

2014 -- S 2884

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STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2014

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A N A C T

RELATING TO PROBATE PRACTICE AND PROCEDURE - FINANCIAL EXPLOITATION
OF ELDERS AND DEPENDENT PERSONS

Introduced By: Senators Conley, Goldin, Cool Rumsey, McCaffrey, and Lombardi

Date Introduced: April 09, 2014

Referred To: Senate Judiciary

It is enacted by the General Assembly as follows:

1 SECTION 1. Title 33 of the General Laws entitled "PROBATE PRACTICE AND
2 PROCEDURE" is hereby amended by adding thereto the following chapter:

3 CHAPTER 19.1

4 FINANCIAL EXPLOITATION OF ELDERS AND DEPENDENT PERSONS

5 **33-19.1-1. Short title.** -- This chapter shall be known and may be cited as the "Financial
6 Exploitation of Elders and Dependent Persons Act."

7 **33-19.1-2. Definitions.** -- As used in this chapter: (1) "Care custodian" means a person
8 who provides health or social services to a dependent adult, except that "care custodian" does not
9 include a person who provided services without remuneration if the person had a personal
10 relationship with the dependent adult: (i) At least ninety (90) days before providing those
11 services; (ii) At least six (6) months before the dependent adult's death; and (iii) Before the
12 dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice
13 care. As used in this section, "remuneration" does not include the donative transfer at issue under
14 this chapter or the reimbursement of expenses.

15 (2) "Health and social services" means services provided to a dependent adult because of
16 the person's dependent condition, including, but not limited to, the administration of medicine,
17 medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping,
18 cooking, and assistance with finances.

1 (3) "Dependent adult" means a person who, at the time of executing the instrument at
2 issue under this section, was a person described in either of the following:

3 (i) The person was sixty-five (65) years of age or older and satisfied one or both of the
4 following criteria:

5 (A) The person was unable to provide properly for his or her personal needs for physical
6 health, food, clothing, or shelter;

7 (B) Due to one or more deficits in the mental functions listed in § 11-5-12(b)(2), the
8 person had difficulty managing his or her own financial resources, or resisting fraud or undue
9 influences.

10 (ii) The person was eighteen (18) years of age or older and satisfied one or both of the
11 following criteria:

12 (A) The person was unable to provide properly for his or her personal needs for physical
13 health, food, clothing, or shelter.

14 (B) Due to one or more deficits in the mental functions listed in § 11-5-12(b)(2), the
15 person had substantial difficulty managing his or her own financial resources, or resisting fraud or
16 undue influences.

17 (4) "Independent attorney" means an attorney who has no legal, business, financial,
18 professional, or personal relationship with the beneficiary of a donative transfer at issue under
19 this chapter, and who would not be appointed as a fiduciary or receive any pecuniary benefit as a
20 result of the operation of the instrument containing the donative transfer at issue under this
21 chapter.

22 (5)(i) A person who is "related by blood or affinity" to a specified person means any of
23 the following persons:

24 (A) A spouse or domestic partner of the specified person;

25 (B) A relative within a specified degree of kinship described in §§ 33-19.1-3 or 33-19.1-4
26 to the specified person, or within a specified degree of kinship described in §§ 33-19.1-3 or 33-
27 19.1-4 to the spouse or domestic partner of the specified person; or

28 (C) The spouse or domestic partner of a person described in subsection 5(i)(B).

29 (ii) For the purposes of this definition, "spouse or domestic partner" includes a
30 predeceased spouse or predeceased domestic partner.

31 **33-19.1-3. Prohibited transaction.** -- (a) A provision of any document or instrument,
32 including commercial instruments as defined in title 6A, making a donative transfer to any of the
33 following persons is presumed to be the product of fraud or undue influence:

34 (1) The person who drafted the instrument;

1 (2) A person in a fiduciary relationship with the transferor who transcribed the instrument
2 or caused it to be transcribed;

3 (3) A care custodian of a transferor who is a dependent adult, but only if the instrument
4 was executed during the period in which the care custodian provided services to the transferor, or
5 within ninety (90) days before or after that period;

6 (4) A person who is related by blood or affinity, within the third degree, to any person
7 described in subsections (a)(1) - (a)(3).

8 (5) A cohabitant or employee of any person described in subsections (a)(1) - (a)(3); or

9 (6) A partner, shareholder, or employee of a law firm in which a person described in
10 subsections (a)(1) - (a)(2) has an ownership interest.

11 (b) The presumption created by this section is a presumption affecting the burden of
12 proof. The presumption may be rebutted by proving, by clear and convincing evidence, that the
13 donative transfer was not the product of fraud or undue influence.

14 (c) Notwithstanding the provisions of subsections (a)(1) - (a)(2), and with respect to a
15 donative transfer to the person who drafted the donative instrument, or to a person who is related
16 to, or associated with, the drafter as described in subsections (a)(4) - (a)(6), the presumption
17 created by this section is conclusive.

18 (d) If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear
19 all costs of the proceeding, including reasonable attorney's fees.

20 **33-19.1-4. Exceptions.** -- Section 33-19.1-3 does not apply to any of the following
21 instruments or transfers:

22 (1) A donative transfer to a person who is related by blood or affinity, within the fourth
23 (4th) degree, to the transferor or is the cohabitant of the transferor.

24 (2) An instrument that is drafted or transcribed by a person who is related by blood or
25 affinity, within the fourth (4th) degree, to the transferor or is the cohabitant of the transferor.

26 (3) An instrument that is approved pursuant to an order of the superior, family, district or
27 any probate court, after full disclosure of the relationships of the persons involved.

28 (4) A donative transfer to a federal, state, or local public entity, an entity that qualifies for
29 an exemption from taxation under section 501(c)(3) or 501(c)(19) of the Internal Revenue Code,
30 or a trust holding the transferred property for the entity.

31 (5) A donative transfer of property valued at five thousand dollars (\$5,000) or less, if the
32 total value of the transferor's estate equals or exceeds the amount of fifty thousand dollars
33 (\$50,000).

34 (6) An instrument executed outside of Rhode Island by a transferor who was not a

1 resident of Rhode Island when the instrument was executed.

2 **33-19.1-5. Review by independent attorney – Certificate of review.** -- (a) A gift is not
3 subject to § 33-19.1-3 if the instrument is reviewed by an independent attorney who counsels the
4 transferor, out of the presence of any heir or proposed beneficiary, about the nature and
5 consequences of the intended transfer, including the effect of the intended transfer on the
6 transferor's heirs and on any beneficiary of a prior donative instrument, attempts to determine if
7 the intended transfer is the result of fraud or undue influence, and signs and delivers to the
8 transferor an original certificate in substantially the following form:

9 "CERTIFICATE OF INDEPENDENT REVIEW

10 I, _____, have reviewed

11 _____
(attorney's name)

12 _____ and have counseled the transferor,

13 (name of instrument)

14 _____, on the nature and consequences of any

15 (name of transferor)

16 transfers of property to _____

17 (name of person described in § 33-19.1-3) that would be made by the instrument.

18 I am an "independent attorney" as defined in § 33-19.1-2 and I am in a position to advise
19 the transferor independently, impartially, and confidentially as to the consequences of the
20 transfer. On the basis of this counsel, I conclude that the transfers to
21 _____ that would (name of person described in § 33-
22 19.1-3) be made by the instrument are not the product of fraud or undue influence.

23 _____ "

24 (Name of Attorney) _____ (Bar#) _____ (Date)

25 (b) An attorney whose written engagement, signed by the transferor, is expressly limited
26 solely to compliance with the requirements of this section, shall not be considered to otherwise
27 represent the transferor as a client.

28 (c) Under no circumstances shall an attorney who drafts an instrument review and certify
29 the instrument.

30 (d) The attorney who conducts the independent review shall provide a copy of the signed
31 certification to the drafting attorney.

32 **33-19.1-6. Failure of gift.** -- If a gift fails under this chapter, the instrument making the
33 gift shall operate as if the beneficiary had predeceased the transferor without spouse, domestic
34 partner, or issue.

1 **33-19.1-7. Liability.** -- (a) A person is not liable for transferring property pursuant to an
2 instrument that is subject to the presumption created under § 33-19.1-3, unless the person is
3 served with notice, prior to transferring the property, that the instrument has been contested under
4 this section.

5 (b) A person who is served with notice that an instrument has been contested under this
6 section is not liable for failing to transfer property pursuant to the instrument, unless the person is
7 served with notice that the validity of the transfer has been conclusively determined by a court.

8 **33-19.1-8. Non-Waiveability.** -- This chapter applies notwithstanding a contrary
9 provision in an instrument.

10 **33-19.1-9. Applicability to present documents.** -- (a) This section shall apply to
11 instruments that become irrevocable on or after January 1, 2015. For the purposes of this section,
12 an instrument that is otherwise revocable or amendable shall be deemed to be irrevocable if, on or
13 after January 1, 2015, the transferor by reason of incapacity was unable to change the disposition
14 of the transferor's property and did not regain capacity before the date of the transferor's death.

15 (b) It is the intent of the general assembly that this chapter supplements the common law
16 on undue influence, without superseding or interfering in the operation of that law. Nothing in
17 this chapter precludes an action to contest a donative transfer under the common law or under any
18 other applicable law. This chapter is declarative of existing law.

19 SECTION 2. This act shall take effect on January 1, 2015.

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EXPLANATION
BY THE LEGISLATIVE COUNCIL
OF

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RELATING TO PROBATE PRACTICE AND PROCEDURE - FINANCIAL EXPLOITATION
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1 This act would create a rebuttable presumption that any donative transfers to certain
2 individuals by persons age sixty (60) years of age or older and any dependent persons of any age
3 for whom a conservator, guardian or trustee has been appointed by a probate court of this state are
4 a product of fraud or undue influence. Those individuals are persons who are in a fiduciary, legal,
5 familial and/or caregiver relationship with the elder and/or dependent persons and utilize their
6 relationship to effect a donative transfer by any document or commercial instrument.

7 This act would take effect on January 1, 2015.

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