserve days amount to only sixty days, which are to be used over a course of a lifetime.<sup>91</sup> There are significant copays that are adjusted each year. Even when there are no other alternatives, Medicare does not pay for long-term care.<sup>92</sup>

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85. *Cost of Care Trends & Insights*, GENWORTH, <https://www.genworth.com/aging-and-you/finances/cost-of-care/cost-of-care-trends-and-insights.html> [<https://perma.cc/E8JT-V8RZ>] (last visited Dec. 1, 2022).

86. For a succinct comparison of the two programs, see *Rehab. Ass'n of Va. v. Kozlowski*, 42 F.3d 1444, 1446–48 (4th Cir. 1994); see also Eleanor D. Kinney, *The Affordable Care Act and the Medicare Program: The Engines of True Health Reform*, 13 *YALE J. HEALTH POL'Y L. & ETHICS* 253, 260–61 (2013).

87. 42 U.S.C. § 1395y(a)(1)(A); see, e.g., *New York ex rel. Bodnar v. Sec'y of Health & Hum. Servs.*, 903 F.2d 122, 124–25 (2d Cir. 1990) (discussing what courts consider in determining what is reasonable and necessary including "whether . . . services were provided in the most appropriate, cost effective setting").

88. 42 U.S.C. § 1395y(a)(1); see *Medicare Hospice Benefits*, U.S. DEPT OF HEALTH & HUM. SERVS., CTRS. FOR MEDICARE & MEDICAID SERVS. 16, <https://www.medicare.gov/Pubs/pdf/02154-medicare-hospice-benefits.pdf> [<https://perma.cc/N3RE-J2G6>] (last visited Dec. 1, 2022).

89. 42 U.S.C. §§ 1395f(a)(3), (6). The hospital review committee is defined at 42 U.S.C. §1395x(k)(4).

90. For the statutory definition of "spell of illness," see 42 U.S.C. § 1395x(a). See also JONATHAN OBERLANDER, *THE POLITICAL LIFE OF MEDICARE 117–20* (Univ. Chi. Press, 2003); *Lewin v. Shalala*, 887 F. Supp. 74 (S.D.N.Y. 1995) (illustrating an additional requirement of three days in a hospital prior to admission to a skilled nursing facility).

91. See *Inpatient hospital care*, CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicare.gov/coverage/inpatient-hospital-care> [<https://perma.cc/8954-ESX4>] (last visited Dec. 1, 2022).

92. See, e.g., *Gonzalez v. Sec'y of U.S. Dep't of Health & Hum. Servs.*, 644 F. Supp. 1086, 1087 (E.D.N.Y. 1986) (Medicare will not pay for long-term care even if returning enrollee's home environment is not suitable for his or her medical well-being).

Medicaid, a joint federal-state program, provides medical care to the elderly, the blind, and the poor.<sup>93</sup> Uniquely, if the applicant meets the eligibility criteria, Medicaid will pay for long-term residential care for the life of the qualified recipient.<sup>94</sup> The National Academy of Elder Law Attorneys provides information on the planning requirements needed to qualify for Medicaid's long-term residential care, preserving many assets for a spouse or next of kin.<sup>95</sup> Because Medicaid is a federal program administered by each of the states, the rules may vary from state-to-state.<sup>96</sup> To meet both the increasing number of applicants and the rising costs, some states have become more aggressive in enforcing strict eligibility standards—like Kansas, who limits Medicaid to those individuals who do not have more than \$2,000 in exempt resources<sup>97</sup>—and in empowering agents to collect assets from liable estates after the death of any recipient.<sup>98</sup> Uniformly, courts hold that the “Medicaid long term care program requires that the recipient use all of his or her ‘available income’ to pay toward their care.”<sup>99</sup>

To counter rising Medicaid costs, states have begun to consider enacting state-sponsored, long-term care insurance programs. Under the programs, the general population would be taxed, and the proceeds

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93. See 42 U.S.C. § 1396; see *What is the Medicaid program?*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/answers/medicare-and-medicaid/what-is-the-medicaid-program/index.html> <https://perma.cc/79DY-3GZE> (last visited Dec. 1, 2022); see generally *Brewer v. Schallansky*, 102 P.3d 1145, 1148–49 (Kan. 2004) (describing state eligibility requirements and the interaction between federal and state legislation).

94. See 42 U.S.C. § 1396(b)(2)(A)(i); see also KIRSTEN J. COLELLO, CONG. RSCH. SERV., IF10343, WHO PAYS FOR LONG-TERM SERVICES AND SUPPORTS? (2022); see also *Answers to All of Your Questions About Medicaid Long Term Care*, AM. COUNCIL ON AGING, (Feb. 28, 2022), <https://www.medicaidplanningassistance.org/medicaid-long-term-care-faq/> [<https://perma.cc/W3XR-6UY4>].

95. See *Medicaid*, The National Academy of Elder Law Attorneys (NAELA), [https://www.naela.org/Web/Web/Consumers\\_Tab/Consumers\\_Library/Consumer\\_Brochures/Elder\\_Law\\_and\\_Special\\_Needs\\_Law\\_Topics/Medicaid.aspx](https://www.naela.org/Web/Web/Consumers_Tab/Consumers_Library/Consumer_Brochures/Elder_Law_and_Special_Needs_Law_Topics/Medicaid.aspx) (last visited April 3, 2023); see also 42 U.S.C. §§ 1382b(a)(1)–(3) (listing exempt assets and the monetary limits on each); see also *N.M. v. Div. of Med. Assistance & Health Servs.*, 964 A.2d 822 (N.J. Super. Ct. App. Div. 2009) (discussing the community spouse allowance and its impact on estate recovery programs).

96. See SOCIAL SECURITY PROGRAM OPERATIONS MANUAL SYSTEM (POMS) § S10110.100.B.1, B.3; see also John Harrison & Tim McCurdy, *An Introduction to Medicaid Planning for Long-Term Care Costs*, EST. PLAN., Jan. 2020, at 3 (discussing how to qualify as poor through planning maneuvers).

97. See, e.g., *Brewer*, 102 P.3d at 1148.

98. See, e.g., *In re Estate of Barg*, 752 N.W.2d 52 (Minn. 2008) (discussing various state efforts to collect assets paid by Medicaid from liable estates); see also Kristine J. Williams, *The Future of Estate Recovery: An Analysis of Different State Approaches and Changes*, 16 NAELA J. 17 (2020) (examining different state approaches to meeting the Medicaid requirement for states to seek adjustment or recovery of medical assistance from the beneficiary's estate or sale of encumbered property); Raymond C. O'Brien, *Selective Issues in Effective Medicaid Estate Recovery Statutes*, 65 CATH. U. L. REV. 27 (2015) (analyzing inconsistencies in state estate recovery programs regarding the manners of transferring property at death).

99. See, e.g., *Mulder v. S.D. Dep't of Soc. Servs.*, 675 N.W.2d 212, 214 (S.D. 2004) (holding that state agencies must provide for reasonable evaluation of assets and income).



would pay premiums on a long-term care insurance policy that could at least partially pay for institutional costs for needy individuals requiring long-term care. In 2019, Washington became the first state to enact such a program; benefits are to begin being disbursed in 2025.<sup>100</sup> However, it is uncertain whether the program will succeed or be emulated by others. Nonetheless, as commentators opine, given “today’s extended lifespans and limited public tolerance for taxes, it may be that a publicly funded solution to family caregivers’ plight is impossible.”<sup>101</sup> But at least in the United States, there is no doubt that benefits for family caregivers need to be increased.

Not surprisingly, many persons needing long-term care pay themselves, called “self-pay,” utilizing hybrid insurance policies into which they have dutifully paid premiums over a long period of time.<sup>102</sup> The premium cost “depend[s] on age, geographic location, the amount of coverage desired, exclusion period chosen and whether an inflation rider and waiver of premium are purchased.”<sup>103</sup> For long-term care insurance, “benefits are payable when a licensed health care practitioner certifies that the insured is unable to perform at least two of five activities of daily living (usually toileting, bathing, ambulating, feeding and dressing) without substantial assistance for a period expected to last at least 90 days.”<sup>104</sup> These hybrid policies can provide money to pay for institutional (or home) care, but if this is not needed, the policy can provide a death benefit, like life insurance, to named beneficiaries.<sup>105</sup>

Legislative and private initiatives are increasingly focusing on providing persons with the resources to stay at home for as long as pos-

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100. See Michelle Cottle, *Getting Old is a Crisis More and More Americans Can't Afford*, N.Y. TIMES (Aug. 9, 2021), <https://www.nytimes.com/2021/08/09/opinion/aging-nursing-home-medicare.html> [<https://perma.cc/AAF5-8N3S>].

101. Adam Hofri-Winogradow & Richard L. Kaplan, *Property Transfers to Caregivers: A Comparative Analysis*, 103 IOWA L. REV. 1997, 2025 (2018). For a discussion of public financing for family caregivers, see *id.* at 2014–20.

102. See Raymond C. O'Brien, *Selective Issues in Effective Medicaid Estate Recovery Statutes*, 65 CATH. U. L. REV. 27, 28 n.6 (2015) (citing *Paying for Long-Term Care*, NIH SENIOR HEALTH, <https://www.nia.nih.gov/health/paying-long-term-care> [<https://perma.cc/Z88E-7D33>] (last visited Jan. 13, 2023)) (discussing self-pay from multiple sources and insurance policies specifically designed for long-term care).

103. Russell N. Adler, Peter J. Strauss & Regina Kiperman, *America's Long-Term Care Crisis*, WEALTH MGMT. (July 3, 2013), <https://www.wealthmanagement.com/estate-planning/america-s-long-term-care-crisis> [<https://perma.cc/J65N-Q8F9>]; see also *How insurance companies set health premiums*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., <https://healthcare.gov/how-plans-set-your-premiums/> [<https://perma.cc/VV3X-STJJ>] (last visited Mar. 18, 2023).

104. Adler et al., *America's Long-Term Care Crisis*, *supra* note 103.

105. See Gilfix, *supra* note 11; Henry Montag & Bill Boersma, *What Advisors Should Know About Hybrid Long-Term Care Policies*, WEALTH MGMT. (Mar. 21, 2019), <https://www.wealthmanagement.com/estate-planning/what-advisors-should-know-about-hybrid-long-term-care-policies> [<https://perma.cc/TWB3-98N3>] (discussing the 2006 Pension Protection Act and how federal statute precipitated hybrid policies).

sible. This is the least expensive alternative, and the one most often preferred by recipients.<sup>106</sup> There are several initiatives championing this approach. First is Programs for All-Inclusive Care of the Elderly (PACE), which includes “services determined necessary by the health professionals team to improve and maintain an individual’s health. PACE programs provide services primarily in an adult day health center and are supplemented by in-home and referral services in accordance with the enrollee’s needs.”<sup>107</sup> Second, federal legislation has been introduced to fund home and community-based services (HCBS), including respite care and paid leave time for caregivers. If this legislation were to pass, states would receive federal grants to assist seniors seeking to remain in their homes and communities.<sup>108</sup> Third, a modicum of existing federal legislation supports caregivers and the recipients they serve by providing unpaid leave without loss of employment, health-related equipment, transportation, emergency items, and respite care for the caregiver.<sup>109</sup> Fourth, “[s]tates may provide home-and-community-based care waiver[s], [often termed] 1915(d) waiver[s], to certain individuals who are eligible for Medicaid.”<sup>110</sup> The services offered by these waivers include: “(1) case management, (2) personal care services, (3) respite care services, (4) adult day health services, (5) homemaker/home health aide, (6) habitation, and (7) other services requested by the state and approved by the Centers for Medicare and Medicaid Services.”<sup>111</sup>

Despite the existence of various programs designed to assist caregivers, the actual use of support services remains very low. “Just 14 per-

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106. See e.g., *Virginia Adult Services (AS): Eligibility and Benefits*, PAYING FOR SENIOR CARE (Nov. 21, 2022), <https://www.payingforseniorcare.com/virginia/adult-services> [https://perma.cc/L9XV-4TUQ]; see generally *Measuring the Costs and Savings of Aging in Place*, OFF. POL’Y DEV. & RSCH. (Fall 2013), <https://www.huduser.gov/portal/periodicals/em/fall13/highlight2.html> [https://perma.cc/4U2B-K7XB].

107. See *Programs of All-Inclusive Care for the Elderly Benefits*, U.S. CTRS. FOR MEDICARE & MEDICAID SERVS., <https://www.medicaid.gov/medicaid/long-term-services-supports/pace/programs-all-inclusive-care-elderly-benefits/index.html> [https://perma.cc/JCH5-3UFD] (last visited Mar. 18, 2023).

108. See Letha Sgritta McDowell, *Legislative Update for Seniors*, WEALTH MGMT (July 22, 2021), <https://www.wealthmanagement.com/estate-planning/legislative-update-seniors> [https://perma.cc/94Zz-WCDQ] (discussing provisions of the Better Care Better Jobs Act introduced in the Senate in 2021).

109. See OLDER AMERICANS ACT (OAA) of 1965, Pub. L. No. 89-73, Stat. 218 (the National Family Caregiver Support Program (NFCSP) is the largest support program under the Older Americans Act); see also Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2612(a)(1)(C) (“[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.”); see also Katie Wise, *Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 563, 586–88 (2002).

110. DAYTON ET AL., *supra* note 19. Waivers are necessary to provide a service not covered because of disqualification.

111. *Id.*

cent report having used respite [care]. . . The most common information and support needs are related to keeping their care recipient safe at home (26 percent); managing their own (the caregiver's) stress (26 percent); and navigating forms, paperwork, and eligibility for services (25 percent)."<sup>112</sup> Significantly, according to a report by the National Alliance for Caregiving & AARP the "majority of caregivers—about two in three for each—feel an income tax credit (68 percent) or program to pay caregivers to provide care (65 percent) would be helpful to defray the financial cost of care."<sup>113</sup>

### III. RESTRAINTS ON CAREGIVER COMPENSATION

#### A. Factual Setting

Statistics reveal the objective parameters of elders requiring care, the characteristics of today's family caregiver, and the support or alternatives available to these family caregivers. To truly appreciate the argument favoring economic compensation for elder caregivers, the factual setting must be described. First, in the *In re Estate of Garza* decision, a son lived with his mother for his entire life, including her last four years. She suffered from "chronic diabetes, gout, hypertension, and obesity," plus a chronic kidney condition that contributed to her worsening debilitation.<sup>114</sup> Throughout her decline, her son provided all her care, which included cooking, taking her to doctor appointments, and assisting her to ambulate around the house, such as to the bathroom and to bed.<sup>115</sup> The son was her exclusive caregiver during this time, testifying that he "did everything" for his mother" given her debilitating condition.<sup>116</sup> In determining that the state legislature enacted the statutory custodial claim "to alleviate hardships to relatives who sacrifice[d] the most for their relatives," the appellate court reversed the trial court's denial of the son's custodial claim.<sup>117</sup> Consistently, caregivers report that

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112. NAT'L ALL. FOR CAREGIVING & AARP, 2020 EXECUTIVE SUMMARY, *supra* note 61, at ES-4.

113. *Id.*

114. *In re Estate of Garza*, No. 1-19-2324, 2020 Ill. App. Unpub. LEXIS 1594, at \*1 (Ill. App. Ct. Sept. 23, 2020) (permitting a custodial caregiver claim by son against mother's estate).

115. *Id.*

116. *Id.*

117. *Id.* at \*2-3.

they put their lives on hold to serve as a primary caregiver for a family member, usually a parent.<sup>118</sup>

In a second decision, *Estate of Macias*, two sons cared for their seriously ill father for several months before his death.<sup>119</sup> One son (Son A) lived with the father in the father's home, while the other son (Son B) lived sixty miles away but traveled to the father's home at around 10:30 pm each night to watch over the father so that his brother could rest.<sup>120</sup> They hired professional caregivers to be with their father during the day while both sons worked.<sup>121</sup> When the professional caregivers left for the day, Son A, the live-in son, would care for his father until his brother arrived late at night for overnight care. However, while both sons would take care of the father's needs in the evenings and overnight, only Son A would return to work the next day if a professional caregiver was unable to work during the day.<sup>122</sup> "They bought food and medicine for him, rubbed lotion on him, bathed him, changed his diaper, and gave him suppositories. They also paid his bills and took care of the rental properties that he owned. When they purchased needed items, they would sometimes do so with their own money."<sup>123</sup> Son A missed more than 300 hours of work because his father required care, resulting in loss of wages but not termination because he was protected by the Family and Medical Leave Act.<sup>124</sup>

Oftentimes, the caregiver is thrust into their duties unexpectedly, without preparation or warning. This was true in *In re Estate of Hale*, when a daughter visited her mother in Texas and found that the mother had advanced Alzheimer's disease and was "filthy, unkempt, and smelled of urine."<sup>125</sup> The mother's physician recommended that the mother be placed in a nursing home because of the severity of her Alzheimer's, but the daughter instead took her to live with her in her own home in Illinois. This was in 1995, and the daughter took care of her there until the mother's death in 2004.<sup>126</sup> Throughout this time, the daughter kept a detailed list of the care she provided her mother, which included "meals, bathing, diapering, housekeeping, providing exercise

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118. See, e.g., *Est. of Fountaine by Fountaine v. Fountaine*, No. 1-19-0289, 2020 WL 4920940, at \*4 (Ill. App. Ct. Aug. 21, 2020).

119. *In re Estate of Macias*, No. 08-CA-1734, 2009 WL 498075 (Ohio Ct. App. Feb. 27, 2009) (holding caregiver son could be paid from recipient father's estate due to an implied contract).

120. *Id.* at \*1.

121. *Id.*

122. *Id.*

123. *Id.* at \*1.

124. See Family and Medical Leave Act (FMLA) of 1993, 29 U.S.C. § 2601(b)(2).

125. *In re Estate of Hale*, 890 N.E.2d 1244, 1245 (Ill. App. Ct. 2008).

126. *Id.*

and medication.”<sup>127</sup> Throughout this period, the daughter “had to forego seeking employment and other activities to care for her mother.”<sup>128</sup>

When the mother died in 2004, her caregiver daughter filed a statutory custodial claim against her mother’s estate to recoup some of the costs borne by the daughter pertaining to “lost employment opportunities, lost lifestyle opportunities, and emotional distress experienced as a result of personally caring for a disabled person.”<sup>129</sup> A statutory claim is possible in Illinois, but upon submission, the caregiver’s sister objected to the caregiver receiving anything.<sup>130</sup> She argued that the statutory claim was barred by the state’s general statute of limitations, which would deprive the caregiver of any remuneration.<sup>131</sup> Eventually, the daughter/caregiver prevailed and granted a remand to establish a reasonable claim.<sup>132</sup> The facts illustrate the intrafamily rivalry and resentment that occurs in many of these cases.

In another case of family disharmony, *Estate of Jolliff*,<sup>133</sup> a 68 year-old sister removed her brother from a skilled-care facility, where he had resided for nearly ten years.<sup>134</sup> Even though the brother was technically married—he and his wife were separated, but never received a final decree of divorce—his sister was his conservator, appointed after he suffered a brain stem injury in a motor vehicle accident.<sup>135</sup> The brother and his estranged wife had children, but the sister assumed the responsibility of caring for him when he was initially institutionalized and throughout the twelve years after removing him from the institution and bringing him home to live with her. While living in her home, “he was unable to perform activities of daily living independently such as bathing, grooming, dressing, meal preparation and laundry.”<sup>136</sup> He was “unable to transfer himself from one body position to another without assistance; he required full time assistance to attend any out of the home function and/or activity.”<sup>137</sup>

Because his sister was his appointed conservator for a period of twenty-two years from the time he was institutionalized until his death, she collected \$275,880 in conservator fees and \$70,925 in helper fees

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127. *Id.*

128. *Id.*

129. *Id.* at 1246.

130. *Id.* at 1244.

131. *In re Estate of Hale*, 890 N.E.2d at 1245–48.

132. *Id.* at 1248.

133. *In re Estate of Jolliff*, 771 N.E.2d 346 (Ill. 2002).

134. *Id.* at 348.

135. *Id.*

136. *Id.*

137. *Id.*

from the brother's guardianship estate.<sup>138</sup> Yet when he died intestate in 1999, the brother's wife filed to administer her husband's estate. One of the brother's daughters was appointed as the estate administrator. Similar to the caregiver daughter in *Hale*, the sister filed a custodial claim with the estate for \$200,000, which the wife and daughter of the brother moved to dismiss based on various constitutional grounds.<sup>139</sup> In holding that the custodial claim was valid, the court noted that it reasonably provides for the sister's care of her brother for twelve years, during which time "she bathed him, groomed him, dressed him, and moved him; she prepared his meals and washed his clothes."<sup>140</sup> She "ask[ed] for \$200,000-less than \$16,000 for each year she lived with and personally cared for [her brother]."<sup>141</sup> Furthermore, the court acknowledged the equity of the sister's claim, pointing out that the wife and daughter "never provided one day of care for [the brother] in the 22 years between his accident and his death . . . ."<sup>142</sup> The sister was there throughout.

Both *Hale* and *Jolliff* center an Illinois innovation—a statutory custodial claim—which will be discussed further.<sup>143</sup> At this point, the statute is an element in the often-acrimonious struggle over the distribution of a recipient's wealth following the conclusion of many years of caregiving. We should be mindful of the fact that the Illinois statute is a solitary statutory enactment. Bereft of any statutes, judicial approaches to claims by caregivers vary—some reject compensation, using a presumption of gratuity, and some rely on evidence of a contract, express or implied.<sup>144</sup> Caregivers' entitlement to compensation is tenuous at best.

### B. *Presumption of Gratuity*

Courts consistently hold that "[s]ervices rendered by a family member on behalf of another family member are presumed to be done gratuitously."<sup>145</sup> This presumption may be rebutted with the preponderance of the evidence of an express or implied contract, and the burden of

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138. *Id.*

139. *Id.* at 348–49.

140. *Id.* at 355.

141. *Id.*

142. *Id.*

143. *See infra* Section IV.B.

144. *See supra* Sections I, III.

145. *Estate of Jesmer v. Rohlev*, 609 N.E.2d 816, 820 (Ill. App. Ct. 1993) (citing *In re Estate of White*, 303 N.E.2d 569 (Ill. App. Ct. 1973); *Meyer v. Meyer*, 39 N.E.2d 311 (Ill. App. Ct. 1942)).

proof is upon any claimant.<sup>146</sup> But exactly who constitutes a family member is elusive. Of course, family membership extends beyond those in a parent-child relationship, but factually, the more distant the relationship, the weaker the presumption.<sup>147</sup> For example, “evidence of a long-standing friendship tends to show that services were rendered gratuitously,”<sup>148</sup> thereby suggesting that consanguinity and affinity are not determinative. Rather, what matters is a “close and loving relationship” between the caregiver and the recipient<sup>149</sup> or evidence of “mutual dependence and reciprocal kindness[.]”<sup>150</sup>

The rationale for the family member presumption of gratuity is that “if it’s a family member, you’re doing it because you love them.”<sup>151</sup> This loving posture is most often confirmed by facts demonstrating that the caregiver did not ask for payment throughout any lengthy period of providing care, no matter the extent of the care. Therefore, waiting until the death of the recipient to file a compensation claim suggests gratuity, not contract.<sup>152</sup> One commentator captures the family interplay, writing, “a person cannot provide an unsolicited kindness to kin and thereafter make the kindness a matter of claim against the donee.”<sup>153</sup> On the other hand, for those persons not in a close association, a community of interest, or an intimate relationship, there is no presumption of gratuity and a claim for services is not barred. For these persons the test is simply whether, under the facts and circumstances, it was reasonable and expected that compensation was due.<sup>154</sup>

The factual setting, discussed in Part III.B, illustrates the inequitable impact of invoking this presumption to bar the claim of a caregiver who often has sacrificed inestimable worth by caring for a recipient, not

146. Estate of Jesmer, 609 N.E.2d at 820 (citing *Campion v. Tennes*, 417 N.E.2d 748 (Ill. App. Ct. 1981)); *Moreen v. Estate of Carlson*, 6 N.E.2d 871 (Ill. 1937)); see also *In re Houser’s Estate*, 133 N.W.2d 618 (Neb. 1965) (holding presumption of gratuity was overcome by a quasi-contract when facts indicated that decedent intended to pay for services).

147. MICHAEL P. MCELROY, 1A HORNER PROB. PRAC. & ESTS. § 23:11, *Claims for services—Who constitutes a family member* (May 2021).

148. *Campion v. Tennes*, 417 N.E.2d 748, 751 (Ill. App. Ct. 1981) (citing *McRoberts v. Estate of Kennelly*, 201 N.E.2d 680 (Ill. App. Ct. 1964)); see also *Cotton v. Roberts’ Estate*, 337 S.W.2d 776 (Tenn. Ct. App. 1960) (emphasizing the intimate family relationship when denying claim by relative against decedent’s estate).

149. See *id.* at 752.

150. *In re Estate of Marks*, 187 S.W.3d 21, 30 (Tenn. Ct. App. 2005) (internal quotation marks omitted).

151. *In re Estate of Garza*, No. 1-19-2324, 2020 Ill. App. Unpub. LEXIS 1594, at \*1 (Ill. App. Ct. Sept. 23, 2020) (quoting the trial court).

152. See, e.g., *In re Herdman’s Estate*, 119 P.2d 277, 279 (Or. 1941).

153. Clifton B. Kruse, Jr., *The Effect of Relational Intimacy on Estate Claims*, 21 COLO. LAW. 699, 699 (1992).

154. See, e.g., *Matter of Estate of Raketti*, 340 N.W.2d 894, 902 (N.D. 1983); see also *Matter of Estate of Zent*, 459 N.W.2d 795 (N.D. 1990) (holding the presumption does not apply to non-family members).

to mention saving the recipient's estate significant wealth by avoiding the cost of institutional care. The presumption of gratuity is only one means of barring caregivers from compensation for services rendered or for opportunities lost.<sup>155</sup>

### C. Statutory Transfers to Caregivers

Other obstacles remain in the way of caregivers receiving compensation. Courts and legislatures are wary of caregivers. In many cases, the recipient has diminished capacity, is reliant upon the caregiver for any assortment of activities of daily living, and is isolated from family and social interaction, thereby precipitating conditions that are ripe for abuse.<sup>156</sup> Admittedly, some recipients legitimately compensate caregivers through *inter vivos* gifts or testamentary legacies, but generally, wariness of abusive opportunities prompt courts and legislatures to aggressively scrutinize any transfer made to a caregiver from a recipient, regardless of family status.<sup>157</sup>

Most often, a transfer to a caregiver is challenged by a relative with standing, who alleges that the transfer by the recipient was the product of the caregiver's undue influence or that at the time of the transfer the recipient lacked donative or testamentary capacity. The cases illustrating contest are legion and not all are without merit, creating significant jurisprudence affecting *inter vivos* and testamentary transfers.<sup>158</sup>

A few states go one step further than contests based upon capacity, fraud, or undue influence by enacting protective statutes that specifically target caregivers. Maine, for example, provides that if real estate

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155. See *supra* Section III.A.

156. For a description of the abuse suffered by the New York heiress Brooke Astor at the hands of her son, Anthony D. Marshall, see MERYL GORDON, *MRS. ASTOR REGRETS: THE HIDDEN BETRAYALS OF A FAMILY BEYOND REPROACH* (2008); see also John Eligon, *Mrs. Astor's Son Guilty of Taking Tens of Millions*, N.Y. TIMES (Oct. 9, 2009), <https://www.nytimes.com/2009/10/09/nyregion/09astor.html> [<https://perma.cc/V2D8-FFJT>]. For more general categories of abuse, see Bruce D. Steiner, *Protecting Against Elder Financial Abuse*, WEALTH MGMT. (Nov. 15, 2019), <https://www.wealthmanagement.com/estate-planning/protecting-against-elder-financial-abuse> [<https://perma.cc/9M4B-TNV7>].

157. See *infra* note 157.

158. See, e.g., *In re Conservatorship of Hestor*, 989 So. 2d 986 (Miss. Ct. App. 2008) (holding that mother lacked ability to manage her financial affairs resulting in one son taking financial advantage of her); *Goodman v. Atwood*, 940 N.E.2d 514 (Mass. Ct. App. 2011) (discussing the elements of undue influence); *Barnes v. Marshall*, 467 S.W.2d 70 (Mo. 1974) (daughter successful in proving her father lacked testamentary capacity); *Haynes v. First Nat. State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981) (describing level of proof necessary to rebut presumption of undue influence in challenge by nephews against their aunt); see also DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993) (describing the testamentary litigation between the children of J. Seward Johnson and Barbara Piasecka, their stepmother and decedent's wife).



or significant personal property is transferred by an “elderly person who is dependent on others to a person with whom the elderly dependent person has a confidential or fiduciary relationship,” then it is *presumed* that the transfer was the “result of undue influence” unless the elderly person received independent counsel.<sup>159</sup> The aforementioned confidential or fiduciary relationship exists whenever there is a “relationship between the elderly dependent person and a person who provides care or services to that person whether or not care or services are paid for by the elderly person.”<sup>160</sup> Similarly, a fiduciary relationship may result because of a family relationship based on marriage or adoption,<sup>161</sup> being a friend or neighbor,<sup>162</sup> or being someone with whom the elderly person shares the same living quarters.<sup>163</sup>

California, raises the presumption of fraud or undue influence if a “dependent adult” transfers property to his or her “care custodian” and the instrument “was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.”<sup>164</sup> To rebut the presumption, the claimant must prove “by clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence,”<sup>165</sup> which will involve facts concerning the mental acuity of the transferor.<sup>166</sup>

There are certain exceptions to this presumption of undue influence. First, and likely the best approach for those employing professional services, is if the instrument is approved after a full disclosure of the relationship between the transferor and the caregiver.<sup>167</sup> Second is if the transfer is made to a person who is related by blood or affinity, within the fourth degree to the transferor, or is the cohabitant of the transferor.<sup>168</sup> Third is if the transfer instrument was drafted by a person related by blood or affinity to the transferor within the fourth degree, or is the cohabitant of the transferor.<sup>169</sup> The statute distinguishes the recipient from the drafter in these two provisions. Fourth, the instrument was executed outside the state of California by a transferor who was not

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159. 33 M.R.S.A. § 1022(1) (2021). California and Nevada have enacted a process to obtain independent review, hence the presumption would be inapplicable if the process is followed. See CAL. PROB. CODE § 21384 and NEV. REV. STAT. § 155.0975.

160. 33 M.R.S.A. § 1022(2)G (2021).

161. *Id.* § 1022(2)A.

162. *Id.* § 1022(2)H.

163. *Id.* § 1022(2)I.

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

165. *Id.* § 21380(b).

166. See, e.g., *In re Burke*, 441 N.Y.S.2d 542 (N.Y. App. Div. 1981).

167. CAL. PROB. CODE § 21382(c) (West 2020).

168. *Id.* § 21382(a).

169. *Id.* § 21382(b).

a resident of California when the instrument was executed.<sup>170</sup> The final exception is for any transfer that does not exceed \$5,000 if the total value of the transferor's estate equals or exceeds \$150,000.<sup>171</sup>

California seeks to balance the bona fide care custodian from others who are possibly more manipulative. As such, the statute defines a "care custodian" against whom the presumption *does apply* to include those persons who provided unpaid services (1) at least ninety days before or after providing those services, (2) during the caregiving relationship, (3) or at least six months before the transferor's death.<sup>172</sup> But the presumption *does not* apply to caregivers with an independent personal relationship with the recipient at least ninety days before providing those services, at least six months before the recipient's death, and before the recipient was admitted to hospice care.<sup>173</sup> If the caregiver meets these criteria, the statute acknowledges a personal relationship between the parties and the presumption of fraud or undue influence will not apply.

Illinois enacted the Presumptively Void Transfer Act,<sup>174</sup> effective in 2015, which creates a rebuttable presumption that any transfer between the transferor and a transferee is void if the transfer exceeds \$20,000 and the transferee is defined as a caregiver, which is defined as a paid or unpaid person assuming responsibility for all or a portion of the care of another person who needs assistance with activities of daily living.<sup>175</sup> Similar to the statutes in Maine, California, and Nevada, there are exceptions. First, family members are excluded from the presumption applying to caregivers;<sup>176</sup> the statute defines family members as a "spouse, . . . child, grandchild, sibling, aunt, uncle, niece, nephew, first cousin, or parent" of the transferor.<sup>177</sup> Second, any transfer is not automatically void but must be challenged within two years after the death of the transferor, or six months after the probate of any will or payable upon death contract.<sup>178</sup> Third, the presumption may be overcome by providing clear and convincing evidence in rebuttal, or proving by a

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170. *Id.* § 21382(f).

171. *Id.* § 21382(e). Illinois exempts transfers not in excess of \$20,000. *See* 755 ILL. COMP. STAT. 5/4a-10(a) (2018); Nevada exempts transfers less than \$3,000. *See* NEV. REV. STAT. § 155.0975(6) (2015); Maine applies the presumption to major transfers, defined as in excess of 10% of the transferor's estate. ME. REV. STAT. 33, § 1022(1) (2022).

172. CAL. PROB. CODE §§ 21380(3)-(4) (West 2020).

173. CAL. PROB. CODE § 21362(a) (West 2011).

174. 755 ILL. COMP. STAT. ANN. 5/4a-10 (West 2018).

175. 755 ILL. COMP. STAT. ANN. 5/4a-5(1) (West 2018). "Illinois may find it needs to narrow the definition of caregiver over time, as the definition of 'care custodian' has in California." Robert Barton, Lisa M. Lukaszewski & Stacie T. Lau, *Gifts to Caretakers*, 29 PROB. & PROP., 22, 24 (May-June 2015).

176. 755 ILL. COMP. STAT. ANN. 5/4a-5(1) (West 2018).

177. 755 ILL. COMP. STAT. ANN. 5/4a-5(2) (West 2015).

178. 755 ILL. COMP. STAT. ANN. 5/4a-10(b), 5/8-1(f) (West 2015).

preponderance of the evidence that the transferor's interest under the new transfer instrument is no greater than what the transferor would receive if there were no instrument.<sup>179</sup> In other words, the new instrument provides no gain to the transferee.

All of the named state statutes creating presumptions of fraud or undue influence have one thing in common: they seek to protect vulnerable older persons from financial abuse. An example of such abuse occurred in the case of *Durham v. Durham*,<sup>180</sup> where an older mother and father increasingly began to rely on their son and his wife, their daughter in law, for physical and financial assistance. When the mother died, the son and his wife moved into his parents' home to provide care for the son's father, then 90 years old, who was grieving over the death of his wife of sixty-four years.<sup>181</sup> Soon after the son and his wife moved into the home, the father executed a quitclaim deed in favor of his son and his wife, granting them joint ownership in the father's home and surrounding forty acres of land.<sup>182</sup>

Within two years the father sought to revoke the deed, claiming it was void under the terms of the Presumptively Void Transfers Act.<sup>183</sup> The father alleged that although his daughter-in-law provided him assistance, she told him he would lose his home if he did not sign the quitclaim deed immediately.<sup>184</sup> He further alleged that she stole \$11,000 from his locked safe, transferred title to his vehicles to herself, wrote checks to herself from her father-in-law's accounts, and concealed her actions throughout the process.<sup>185</sup> The court held that the daughter-in-law served as a caregiver under the terms of the state statute, that a transfer was made to her that benefited her in excess of what she would have otherwise received upon the man's death, and that she was not a defined family member under the statute, which would have exempted her from the terms of the statute.<sup>186</sup> As such, the court applied the terms of the statute and held that the quitclaim deed executed by the father was void.<sup>187</sup>

Undoubtedly, there are many instances when elders are the victims of financial abuse committed by unscrupulous caregivers. Statutes such as those enacted in Maine, Nevada, Illinois, and California, plus the vast body of caselaw scrutinizing transfers based on fraud or undue in-

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179. 755 ILL. COMP. STAT. ANN. 5/4a-15 (West 2015).

180. *Durham v. Durham*, No. 5-20-0140, 2021 WL 1227740 (Ill. App. Ct. Mar. 31, 2021).

181. *See id.* at \*1.

182. *See id.*

183. *See id.*

184. *See id.* at \*8.

185. *See id.* at \*1-2.

186. *See id.* at \*13.

187. *See id.* at \*12-13.

fluence, serve a valid purpose. Yet these remedies place undue burdens on those well-intentioned caregivers who, because of dependable service, acquire the status of objects of the decedent's bounty. To properly provide for these persons, an "attorney will need extra time to investigate whether a 'care custodian' relationship applies and, if it does, to take measures to ensure that the gift does not fail, such as retaining an additional attorney to execute a certificate of independent review."<sup>188</sup>

Likewise, an attorney will need to ensure that valid express contracts are in place to allow for the family caregiver to overcome the presumption of gift, which is an additional burden placed upon equity owed to the caregiver. There must be better options.

#### IV. CAREGIVER COMPENSATION OPTIONS

Volunteer caregivers expend considerable dedication into providing care to family members and/or friends. As care recipients age and their needs deepen in both dependency and complexity, caregivers may shoulder a higher burden regarding time and monetary expense. The judicial and legislative hostility towards caretaker compensation is difficult to comport with the reality that most caregivers face. Nevertheless, this final section illustrates three caregiver compensation options: explicit agreements, the statutory custodial claim, and, as the author suggests, the private caregiver presumption.

##### A. *Caregiver Agreements*

Any person entering a continuing care retirement community (CCRC) must sign an agreement, a contract, defining the obligations of all the parties involved.<sup>189</sup> The items covered in any agreement include the party responsible for payment,<sup>190</sup> the grounds upon which a resident may be discharged,<sup>191</sup> and the obligations of all of the parties, including as to costs and service. Because these CCRCs are expensive, yet offer an extensive range of services, any contractual agreement will be detailed and often be the product of lessons learned from other retirement

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188. Robert Barton, Lisa M. Lukaszewski & Stacie T. Lau, *Gifts to Caretakers*, 29 PROB. & PROP. 22, 25 (May-June 2015).

189. See also *Herriot v. Channing House*, 2009 WL 225418 (N.D. Cal. 2009) (upholding the terms of a contract signed by residents under California Health and Safety Code §1787).

190. See, e.g., *Slovik v. Prime Healthcare Corp.*, 838 So.2d 1054 (Ala. Ct. App. 2002) (holding that person responsible for a third-party recipient's care is not liable for payment for that care).

191. See generally 42 U.S.C. §§ 1395i-3(c)(5)(A)(ii), 1396r(c)(5)(A)(ii) (a nursing facility may not require a third-party to guarantee payment of costs as a prior condition to admission to the facility).

communities and their accrediting associations.<sup>192</sup> These CCRCs are organized and motivated to avoid hassle and litigation. On the other hand, individual caregivers are not organized. The terms of caregiving services and corresponding costs and payments are likely implied at best,<sup>193</sup> and even if express, may still be rejected if suspected to fraudulently transfer estate assets to commit Medicaid fraud.<sup>194</sup>

The facts of *In re Estate of Olivo vs. Commissioner* illustrate the imprecise nature of private caregiver contracts.<sup>195</sup> The case involved a son who provided full time care for his parents from 1994 to 2003, when the latter of the parents died. The caregiver-son was a licensed attorney with an advanced law degree in taxation but ceased to practice law during the time he cared for his parents full-time. After his father died, caring for his mother took a severe toll on him. He was not sleeping because of her needs, and relations with the remainder his family were strained and contentious. During the last decade of his mother's life, she was hospitalized twenty-five times due to an increasing number of chronic conditions.<sup>196</sup>

When his mother died, the caregiver-son completed her estate tax return to include fees taken as her estate accountant, attorney, and administrator; these were separate expenses from a claim he made to a fee of \$1,240,000, specified "as a debt the estate owed to him for the care he provided to decedent pursuant to an alleged agreement he had with [his mother] to compensate him for his services in caring for her[.]"<sup>197</sup> When the claim was rejected, the court held that there was no express agreement between the mother and her son to provide caregiver services to the parents.<sup>198</sup> Specifically, the court ruled that the "estate failed to provide a written contract or any other documentary or corroborating evidence to substantiate the alleged agreement . . . ."<sup>199</sup> The burden of proof to produce such a contract was on the caregiver-son and he was unable to produce any written agreement or clear and convincing evidence of an oral contract between him and his parents.<sup>200</sup> Similarly, he

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192. See, e.g., *Providers Earn Recognition for Accredited Services*, COMM'N ON ACCREDITATION OF REHAB. FACILITIES INT'L, <http://www.carf.org/Providers.aspx?content=content/Accreditation/Opportunities/AS/CCAC.htm> [<https://perma.cc/7HAR-DDQU>] (last visited Mar. 20, 2022).

193. See, e.g., *In re Estate of Milborn*, 461 N.E.2d 1075, 1078 (Ill. App. Ct. 1984) (describing facts indicating how an implied contract may result from the equitable premise that no one should unjustly enrich himself at another's expense).

194. See, e.g., *Andrews v. Div. of Med. Assistance*, 861 N.E.2d 483 (Mass. App. Ct. 2007) (refusing to honor caregiving contract without evidence of contemporaneous intent to pay).

195. *In re Estate of Olivo v. Comm'r*, No. 15428-07, 2011 WL 2709636 (T.C. July 11, 2011).

196. *Id.* at \*2.

197. *Id.* at \*3.

198. *Id.* at \*5.

199. *Id.* at \*3.

200. *Id.*

was unable to recover under a theory of quantum meruit, an equitable ground providing restitution to a person who has provided a benefit with a *reasonable expectation* of monetary recovery.<sup>201</sup> The court held that there could be no reasonable expectation of recovery because any services provided to a family member are presumptively gratuitous.<sup>202</sup>

The *Olivio* decision, describing the plight of the caregiver-son, concomitantly illustrates the vague parameters of private caregiving, particularly among family members, and the necessity of having an express contract validly executed by all parties. Legal commentators note that this decision illustrates that “documentation is very important . . . particularly if the [person asserting the claim] has an expertise in the area in which the expense was incurred. A one-page contract probably would have been sufficient here.”<sup>203</sup> Interestingly, more thought is now being given to standardizing private caregiver agreements, prompting more people to use them.<sup>204</sup> For example, the Family Caregiver Alliance provides information on how to create such agreements: first, discuss the agreement with family members; second, establish compensation for a caregiver; third, determine the elements needed for an agreement to be effective; and fourth, supply a suggested list of items that should be included in any agreement.<sup>205</sup> These efforts to provide advice supplement the modern trend to permit more persons to remain in their homes for as long as possible, thereby lessening the burden on Medicaid long-term care expenditures and establishing ethical boundaries.<sup>206</sup>

Precise contract documentation will also rebut the effects of any Dead Man Statute that prohibits a caregiver from testifying about an oral conversation with a decedent unless there is independent corroborating testimony.<sup>207</sup> Such a statute renders as inadmissible any testimony intended to prove that the decedent entered into an oral contract, which works in tandem with the family member presumption of gratuity to negate any economic compensation awarded for caregiver ser-

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201. *Id.* at \*5. To recover under a theory of quantum meruit, a plaintiff must establish: (1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services.

202. *Id.* at \*6.

203. *Lack of Documentation Results in Deduction Disallowance*, 38 EST. PLAN. 37, 39 (2011).

204. See *Personal Care Agreements*, FAM. CAREGIVER ALL., <https://www.caregiver.org/resource/personal-care-agreements/> [https://perma.cc/A223-UJDJ]; see also ALBERT W. SECOR & TERRY C. COX, 26 TENN. PRAC. ELDER L. § 5:7 (2021 ed.).

205. See FAM. CAREGIVER ALL., *supra* note 204.

206. See, e.g., Sheena J. Knox, Note, *Eldercare for the Baby-Boom Generation: Are Caregiver Agreements Valid?*, 45 SUFFOLK U. L. REV. 1271 (2012).

207. See, e.g., TENN. CODE ANN. § 24-1-203 (West 2022); 735 ILL. COMP. STAT. ANN. 5/8-201 (West 2022) (effective Jan. 1, 2012) (disallowing testimony of a conversation with a deceased person or a person disabled due to mental illness).

vices.<sup>208</sup> For instance in *In re Estate of Rollins*, the state appellate court held that the Dead Man's Act barred testimony by the decedent's half-sister, who was his caregiver.<sup>209</sup> The half-sister alleged that she and the decedent had an oral agreement that he would compensate her for her provision of his care during his final years.<sup>210</sup> In prohibiting her testimony, the court admitted that the statute may promote "unjust results" but nonetheless it remains the law of the land.<sup>211</sup>

### B. Statutory Custodial Claim

In 1988, Illinois became the first state to permit individuals to file custodial claims against the estate of a disabled person for compensation for services rendered to that disabled person.<sup>212</sup> Illinois initiated the custodial claim process! The qualifying terms of the statute are strictly construed,<sup>213</sup> but in the absence of an express agreement or an enforceable claim under either an oral contract or quantum meruit, this statutory approach provides a reasonable basis upon which to award economic compensation. The elements are as follows:

*First, who may bring a claim?* To qualify you must be (a) a spouse, parent, brother, sister, or child, of (b) a person with a disability, who (c) dedicates himself or herself to the care of that disabled person, by (d) living with and personally caring for that person, for (e) at least three years.<sup>214</sup>

*Second, what are the parameters of the claim?* The statutory claim shall be (a) made against the estate<sup>215</sup> of the disabled person, (b) consider the claimant's lost employment opportunities, lost lifestyle opportunities, and any emotional distress experienced as a result of personally caring for the disabled person, (c) must be based on the nature and extent of the person's disability and subject to available estate assets, and (d) may

208. See Gallanis & Gittler, *supra* note 44, at 770–71.

209. *In re Estate of Rollins*, 645 N.E.2d 1026, 1027, 1031 (Ill. App. Ct. 1995); see also *In re Estate of Babcock*, 473 N.E.2d 1316 (Ill. 1985) (holding that spouses of persons incompetent to testify under the Dead Man's Act are also barred from testifying).

210. But see *In re Estate of Goffinet*, 742 N.E.2d 874 (Ill. App. Ct. 2001) (holding that the Dead Man's Act did not apply to a daughter appointed as her mother's guardian, by the state thus allowing her to testify about her services rendered as guardian).

211. *In re Estate of Rollins*, 645 N.E.2d at 1032.

212. 755 ILL. COMP. STAT. ANN. 5/18-1.1 (West 2015).

213. See Anne E. Melley, *Claims for Services Rendered to Decedent—Family Members*, 19 ILL. LAW AND PRAC. EX'RS AND ADM'RS § 67 (West, updated Aug. 2022); see 19 Ill. L. & Prac. EX'RS AND ADM'RS § 67 (West, updated Aug. 2022).

214. See 755 ILL. COMP. STAT. ANN. 5/18-1.1 (West 2015).

215. Cf. *Herman v. Hilton*, No. 4-12-0575, 2013 WL 428055, ¶38 (Ill. App. Ct. Feb. 1, 2013) (estate may include any assets within the ambit of decedent's ownership, including non-probate transfers).

be in addition to any other claim such as reasonable nursing and other care.<sup>216</sup>

*Third, are there mitigating factors?* A court may reduce the amount of the custodial claim award if, (a) the claimant received free or low cost housing because of any cohabitation with the disabled person, (b) caring for the disabled alleviated the need for the claimant to be employed full time, (c) the claimant received an outright financial benefit, (d) the disabled person received care from others in addition to the claimant, or (e) the care provided by the claimant was not necessarily proximate to the time of the disabled person's death.<sup>217</sup>

*Fourth, what is the amount of the compensation?* Subject to the aforementioned parameters, mitigating factors, each claimant may receive, at a minimum but limited by assets available, \$180,000 (100% disability), \$135,000 (75% disability), \$90,000 (50% disability), and \$45,000 (25% disability).<sup>218</sup>

The Illinois statute sustained challenges for violating due process, equal protection, and special legislation principles, but while the state appellate court did not expressly decide the constitutionality of the statute, it did permit the statute to be applied, yet pointed out that a practical problem could arise when an estate must pay an array of creditor claims.<sup>219</sup> Courts have ruled that a general state statute of limitations is inapplicable when evaluating the number of caregiver years a relative could use to establish a custodial claim.<sup>220</sup> Also, more than one specified family member may make a custodial claim against the estate of the disabled person, but each claimant must establish the necessary parameters.<sup>221</sup> The caregiver need not provide all of the care to the decedent; other parties could contribute to the care of the decedent and the family caregiver could file a claim. Obviously, there is a range of factors to consider when establishing the amount of the compensation.<sup>222</sup>

The statute has merit because it provides economic compensation to caregivers without the necessity of proving an express contract or establishing an argument for quantum meruit. Further, it rejects the pre-

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216. See 755 ILL. COMP. STAT. ANN. 5/18-1.1 (West 2015).

217. See *id.*

218. See *id.*

219. See *In re Estate of Gebis*, 710 N.E.2d 385, 389 (Ill. 1999) (holding that the claim is constitutional and takes priority along with burial and administrative expenses). For a case involving the priority of claims, see *Herman v. Hilton*, No. 4-12-0575, 2013 WL 428055 (Ill. App. Ct. 2013) (holding that a claimant may become a creditor with a claim against any assets of the decedent's estate).

220. See, e.g., *In re Estate of Hale*, 890 N.E.2d 1244 (Ill. App. Ct. 2008) (holding that the three years specified in the statute was simply a minimum time specified and the state's general statute of limitations did not apply).

221. See, e.g., *In re Estate of Jolliff*, 771 N.E.2d 346 (Ill. 2002).

222. See, e.g., *In re Estate of Lower*, 848 N.E.2d 645 (Ill. App. Ct. 2006).



sumption that all care given by a family member is gratuitous. Finally, the statute provides a range of parameters and mitigating factors that offer a court flexibility regarding facts and data.

But the statute does have flaws. First, requiring the claimant to be a relative—spouse, parent, brother, sister, or child—is an obstacle for many who provide caregiving services.<sup>223</sup> Among these are nonmarital cohabitants, stepchildren, nieces and nephews, and long-term friends. Courts seem willing to permit a half-sister to file a custodial claim against the estate of her half-brother,<sup>224</sup> and even though the Illinois statute includes spouses as relatives able to file a claim, traditionally spouses have been expected to provide care for each other without remuneration.<sup>225</sup>

There have been significant changes in the composition of the family in the United States since the right to privacy was officially sanctioned in 1965.<sup>226</sup> Today, statutory and common law marriage retain their status as the primary vehicles by which the state distributes various economic advantages, even sociological preeminence, yet it is undeniable that increased personal liberty has resulted in a rapid increase in the number of nonmarital cohabitants.<sup>227</sup> Not all nonmarital cohabitants are young. Among them is an “increasing share of middle-aged and older adults [who] are living with persons other than their spouses or cohabiting partners, and this living arrangement is increasingly associated with poor health.”<sup>228</sup> For example, the Illinois statute fails to include persons exercising their liberty prerogatives through nonmari-

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223. See, e.g., *Estate of Boyd v. Langford*, No. 5-16-0140, 2017 WL 104142 (Ill. App. Ct. 2017) (holding that nonmarital cohabitation that lasted thirty-eight years, the last nine of which consisted of caregiver services, was sufficient to rebut any presumption of fraud and entitled the caregiver to nonmarital non-probate estate assets).

224. See, e.g., *McGee v. La Salle Nat'l Bank (In re Estate of Rollins)*, 645 N.E.2d 1026 (Ill. App. Ct. 1995).

225. See, e.g., *Stokes v. Stokes*, 88 N.E. 829, 831 (1909). But see *State Bank v. Lower (In re Estate of Lower)*, 848 N.E.2d 645 (Ill. App. Ct. 2006) (granting wife \$100,000 for caring for her husband for three years prior to his death due in part to her emotional distress, absence from her business, and loss of her social life).

226. See *Griswold v. Connecticut*, 381 U.S. 479 (1965) (marital partners' right to privacy); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (individual right of privacy); *Lawrence v. Texas*, 539 U.S. 558 (2003) (same sex individuals' liberty interest); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same sex couples' right to marriage).

227. The number of adults cohabiting in the United States in 2016 reached 18 million, up 29% since 2007. A.W. Geiger & Gretchen Livingston, *8 Facts about Love and Marriage in America*, PEW RESEARCH CTR. (Feb. 13, 2019), <https://www.pewresearch.org/fact-tank/2019/02/13/8-facts-about-love-and-marriage/> [<https://perma.cc/UE2L-ZBLB>]. For a discussion of nonmarital cohabitation, see Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 ACTEC L. J. 79 (2020).

228. Esther O. Lamidi & Sue P. Nash, *Two Decades of Change in Living Arrangements and Health of Middle-Aged and Older Adults in the U.S., 1997-2018*, 41(5) J. APPLIED GERONTOLOGY 1407, 1407 (Feb. 24, 2022).

tal cohabitation, thereby impacting constitutional safeguards and the overall equitable intent of the legislation.

Second, requiring a claimant to live with the disabled person is an issue. To illustrate, the Third District Appellate Court of Illinois held that a sister of the disabled person who was living in a separate apartment, but in the same building, was not living with the decedent as required by the statute.<sup>229</sup> Likewise, a son who cared for his disabled mother two or three days a week and spent vacations with her did not live with his mother and was thus unable to make a custodian claim.<sup>230</sup> Caregiving can be more complicated than living in a common physical abode. This is illustrated by the fact that a “share of the adult population report being in a committed intimate relationship while living in separate residences, giving rise to the label ‘Living Apart Together’ (LATs)”<sup>231</sup> It is possible that a person could *dedicate* himself or herself to the care of a disabled person and yet have a separate physical residence and vice versa. Living together does not automatically equate with dedication.

The parameters of dedication are illustrated in *Estate of Mendelson v. Mendelson*, where for six years a son made daily meals for his mother, cleaned her home, did her laundry, administered her medications, drove her to medical appointments, and ran errands for her.<sup>232</sup> He also lived in her spacious home with his wife and their children, sent his children to nearby schools, and maintained his employment opportunities.<sup>233</sup> When he filed a custodial claim, the court held that he did not sufficiently dedicate himself to his mother to warrant his claim. The court found that “factors to consider as to whether a claimant dedicated himself to the decedent’s care include whether the claimant lost employment opportunities, lost lifestyle opportunities, and suffered emotional distress due to his care of the decedent.” It seems reasonable that the Illinois statute should apply these factors to the caregiver living apart from the recipient.

Third, the Illinois statute requires a minimum of three years of caregiving before a claimant becomes eligible to make a claim. On one hand, it seems reasonable to establish a threshold of caregiving duration to minimize the number of claims. Furthermore, by requiring a minimal threshold, the statute maximizes the parameters and mitigating factors affecting the amount of compensation. However, caregiving is a human endeavor involving intimate involvement, extraordinary commitment, and end of life presence; this is not equivalent to accumu-

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229. See *In re Estate of Hoehn*, 600 N.E.2d 899 (Ill. App. Ct. 1992).

230. See *In re Estate of Riordan*, 814 N.E.2d 597 (Ill. App. Ct. 2004).

231. Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1016 (2018).

232. See *Estate of Mendelson v. Mendelson*, 48 N.E.3d 891, 896 (Ill. App. Ct. 2016).

233. See *id.* at 899.

lating years to qualify for a vested pension. The uniqueness of the care rendered trumps the quantity of time it was rendered, warranting closer examination of the scope of the care provided, proximity to death of the decedent, and the level of sacrifice offered by the caregiver.

Fourth, the statute provides compensation amounts ranging from \$45,000 to \$180,000, yet the statute qualifies these amounts by specifying they are “at a minimum but subject to the extent of the assets available.”<sup>234</sup> Attorneys representing clients in pursuit of these claims opine that the care given was never about the money, as “the amounts sought . . . are typically the statutory minimum.”<sup>235</sup> One attorney, whose practice involved filing custodial claims, reported that she filed claims ranging from \$100,000 to \$3 million for cases involving 100% disability.<sup>236</sup> Money received by the claimant is treated as gross income for tax purposes, and the deductibility of claims on any estate tax return filed by the decedent’s estate is dependent on state and federal law.

But are the statute’s compensation parameters warranted? On a practical level, the decedent’s estate must have sufficient assets to meet any custodial claim, any claim should be documented by disability reports made by the decedent’s caseworker, the claim must be filed against the decedent’s probate within six months, and the care provided proximate to the decedent’s death is of particular significance. Throughout the process, “[o]ne of our major arguments is that the claimant saved the decedent money by providing care for free or reduced rates.”<sup>237</sup> These recited practicalities are muted by the objectivity of the statute’s provisions, relying as they do upon a decedent’s disability and specified minimum levels of compensation. Another more holistic approach is to delete the minimum amounts, which were last updated in 2008, thereby focusing solely on the decedent’s disability, the length of care provided, the savings generated, and the contribution made to the decedent’s personal wishes. The claimant should be placed on an equal footing with the other objects of the decedent’s bounty, in proportion with what others are receiving from the decedent, and in proportion to what the caregiver deserves. The private caretaker presumption provides for this.

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234. 755 ILL. COMP. STAT. ANN. § 5/18-1.1 (2015).

235. Margot Gordon, *Custodial Claims: Compensation for Family Caregivers*, 98 Ill. B.J. 256, 257 (2010).

236. *Id.* at 258.

237. *Id.*

### C. *Private Caregiver Presumption*

Private caregivers who are consanguineous family members, dedicated to the care of chronically disabled relatives, are denied compensation by the traditional presumption that their care is gratuitously given. This presumption may be rebutted with a written agreement specifying compensation, but because of the intimate nature of the services rendered, such agreements are rare. Even if extant, they are subject to scrutiny as being the product of fraud, duress or undue influence, not to mention that Medicaid authorities will view them as veiled attempts to conceal estate assets when applying for Medicaid long-term care assistance.<sup>238</sup> Further, oral understandings between a caregiver and a recipient, which are far more likely, are rebuffed because they are either devoid of actual expectation of economic compensation or proof of such is barred by the Dead Man's Statute.

Further, *inter vivos* gifts or testamentary transfers, both probate and nonprobate arrangements from care recipients to caregivers, are regarded with scrutiny if not banned outright. As discussed, at present, Illinois, California, Maine, and Nevada have enacted statutes banning or limiting these transfers, which at a minimum warrant careful legal analysis. In every state there are multiple judicial opinions illustrating the precarious nature of transfers made between two persons in a confidential relationship. At the level of will contest, the cases acknowledge that the relationship between a caregiver and recipient is confidential, relying on trust, if not an outright guardian-ward dependency.<sup>239</sup> Such confidentiality warrants heightened scrutiny which, when coupled with adverse presumptions and statutory restraints, engenders inequities for a caregiver—family or not—who sacrifices options inherent in individual liberty to provide needed personal care for another unable to continue activities of daily living unassisted.

To address the economic inequities fostered by both statutory and common law, this Article proposes a positive presumption, termed the private caregiver presumption, which relies upon the premise of the traditional doctrine of advancement, presuming a decedent intends equality. The original doctrine of advancement applied to an intestate decedent and his or her children, and eventually it was extended to de-

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238. See, e.g., *Hines v. Dep't of Pub. Aid*, 850 N.E.2d 148 (Ill. 2006) (describing one state's efforts to recover assets allegedly owned by a Medicaid recipient).

239. See, e.g., *Haynes v. First Nat'l State Bank of New Jersey*, 432 A.2d 890 (N.J. 1981) (describing the elements necessary to establish undue influence between a daughter and her elderly mother); see generally Elizabeth Candido Petite, *Recognize Red Flags in Estate Planning to Avoid Litigation*, 46 EST. PLAN. 40 (2019), <https://www.lindabury.com/firm/wp-content/uploads/2019/05/Reprint-Estate-Planning-Magazine-May-2019-PETITE3071108.1.pdf> [<https://perma.cc/3AUS-3923>] (describing classic examples of intra-family contest of wills).

cedent and his or her heirs.<sup>240</sup> The doctrine's goal is the same: to foster equality. In minor ways, the presumption advocated here departs from children or heirs; it applies to those, regardless of consanguinity, who may be described as "objects of the decedent's bounty," which may include decedent's private caregivers, regardless of familial status. "The natural objects of a testator's bounty are those who have some natural claim upon his benevolence, affection or consideration,"<sup>241</sup> and benevolence, affection, and consideration are not confined to heirs alone. Furthermore, unlike the traditional doctrine that applied solely to intestacy, the presumption applies regardless of whether the decedent died testate, intestate, or a bit of both, encompassing both probate and non-probate transfers. The elements are as follows:

*First, who may bring a claim?* Any caregiver who (a) dedicates himself or herself, to (b) the personal care of a chronically disabled person, so as to (c) warrant both personal and economic benefit to the decedent and his or her estate, with (d) a corresponding economic loss to the caregiver.

*Second, what are the parameters of the claim?* A presumption arises in favor of any qualified caregiver meriting an economic claim as a creditor of the estate based on (a) the caregiver's lost employment opportunities, (b) lost lifestyle opportunities, and (c) any emotional distress experienced as a result of caring for the decedent. In evaluating any compensation based on this presumption, the court will take into consideration (d) the applicable statute of limitation for filing of a creditor claim, (e) the overall assets of the estate, including probate and non-probate assets, and (f) any other claim or economic benefit awarded to the caregiver as a result of the decedent's death.

*Third, are there mitigating factors?* Any court may rebut the primary caregiver presumption in whole or in part because of *inter vivos* compensation received by the caregiver from the decedent to include savings on living expenses, receipt of financial or entitlement support, that the services rendered by the caregiver were insubstantial due to the contribution of others, or that the caregiver's services were not proximate to the death of the decedent.

*Fourth, what is the amount of the compensation?* Based on the parameters of the claim and the existence of any mitigating factors, a court may award to the caregiver, as a creditor of the decedent's estate, an amount commensurate with any other recipient object of the decedent's

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240. See UNIF. PROB. CODE § 2-109 (amended 2019).

241. *Hockersmith v. Cox*, 95 N.E.2d 464, 470 (Ill. 1950); see also Robert S. Hunter, *Natural Objects of Bounty-Definition*, 19 ILL. PRAC. EST. PLAN. & ADMIN. § 211:3 (4th ed. 2021) ("When I refer to the natural objects of one's bounty, I mean those persons who might reasonably be expected to be his beneficiaries because of family relationship or ties of gratitude or affection.").

bounty. These objects of bounty would include any person, institution, or group of persons, regardless of family connection, taking decedent's property under testate, intestate, or will substitutes.

There are a number of distinctive elements to this proposed presumption. Claimants seeking to benefit need not be related, either consanguineously or by affinity. Instead, the presumption benefits *any person* voluntarily dedicating personal care to a *disabled person* that results in *economic benefit* to the decedent recipient or his or her estate and a corresponding *economic loss* to the caregiver. This approach recognizes the evolving nature of who constitutes family, plus the corresponding statistical parameters defining modern caregivers. As is described in the parameters of the claim and subject to the defined mitigating factors, a court is empowered to establish an amount of compensation commensurate with these subjective factors. The goal is to distribute the decedent's estate in a manner that promotes equality among all of the decedent's objects of bounty. Similar to the premise underlying the traditional doctrine of advancement, treating all the decedent's objects of bounty equally better fosters equity.

## V. CONCLUSION

The percentage of Americans needing assistance with activities of daily living continues to increase exponentially, especially in some of our most populous states. An increasing aging population will place the elderly at risk, add financial burdens on families, and further stress the limits of Medicaid funding. To address the challenge of cost and care, states and the federal government are enacting strategies to permit more Americans to remain in their homes for as long as possible. A significant number of persons, defined as private caregivers, have voluntarily taken upon themselves the responsibility of caring for disabled persons, providing companionship, food, support for the activities of daily living, and interaction with medical and legal bureaucracies.

Almost all of these caregivers provide care because they are able to do so and feel it is their responsibility as a friend, relative, partner, or spouse. The reality is that while these caregivers expend substantial dedication, often for many years, very often they concomitantly suffer loss of income, career opportunities, social interaction, and emotional tranquility. These losses become objectified when the disabled recipient dies and there is no financial compensation made to the caregiver from the decedent's estate. Indeed, even if the decedent's estate provides for the surviving caretaker, these gifts, devises, and bequests are often voided because of the confidential relationship that exists between the

decedent and the caregiver. Oral claims for recompense are often voided because the caregiving is considered gratuitous, or because any testimony concerning the elements of the claim is barred by the state's Dead Man Statute. Uniquely, Illinois permits a defined family member to submit a custodial claim against the decedent's estate. However, this is available in only one state and ignores the efforts of countless modern caregivers who do not qualify as family. Nonetheless, at least four states raise a statutory presumption of fraud or undue influence involving most transfers made to caregivers.

To address the inequitable treatment affecting an increasing number of modern caregivers, this Article proposes a private caretaker presumption, which provides a dedicated claimant with the option of submitting a creditor's claim upon the decedent's estate resulting in compensation that a court finds fair when compared to any amounts devolving to other objects of the decedent's bounty. Similar to the presumption of equality integral to the traditional doctrine of advancement, this presumption permits a court to promote equality among all those to whom the decedent owed gratitude or affection. The presumption does not require statutory enactment, and it does not limit the ability of a court to estimate the parameters of the caregiver's contribution or any mitigating factors to lessen the claim. Instead, it permits a court to recognize that something of value was given, which enhanced the value of the decedent's estate. The presumption permits the caregiver to receive compensation in proportion to what was awarded to others. Current law falls short, and this presumption is meant to address this challenge of inequity.