

Department of Legislative Services  
Maryland General Assembly  
2019 Session

FISCAL AND POLICY NOTE  
First Reader

House Bill 1061 (Delegate Guyton)  
Health and Government Operations

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Estates and Trusts - Testamentary Instruments - Fraud and Undue Influence

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This bill specifies that, with limited exceptions and notwithstanding any provision of a testamentary document to the contrary, any provision of a testamentary instrument that becomes irrevocable on or after the bill's October 1, 2019 effective date making a transfer *to specified individuals* is *presumed* to be the product of fraud or undue influence. A beneficiary may rebut the presumption by proving, with clear and convincing evidence, that the transfer was not the product of fraud or undue influence. If a beneficiary fails to rebut the presumption, the instrument making the transfer must operate as if the beneficiary had predeceased the transferor without a spouse, a domestic partner, or issue. A beneficiary who is unsuccessful in an action to rebut the presumption of fraud or undue influence must pay all costs of the proceeding, including reasonable attorney's fees.

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Fiscal Summary

**State Effect:** The bill is not anticipated to affect State operations or finances.

**Local Effect:** The bill is not anticipated to affect local government operations or finances.

**Small Business Effect:** None.

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Analysis

**Bill Summary:** "Dependent adult" means an individual who at the time of executing the instrument at issue (1) was unable to provide properly for personal needs, physical health, food, clothing, or shelter or (2) had difficulty managing financial resources or resisting fraud or undue influence. "Care custodian" means an individual who provides health or social services to a dependent adult; however, the term does not include an individual who

provided services without compensation if the person had a personal relationship with the dependent adult (1) at least 90 days before providing those services; (2) at least 6 months before the dependent adult's death; and (3) before the dependent adult was admitted to hospice care, if applicable.

“Health and social services” means services provided to a dependent adult because of the dependent adult's condition, including assistance with specified personal, medical, and financial needs. “Independent attorney” means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a testamentary transfer at issue under the bill, and would not be appointed as a fiduciary or receive any benefit as a result of the operation of the instrument at issue.

#### *Individuals to Whom Transfers are Presumed Fraudulent or the Result of Undue Influence*

Generally, any provision of an instrument is presumed to be the product of fraud or undue influence if the instrument makes a transfer to:

- an individual who drafted the instrument;
- an individual who transcribed the instrument or caused the instrument to be transcribed and who was in a fiduciary relationship with the transferor when the instrument was transcribed;
- a care custodian of a transferor who is a dependent adult, if 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;
- an individual who is related, within the third degree, to an individual who drafted or transcribed the instrument, or a care custodian as specified;
- a cohabitant or an employee of an individual who drafted or transcribed the instrument, or a care custodian as specified; or
- a partner, a shareholder, or an employee of a law firm in which an individual who drafted or transcribed the instrument has an ownership interest.

With respect to a transfer to the individual who drafted the instrument, or to an individual who is related to or associated with the drafter, as specified, the presumption of fraud or undue influence is *conclusive*.

#### *General Exceptions to Applicability*

The bill's provisions do not apply to (1) a transfer to an individual who is related within the fourth degree to the transferor, or is the cohabitant of the transferor; (2) a testamentary transfer to a federal, state, or local public entity, a specified nonprofit organization, or a trust holding the transferred property for the entity; (3) a testamentary transfer of property

valued at \$5,000 or less, if the total value of the transferor's estate is at least \$150,000; or (4) a testamentary instrument executed outside the State by a transferor who was not a resident of the State when the instrument was executed.

### *Independent Attorney*

A testamentary transfer to an individual described under the bill is not presumed to be the result of fraud or undue influence if the instrument was reviewed by an independent attorney who (1) counseled the transferor, out of the presence of any heir or proposed beneficiary, about the nature and consequences of the intended transfer; (2) attempted to determine if the intended transfer is the result of fraud or undue influence; and (3) signed and delivered to the transferor an original certificate attesting that the attorney reviewed the testamentary instrument, counseled the transferor, and does not believe the transfer to be the product of fraud or undue influence. An independent attorney whose written engagement is expressly limited to completing the certificate process must not otherwise be considered to represent the transferor as a client. The independent attorney must provide a copy of the signed certification to the attorney who drafted the testamentary instrument.

An attorney who drafts a testamentary instrument may review and certify that instrument for a testamentary transfer to a care custodian.

**Current Law/Background:** Generally, "issue" means every living lineal descendant except a lineal descendant of a living lineal descendant.

Statute does not contain a presumption of fraud or undue influence related to transfers contained in a testamentary instrument. Other states, including California, have enacted laws with provisions similar to those in the bill, which establish a presumption of fraud or undue influence when a benefit is received by a similar list of individuals.

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## **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts); Register of Wills; Maryland Department of Health; Department of Human Services; California Code; Department of Legislative Services

**Fiscal Note History:** First Reader - March 1, 2019  
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