

# **UNDUE INFLUENCE: DEFINITIONS AND APPLICATIONS**

**A PROJECT SUPPORTED BY THE BORCHARD FOUNDATION  
CENTER ON LAW AND AGING**

**FINAL REPORT**

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## **Final Report to the Borchard Foundation Center on Law and Aging**

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### **Introduction**

In 2009, the Superior Court of California, County of San Francisco, undertook to study the phenomenon of undue influence, supported by a grant from Borchard Foundation Center on Law and Aging. The impetus for the project arose from the lack of a definition of undue influence in the California Probate Code. The term itself appears in the Probate Code where the execution of wills is concerned (California Probate Code §6104 (2010)), when a gift is in question (California Probate Code §21350 (2010)), and in other sections concerned with will contests and prohibited transferees. It is also specifically mentioned in the criteria for a probate conservator of estate\*. A conservator of the estate may be appointed for an individual who is “substantially unable to manage his or her own financial resources or resist fraud or undue influence” (California Probate Code §1801(b) (2010)). And yet, there is no statutory definition of undue influence in the California Probate Code.

### **Rationale for Project on Undue Influence**

#### ***Probate Courts***

The need for a clear definition of undue influence has emerged as California probate courts and probate courts across the country increasingly must deal with conservatorship petitions alleging that undue influence is imminent, is actively taking place, or took place within the prior few months and is in danger of occurring again. This context is different from the usual court proceeding where allegations of undue influence concern matters which took place in the more distant past and the focus is on an outcome, usually one transaction, such as a will or a contract.

\*Conservatorships in California are approximate to adult guardianships in other states. The term conservatorship will be used in this report because the project originated in California.

Claims of undue influence can be difficult to understand and prove, both because of the lack of a definition in the Probate Code and because it occurs behind closed doors without witnesses (McNaughton, 2002). Increasingly, though, probate courts have staff such as investigators or visitors who go out and interview proposed conservatees and determine their circumstances, including the presence of apparent undue influence. Probate courts are also receiving more information from community practitioners such as Adult Protective Services social workers, physicians, and hospital discharge planners. In fact, professionals from these groups often supply the background and justification for petitions for conservatorship.

In California, the definition of undue influence is contained in California Civil Code §1575, which was enacted in 1872, a date which calls into question its application in the 21<sup>st</sup> century. The other 49 states also have little to no guidance regarding the definition of undue influence in their probate codes, as will be shown in this report. Thus, probate judges across the country lack Probate statutory support when they must consider imposing a conservatorship on an elder who is allegedly being victimized by someone using undue influence. Additionally, there is the risk that cases will not be handled consistently.

Complicating the picture is traditional thinking that mental capacity and undue influence are intrinsically linked. In other words, undue influence occurs only if there are deficits in mental functioning. As Nerenberg (2010) (Appendix C) notes in her literature review for this project, a California court found otherwise in the *Estate of Olson*:

Soundness of mind and body does not imply immunity from undue influence. It may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But history and experience teach that minds of strong men and women have been overborne, and they have been by a master mind persuaded to consent to what in their sober and normal moments, and free from undue influence, they would not have done.

Despite this clear finding and the reality that charismatic and malevolent leaders throughout history have imposed their thoughts and wills on entire countries, the perception that undue influence cannot exist without mental deficits persists.

The doctrine of undue influence derives from English courts. A will contest heard by Sir Francis Bacon as the Lord Chancellor of England in 1617 illustrates common aspects of the process of undue influence which emerged in the context of a will contest. These aspects include frail health, and physical dependency, false affection, relationship poisoning, threats and mistreatment, and involvement in the execution of documents by and in favor of the alleged abuser ((Welden-Smith, 2009; Appendix B) (Nerenberg, 2010; Appendix C)).

A woman, having acquired an influence over an old and weak man, induced him by pretending affection for him and prejudicing him against his relatives to make a deed and a will in her favour, and thereafter by threats and cruelty prevented him from revoking these instruments, by virtue of which on his death she became possessed of his entire real and personal estate. In a suit by his next-of-kin against her and her husband: Held, that the deed and will should be made void; that the plaintiffs were entitled to the estate of the deceased; that they should have administration of the personal estate; and that there should be an inquiry as to all the personal estate and in whose hands all or any part thereof was or had been.

Held, also, that the Attorney-General should be advised that complaint should be made of the woman's conduct in the Star Chamber with a view to some exemplary punishment being inflicted upon her. (Appendix A)

### ***Community Practitioners***

The need for a clear definition of undue influence is also due to the “discovery” and upsurge in the reporting of elder abuse and neglect. This phenomenon, first described in the 1980s in the United States, resulted in a number of publications and research projects, as well as changes in state laws across the country. Various community agencies and organizations, especially Adult Protective Services, began working with aspects of elder abuse and neglect including undue influence. The “discovery” of elder abuse led to the “discovery” of undue influence (Nerenberg, 2008).

Community practitioners such as hospital discharge planners, physicians, and Adult Protective Services professionals provide the supporting information for petitions for conservatorship. They, too, deal with undue influence, but from a different perspective than the

probate courts. They encounter it as a process that is happening in present time, not as a transaction that happened in the past. They also see it when finances are not directly or currently being abused. For example, community practitioners are concerned when an adult child with a criminal history convinces a frail elder that it is best if he or she moves in with them, when a caregiver supplies the elder with large amounts of alcohol, or when there is sexual abuse.

Undue influence is mentioned in many state Adult Protective Services (APS) laws (Stiegel & Klem, 2007). APS referrals for petitions for conservatorship are frequently sent to the Public Guardian, a county agency that has the legal capacity to file for conservatorship and serve as conservator of both person and estate. Attorneys at that agency then prepare the petition and file it with the court. The lack of a clear definition of undue influence concerns these practitioners as well as other community practitioners who work with elders. There have been varying interpretations of the term, “undue influence” and queries about the meaning and application of the two phrases, “subject to undue influence” and, “unable to resist undue influence.” The latter phrase is contained in California Probate Code has been taken to mean that undue influence has already occurred or is imminent. There is also concern about being able to accurately predict undue influence and thus prevent it from happening in the future and resulting in impoverishment, homelessness, physical abuse, dependency, and inadequate care for elderly victims.

### ***Aging Population and Undue Influence***

Still another impetus for the study of undue influence is the aging of the baby boomers. This group of people has now reached the age of 60 and is growing faster than the general population. For instance, the elderly population in California was 12 percent of the state in 1990 but will grow to 14 percent by 2020. During the same time period, the group of people over age 60 will increase by 112 percent. Even more interesting is the fact that the “oldest old,” those age 85 and older, will increase by 143 percent by 2020 (California Department of Aging, 2007). It is the old-old, who are in most in need of assistance as chronic illnesses and infirmities of aging take their toll. According to anecdotal evidence and preliminary research, the old-old are the people most subject to conservatorships and possibly, undue influence (Quinn, 2005; Quinn & Nerenberg, 2005). One of the results of this growth of older people is that all lawyers, regardless

of specialization, will likely find themselves working with people over 60, the age group usually dealt with only by trust and estate attorneys. According to Welden-Smith (2009) (Appendix B), attorneys will need to determine if their clients are free of undue influence in such matters as validity of deeds, contracts, powers of attorney, estate planning, wills, and testamentary gifts, which, when contested usually involve allegations of undue influence or fraud. Courts will also be dealing with more elders and with more commonly, with people over the age of 85.

## **Research Design**

The project addressed the need for a definition of undue influence in the Probate Code that can be referred to by probate courts, Adult Protective Service personnel, Public Guardian personnel, and other community agencies in California to determine when proposed conservatees are unable to resist undue influence. An anticipated outcome was a checklist or assessment measures that would establish benchmarks or a rating system for determining whether undue influence had occurred or was likely to occur in the immediate future. For example, the measures might enumerate 6 to 10 criteria for undue influence, of which 4 to 6 must be present. Such measures would increase the likelihood that petitions for conservatorship in which undue influence is alleged are appropriate and identify cases of undue influence that may otherwise have been missed. Providing courts with such a statute in the Probate Code could potentially reduce the need for costly and protracted legal proceedings, which take place now in order to establish if undue influence has occurred in conservatorship petitions or will contests. Were undue influence to be defined in the Probate Code, specifically in the conservatorship section, consistency in the handling of cases would be further enhanced.

The one-year project used both quantitative and qualitative approaches. Primary activities included:

1. A review of California state law related to undue influence;
2. A review of 50 states' legislation to determine whether their probate codes contained a definition of undue influence;
3. A review of the social service and psychological literature on undue influence;

4. Focus groups with San Francisco Adult Protective Services social workers, staff from San Francisco Public Guardian, and private attorneys with expertise in probate law; and
5. A file review of 25 cases in San Francisco Superior Court selected because probate court investigators or researchers had determined that there were elements of undue influence in the case, as well as a related set of case studies.

The project was carried out under the direction of Mary Joy Quinn, Director of the Probate Court of the San Francisco Superior Court. Two consultants, Eileen Goldman and Lisa Nerenberg, were hired to conduct the focus groups, file review, and literature review; and to assist in the development of an assessment tool or guidelines. The project was undertaken in collaboration with the California Administrative Office of the Courts (AOC), with Deana Piazza, Supervising Research Analyst, overseeing data collection and analysis. Other collaborators included Stetson University College of Law students supervised by Professor Rebecca Morgan, and law students under the supervision of the San Francisco Probate Court's senior staff attorney, Stella Pantazis.

### **Review of California Law and Undue Influence**

The review and analysis of California law was conducted by Rachel Welden-Smith, a law student, under the supervision of the Probate Court's senior staff attorney, Stella Pantazis. (2009) (Appendix B). It included a review of the statutes, legal articles, case law, jury instructions, and an article on the psychology of undue influence. These sources contribute to a deeper understanding of undue influence and add factors that can be considered in crafting a definition of undue influence.

One California case and one California statute stand out from Welden-Smith's review and for that reason are detailed in this report. The first and most commonly invoked statute regarding undue influence is California Civil Code §1575, which was enacted in 1872 and is commonly cited as a definition of undue influence. The elements are:

1. The use, by one in whom a confidence is reposed by another, or who holds real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

2. In taking an unfair advantage of another's weakness of mind; and
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Pressure of some type is always a part of undue influence situations. In a seminal California case, *Odorizzi v Bloomfield*, undue influence was used against a person who was not an elder and had mental capacity. The person was a schoolteacher who had been arrested on Saturday, June 10, 1964 on criminal charges of homosexual activity. On Sunday, June 11, 1964 he signed a statement resigning from his teaching position, but only after pressure from his superiors who had come to his home. The resignation was accepted by the school district on June 13. When he sought to be reinstated that fall, he was refused and thereafter filed a lawsuit alleging that his resignation was invalid because it was obtained through duress, fraud, mistake, and undue influence and given at a time when he lacked capacity to make a valid contract. In *Odorizzi v. Bloomfield School District*, the California Court of Appeal, referring to California Civil Code §1575, found that only undue influence applied to the situation and stated, "the essence of undue influence is the use of excessive pressure by a dominant person over a servient person resulting the will of the servient person being overborne." The court cited factors that indicated excessive pressure:

1. Discussion of the transaction at an unusual or inappropriate time;
2. Consummation of the transaction in an unusual place;
3. Insistent demand that the business be finished at once;
4. Extreme emphasis on the untoward consequences of the delay;
5. Use of multiple persuaders by the dominant side against a servient party; and
6. Absence of third-party advisors

A recently released film, *The Last Station*, contains many of the pressure factors cited above as well as other factors cited by Nerenberg (2010) (Appendix C) in her literature review. The main conflict in the film centers on whether Leo Tolstoy, the great Russian writer, should leave his literary estate to his family or to a group of people advocating his philosophy of life. He is induced to execute his will in favor of the group. However, after his death, a court reversed that act. It may be informative to read that court decision.



More recent law is contained in California Welfare and Institutions Code §15610.30 et seq., which address financial abuse of an elder or dependent adult. In 2009, that section and others in the Welfare and Institutions Code were amended. The term undue influence was added. Section 15610.30(3) of the California Welfare and Institutions Code now states that financial abuse of an elder or dependent adult occurs when a person or entity does any of the following: “Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriate, obtaining, or retaining, real, or personal property of an elder or dependent adult when the elder or dependent adult lacks capacity pursuant to Probate Code §812, or by undue influence, as defined in Civil Code §1575, or both.” Thus, undue influence is legally related to financial abuse. Section 15657.6 of the Welfare and Institutions Code—which references an elder lacking capacity (pursuant to California Probate Code §812) or being of unsound mind, but not entirely without understanding—states that a person or entity must return real or personal property if the elder or the elder’s representative demands it. Failure to do so in a timely fashion subjects the perpetrator to the same remedies available for financial abuse, namely, damages, attorney’s fees, and costs.

Although the California Probate Code does not contain a definition of undue influence, it does contain specific information as to determining deficits in mental functions in §811 and the capacity to make decisions in §812. These statutes may prove helpful in crafting legislation pertaining to undue influence and are discussed later in this report.

In her analysis of California law related to undue influence, Welden-Smith (2009) (Appendix B) focuses on will contests. She offers an approach to the lack of a definition of undue influence in the California Probate Code. While it is based on undue influence in the context of wills and not living people, it is instructive and, as will be seen later in this report, adaptable to a larger view of undue influence and possible construction of a statutory definition of undue influence for the Probate Code (Nerenberg, 2010) (Appendix C). Welden-Smith sets out a four-factors model:

- (1) The person who made the will suffered from mental and/or physical conditions that could permit his freedom of will to be overcome;

- (2) A relationship existed with someone whereby that person had an opportunity to influence the person who made the will;
- (3) The person who benefited from the will was active in procuring the will; and
- (4) The will cuts out those people or organizations that would naturally benefit from the will or, the will is contrary to the prior expressed intentions of the will maker.

### **Undue Influence and Probate Law in Other States**

The review of definitions of undue influence as they apply to conservatorship or adult guardianship in other states' probate statutes was conducted with the assistance of Professor Rebecca Morgan at the Stetson University College of Law. Using electronic technology, Dr. Morgan assigned students to work with the Project Director to identify state probate codes to see if they contained definitions of undue influence.

Not a single state has a clear definition of "undue influence" in its Probate Code, although, like California, most reference the term. Some states, namely Florida, Georgia, Louisiana, Nevada, North Dakota, South Dakota, and Ohio, have partial definitions, which broadly define undue influence as something that occurs when a fiduciary or confidential relationship exists in which one person substitutes his own will for that of the donor's will.

Many states have definitions of undue influence in other code sections such as the civil code or penal code. In addition, most states, like California, have case law that sets out defining aspects of undue influence. It appears that states have been reluctant to place definitions of undue influence into their probate codes although despite the fact that cases governed by undue influence arise mainly in the probate context.

### **Literature Review on Undue Influence**

The literature review consisted of a general overview of how undue influence and related topics have been by addressed by experts in the fields of psychology, law, criminology, victimology, and elder abuse. The findings are partially described below, with the full review included as Appendix C. The general overview of undue influence was conducted by consultant Lisa Nerenberg. Articles were identified by the Project Director, Mary Joy Quinn and by

searching bibliographic databases and the World Wide Web. Ms. Nerenberg reviewed the literature on undue influence as it pertains to elder abuse and related areas that have been referenced in the literature on undue influence, which include:

1. How totalitarian regimes control populations;
2. How captors induce prisoners of war (POWs) to denounce their countries, collaborate with their captors, and turn on fellow prisoners;
3. How cults undue influence and maintain members;
4. Why victims of domestic violence may not leave abusive relationships or take action against their batterers;
5. How caregivers maintain control over those they care for;
6. How hostages bond with their captors;
7. How professionals exploit relationships of trust and confidence with clients; and
8. How white collar criminals and con artists use manipulation and deception for financial gain.

The non-legal or psychological literature on coercive persuasion addresses a wide range of circumstances in which victims are induced to act in ways that are contrary to their own interest for the benefit of others. These range in scope from totalitarian regimes that have used coercive persuasion to maintain order and control, to psychotherapists who use their power over clients for sexual gratification. In the case of cults, the focus of attention has been on determining whether cults' use of coercive persuasion justified such interventions as forced removal of the person from the cult followed by "deprogramming," or petitions for conservatorship. In contrast, the law has focused mainly on will contests and, less frequently, on undue influence in contract law.

Despite wide variations in the contexts and circumstances in which undue influence and coercive persuasion in general have been explored, the findings are remarkably similar in terms of the salient features. Psychologists, sociologists, criminologists, victimologists, legal experts, and courts have focused on the following:

1. **Victim characteristics** contributing to vulnerability include incapacity resulting from dementia, mental illness, or impairment; deficits in judgment or insight; altered states of mind (which may be induced), resulting from medications, sleep deprivation, etc.; emotional distress (which may also be induced). Some analysts and practitioners have noted that people with “dependent personalities” are at heightened risk. The Diagnostic and Statistical Manual (DSM-IV) defines persons with dependent personality disorder as emotionally dependent on other people, who spend great effort trying to please others, who tend to display needy, passive, and clinging behavior, and who have a fear of separation. Another personality characteristic that has been mentioned repeatedly is “acquiescence.” Acquiescence, which is not included in the DSM-IV, is generally taken to mean persons who are overly compliant or “too agreeable.” Induced states such as learned helplessness, Stockholm Syndrome, and battered partner syndrome have also been identified as impediments to free will.
2. **Influencers’ power.** Experts agree that to constitute undue influence influencers must be in positions of power or authority toward those they influence. They may be in positions of trust or confidence, which can be formal (e.g., the powerful person has a legal duty toward the less powerful person, as in the case of fiduciaries) or informal (as in the case of family members or neighbors). Their power may also be based on professional authority, disproportionate strength or status, or the nature of the relationship. Caregivers who provide life sustaining care hold particular power. Clergy and spiritual advisors are also considered to be in positions of power toward those they counsel. Psychotherapists and physicians are also in positions of power relative to their clients or patients.
3. **Improper actions or tactics.** Influencers take affirmative steps or actions to persuade victims to engage in behaviors that are contrary to their interests in ways that exceed what is considered to be “normal” persuasion. Actions suggestive of undue influence include controlling weaker persons’ environment and social interactions by imposing isolation, insulating them from outside supervision and advisors, poisoning their relationships with others by “bad mouthing” them, and invoking fear of others. Other agreed-upon actions or tactics include inducing dependency through “puppeteering” (inducing trust or

submissiveness to point that victims mindlessly follow whatever demands or requests are made), by withholding or interfering with care, and reinforcing feelings of helplessness. Influencers may use threats or enticements or even physical force to gain compliance or emotionally manipulate those they wish to unduly influence by playing on their loyalties. Legal experts have focused on the role of influencers in manipulating transactions and the settings in which they occur. For example, influencers typically initiate transactions and do so in secrecy. They may discourage or prevent victims from seeking third party advisors or independent advice and carry out actions outside of normal settings (e.g. asking someone in a nursing home to transact legal business), or when elders are near death, on heavy medication, or recently widowed.

4. **Unfair, improper, “unnatural,” or unethical transactions or outcomes.** Legal experts generally agree that to constitute undue influence, harm must result such as the loss of assets or property or inadequate care. Legal experts have focused on transactions that are considered unfair or improper by objective measures or what is considered “reasonable,” such as the sale of victims’ property below market value, or gifts made by victims that are not commensurate with the length and quality of their relationships with recipients. Other examples that are suggestive of undue influence are when those executing documents cannot explain them, when the transactions diverge significantly from those they have made in the past (e.g., uncharacteristic changes in wills, trusts, etc.), and transactions that are considered “unnatural” in the sense that they diverge from what is normally expected (testators change wills to benefit new friends as opposed to “natural heirs.”) Improper relationships include sexual relations between professionals or caregivers and their clients, fiduciaries who are also clients’ beneficiaries, etc.

## **Case Examples**

### ***Case One***

*An 80-year-old man with a diagnosis of dementia became increasingly forgetful after his wife died. As his needs increased, his daughter, who lived in another state, set up resources for him and monitored his care. One of the resources she engaged was housekeeping one a week*

*with a woman she found on the Internet. She became unhappy with the work of the housekeeper and tried to fire her, but her father wouldn't allow it. The daughter later discovered that her father had married the housekeeper. After the marriage ceremony her father added or was induced to add his new wife's name on his bank accounts as a joint tenant. The housekeeper drained the accounts and left the man after the money was gone. Reportedly she had been verbally abusive to him.*

*Tactics used by the alleged abuser included secrecy, development of a romantic relationship and marriage, and manipulation to get herself put on joint financial accounts. In addition, she created dependency and infantilized the client by feeding and bathing him when he didn't need it. She insisted that he did need it to "preserve his strength." She isolated him, turned him against his family, and harassed other professionals who were hired to help him. She convinced him that she was "the only one who cared about him" in a threatening world, thereby creating a "siege mentality" and reinforcing his social isolation. She neglected his care and lived in a separate residence once they were married.*

### **Case Two**

*An 82-year-old woman lived in her home with two sons, one developmentally disabled, the other with extensive criminal and substance abuse history. She had a history of psychiatric issues and had been diagnosed with schizophrenia. She had diabetes and was dependent on others for her daily care. Her sons neglected her care, which resulted in a below the knee amputation.*

*The son with the criminal and substance abuse history used several tactics to get influence over his mother's finances. He said that gang members were threatening him (which wasn't happening) and that he needed money to appease them. He manipulated her delusions of paranoia to his benefit. He also manipulated her feelings of family loyalty in order to gain access to her bank accounts.*

The defining features of undue influence that appear in the literature review are related to Welden-Smith's four-factors model (2009) (Appendix B) and are summarized in the chart that follows.

## Elements of Undue Influence Described In Professional Literature

Category I	Category II	Category III	Category IV
Victim characteristics contributing to vulnerability	Influencers' characteristics, sources of power, and opportunities	Actions or tactics, including emotional, psychological, and legal manipulation	Unfair, improper, "unnatural," or unethical transactions or outcomes
<p>Incapacity resulting from:</p> <ul style="list-style-type: none"> <li>• Dementia</li> <li>• Mental illness</li> <li>• Physical/functional decline</li> <li>• Accident, injury</li> </ul> <p>Alert, oriented, physically capable but has vulnerabilities that have been induced or are personality based.</p> <p>Deficits in judgment or insight</p> <p>Altered state of mind (may be induced):</p> <ul style="list-style-type: none"> <li>• Under effect of medications</li> <li>• Sleep deprivation</li> <li>• Under the influence of alcohol</li> <li>• Pseudo dementia</li> </ul>	<p>Persons in positions of trust and confidence. May be:</p> <ul style="list-style-type: none"> <li>• Formal (e.g., fiduciary)</li> <li>• Informal (e.g., family member)</li> </ul> <p>Professional authority resulting from job, profession, experience, training:</p> <ul style="list-style-type: none"> <li>• Care provider</li> <li>• Health care professional</li> <li>• Therapist</li> <li>• Clergy or spiritual advisor</li> </ul> <p>Superior strength</p> <p>Personality traits:</p> <ul style="list-style-type: none"> <li>• Charismatic</li> <li>• Persuasive</li> </ul>	<p>Controls weaker party's social interactions:</p> <ul style="list-style-type: none"> <li>• Imposes isolation</li> <li>• Insulates relationship from outside supervision and advisors</li> <li>• Suppresses loyalties</li> <li>• Induces sense of obligation and indebtedness</li> <li>• Plays on loyalties (family, cultural ties, etc.)</li> <li>• "Poisons" relationships with others</li> <li>• Creates "siege mentality" (all others intend harm)</li> </ul> <p>Controls weaker party's behavior:</p> <ul style="list-style-type: none"> <li>• Imposes rules, rewards, punishments</li> <li>• Suppresses old behaviors</li> </ul>	<p>Victim loses assets or property</p> <p>Victim loses control of assets or property</p> <p>Victim loses housing or care</p> <p>Victim's care is inadequate or not commensurate with elder's assets</p> <p>Transactions (including changes to wills, trusts, purchases, etc.) that:</p> <ul style="list-style-type: none"> <li>• Unfairly benefit influencers (purchases property below market value)</li> <li>• Involve gifts that are not commensurate with length and quality of relationship</li> <li>• Are abrupt</li> </ul>

Category I	Category II	Category III	Category IV
<p>Victim characteristics contributing to vulnerability</p> <p>Emotional distress resulting from situational events and losses:</p> <ul style="list-style-type: none"> <li>• Depressed</li> <li>• Lonely</li> <li>• Anxious</li> <li>• Fearful</li> <li>• Grieving</li> </ul> <p><u>Personality types/disorders</u></p> <p>Dependent personality:</p> <ul style="list-style-type: none"> <li>• Unable to make decisions without advice and reassurance</li> <li>• Avoids personal responsibility</li> <li>• Fears abandonment</li> <li>• Feels helpless when relationships end, causing person to move into other relationships immediately</li> <li>• Overly sensitive to criticism</li> <li>• Pessimistic and lacks confidence in ability to care</li> </ul>	<p>Influencers' characteristics, sources of power, and opportunities</p> <p>Privilege or disproportionate status based on:</p> <ul style="list-style-type: none"> <li>• Gender</li> <li>• Age</li> <li>• Race</li> <li>• Class</li> <li>• Citizenship</li> </ul> <p>Caregiver's power derived from access, authority, opportunity, and physical strength</p> <p>“Reliant relationships.” A weaker person relies on others for judgments or advice.</p> <p>“Dominant-subservient relationships.” A weaker person (e.g., someone with a mental impairment) is subservient to a dominant person.</p>	<p>Actions or tactics, including emotional, psychological, and legal manipulation</p> <ul style="list-style-type: none"> <li>• Deprives person of sleep and sensory stimulation</li> <li>• Determines what person wears, what person eats, how person spends time, person's finances</li> <li>• Controls person's basic needs</li> <li>• Confines weaker party</li> </ul> <p>Controls information and communication:</p> <ul style="list-style-type: none"> <li>• Uses deception</li> <li>• Withholds information about outside world</li> <li>• Manipulates or reinterprets information</li> </ul> <p>Controls weaker party's thoughts:</p> <ul style="list-style-type: none"> <li>• Instills new attitudes</li> <li>• Allows no criticism or input</li> <li>• Discourages critical thinking (defines world as good-evil, black-white)</li> </ul>	<p>Unfair, improper, “unnatural,” or unethical transactions or outcomes</p> <ul style="list-style-type: none"> <li>• Diverge from victim's expressed wishes or past patterns</li> <li>• Are “unnatural” (provisions are different from what might be expected)</li> <li>• Relationship of parties has developed recently and is of short duration</li> </ul> <p>Behavior of professional or caregiver falls outside of professional responsibility or breaches fiduciary duty, or is in other ways, illegal, immoral, or inappropriate:</p> <ul style="list-style-type: none"> <li>• Fiduciary or caregiver as beneficiary</li> <li>• Caregiver, therapist, etc. as sexual partner</li> </ul> <p>Subjugation</p>



<p align="center"><b>Category I</b></p> <p>Victim characteristics contributing to vulnerability</p>	<p align="center"><b>Category II</b></p> <p>Influencers' characteristics, sources of power, and opportunities</p>	<p align="center"><b>Category III</b></p> <p>Actions or tactics, including emotional, psychological, and legal manipulation</p>	<p align="center"><b>Category IV</b></p> <p>Unfair, improper, "unnatural," or unethical transactions or outcomes</p>
<p>for self</p> <ul style="list-style-type: none"> <li>• Fears losing support or approval if they disagree with others</li> <li>• Finds it difficult to be alone</li> <li>• Willing to tolerate mistreatment and abuse from others</li> <li>• Places the needs of their caregivers above their own</li> <li>• Naïve and lives in fantasy</li> </ul> <p>Acquiescent personality</p> <p>Passive personality</p>		<p>Creates and/or reinforces feelings of helplessness or powerlessness:</p> <ul style="list-style-type: none"> <li>• Puppeteering: Inducing trust or submissiveness to point that victims mindlessly follow whatever demands or requests the exploiters make.</li> <li>• Reinforcing dependency by withholding care or assistive devices, preventing access by service providers, etc.</li> <li>• Raises questions about competence (e.g., as in the movie <i>Gaslight</i>)</li> <li>• Promotes idea that controller is all-knowing or all-powerful</li> </ul> <p>Threats/enticements:</p> <ul style="list-style-type: none"> <li>• Uses romantic or sexual enticement to gain compliance</li> </ul>	<p>Victim's lifestyle and environment do not reflect stated or past preferences</p>

<p align="center"><b>Category I</b></p> <p>Victim characteristics contributing to vulnerability</p>	<p align="center"><b>Category II</b></p> <p>Influencers' characteristics, sources of power, and opportunities</p>	<p align="center"><b>Category III</b></p> <p>Actions or tactics, including emotional, psychological, and legal manipulation</p>	<p align="center"><b>Category IV</b></p> <p>Unfair, improper, "unnatural," or unethical transactions or outcomes</p>
		<ul style="list-style-type: none"> <li>• Uses physical intimidation or threats, including threats to kill, abandon, or institutionalize victim</li> </ul> <p>Emotional control and manipulation:</p> <ul style="list-style-type: none"> <li>• Elicits sympathy for influencer</li> <li>• Induces shame and guilt</li> <li>• Dehumanizes person by keeping him or her in filth</li> <li>• Instills notion that problems are all victim's fault</li> <li>• Produces emotional highs and lows, excitement</li> <li>• Shows intermittent kindness</li> </ul> <p>Beneficiaries control execution of transactions:</p> <ul style="list-style-type: none"> <li>• Aggressively initiates transactions (active procurement of finances and financial instruments)</li> </ul>	

<b>Category I</b> Victim characteristics contributing to vulnerability	<b>Category II</b> Influencers' characteristics, sources of power, and opportunities	<b>Category III</b> Actions or tactics, including emotional, psychological, and legal manipulation	<b>Category IV</b> Unfair, improper, "unnatural," or unethical transactions or outcomes
		<ul style="list-style-type: none"> <li>• Initiates actions when elder lacks requisite capacity</li> <li>• Initiates actions when elder is near death, on heavy medication, recently widowed, hospitalized</li> <li>• Emphasizes haste</li> <li>• Discourages third party advisors or independent advice</li> <li>• Carries out transactions in secrecy</li> <li>• Carries out transactions outside of normal settings (e.g., in a nursing home)</li> <li>• Makes repeated solicitations</li> </ul> <p>Induces feelings of gratitude and loyalty suggestive of the "Stockholm syndrome"</p> <p>Manipulates information to suggest that the influencer is being unfairly perceived, treated, or judged</p>	

<b>Category I</b> Victim characteristics contributing to vulnerability	<b>Category II</b> Influencers' characteristics, sources of power, and opportunities	<b>Category III</b> Actions or tactics, including emotional, psychological, and legal manipulation	<b>Category IV</b> Unfair, improper, "unnatural," or unethical transactions or outcomes
		<p>Reduces self-efficacy or induces "learned helplessness" (e.g., arbitrarily rewarding and punishing subjects)</p> <p>Enlists others to help gain compliance through peer or group pressure</p> <p>Exercises multiple forms of persuasion</p>	

## Focus Groups

To gain greater insight into how professionals who are likely to encounter undue influence perceive and address it, the project team conducted focus groups. Although they had initially planned to only conduct groups with Adult Protective Services (APS) and Public Guardian staff, private probate attorneys also expressed interest in being a part of the study and were included. One focus group was conducted for each group.

Focus group members had considerable experience:

1. The nine workers who participated in the APS focus group had worked in the field for an average of nine years (ranging from 3 to 13 years).
2. The eight Public Guardian employees had worked in the field for an average of five to six years (ranging from 1 to 15 years).
3. The five attorneys all had extensive experience in working with conservatorships and several had additional experience with trusts.

Focus group discussions were open ended and structured around the four areas that were first noted in Welden-Smith (2009) (Appendix B) and developed in the literature review (Nerenberg, 2010) (Appendix C):

1. What are the characteristics of the alleged victim?
2. What are the characteristics of alleged influencers and their relationships to victims?
3. What were the circumstances and tactics that were used?
4. What “bad” transaction(s) resulted?

Focus group members had significant experience with clients they felt had been subjected undue influence. Many had received training on the subject. To a great extent, they identified the same defining features of undue influence that appear in the literature (which may reflect the training they had received). Among the prominent factors all three groups identified were isolation, poor health, diminished mental capacity, and insight and judgment problems. They also mentioned the need to evaluate whether some tangible or other negative impact resulted from the

undue influence. There were, however, some variations from the literature. Some, like heightened attention to cultural variations and immigration issues, reflect San Francisco's population.

Differences were also noted among the three groups, which seems to suggest that variations in their professional perspectives and biases, their roles, the laws that dictate their practice, and the situations they are likely to encounter play a role in shaping their views. The informal nature of the discussions and the small size of the groups do not make for concrete conclusions but do raise themes for further discussion.

- **Attitudes about “Who is the victim?”**. The attorneys voiced general agreement that in addition to the persons directly influenced, others were likely to be victimized “tangentially.” These included victims’ heirs and charities that had been promised bequests but did not receive them due to the alleged presence of undue influence. This is perhaps not surprising in light of the fact that lawyers are likely to become involved in conservatorship, contract, and estate cases at the request of family members. This point of view, however, sharply contrasts with that of the APS and Public Guardian workers, who were more narrowly focused on the interest of the persons being directly influenced. This view may reflect these workers’ perceived role as advocates.
- **Patterns over time.** Psychologists studying undue influence have emphasized that undue influence is a process that occurs over time. This outlook was shared by the APS and Public Guardian workers who spoke at length about changing relationships and patterns between victims and influencers that they had observed. Some noted, for example, that in caregiving relationships, care receivers initially were the “holders of power” but that the power may, over time, shift to their caregivers. In contrast, the lawyers tended to de-emphasize the length of relationships, focusing instead on the circumstances at the time the legal transactions were actually taking place.
- **Perpetrators.** Focus group participants in all three groups tended to focus on undue influence by family members, caregivers, and new friends and romantic interests. Several cited examples in which persuaders had gained the compliance, trust, and cooperation of their victims through expressions of love, companionship, and sex. Implicit in these examples is the notion that family and cultural loyalties and the desire

for love, emotional attachment, or sexual gratification creates imbalances in power between victims and persuaders, assumptions that may well generate controversy. Others provided examples of situations in which influencers played upon victims' family and cultural loyalties and sense of responsibility to gain compliance. In contrast, the focus group participants gave only a few examples of undue influence by fiduciaries, lawyers, or other professionals, quite possibly because they are not aware of these transgressions due to the nature of their practices. A notable exception is that several members cited undue influence by telemarketers. They provided examples in which the nature, frequency, and persistence of phone contact set these situations apart from "normal" marketing, with phone solicitors establishing personal relationships with their victims that took on an importance beyond what is normally expected.

- **Capacity.** Workers acknowledged that many victims of undue influence scored within normal ranges on mental status exams and appeared to function well in other aspects of their lives. However, they frequently mentioned lack of judgment and insight as risk factors in undue influence. These observations perhaps suggest a need for more sensitive or nuanced assessment tools that measure these factors.
- **Victims' participation.** The workers provided insight into how victims contribute to their victimization. They noted examples in which victims had, at least initially, voluntarily and knowingly succumbed to persuasion. The workers attributed this compliance to such factors as wanting to help new immigrants or the less fortunate, or being lonely and craving attention. They cited other examples of elders who knew that they were being taken of advantage of, but felt it was worth it given the fact that they lacked alternatives (e.g., they lacked family members to provide care). One member defined this as "bartering."

## Case Examples

### *Case Three*

*A woman in her 90s lived alone and had severe functional impairment. She was chair/bed bound. She was extremely hard of hearing and had severe memory problems following a stroke. She also had signs of impaired judgment and lack of insight. A 42 year old man moved in and*

*became her caregiver. He had met her when he was doing door-to-door sales. When he became incapacitated himself following an accident, he moved back to the East Coast. His younger brother then moved in, ostensibly to assist with caregiving. He convinced the woman to marry him and promised to take care of her the rest of her life.*

*He then took over her life, at the same time becoming financially dependent on her. He isolated the woman by preventing any caregivers from coming in. He poisoned her relationships with others, telling her that he was the only one who cared about her. He effectively isolated her and induced dependency and reinforced her feelings of helplessness. He intimidated her by yelling at her and, at times, being rough with her physical care. He also set up a security system so that he could monitor discussions with anyone who came to the house, including her attorney. He told her that she would end up in a nursing home without his care.*

#### **Case Four**

*An extremely bright and mentally intact 80 year old woman who lived alone had come to the United States as a young woman. Her husband died two years before the financial abuse by telemarketers began. They did not have children. She became the victim of scams, including lottery scams. She thought she was a savvy investor. She also thought that if she consolidated her money and provided to the appropriate people, she would make millions. Although she could acknowledge that she had been the victim of some scams, she basically believed that the people who called her truly wanted to help her invest well and make money. Even when told she was losing her life savings, she persisted in giving her money away. She refused to have a neuropsychological examination.*

*Tactics of the alleged abusers included manipulation, such as providing appreciation awards from phony organizations for which she had to pay. She was induced to get a reverse mortgage on her four-unit building, which she had owned free and clear. She then deposited \$556,000 into her account in January. By February the money was gone. A retirement account of \$300,000 was also depleted. Additionally, she amassed \$100,000 in credit card debt. She believed that she had invested the money well and that she would be receiving a two-million dollar payoff from a lottery. But first, she had to withdraw \$7,000 “to give to the armed guards*



*who would deliver the money.’’ There were multiple and ongoing solicitations including up to 20 telephone calls per day. The calls became her social life.*

## **Summary of Court File Review Results**

### ***Background***

In order to better understand the characteristics of conservatorship cases involving undue influence, and to assess the extent to which those characteristics are consistent with what is put forth in the literature, the project team conducted a court file review. The file review concentrated on four major areas: the characteristics of the proposed conservatee, the characteristics of the alleged abuser, general case characteristics, and the nature of the undue influence. (See Appendix E for the detailed data tables and Appendix F for the file review data collection instrument.) The data collection instrument replicated selected questions from two prior case file reviews of the general population of conservatorship cases to facilitate comparison.

Because a large proportion of cases do not involve undue influence specifically or financial more abuse generally, it was not feasible to select a random sample of cases. Therefore, the project team worked with court investigators and attorneys and consulted a previous study to identify a targeted sample of cases involving undue influence. The final sample size was 25 cases, after eliminating a small number of cases that involved only financial abuse or fraud and not undue influence (e.g., a case in which the victim was severely incapacitated and so unaware that it would not have been possible to exert undue influence). The sample size is adequate to begin to detect patterns in cases, but not large enough to be considered representative of all conservatorship cases involving undue influence. Results should be interpreted with caution due to the small sample size; for example, just three cases represent more than 10 percent of the sample.

Where relevant, current data are compared to analogous case file data collected in two prior studies. The prior studies dealt with the general population of conservatorship cases, not just those cases involving undue influence, and may be helpful in beginning to point to some ways in which the two may differ.

### *Case Characteristics*

A large majority of petitions (76 percent) were for conservatorship of both the person and the estate. None of the cases reviewed involved petitions for conservatorship only of the person. (See Table 2.) In the prior studies of the general conservatorship population, four to five percent of cases involved petitions for conservatorship of the person only. The general conservatorship population also seemed somewhat less likely than the undue influence sample to involve petitions for conservatorship of the estate only (5 to 6 percent versus 24 percent).

Private professional conservators petitioned for conservatorship in almost half (48 percent) of cases, followed by the Public Guardian (32 percent) and family members (24 percent). A small proportion of cases involved multiple petitioners. (See Table 3.) It was uncommon for the alleged abuser to file a competing petition or contest the conservatorship; that occurred in only eight percent of cases (see Table 4).

The most common reason for the establishment of the conservatorship—specifically with respect to undue influence—was to provide court supervision of assets that were in jeopardy (88 percent). Other common reasons for conservatorship included preventing further loss of assets (80 percent) and taking control out of the hands of the alleged abuser (24 percent). (See Table 5.)

The court files reflected that adult protective services (APS) was involved in all but one case (96 percent; see Table 6). This is a much higher incidence than in prior studies dealing with the general conservatorship population, in which APS involvement ranged from 33 to 54 percent.

### *Characteristics of Proposed Conservatees (PCs)*

Approximately half of the PCs were female and half were male (see Table 7). PCs in the two prior studies were somewhat more likely to be female (ranging from 58 to 68 percent of the sample). Nearly three-quarters of PCs were 80 years of age or older, and more than one-quarter were 90 or older, with a mean age of around 81. (See Table 8.) There was insufficient information in the court files to assess the racial/ethnic composition of the sample.

PCs were mostly likely to be widowed (44 percent) or to have never been married (20 percent). Only 5 of the 25 PCs were married. (See Table 9.) All of the PCs lived in a private

residence (as opposed to, for example, a nursing home or assisted living facility; see Table 10a). Although it may be an artifact of a small sample, the general conservatorship population examined in previous studies was much less likely to live in a private residence (37 to 53 percent). PCs most commonly lived alone (40 percent) or with a caregiver or attendant (20 percent). Only 1 of the 25 PCs lived with a spouse who was not also a caregiver. (See Table 10b.)

Having involved family members is commonly viewed as a protective factor against abuse by strangers. Interestingly, nearly two-thirds (64 percent) of PCs had family members involved in their lives (see Table 11). However, without additional information about the length and nature of involvement, it is difficult to explain this finding. For example, family members may have become involved after the PC had already experienced a loss or may have had a direct or indirect role in the undue influence itself.

All of the PCs had at least one impairment, whether mild or severe. All but two (92 percent) had multiple impairments, with more than two-thirds having five or more. Consistent with the underlying rationale for many conservatorships, the most common impairments were related to diminished mental capacity (88 percent), cognition (84 percent), and executive functioning (72 percent). Many PCs also had physical impairments including issues with mobility (60 percent) and activities of daily living (52 percent), as well as mental health issues (52 percent) and depression (44 percent). (See Table 12.)

Court files were reviewed for evidence of other traits of PCs that are sometimes associated with susceptibility to undue influence. Lack of insight and poor judgment (both 88 percent) were by far the most common of these traits. More than one-third (36 percent) of PCs could be characterized as acquiescent and one-quarter (24 percent) could be characterized as lonely. (See Table 13.)

### ***Characteristics of Alleged Abusers (AAs)***

In well over half (60 percent) of cases, there was more than one AA (see Table 14); as a result, percentages reported are based on the total number of abusers (40) rather than the total number of cases (25). AAs appeared more likely to be male than female (48 percent versus 30 percent), although the gender of the abuser was unknown in roughly one-quarter cases, primarily

those involving lottery scams and telemarketing fraud (see Table 15). The age of the AA was unknown in the vast majority of cases. The court file showed evidence of a criminal history or substance abuse history for more than one in ten AAs (both 13 percent; see Table 16).

AAs were most likely to be friends or neighbors (28 percent), family members (25 percent), part of a telemarketing or lottery scam (25 percent), or a caregiver or attendant (15 percent). AAs who were family members were somewhat less likely to be spouses or children than other types of relatives. Other than caregivers or attendants, persons with a professional relationship to the PC—doctors, attorneys, representatives of banks, and fiduciaries—were not found among the AAs. (See Table 17.) The AA was financially dependent on the PC in 15 percent of cases and romantically involved with the PC in 13 percent of cases (see Table 18).

### *Details of Abuse/Undue Influence*

Financial abuse was by far the most common type of abuse or neglect alleged in the petition or in the court investigator's report, occurring in all but one case. Other common but less frequent forms of abuse or neglect included neglect (by others; 40 percent), psychological abuse (20 percent), and isolation (16 percent). (See Table 19.) Financial abuse was also most common among the general conservatorship population; however, that population appeared more likely than the undue influence sample to be self-neglecting.

Nearly half (48 percent) of cases involved more than one type of abuse or neglect (see Table 19). In more than three-quarters of cases the PC did not acknowledge the abuse or neglect (see Table 20). Both of these findings are consistent with those in the general conservatorship population

In nearly one-third of cases, there was insufficient information in the court file to assess the length of time the abuse had been occurring. Where there was sufficient information, a large majority of cases involved abuse that had been occurring over a period of more than two years. (See Table 21.)

Loss of cash or savings was by far the most common result of the undue influence, experienced by 84 percent of PCs. Loss of real property was the second most common (32

percent), followed by a change in a will or trust and unauthorized loans (both 20 percent). (See Table 22.)

Court files were reviewed for evidence of tactics cited in the literature or by professionals in the field as commonly used by perpetrators of undue influence. In all cases, the alleged abusers used multiple tactics to gain access to the PCs' finances. The most frequently documented tactics were playing on weaknesses (76 percent), lying or deception (68 percent), repeated solicitations (40 percent), and fostering dependence (36 percent). Less common tactics included initiating transactions at unusual times or in unusual settings, aggressive initiation of transactions, an emphasis on haste, and secrecy. (See Table 23.)

Court files were also reviewed for other elements or characteristics of the alleged undue influence that cannot be classified as tactics, but have also been mentioned in the literature and by professionals. The most common characteristic, present in 8 out of 10 cases, is that the transaction unfairly benefits others. Less frequent but other common characteristics included the elder being ignorant of or unable to explain the facts of the transaction (48 percent) and the level of the elder's care not being commensurate with the amount paid for the care (32 percent). (See Table 24.)

### **Crafting Legislation**

The need to more uniformly define undue influence as it pertains to conservatorship is clear. By drawing from such diverse fields as law, psychology, criminology, victimology, fraud, advertising, and elder abuse, the project yielded a more comprehensive list of contributing factors than has been available to date. It further identifies similarities and differences in how undue influence has been defined and conceptualized.

Undue influence is a complex and poorly defined legal concept which makes it amenable to legislative action (Welden-Smith, 2009). Having a definition placed in the Probate Code in the conservatorship section would be valuable to courts, judges, attorneys, and community practitioners and would help to ensure more consistent handling cases involving allegations or suspicions of undue influence. The latter could then prepare information for conservatorship petitions that are in concert with the definition in the Probate Code.

### *New Avenues for Crafting Legislation*

This Project has suggested promising new avenues for those who craft legislation, particularly the four elements suggested by Welden-Smith (2009) (Appendix B) and expanded upon by Nerenberg (2010) (Appendix C). The four elements are stated in the chart below without specific examples in order to highlight the elements.

<b>Category I</b>	<b>Category II</b>	<b>Category III</b>	<b>Category IV</b>
Victim characteristics contributing to vulnerability	Influencers' characteristics, sources of power, and opportunities	Actions or tactics, including emotional, psychological, and legal manipulation	Unfair, improper, "unnatural," or unethical transactions or outcomes

Using this approach, those filing petitions for conservatorship might be required (by statute) to give examples of the factors (listed in the statute) that fall within each category to justify the need for conservatorship:

1. Vulnerability resulting from permanent, situational, or induced impairments; emotional distress, personality characteristics, etc.;
2. Power differential between proposed conservatee and others who are in positions to influence them;
3. Actions, tactics, or circumstances suggestive of undue influence, including specific actions taken by the alleged perpetrators; and
4. Actions that would be perceived as unfair, unnatural, unethical, by objective third parties.

A preliminary analysis of the cases from the court file review showed that factors from all four of the above categories were present in most if not all cases, suggesting that this could be a promising scheme for evaluating cases that may involve undue influence. Unlike assessments of undue influence in will contests, however, in which analysts decide if undue influence was exercised at a specific point in the past and in relation to a specific transaction with the goal of rectifying the alleged abuse or harm, conservatorship is a protective intervention which looks to stopping current abuse, preventing future losses and perhaps correcting past "bad acts," e.g.,

rescinding the sale of the house. Risk assessment theory suggests that past victimization raises the risk of future victimization. Applying this concept to conservatorship, one could assume that if someone has been unduly influenced in the past, he or she is likely to be unduly influenced in the future. Demonstrating past instances of undue influence is therefore relevant and meets the criteria of Probate Code §1801(b).

Adapting the approach to undue influence for conservatorships as outlined by the chart may require modifications to accommodate the existence of imminent risk where the “bad act” has not actually occurred. Factors that fall within the first three categories might still need to be demonstrated, but Category IV would need to be expanded to include factors that outline imminent risk of future victimization.

Another new avenue for policymakers and those drafting legislation would be to consult with community practitioners in order to learn more about factors in undue influence that are in the process of occurring with living elders and dependent adults.

### ***Existing Avenues for Crafting Legislation***

There are other avenues that already exist that could be consulted, including neuropsychological testing, other Probate Code sections, the California Judicial Council form GC-335, *Capacity Declaration*, case law, and a reexamination of Civil Code §1575. These avenues could be consulted and possibly modified or amended to reflect a definition of undue influence.

An examination of relevant case law, which often cites Civil Code §1575, would shed light on the issue of undue influence and isolate factors that have already been adjudicated. A re-examination of Civil Code §1575, first enacted in 1872, would be helpful to determine what has made it so useful for over a century. Taking the main concepts from that code and adapting them to modern terminology and gender-neutral language could be useful.

*Probate Code §811 and §812*

While California Probate Code does not contain a definition of undue influence, §811 and §812 do set out specific deficits in mental functioning and factors in decision making that would be useful in examining elements to consider in drafting a definition of undue influence.

California Probate Code §812 directly addresses the capacity to make decisions as follows :

A person lacks the capacity to make a decision unless the person has the ability to communicate verbally or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

- (a) The rights, duties, and responsibilities created by, or affected by the decision.
- (b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision.
- (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

California Probate Code §811 sets out deficits in mental functioning that can affect a person's capacity to make decisions, including making a will, contracting, marrying, making medical decisions, and other actions. A determination that the person is of "unsound mind" or lacks capacity to make a decision or do a certain act must be supported by evidence of a deficit in at least one of the following mental functions and there must be evidence that the deficit or deficits and the decision or acts in question are correlated. The functions are:

- (1) Alertness and attention;
- (2) Information processing;
- (3) Thought processes; and
- (4) Ability to modulate mood and affect.



### *Capacity Declaration Form*

The mental functions of California Probate Code §811 are mirrored in California Judicial Council form GC-335, *Capacity Declaration* (Appendix D). This form is required to be filed when exclusive medical decision making powers for the conservator are being requested, when dementia powers are being requested, and when there is a request to change the residence of a person in a temporary conservatorship. It may be filed at any other time during the conservatorship as well. The persons who may complete the form are physicians, psychologists, or religious healing practitioners. Those completing the form are instructed to record their impressions (not psychiatric diagnoses) of the (proposed) conservatee's mental abilities. The most salient sections of the form that could be related to undue influence are found in California Probate Code §811 (2), the information processing section; in California Probate Code §811 (3) the thought disorder section, which includes delusions; and in California Probate Code §811 (4), the ability to modulate mood and affect.

In California Probate Code §811 (2), the information processing section, there are seven items. Item 4 is "understanding and appreciating quantities," a mental function with which victims of undue influence tend to have difficulty; they have trouble grasping how much money they have and what is happening to it. Item 5 is "reasoning using abstract concepts," which translates to the ability to grasp one's situation, including knowing that allowing others to spend your money may impoverish you. Item 6, "the ability to plan, organize, and carry out actions in one's own rational self-interest," is perhaps the most salient item because victims of undue influence are making decisions that are not in their best interests, but rather focused on pleasing someone else to their own detriment. Item 7 relates to reasoning logically, which is most apparent in situations where telemarketers and sweepstakes scammers return again and again, pressuring individuals to "invest," although there is never a financial return and the victims never "win."

California Probate Code §811 (3) refers to thought disorders. Item 3, "delusions," gives the example of a "demonstrably false belief maintained without or against reason or evidence." Victims of undue influence invariably believe something that is not true, that they somehow will benefit from selling their house at a below market rate, that it is a good thing to invest in a horse

ranch having never ridden a horse or previously been interested in such an investment, that people who “sound so nice on the phone” are not taking advantage of them, or that a caregiver wants to marry them solely based on affection. Victims who are intelligent, alert, and oriented and who previously worked in high level financial settings can have unshakable beliefs in scams.

Victims of undue influence may also have some of the characteristics described in California Probate Code §811 (4) which refers to “inability to modulate mood and affect.” They may be focused on the euphoria at the thought of “winning” and be apathetic and indifferent to not winning.

### *Neuropsychological Testing*

Finally, a review of the elements of in-depth neuropsychological testing would be useful because undue influence is addressed directly. Tests may include measures of overall cognitive functioning, both short- and long-term memory, mental agility and flexibility, ability to learn and retain new information, attention, language and speech abilities, and visual/motor functioning, as well as insight and judgment. As shown through the focus groups, the file review, the literature review and the review of California law, poor insight and poor judgment are linked to undue influence whether or not there is cognitive impairment. Persons with poor insight and judgment do not understand their current situation and the impact and consequences of their decisions, including those that affect their finances, their medical treatment, and their romantic lives.

Another dimension that can be tested is executive functioning, which includes ability to think abstractly, integrate stored information, use memory to meet the demands of a current situation, draw inferences, and manipulate information in one’s mind as one attempts to solve problems and consider alternative solutions. It also includes processing of complex information, the organizing of complex information, and the use of such information in planning and strategizing. Several of the elements of executive functioning correlate with California Probate Code §811, which addresses deficits in mental functioning.

## **Case Examples**

### ***Case Five***

*A 75-year-old man who was alert and oriented fell victim to both telemarketers and bogus sweepstakes companies. He was a retired accountant who had been employed in a large accounting firm. He had been widowed for two years. He was convinced that “winning” was just around the corner. His house was in foreclosure and his credit card debt was \$22,000. Both his homeowner’s insurance and property tax payments were in arrears. He acknowledged that he had the funds to pay the bills, but considered that the money he was spending on the scams would result in winnings of \$1,000,000. He said, “It is an investment just like the stock market.” He also said, “They are so nice when they call. They tell me that I deserve to win this money, that I’ve deserved it all my life and now I can have it.” He was indifferent to the fact that he had spent \$129,000 in nine months. He said, “Well, it just keeps going up, doesn’t it?” He was opposed to the conservatorship and firm in his denial of being defrauded, despite warnings from the police, Adult Protective Services, and close friends.*

### **Recommendations for Community Practitioners**

In past decades, probate courts did not have investigators or visitors to inform them about the situations of proposed conservatees. Community practitioners were not much involved with petitions for conservatorships and had little contact with the probate courts. But these circumstances are changing around the country and probate courts are receiving more information either from their own staff or from community practitioners who want and need to know how to be effective in the legal arena so as to benefit the citizens they serve.

Community practitioners would benefit from scales or instruments that measure the following factors:

- Judgment and insight (88 percent of the cases in the file review reported deficits in these areas among proposed conservatees);

- Power differentials between victims and perpetrators. Relevant factors include levels of dependency, differences in intelligence, strength, status, etc.;
- Seriousness or severity of actions taken to influence weaker parties such as frequency, duration, or severity of pressure;
- Objective measures of “fairness”;
- Precise measures of cognitive functions that are related to signing documents;
- Understanding of documents signed, ability to estimate financial needs and the value of real property and personal property, and ability to execute financial documents;
- Personality factors of victims that are associated with undue influence, including dependency, acquiescence, and low self-efficacy; and
- Tactics of manipulation, such as isolation of victim from those who care, poisoning relationships, and inducing dependency.

In practice, there are situations where petitions for conservatorship are filed because there is demonstrated imminent risk, although a “bad act” has not yet occurred. For instance, the proposed conservatee may have gone to an attorney, accompanied by his “new best friend” wanting to deed his house over to her within a few months of the death of his wife of 60 years. However, there are no tools to measure imminent risk.

In addition, there may be value to being able to predict when undue influence could happen given a particular set of circumstances. Community practitioners could benefit from learning about such circumstances in order to assist their clients. A rating scale or assessment tool would be most useful. Conservatorship may not be indicated but other protective measures might be more appropriate in such circumstances. Educating community practitioners about the current state of knowledge about undue influence clearly needs to be undertaken. Curricula need to be developed that assist with detection of undue influence and address appropriate interventions for each case.

### **Recommendations for Future Research**

The research conducted in support of this project represents an important first step, but must be expanded in order to gain a deeper understanding of the factors related (and not related)

to undue influence and to more reliably establish common patterns to provide a framework for assessing cases. Research should also be oriented to the practical issues faced by the courts and partner agencies in handling cases that potentially involve undue influence. Priority areas for further research are outlined below.

Expand scope of court file review:

- Revise data collection instruments to capture the expanded list of elements of undue influence developed over the course of the project.
- Review a larger sample of cases—including cases from courts in other jurisdictions—to improve the ability to generalize to a larger population and to allow for more complex data analysis (e.g., exploration of the relationship between different elements of undue influence).
- Review a sample of financial abuse cases not involving undue influence to allow for an analysis of characteristics that may distinguish the two types of cases.

Incorporate other data sources and data collection methods:

- Supplement court file review with court observation, which may facilitate the collection of more contextual, qualitative information than is possible through court file review.
- Conduct interviews with judicial officers, and perhaps court investigators, to explore their perceptions of the elements of undue influence, challenges they may face in assessing whether undue influence is a factor in a case, and what tools or education may assist them in handling cases where undue influence has been raised as an issue.
- Establish data sharing/confidentiality agreements between courts and justice partners (e.g., APS, Public Guardian) to allow researchers to collect data on the same client from multiple sources. Each agency has somewhat different information due to its unique role and perspective within the system; the ability to merge data from multiple agencies will allow for a fuller exploration of the elements of undue influence present within any given case and the patterns that may exist across cases.

Research policies, guidelines, and practices in other jurisdictions:

- Conduct formal or informal surveys of courts and partner agencies in other jurisdictions to assess whether they've established any operational definitions of undue influence.

### **Dissemination of Results of Project**

Owing to current widespread interest in undue influence, it is anticipated that there will be a great demand for project findings and products. In fact, four presentations were given by project staff before the final report was written and there are two invitations to give presentations at statewide organizations.

1. San Francisco Bioethics Forum – November 12, 2009

Twenty people were present. It was a multidisciplinary group composed of social workers, physicians, lawyers, nurses, and hospital discharge planners.

2. Elder Mediation Group – November 18, 2009

Eight attorneys attended. They are attorneys who are doing mediation with elders and interested in working more with elders.

3. San Francisco Department of Aging and Adult Services – January 27, 2010

Eighty people were present, including staff from the Office of the Public Guardian, Adult Protective Services, and In-Home Health Services staff. Feedback by way of evaluations stated that information about the nature and effect of undue influence was new and useful.

4. San Francisco Hospital Council – February 18, 2010

Fifteen people were present, including physicians, discharge planners, hospital administrators, and staff from the Office of the Public Guardian.

Project staff have been invited to give a presentation on the project at the annual conference of the California Association of Superior Court Investigators in May 2010. Approximately 80 people will be attending. In addition, project staff have been invited to give a presentation to the California state organization for Public Guardians in Fall 2010.

Further dissemination activities will include presentations at local, statewide, and national professional forums, including the San Francisco Consortium for Elder Abuse Prevention, the annual statewide conferences of court investigators and public guardians, and the Center for Judicial Education and Research (CJER), which is the educational division of the California Judicial Council. The final project report will be made available on the Web site of the California Administrative Office of the Courts, Center for Families, Children & the Courts. Articles will be submitted to the *Journal of Elder Abuse & Neglect, Victimization of the Elderly and Disabled*, and the *Journal of the National College of Probate Judges*. Opportunities to present at national forums for judges, public and private guardians, Adult Protective Services, and others will also be explored.

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**APPENDIX A**

**REPORTS OF CASES**

DECIDED BY

**FRANCIS BACON,**

**BARON VERULAM, VISCOUNT ST. ALBANS, LORD CHANCELLOR**

**OF ENGLAND,**

**IN THE**

**High Court of Chancery**

(1617-1621)

PREPARED FROM THE

RECORDS OF THAT COURT

BY

JOHN RITCHIE, M.A.

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

LONDON:

SWEET & MAXWELL, LIMITED,

2 & 3 CHANCERY LANE, W.C.2

1932 (Printed in England.)

JOY AND ANOTHER v. BANNISTER AND ANOTHER (NO. 1) 33

JOY AND ANOTHER v. BANNISTER AND ANOTHER (No.I)

BACON, L.K.

*Fraud- Undue Influence-Old and infirm man-Deception by woman-Deed and will thereby obtained-Duress-Avoidance of instruments-Restoration of property.*

*A woman, having acquired an influence over an old and weak man, induced him by pretending affection for him and prejudicing him against his relatives to make a deed and a will in her favour, and thereafter by threats and cruelty prevented him from revoking these instruments, by virtue of which on his death she became possessed of his entire real and personal estate. In a suit by his next-of-kin against her and her husband: Held, that the deed and will should be made void; that the plaintiffs were entitled to the estate of the deceased; that they should have administration of the personal estate; and that there should be an inquiry as to all the personal estate and in whose hands all or any part thereof was or had been.*

*Held, also, that the Attorney-General should be advised that complaint should be made of the woman's conduct in the Star Chamber with a view to some exemplary punishment being inflicted upon her.*

George Lydiatt (or Lideat), a man of about eighty years of age, was the owner of an estate consisting of goods and land of the value of upwards of £3,000. He executed a deed conveying all his land to Anne Death, the wife of Richard Death, neither of whom was related to him; and he made a will bequeathing all his personal estate to her and appointing her his executrix, and not long afterwards he died. She took possession of and proceeded to enjoy the property so conveyed and bequeathed to her. Subsequently, on the death of her husband, she married Thomas Bannister. One Simon Joy and his wife Elizabeth, who was a niece of Lydiatt, brought the present suit against T. Bannister and his wife seeking that the deed and will might be avoided on the ground that Lydiatt had been induced to make them by undue influence, threats and cruelty of the female defendant, that the plaintiffs might take administration of the personal estate of George Lydiatt, and that all the estate might be restored to them.

The facts upon which the allegations of undue influence, threats and cruelty were based are thus recited in the decree which was made in the suit: It appeareth on full proof unto this Court that the said George Lydiatt, being an old man about the age of eighty years and being weak of body and understanding and having a great estate of goods and lands to the value of £3,000 and more, was drawn by the practices and indirect means of the said Anne to give up his house here in London and to come and sojourn with her at her house in the country, she being then the wife of one Richard Death, and she having him there did so work upon his simplicity and weakness and by her dalliance and pretence of love unto him and of intention after the death of her then husband to marry him, and by sundry adulterous courses with him and sorcery and by drawing of his affections from the plaintiff Elizabeth and other his kindred, telling him sometimes that they would poison him and sometimes that they would rob him, and that thereby she circumvented the said George Lydiatt and got from him at the first in gold plate and such a like matter of £1,000 or £1,500, and afterwards by her said practices caused him to make the said will whereby she got all his personal estate whereof the plaintiffs in equal degree with others were to have taken administration if they had not been prevented by the said will; and that said Anne did also by the like practices and without any true or valuable consideration get conveyance of the said George Lydiatt's lands unto herself and her heirs to the disinheriting of his heir-at-law, she the said Anne being a mere stranger unto him, and she and her then husband, Death, being but of mean estate before the said George Lydiatt was drawn to sojourn with them; and that after the said Anne had gotten the said George Lydiatt to make the said will and conveyance and thereby had possessed herself of his whole estate, she neglected such attendance of him as she had used before and used him in a most cruel manner reviling him and causing him to be whipped and suffered him to lie loathsomely and uncleanly in his bed until three o'clock in the afternoon without anybody to help him so as all the skin of his loins went off, he being not able to help himself by reason he was troubled with a dead palsy and other diseases, and when at any time she did come to help him up she would pinch him and revile him and by such cruel and terrible courses kept him so in awe as that he durst not revoke what before he had done, neither would she suffer his nieces to come unto him lest he should make his moan unto them, for she said if they came there she would scald them out of her house.

On May 17, 1617, the cause came before Bacon, L.K., who, being of clear opinion that the deed and will were given by practice and circumvention,

*Ordered and Decreed* that the deed and will should be brought into Court by the defendants, and dampened and made void for ever; that the plaintiffs should be at liberty to take an administration of the goods of the said George Lydiatt, and be restored to that which by the adjudication belonged to them; that when the plaintiffs had the administration, a commission should be awarded to inquire of the whole personal estate of George Lydiatt, and what moneys had come to the defendants out of that estate, and in whose hands all or any part thereof then was or thereto had been, and the value thereof; and that the plaintiffs should make a bill of costs of their charges sustained in the suit, and the Lord Keeper would be pleased to tax the same, and the same costs being so taxed, the defendants should pay the same forthwith to the plaintiffs.

*And* because the practice and dealing of the female defendant in obtaining the will appeared so foul, his Lordship expressed a wish to the Attorney-General that complaint thereof should be made in the Star Chamber that some exemplary punishment might be inflicted upon her for the same.

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## APPENDIX B

### A STATUTORY DEFINITION OF UNDUE INFLUENCE

By Rachael Welden-Smith

#### I. Introduction

Imagine that two different elderly women seek to transfer ownership of their homes to their adult children. One woman sees this as a potential tax break for herself and her family, while the other has been led to believe by her daughter that she would be better off living in a small apartment and selling her house to her daughter at a below-market rate. The transfers may be the same, but in the later case undue influence may have a role.<sup>1</sup>

Although the doctrine of undue influence dates back to the English courts of equity, it is important today more than ever, in part, because of the aging population. In 1996 the California Legislature found that 14% of the population of California was over 60, but would rise to 21% by 2020.<sup>2</sup> The sheer number of aging baby boomers will test the traditional methods of dealing with capacity and undue influence.

Due to the increase of the elder population all lawyers, regardless of specialization, will deal with the issue of undue influence and capacity.<sup>3</sup> In the past, only trust and estate lawyers

<sup>1</sup> Birkel, Julia L., Byrne, John M., Bernatz, Dr. Susan I., Litigating Financial Elder Abuse Claims, Los Angeles Lawyer, October 2007.

<sup>2</sup> Tanibata, Sherrill, Y., Mind Over Matters, Los Angeles Lawyer, October 2007.

<sup>3</sup> The mental ability a person must have to prepare a valid will. This capacity is often described as the ability to recognize the nature objects of one's bounty, the nature and extent of one's estate, and the fact that one is making a plan to dispose of the estate after death. Black's Law Dictionary, Second Edition, at 84.

had to determine whether a document may be the product of undue influence. Now, lawyers in every specialization could find themselves tackling this issue. This is because cases in which validity of deeds, contracts, powers of attorney, and testamentary gifts are contested almost always involve allegations of undue influence or fraud.<sup>4</sup>

Claims of undue influence are difficult to prove because of the lack of a statutory definition in the California Probate Code, as well as for practical reasons. First, each side of an undue influence case can shade the facts in a way favorable to their side, from the “picture of tenderness” to “terrible abuse.”<sup>5</sup> Second, the influencing behaviors often are not overt acts and usually happen behind closed doors.

In general, California law permits testators to dispose of their property on death as they see fit, without regards to fairness. However, if a testator was affected by influence such that his or her own free will was overcome, then to the extent that the will is procured by that influence it will be invalid.<sup>6</sup> Under California probate law, undue influence is one of the primary grounds for contesting a will. According to one legal professional, challenges to wills and trusts are increasing and the main grounds for the challenges are that the testator was subject to undue influence.<sup>7</sup>

While the probate code provides that a will may be revoked or procured by undue influence, the code itself does not provide a definition or criteria on which to base assessment. Because courts lack statutory guidelines, “cases involving conservatorships or decedent matters in which undue influence is alleged commonly go to trial for judges and juries to determine

<sup>4</sup> Id.

<sup>5</sup> Dustman, Karen Dale, A Primer on Undue Influence: From Presumption to Proof, Nevada Lawyer, April 2007.

<sup>6</sup> California Probate Code §6104.

<sup>7</sup> Sacks, Robert N., Making Sure the Gift is Valid: Lack of Capacity and Undue Influence Considerations.

whether undue influence has taken place.”<sup>8</sup> This not only results in enormous financial and emotional burdens on the parties involved (usually elders) and their families<sup>9</sup>, but also produces inconsistent results.

Further, without a definition of undue influence, Adult Protective Services staff, public guardians, and others have difficulty identifying when an elder has been or is at risk of becoming subject to undue influence.<sup>10</sup> Nor is there an assessment tool for determining which individuals may be susceptible to or have been subject to undue influence. Therefore, incidents of undue influence often go undetected, the results of which are impoverishment, homelessness, dependency, and inadequate care for the elderly victims.<sup>11</sup>

According to the California Commission on Aging, there are 200,000 victims of financial elder abuse each year. This accounts for 40 percent of all abuse against seniors. Alarming, however, only one in every twenty-five incidents of abuse is reported.<sup>12</sup> California’s legislature has responded to this by strengthening statutes designed to protect the elderly from “self-serving relatives and cunning salespeople.”<sup>13</sup>

The fact that undue influence is such a complex and poorly defined legal concept makes it amenable to legislative action. To this end, the San Francisco Probate Court, the California Judicial Council, and the California Administrative Offices of the Courts, have undertaken to explore adding a definition of undue influence to the California Probate Code.<sup>14</sup>

<sup>8</sup> Undue Influence: Definitions and Applications – Grant Application.

<sup>9</sup> Undue Influence: Definitions and Applications – Grant Application.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> Litigating Financial Elder Abuse Claims, Los Angeles Lawyer, October, 2007, at 19.

<sup>13</sup> Id.

<sup>14</sup> Undue Influence: Definitions and Applications – Grant Application.

The purpose of this article is to suggest a statutory definition of undue influence. Part II considers the current approach to undue influence in California and in other states, focusing on case law, statutes, and secondary sources. Part III recommends two different approaches to defining undue influence, a four-prong test and a presumption model. Implementing one of these approaches will address the problems associated with the lack of a definition for undue influence in the California Probate Code.

## II. Background

### A. *Undue Influence in California*

Although there is a definition of undue influence in the California Civil Code,<sup>15</sup> the courts have made numerous definitions. Undue influence is generally defined as an exertion of influence over the donor, which overcomes the donor's free will and causes a transfer that the donor would not have otherwise made.<sup>16</sup> Although each jurisdiction defines undue influence differently, the definitions generally focus on an involuntary testamentary act due to coercion or control being exercised over the testator that destroys the testator's free will.<sup>17</sup>

#### 1. *Definition of Undue Influence by California Courts*

In 2002 the California Supreme Court defined undue influence as “pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying testator's free agency.”<sup>18</sup> A long line of California cases have held that a *presumption* of undue influence is created where there is a confidential relationship

<sup>15</sup> California Civil Code §1575.

<sup>16</sup> Restatement Third of Property.

<sup>17</sup> Sacks, Robert N., Making Sure the Gift is Valid: Lack of Capacity and Undue Influence Considerations.

<sup>18</sup> Rice v. Clark (2002) 28 Cal.4<sup>th</sup> 89.



between the testator and the influencer, a transfer for no consideration, an opportunity to exert undue influence, a particular susceptibility to undue influence on the part of the transferor, and undue benefit to the party who participated in the procurement of the transfer.<sup>19</sup>

Other cases have held that there is a presumption that a document was procured by undue influence if the following three factors are present: (1) confidential relationship between the alleged influencer and the testator; (2) influencer actively participated in the preparation of the testamentary document; and (3) the result is unnatural or unduly favors the alleged influencer.<sup>20</sup>

Without the presumption, however, the burden of proof is on the party contesting the will to establish undue influence.<sup>21</sup> Typically the elements of undue influence are: a grantor who is susceptible to having his or her free will overcome, a transfer of property that is inconsistent with the voluntary actions of the testator, with the influencing party receiving something that he or she ordinarily would not have.<sup>22</sup>

In the seminal California case *Odorizzi v. Bloomfield School District*, the California Court of Appeal explained, “the essence of undue influence is the use of excessive pressure by a dominant person over a servient person resulting in the will of the servient person being overborne.”<sup>23</sup> The court cited the following factors as indicative of excessive pressure:

(1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once, (4) extreme emphasis on the untoward consequences of the delay, (5) use of multiple persuaders by the dominant side against a servient party, (6) absence of third-party advisors to the servient party, and (7) statements that there is no time to consult financial advisers or attorneys.<sup>24</sup>

<sup>19</sup> *Ross v. Conway* (1892) 92 Cal.632, 635.

<sup>20</sup> *Rice*, at 96-97; *In re Estate of Hobart* (1940) 16 Cal 2d 573, 581.

<sup>21</sup> Tanibata, Sherrill Y., *Mind Over Matters*, Los Angeles Lawyer, October 2007.

<sup>22</sup> *Estate of Mann* (1986) 184 Cal.App.3d 593; *Estate of Sarabia* (1990) 221 Cal.App.3d 599.

<sup>23</sup> *Odorizzi v. Bloomfield School District* (1966) 246 Cal.App.2d 123.

<sup>24</sup> *Id.*

Nearly every California court includes a person's disposition to exert undue influence, as well as the opportunity to exert undue influence, as part of its elements for proving undue influence.<sup>25</sup> Both are usually shown by circumstantial evidence (e.g., the influencer has long and undisturbed access to the testator, or the testator turns away from his or her family and toward the influencer).

In 2005 a California case held that a presumption of undue influence is created where “(1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument.”<sup>26</sup>

In *Franco*, the court held that the decedent's will was a product of undue influence based on the presence of several factors. The decedent was mentally immature and overly trusting (susceptibility factor), and the instrument itself made dispositions that were both unnatural (left everything to two nephews he hardly knew at the exclusion of his sister, with whom he had a close relationship) and contrary to his expressed intentions (unnatural result factor). Further, the beneficiary had the opportunity to control the decedent's testamentary act (opportunity to exert influence factor).

According to *Franco*, an intimate, personal, or confidential relationship with an alleged influencer is circumstantial evidence that the influencer had opportunity to influence the testator.<sup>27</sup> These confidential relationships include: trustee/beneficiary, attorney/client,

<sup>25</sup> Cote, Michael J., Undue Influence in Execution of Wills, American Jurisprudence Proof of Facts 2d, 109.

<sup>26</sup> David v. Hermann (2005) 129 Cal.App.4<sup>th</sup> 672.

<sup>27</sup> Id.

guardian/ward, physician or nurse/patient, parent/child, and husband/wife. All of these have been held to be confidential relationships.<sup>28</sup>

It should be noted that in California there is a presumption of invalidity for gifts made to certain individuals under California Probate Code §21350. For example, an instrument is invalid if it makes a gift to the person who drafted it. This means that a presumption of undue influence arises when an attorney actively participates in procuring or executing a will in which he is a beneficiary, whether or not the benefit to the attorney was undue.<sup>29</sup> The provisions of Section 21350 prevent those in fiduciary relationships with a testator from obtaining gifts through the use of undue influence or overbearing behavior.<sup>30</sup>

## 2. *How Statutes From Other Areas of California Law Define Undue Influence*

California Probate Code §6104 provides that the “execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud or *undue influence*.”<sup>31</sup> While the Probate Code offers undue influence as one of the grounds under which a will can be contested, it does not provide its own definition of undue influence. Instead, the definition of undue influence comes for the California Civil Code, which does not specifically pertain to probate matters, but rather civil matters in general.

The California Civil Code defines undue influence as:<sup>32</sup>

1. The use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

<sup>28</sup> Cote, Michael J., Undue Influence in Execution of Wills, American Jurisprudence Proof of Facts 2d, 109.

<sup>29</sup> Estate of Auen (1994) 30 Cal.App.4<sup>th</sup> 300.

<sup>30</sup> Cote, citing Osorine v. Weingarten (2004) 124 Cal.App.4<sup>th</sup> 304.

<sup>31</sup> California Probate Code §6014 (emphasis added).

<sup>32</sup> California Civil Code §1575.

2. In taking an unfair advantage of another's weakness of mind;
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

In an undue influence case, a personal representative of an estate may bring a Civil Code §1575 undue influence claim under Probate Code §850. This is an equitable action that will be tried by the court. However, pleadings alleging undue influence often do not refer to language in Civil Code §1575.

Despite not having a definition of undue influence, the California Probate Code does set out whether or not someone has the mental capacity to make a will in Section 6100.5(a). Further, Probate Code §811 provides factors to be considered by judges in determining capacity, which may prove helpful in creating a definition of undue influence:

Deficits in mental functions:

(a) a determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including... *to execute wills*, or *to execute trusts*, shall be supported by evidence of a deficit in at least one of the following mental functions... (1) Alertness and attention,...(2) Information processing,...(3) Ability to modulate mood and affect.<sup>33</sup>

***B. Undue Influence Law in Other States***

*1. Cases*

The laws of undue influence differ from state to state, but generally each state defines undue influence as “influence that deprives the grantor of freewill.”<sup>34</sup> The general elements of

<sup>33</sup> California Probate Code §811.

<sup>34</sup> Ross, Eunice and Reed, Thomas, Challenging Post-Death Distribution Plans Involving Lifetime Contracts, Deeds and Trust Instruments, Will Contests (Second Edition) §9:10.

undue influence reduced from the case law of many states are: (1) susceptibility to influence, (2) a confidential relationship between influencer and testator, (3) use of the relationship by the influencer in an attempt to get the testator to make a change of disposition, and (4) a change of disposition that is unconscionable.<sup>35</sup>

In order to make showing of undue influence in Alabama, Connecticut, Iowa, Minnesota, Nebraska, Ohio, and South Dakota, the contesting party must prove a version of these four elements. Maryland, Missouri, North Carolina, Tennessee, Texas, Washington, and Montana have factors in addition to the four general ones.

Wisconsin uses either a two-element test or a four-element test. Susceptibility, opportunity to influence, disposition to influence, and coveted result comprise the four-element test. Once the first three elements have been proven then there need only be a slight showing of the fourth. The two-element test consists of the presence of a confidential or fiduciary relationship between the testator and the influencer and “suspicious circumstances.” This creates a rebuttable presumption of undue influence in Wisconsin.

Oregon also uses a suspicious circumstances test in determining whether a testamentary instrument is a product of undue influence, which includes the following factors: “(1) whether the challenged beneficiary participated in the preparation of the instrument; (2) whether the testator received independent advice from an attorney in preparing the instrument; (3) whether the instrument was prepared in secrecy and haste; (4) whether the testator’s attitude toward others had changed by reason of his or her relationship with the challenged beneficiary; (5) whether there is a decided discrepancy between a new and previous will of the testator and

<sup>35</sup> Id.

continuity of purpose running throughout former wills indicating a settled intent in the disposition of his estate; (6) whether the disposition of the estate is such that a reasonable person would regard it as unnatural, unjust or unfair; and (7) whether the testator was susceptible to undue influence.<sup>36</sup>

In Nevada, a presumption of undue influence is created where there is a confidential relationship between the alleged influencer and the testator, the alleged influencer actively participated in the preparation of the testamentary document, and the result is unnatural or unduly favors the alleged influencer.<sup>37</sup> The presumption then shifts the burden of proof to alleged influencer to show that the absence of undue influence was more probable than its existence.<sup>38</sup>

At trial an examination of the totality of circumstances is essential. Susceptibility to influence will be an important factor, as well as physical and mental condition, social condition (including whether the testator was isolated or had access to unbiased advice, as well as legal counsel), significant changes in spending or lifestyle, and who took control of the actual disputed document after it was executed.<sup>39</sup>

In North Carolina, the court found no undue influence where the testator was old and suffered from loss of memory and the proponent of the will helped the testator with her affairs, drove her to the attorney to make the will, and was present at the meeting. The proponent was a beneficiary of the will but not the testator's own son or two grandchildren. The testator had also

<sup>36</sup> Ramsey v. Taylor (2000) 166 Or.App. 241.

<sup>37</sup> In re Estate of Peterson (1961) 77 Nev. 87, 95.

<sup>38</sup> Id.

<sup>39</sup> Dustman, Karen Dale, A Primer on Undue Influence: From Presumption to Proof, Nevada Lawyer, April 2007.

said at times that she was afraid of the proponent.<sup>40</sup> In one egregious example, a South Carolina court found undue influence where the testator's son threatened to put her in a nursing home if she did not live with him, monitored all of her conversations with a baby monitor, controlled all of her finances, and controlled the execution of her will despite the fact that testator wanted everything to go to her children equally. The testator's son also prevented any of his siblings from visiting their mother while she was in the hospital.<sup>41</sup>

## 2. *Statutes*

The undue influence statutes of Oklahoma, Montana, North Dakota, and South Dakota have the same exact language as California Civil Code §1575. Maine has perhaps the most comprehensive undue influence statute, which provides an excellent model for California:<sup>42</sup>

1. **Presumption.** In any transfer of real estate or major transfer of personal property or money for less than full consideration or execution of a guaranty by an elderly person who is dependent on others to a person with whom the elderly dependent person has a confidential or fiduciary relationship, it is presumed that the transfer or execution was the result of undue influence, unless the dependent person was represented in the transfer or execution by independent counsel.
2. ...Confidential or fiduciary relationships include the following:
  - A. A family relationship between the elderly dependent person and the transferee...including relationships by marriage and adoption;
  - B. A fiduciary relationship between the elderly dependent person and the transferee...such as with a guardian, conservator, trustee, accountant, broker or financial advisor;
  - C. A relationship between the elderly dependent person and a physician, nurse or other medical or health care provider;
  - D. A relationship between the elderly dependent person and a psychologist,

<sup>40</sup> In re Will of Prince (1993) 109 NC App. 58.

<sup>41</sup> In re Estate of Cumbee (1999) 333 S.C. 664.

<sup>42</sup> Maine Revised Statutes Annotated §1022.

social worker or counselor;

- E. A relationship between the elderly dependent person and an attorney;
- F. A relationship between the elderly dependent person and a priest, minister, rabbi or spiritual advisor;
- G. 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;
- H. A relationship between the elderly dependent person and a friend or neighbor; or
- I. A relationship between the elderly dependent person and a person sharing the same living quarters.

**C. *Proposed Definitions of Undue Influence by Professionals in the Community***

Dr. J. Edward Spar, Director of Geriatric Psychiatry at the UCLA School of Medicine, explains that undue influence is difficult to prove because the acts are usually hidden from view. However, it is an important area to understand, as there has been a growth in exploitation of the elderly by undue influence. He offers the following hypothetical situation as an illustration: an elderly person with dementia and some cognitive impairment becomes involved with a younger person who has been hired or volunteers as a caregiver. In this case it is easy for the caregiver to create the common undue influence circumstances, particularly if the elder has no close relatives. He lists these as the factors that are prominent in most undue influence scenarios:

the production of isolation, the creation of the siege mentality, the fostering of dependence, the creation of powerlessness, the use of fear and deception, and keeping the victim unaware of the manipulative program put into place to include and control and to obtain the signing of documents which benefit the perpetrator at the cost of the victim.<sup>43</sup>

<sup>43</sup> Spar, J. Edward MD, Attorney's Guide to Competency and Undue Influence, National Association of Elder Law Attorney's Quarterly, Summer 2000.



According to Dr. Spar, the common result of this situation is “inappropriate gifts, excessive payments for services rendered, late-life marriages, and new trusts and wills leaving everything to the perpetrator at the expenses of family members.”<sup>44</sup>

Dr. Spar concludes by proposing legislation that addresses the problem outlined above. His legislation provides for a presumption of undue influence where a transfer is made by a dependent adult, or independent adult with dementia or delirium, if the transferee and the transferor had a relationship of trust, or the transferee was a caregiver to the transferor and (1) the transfer itself was in great excess of the value of services rendered by the transferee, or (2) the transfer was made after the onset of the dependency.

In *Psychological Aspects of Undue Influence*, Dr. Ira Turkat defines undue influence as a person’s free will being usurped by the will of another.<sup>45</sup> According to Dr. Turkat, this is primarily a psychological phenomenon and therefore it is important for an attorney to understand the psychology workings of undue influence.

Dr. Turkat proposes a three-part model of classes of variables that converge to create undue influence. Predisposing Factors are characteristics that make an individual susceptible to being manipulated; Vulnerability Enhancers are the methods used to nurture the predisposing factors; and Execution Variables are the seizing of the right moment to produce the undue influence.

Some of the predisposing factors Dr. Turkat provides are death of a spouse, depression, isolation, social attention, anxiousness, dependency, diminished mental capacity, and undetected

<sup>44</sup> Id.

<sup>45</sup> Turkat, Dr. Ira Daniel, *Psychological Aspects of Undue Influence*, [www.abanet.org/genpractice/newsletter/lawtrends/0501/estate/probate](http://www.abanet.org/genpractice/newsletter/lawtrends/0501/estate/probate).

pathology. For vulnerability enhancers, Dr. Turkat outlines the three types of people who will generally take advantage of a susceptible person. These are con artists, the psychologically damaged, and those who were tempted over time although did not originally set out to take advantage.

These people generally use common methods to cultivate the exploitation, including increasing dependency needs, relationship poisoning, self-promotion, restricting access, deceptive manipulations, reinterpreting, events and inactive relatives. Dr. Turkat explains that vulnerability enhancers create the trust, reliance, and submission on the part of the susceptible person in favor of the manipulator.

Finally, there must be a right moment to usurp the will of the victim. According to Dr. Turkat, this right moment occurs when the manipulated person is finally submissive enough to execute the redirection of their assets. Execution variables include taking advantage of a particular mental state, increasing the vulnerable person's discomfort, pressuring the client, and puppeteering the client.

***D. Where Things Are Now: How the Legal Community Treats Undue Influence***

To summarize, today the definition of undue influence in most states includes a combination of certain factors. In general, evidence of the following facts and circumstances tends to establish the existence of undue influence in the procurement or execution of a will:<sup>46</sup> (1) testator's susceptibility to undue influence, including age, physical infirmity, mental infirmity, isolation, and dependence on others; (2) relationship between principal beneficiary and testator, including a fiduciary relationship or other confidential relationship; (3) the beneficiary's

<sup>46</sup> Cote, Michael J., Undue Influence in Execution of Wills, American Jurisprudence Proof of Facts 2d, 109.

disposition to exert undue influence; (4) the beneficiary's opportunity to exert undue influence; (5) the beneficiary's exertion of control over testator as to other, non-testamentary matters; and (6) an unnatural disposition of estate under a challenged will, indicated by an unusually favorable treatment of the influencer, unusually unfavorable treatment of the natural objects of testator's bounty, or inconsistent provisions of prior wills.

### **III. Analysis**

#### ***A. The Problem With Not Having a Statutory Definition of Undue Influence***

When Arthur Greenhill married his fourth wife, Adelle, he was 65 years old. Four and half months later he was dead. He left behind his widow, children, and a will written on his death bed. In the will, Arthur's new wife was to receive the bulk of his estate. Arthur's four children from his first and second marriages, with whom he had close and loving relationships, received gifts of only \$10 each. Arthur's previous dozen or so wills had devised everything he has to his children. Nevertheless, Arthur's widow, as executor of the estate, petitioned for probate of the will. The children contested on the grounds that their father had executed it under the undue influence of his new wife.

The allegation was based on the fact that Arthur signed the will in question while in critical condition after a heart attack, and with his death expected at any time. In fact, just two hours before the signing, Arthur's doctor had determined that any further questioning of Arthur would likely result in his death. Arthur was in extreme pain and barely spoke in the hours after being rushed to the hospital.

According to the testimony of his doctor, Arthur may have spoken a few words to his wife during this time at the hospital. His wife then inquired "if it would be possible to bring a

lawyer so that Mr. Greenhill might sign his will, or make out his will.”<sup>47</sup> The doctor then referred her to a nurse to make the telephone call asking the attorney to come to the hospital. Arthur could not even breathe without an oxygen mask when his attorney appeared at the hospital.

Arthur, his wife, and the attorney had discussed a new will for Arthur some months before. However, that will was never finalized, so the attorney was forced to hand write a new will in the hospital room. The attorney prepared the will (which left everything to Arthur’s wife) at the hospital in the presence of Arthur and his wife. On its completion, Arthur signed his will. One day later, he died.

In a scenario similar to Arthur’s, another newlywed executed a will for the benefit of her new spouse right before dying. Irene Teel had been married just six months when she killed herself at the age of 69. Two weeks prior to her death, Irene executed a will leaving her entire estate to her husband and disinheriting her only child. Like Arthur, Irene had a close and friendly relationship with her daughter and spoke of leaving everything to her when she died.

Like Arthur and his wife, Irene and her husband had been married only a short time; however, in both cases each spouse received the entirety of the estate. These gifts were also similar in that they disinherited the decedents’ children. Further, the spouses of Arthur and Irene were both involved in the discussion of the wills and present during their drafting.

After Irene’s death, her daughter contested the will on the grounds of undue influence. The court found that Irene’s abnormal conduct, her attempts at suicide, the disinheritance of her daughter in favor of her new husband to whom she had been married less than six months, and

<sup>47</sup> In re Greenhill’s Estate (1950) 99 Cal.App.2d 155, at 161.

her overall mental and physical weakness justified finding that she had been subject to undue influence.<sup>48</sup>

In the case of Arthur, the court held the evidence was sufficient to show that Arthur's wife did have an opportunity to unduly influence his mind, and that her actions and conduct might be regarded as suspicious; however, such evidence was insufficient to support a finding of undue influence.<sup>49</sup>

Although Irene's and Arthur's stories are factually similar, the California courts determined only one decedent had been unduly influenced. This inconsistency highlights the need for a statutory definition of undue influence.

### ***B. Possible Solutions***

As discussed in Part II, there are currently two legal theories of undue influence, the "factors" model and the "presumption model."<sup>50</sup> The presumption model creates a presumption of undue influence where there is a confidential or trust relationship between the testator and the alleged influencer (such as the relationship between an elderly person with mental or physical impairments and his or her caregiver). The presumption model shifts the burden of proof onto the proponent of the will, rather than contesting party, to show that the disposition was not a product of undue influence.<sup>51</sup>

The factors model focuses on the susceptibility of the victim to undue influence. However, susceptibility alone is not enough to prove undue influence without other factors,

<sup>48</sup> In re Teel's Estate (1944) 25 Cal.2d 520, at 527.

<sup>49</sup> Greenhill at 169.

<sup>50</sup> Spar, J. Edward MD, Attorney's Guide to Competency and Undue Influence, National Association of Elder Law Attorney's Quarterly, Summer 2000.

<sup>51</sup> Id.

including an actual showing that improper influence was exerted and a disposition that would not have been made absent the influence.<sup>52</sup>

1. *Presumption Model*

Generally the contestant of a will has the burden of proving undue influence. If a presumption of undue influence applies, however, the burden of proof shifts to the proponent to show the absence of undue influence.<sup>53</sup> Based on the law in the majority of states, the presumption of undue influence is created when:

- (1) There is a confidential relationship between the testator and the beneficiary;
- (2) The beneficiary actively participated in procuring or executing the testamentary document; and
- (3) The beneficiary unduly benefited from the testamentary document.

Under (1), a confidential relationship is one where the person has the confidence of another and purports to act or advise another.<sup>54</sup> Said another way, a confidential relationship “exists whenever trust and confidence is reposed by one person in the integrity or fidelity of another.”<sup>55</sup> This can be established with or without a technical fiduciary relationship.<sup>56</sup> Whether or not the testator and alleged influencer have a confidential relationship is a question of fact, and must be determined on a case-by-case basis.

<sup>52</sup> *Id.*

<sup>53</sup> *Estate of Auen* (1994) 30 Cal.App.4<sup>th</sup> 300.

<sup>54</sup> *Kudokas v. Balkus* (1972) 26 Cal.App.3d 744.

<sup>55</sup> California Jury Instruction §334.

<sup>56</sup> Birkel, Julia L., Byrne, John M., Bernatz, Dr. Susan I., *Litigating Financial Elder Abuse Claims*, Los Angeles Lawyer, October 2007.

Familial relationships are frequently confidential but mere kinship is not enough to establish a confidential relationship, and not every familial influence will be undue influence.<sup>57</sup> According to the court in *Feiden v. Feiden*, a family relationship does not create a presumption of undue influence without other factors such as “inequality or controlling influence.”<sup>58</sup>

Despite this, the National Elder Abuse Incident Study found that in 60.4% of the cases of financial elder abuse an adult child of the elder was the perpetrator. Grandchildren were perpetrators in 9.2% of the cases and other relatives were perpetrators 9.7% of the time.<sup>59</sup>

In *Parrisella v. Fotopulos*, the Arizona Superior Court held that a will was not the product of undue influence where the testator’s fiance was the beneficiary, because a sexual relationship is not a confidential relationship to raise the presumption of undue influence.<sup>60</sup> The mere fact that a relationship is friendly or intimate does not make it confidential.<sup>61</sup>

The Restatement Third of Property divides confidential relationships into three categories of relationships – fiduciary, reliant, and dominant-subservient.<sup>62</sup> A “fiduciary relationship” can be between the testator and a hired professional, such as attorney and client, or professional and beneficiary. However, a fiduciary relationship can also be with a non-professional, relative or friend, for example, a guardian, conservator, or individual trustee.

<sup>57</sup> Dustman, Karen Dale, *A Primer on Undue Influence: From Presumption to Proof*, Nevada Lawyer, April 2007.

<sup>58</sup> Cote, Michael J., *Undue Influence in Execution of Wills*, American Jurisprudence Proof of Facts 2d, 109.

<sup>59</sup> [www.aoa.gov.eldfam/Elder\\_Rights/Elder\\_Abuse/AbuseReport\\_Full.pdf](http://www.aoa.gov.eldfam/Elder_Rights/Elder_Abuse/AbuseReport_Full.pdf).

<sup>60</sup> *Parrisella v. Fotopulos* (1974) 522 P2d 1081.

<sup>61</sup> California Jury Instruction §334.

<sup>62</sup> Restatement Third of Property (2003) §8.3.

A “reliant relationship” is one where there is a special relationship of confidence or trust, where the testator regularly relied on the alleged influencer for judgment or advice. The Restatement gives the example of a doctor and patient.

The last type of relationship, “dominant-subservient,” is where the testator is subservient to the dominant influence. This usually occurs between a mentally or physically feeble testator and a caregiver or child. However, there is potential for overlap within all these relationships.

The Restatement rejects the use of a confidential relationship as the only factor needed to create a presumption of undue influence. According to the Restatement, once a confidential relationship has been established there must also be suspicious circumstances to raise the presumption of undue influence. Suspicious circumstances are those which point to an abuse of the confidential relationship. These factors can include susceptibility of the testator, participation by the alleged influencer in the preparation or procurement of the will, whether the testator received independent advice, and whether the disposition is such “that a reasonable person would regard it as unnatural, unjust, or unfair.”<sup>63</sup>

Under element (3) undue profit requires an assessment of the relationship between the testator and the beneficiary.<sup>64</sup> What constitutes a proper disposition in one case could be considered an improper disposition in another case depending on the relationship. For example, if a disabled elderly testator devises her home to her caregiver, this may be proper despite a confidential relationship if the caregiver is also the testator’s daughter. On the other hand, if the caregiver is a hired professional, the gift may not be proper.

<sup>63</sup> Restatement Third of Property.

<sup>64</sup> Taylor, Thomas C., Introduction to Wills and Will Drafting, California Transactions Forms Estate Planning.



This presumption of undue influence can be overcome by showing that the testator had independent advice, or acted of his or her own volition with a full understanding of the consequences of his or her actions.<sup>65</sup> However, testamentary capacity alone is not enough to rebut the presumption of undue influence, because the testator could have the requisite capacity to make a will, but still be under the influence of another.<sup>66</sup>

## 2. *Four-Factors Model*

The following four-factors model is based on the four general elements present in most every state's definition of undue influence:

- (1) whether testator's mental and physical condition was such as to permit a subversion of his freedom of will;
- (2) whether there was an opportunity afforded by the beneficiary's relationship to testator to influence testator;
- (3) whether beneficiary was active in procuring the execution of the will; and
- (4) whether the will cut off natural objects of testator's bounty or whether there was a variance between terms of will and expressed intentions of testator.

Under element (1), susceptibility characteristics include, "advanced age, lack of intellectual capacity or firmness of character and physical debility."<sup>67</sup> Age of the testator is always an important factor, especially when coupled with an inability on the part of the testator to look after his or her own affairs. Strength or weakness of the testator's character is important because a weak character can demonstrate a susceptibility to undue influence, while a strong character can show a likelihood not to be influenced. Mental or physical condition can be an

<sup>65</sup> *Sparks v. Sparks* (1950) 101 Cal.App.2d 129.

<sup>66</sup> Cote, Michael J., *Undue Influence in Execution of Wills*, American Jurisprudence Proof of Facts 2d, 109.

<sup>67</sup> Cote, Michael J., *Undue Influence in Execution of Wills*, American Jurisprudence Proof of Facts 2d, 109.

important indicator because physical suffering can make the testator weak and susceptible to influence. Additionally, when there is physical suffering the influencer may be able to easily coerce the testator by withholding comforts, like pain medication.<sup>68</sup>

The elderly are presumed to fall into the category of persons who are vulnerable to undue influence. Factors that contribute to their vulnerability include “mental and physical infirmities, dependence on others for help with finances and daily needs, loss of a spouse, lack of financial sophistication, and isolation.”<sup>69</sup> These factors highlight why elderly testators are typically taken advantage of by a family member or caretaker.

However, in *Nessen v. Nessen*, the court held that although the grantor was seventy-five years old and suffered from mental and physical disabilities including pain, sleeplessness, forgetfulness, and vulnerability to persuasion, this was not enough to indicate undue influence without other factors.<sup>70</sup> Likewise, the court in *Anderson v. Nelson*, held “as a general rule, age, physical condition, and suffering or pain furnish no basis for setting aside a conveyance if the party seeking rescission exercised a free and untrammelled mind.”<sup>71</sup>

It is not just having “influence” over the donor that makes a gift invalid; there must also be an element of the donor being pressured or coerced into making a gift that he or she would not have otherwise made.<sup>72</sup> “Undue influence causes a disposition different from that which one would have made if the other were permitted to follow his or her own inclinations.”<sup>73</sup> Therefore,

<sup>68</sup> Id.

<sup>69</sup> Birkel, Julia L., Byrne, John M., Bernatz, Dr. Susan I., Litigating Financial Elder Abuse Claims, Los Angeles Lawyer, October 2007.

<sup>70</sup> Nessen v. Nessen (1933) 218 Cal. 59.

<sup>71</sup> Anderson v. Nelson 83 Cal.App. 1,5

<sup>72</sup> Sacks, Robert N., Making Sure the Gift is Valid: Lack of Capacity and Undue Influence Considerations.

<sup>73</sup> Ross, Eunice and Reed, Thomas, Challenging Post-Death Distribution Plans Involving Lifetime Contracts, Deeds and Trust Instruments, Will Contests (Second Edition) §9:10.

element (4) requires a disposition indicative of undue influence by either an unnatural provision of will, or a disposition of property contrary to the expressed desire of testator.

A will is unnatural if it “provides a substantial benefit to one who has no natural claim to it or a benefit that is out of proportion to the amounts received by other persons having an equal claim to participate in the testator’s bounty.”<sup>74</sup> This factor is not enough on its own and must be considered with other factors, as testators are entitled to dispose of their assets in any way they choose. For example, in *Ruestman v. Ruestman*, the court held that a decedent had the right to dispose of his property to his second wife to the exclusion of his son.<sup>75</sup>

In order to establish element (4), Robert N. Sacks proposes some questions that are helpful and focus on the “why” behind the gift: does the gift seem natural for this testator; is the planned gift all of or substantially all of, the testator’s estate; and in some cases, why did the testator choose to disinherit one or more of his or her children. Evidence of why testators did what they did is useful in disproving undue influence because it tends to negate element (4).<sup>76</sup>

However, a parent may favor one child or desire to please one child over another without amounting to undue influence.<sup>77</sup> As an example, an elderly parent may transfer a home to a child to the exclusion of his or her other children. In these situations, the contesting child would have to show that the gift was contrary to and not an expression of the parent’s wishes.<sup>78</sup>

<sup>74</sup> Cote, Michael J., Undue Influence in Execution of Wills, American Jurisprudence Proof of Facts 2d, 109.

<sup>75</sup> Ruestman v. Ruestman (2003) 111 S.W.3d 464.

<sup>76</sup> Sacks, Robert N., Making Sure the Gift is Valid: Lack of Capacity and Undue Influence Considerations.

<sup>77</sup> Goldman v. Goldman (1953) 116 Cal.App. 2d 227.

<sup>78</sup> Tanibata, Sherrill Y., Mind Over Matters, Los Angeles Lawyer, October 2007.

### ***C. Recommendation***

The presumption model and the four-factors model work best in conjunction with each other. This is because each can be incomplete on its own. There are many arguments against each model individually. For example, in the factors-based approach, the court in *Olam v. Congress Mortg. Co.*, stressed that although California courts have identified various factors of undue influence, there is “no precise formula of factors, that when applied will identify for the court whether undue influence has occurred.”<sup>79</sup> Similarly, the court in *Odorizzi v. Bloomfield* held that not one case existed where undue influence was found on a showing of only one of the factors.<sup>80</sup>

As for the presumption model, recall the two elderly women who sought to transfer ownership of their homes to their children. Undue influence only came into play in one of the scenarios, even though the transfers were essentially the same. However, under a presumption model undue influence could be presumed in both cases if each child was in a confidential relationship with his or her mother and was active in helping her prepare her will.

A better solution is a general rule that the contestor of the will has the burden of proving undue influence by a showing of the four factors (whether testator’s mental and physical condition was such as to permit a subversion of his freedom of will; whether there was an opportunity afforded by the beneficiary’s relationship to testator to influence testator; whether beneficiary was active in procuring the execution of the will; and whether the will cut off natural objects of testator’s bounty or whether there was a variance between terms of will and expressed

<sup>79</sup> *Olam v. Congress Mortg. Co.* (1999) 68 F.Supp.2d 1110, 1141.

<sup>80</sup> *Odorizzi v. Bloomfield School District* (1966) 246 Cal.App.2d 123, 131.

intentions of testator). However, where there is a presumption of undue influence,<sup>81</sup> it is up to the proponent of the will to prove the absence of undue influence.

#### **IV. Conclusion**

Once undue influence has been found, some states hold that the entire will is invalid.<sup>82</sup> The general rule, however, is that only the provisions that have been tainted by undue influence need to be thrown out. Other provisions of the will may be valid so long as they are interdependent from the invalid provisions and can be separated without defeating testator's intent or distribution scheme.

Likewise, the general rule will not be appropriate where it would cause unfairness to testator's heirs. In *Re Estate of Robinson*, the Supreme Court of Kansas held that it was an error for the trial court to deny the entire will for probate upon finding that certain provisions were a result of undue influence by the testator's wife.<sup>83</sup> Instead, the trial court should have admitted the will for probate and stricken the provision procured by the wife.<sup>84</sup>

As for Arthur and Irene, by applying the four-factors model we achieve the consistent result striven for by this paper. Under element (1) of the four factors, both Arthur and Irene were susceptible to undue influence, Arthur because of his physical condition of being on his death bed, and Irene because of her mental condition which led to her suicide. In both cases, the beneficiaries had the opportunity to influence the decedents. Both beneficiaries were spouses of the decedents, giving them ample opportunity to exert influence.

<sup>81</sup> There is a presumption of undue influence when [there is] a relationship between the testator and the beneficiary; the beneficiary actively participated in procuring or executing the testamentary document; and the beneficiary unduly benefited from the testamentary document.

<sup>82</sup> 36 Am. Jur. Proof of Facts 2d 109, at 27.

<sup>83</sup> *Re Estate of Robinson* (1982) 644 P2d 420.

<sup>84</sup> *Id.*

Similarly, under element (3), both beneficiaries were active in procuring the will of their spouses. Arthur's wife was present at the attorney's office when the will was discussed and in the hospital where the will was executed. Irene's husband was also present and participated in the drafting of his wife's will.

Finally, both Arthur's and Irene's wills cut off their beloved children in favor of their new spouses. Based on all of the above, had the court been applying this model, both wills would have been found to be a product of undue influence. Using the factors-based approach will successfully eliminate the prior inconsistencies associated with not having a statutory definition of undue influence in the probate court.

## APPENDIX C

### Literature Review on Undue Influence

Lisa Nerenberg

Since the mid-1990s, interest in the role of undue influence in elder financial abuse has grown. This can perhaps be accounted for by the fact that undue influence offers a compelling explanation for situations that are increasingly coming to the attention of adult protective service workers, law enforcement, and others in the field of abuse prevention. These include incidents in which elders who appear to be acting freely (those with minimal or no cognitive impairment and who are not being overtly coerced) consent to exploitative transactions, remain in abusive relationships, and defend those who seek to harm or exploit them. In many cases, victims have strong emotional attachments to their abusers. Some refuse to believe that abuse has occurred even in the face of significant losses, impoverishment, or homelessness. Some even defend their abusers.

Practitioners in the field of elder abuse prevention recognize that elders with cognitive impairments are often tricked, misled, or intimidated into surrendering money or property by signing documents like powers of attorney, deeds, or other contracts; and, that under these circumstances, victims are not acting “freely.” They further recognize that abusers may gain compliance through threats and coercion. But cognitive impairment and coercion do not explain those situations in which victims appear to be acting freely.

Most practitioners in the field of elder abuse prevention, including social workers, adult protective service workers, and legal and health care professionals, adhere to ethical and practice principles or guidelines that acknowledge clients’ autonomy and right to make their own decisions. This extends to actions or choices that appear eccentric, risky, or even foolish. As a result, they have been reluctant to call seemingly counterproductive actions into question for fear of treading on clients’ civil liberties. But as awareness of abuse increases and more of these

paradoxical cases are reported, many have begun to look beyond the “autonomy and free choice explanations” to explain how abusers gain compliance or consent through unfair manipulation.

Some have turned to the fields of psychology, marketing, domestic violence, victimology, criminology, and civil law to understand how individuals exercise control over others. The following sections provide an overview of these diverse perspectives and their potential implications for understanding elder abuse.

### **The Psychology of Control and Influence**

Psychologists have for decades studied how people exercise influence over others’ thoughts and actions under both normal and extraordinary circumstances. In everyday life, persuasion is used to maintain social control, enlist support for political or religious causes, and promote consumerism. Persuasion has also been used for unethical purposes. Totalitarian regimes, cults, hostage takers, batterers, scammers, and corrupt caregivers have used unfair persuasion to gain control over the thoughts, actions, loyalties, and resources of others.

A variety of terms have been used to describe unfair persuasion and its effects, many of which are imprecise and used inconsistently. The term “brainwashing,” for example, which was originally used to describe attempts to achieve deep and permanent behavioral changes in foreign prisoners, especially during the Korean War, is no longer widely used in psychology and other sciences because of its vagueness, history of being used in propaganda, and association with highly controversial and sensationalized events. Today, the terms coercive persuasion, coercive psychological systems, or coercive influence are more commonly accepted. Specific areas of exploration include:

1. How totalitarian regimes control populations;
2. How captors induce prisoners of war (POWs) to denounce their countries, collaborate with their captors, and turn on fellow prisoners;
3. How cults recruit and maintain members;
4. Why victims of domestic violence do not leave abusive relationships or take action against their batterers;
5. How caregivers maintain control over those they care for;
6. Hostages who bond with their captors;



7. How professionals exploit relationships of trust and confidence toward clients; and
8. How white collar criminals and con artists use manipulation and deception for financial gain.

## **Early Work**

Early exploration into coercive persuasion focused on totalitarian regimes (Hunter, 1951; Lifton, 1961, 1989; Schein, 1961; Singer, 1995). In the 1930s, the media revealed “purge trials” in the former Soviet Union in which men and women were accused of committing crimes against the state and manipulated into falsely confessing or accusing others. These accounts were followed in the late 1940s and early 1950s by revelations about thought reform programs used by the Communists in China to induce the population to embrace new political philosophies and behaviors through a coordinated program of psychological, social, and political coercion. The term brainwashing is believed to have originally come from the Chinese term *xǐ nǎo*, which translates as “to wash the brain” and was first applied to methodologies of coercive persuasion used in the “reconstruction” of the “feudal thought patterns” of Chinese citizens raised under prerevolutionary regimes (Lifton, 1961; Schein, 1961). It was later popularized by journalist Edward Hunter, who explained the “education reform” based on personal observations and interviews with persons who had been exposed to the process (Hunter, 1951).

Lifton (1961) identified eight criteria used by the Chinese to explain thought reform:

- “Milieu control” is the control of information and communication that results in isolation from society.
- “Mystical manipulation” is the manipulation of events and experiences that appear to be spontaneous but in fact are planned and orchestrated to allow the controller to reinterpret them.
- The “demand for purity” refers to exhortations to conform to the ideology of the group as a means to achieve perfection. Guilt and shame may also be induced.
- Confession. “Sins, attitudes, and faults,” (as defined by the group) must be confessed and are then exploited by leaders.

- Sacred science. The group's doctrine or ideology is considered to be the ultimate truth, beyond questioning or dispute. The leader, as the spokesperson for God or for all humanity, is likewise above criticism.
- Loading the language. The group interprets or uses words and phrases in new ways that the outside world does not understand. This jargon consists of clichés that serve to alter members' thought processes to conform to the group's way of thinking.
- Doctrine over person. Members' personal experiences are subordinated to the sacred science and any contrary experiences are denied or reinterpreted to fit the ideology of the group.
- Dispensing of existence. The group has the prerogative to decide who has the right to exist and who does not. This is usually not literal but means that those in the outside world are not saved, unenlightened, or unconscious. Those that do not join the group and accept its ideology must be rejected by members.

Following the Korean War of 1950-53, the United Nations and individual governments assigned intelligence officers, psychiatrists, and psychologists to debrief returning prisoners of war (POWs), many of whom had collaborated with their captors, renounced their governments, and turned on fellow prisoners (Singer, 1995).

Subsequent studies and first-person reports from former prisoners began to appear in the academic literature and popular media. The investigators identified a variety of techniques that had been used to gain control over the prisoners, including:

- Dehumanizing the soldiers by keeping them in filth;
- Sleep deprivation;
- Partial sensory deprivation;
- Psychological harassment;
- Inculcation of guilt;
- Group social pressure; and
- Withholding information.

These early explorations into thought reform had far-reaching implications. They revealed the extent to which human will can be subverted and the powerful tools and methods

that can be brought to bear in doing so. Although they focused on politically motivated acts and campaigns in Asia, they set the stage for psychologists to explore a wide range of conduct in the West. In the following decades, theories of mind control were applied to such disparate phenomena as cults, hostage situations, domestic violence, and advertising.

## **Cults**

In the early 1960s, mental health professionals began to apply what had been learned from these early studies of brainwashing to explain how cults induct and maintain members. Psychologist Margaret Singer, who had interviewed Korean War prisoners in the 1950s, later was among those who served as expert witnesses in court cases involving cults (Singer, 1992; Singer, 1995). Drawing from her experiences with POWs and interviews with cult members and their families, Singer described six conditions needed for thought reform:

1. Keep the person unaware of what is going on and the changes taking place;
2. Control the person's time and, if possible, physical environment;
3. Create a sense of powerlessness, covert fear, and dependency;
4. Suppress old behaviors and attitudes;
5. Instill new behaviors and attitudes; and
6. Put forth a closed system of logic; allow no real input or criticism.

Distilling elements from Singer's and Lifton's earlier work, Steven Hassan proposed the BITE (an acronym for behavior, information, thoughts, and emotions) model to describe cults' use of control (Hassan, 1988).

- **Behavior Control** is regulating cult members' physical reality, including where, how, and with whom they live and associate. Cults control the clothes members wear, the food they eat, how much sleep they get, and how their money and time are spent. Members are made to ask permission for major decisions and to report their thoughts and feelings. Behavior is also controlled through rigid rules, regulations, rewards, and punishments.
- **Information Control** includes the use of deception or the withholding or distorting of information. Access to non-cult sources of information is minimized or discouraged and leaders decide who needs to know what. Members are encouraged to spy on each other and

to pair up with "buddies," which helps them do so. The cult generates its own information and propaganda, and distorts or misquotes information from others.

- **Thought Control.** Cults define reality as being black and white, or good and evil. Members are encouraged to internalize the group's truth. Language is used in ways that discourage thought and reduce complexity. This includes the use of clichés, platitudes, and "buzz words." Critical thinking, analysis, and constructive criticism about the leader, doctrine, or policy are discouraged. The use of denial, rationalization, justification, and wishful thinking is pervasive. Chanting, meditating, praying, speaking in "tongues," and singing or humming are encouraged to interfere with thought and communication.
- **Emotional Control** relates to the manipulation of members' feelings. Members are led to believe that others' problems are their fault and made to feel guilty for who they are, their families, their past, their affiliations, and their thoughts, feelings, and actions. Fears about the "outside" world, of enemies, of losing one's "salvation," of leaving or being shunned by the group, and of disapproval are promoted. Emotional control is achieved by producing extreme emotional highs and lows. Other tactics include ritual and public confession of "sins," the indoctrination of phobias, and the programming of irrational fears about what will happen if they leave the group or question the leader's authority.

Allegations of unfair persuasion by cults were made in several highly publicized events including the Jonestown mass suicide/murder of 1978 in Guyana and the 1993 siege of a compound of Branch Davidians, a religious group originating from the Seventh Adventist Church. The Jonestown event claimed the lives of almost 1,000 followers of cult leader Jim Jones, and the 51-day siege between the Branch Davidians and federal authorities in Waco, Texas in 1993 ended with a fire that killed the group's leader, David Koresh, and 81 of his followers (Washington Post, 1997).

### **Controversies Surrounding Cults**

Applying psychological theories and principles to cults raised a storm of controversy with cult followers and critics, civil libertarians, religious groups, and academics engaging in highly publicized disputes. During the 1980s, Margaret Singer was among those mental health

professionals who became controversial figures due to their involvement as expert witnesses in court cases against new religious movements.

In 1983, the American Psychological Association's (APA) Board of Social and Ethical Responsibility for Psychology asked Singer to chair a task force to (Introvigne, 1998):

1. Describe the deceptive and indirect techniques of persuasion and control that may limit freedom and adversely affect individuals, families, and society;
2. Review the data base in the field;
3. Define the implications of deceptive and indirect techniques of persuasion and control for consumers of psychological services; and
4. Examine the ethical, educational, and social implications of this problem.

The task force's report, released a few years later, affirmed that cults' use of deceptive and indirect techniques of persuasion and control can compromise individual freedom and result in serious harm. The report further called for more research on the topic. The APA, however, rejected the committee's findings, claiming that the report "lacks the scientific rigor and evenhanded critical approach necessary for APA imprimatur," and declined to take a position on the issue. Individual critics were more disapproving, with one advisor to the APA claiming that the report "resorts to sensationalism in the style of certain tabloids" and that "the term 'brainwashing' was more suitable to 'cultists' and revival preachers" (Introvigne, 1998).

The incident did not, however, put the issue to rest (Introvigne, 1998; Bromley & Hadden, 1993). In 1990, the APA's Division of Psychologists Interested in Religious Issues approved a resolution stating that it "supports the conclusion that, at this time, there is no consensus that sufficient psychological research exists to scientifically equate undue non-physical persuasion (otherwise known as 'coercive persuasion', 'mind control', or 'brainwashing') with techniques of influence as typically practiced by one or more religious groups. Further, the Executive Committee invites those with research on this topic to submit proposals to present their work at Divisional programs."

The American Civil Liberties Union (ACLU) also addressed cults' use of persuasion. In the 1970s, the ACLU considered whether cults were using mind control techniques to exploit the

vulnerability of youths and whether there was legal justification for parents' kidnappings and deprogramming of their children (Donohue, 1985). The ACLU concluded that for those who had reached the age of majority, there was no justification for mental incompetence proceedings, conservatorships, or temporary guardianships unless physical coercion or its threat had been used. In the absence of these factors, the ACLU concluded, adult inductees had the right to exercise their prerogative, and it was essentially criminal for "deprogrammers" to kidnap cult members and "unbrainwash" them.

### **Stockholm Syndrome or Traumatic Bonding**

The term *Stockholm syndrome* was coined by criminologist and psychiatrist Nils Bejerot, who assisted police during a 1973 robbery of a bank, the Kreditbanken, in Stockholm, Sweden (Bejerot, 1974). During the event, the robbers took four bank employees hostage and held them for six days. After their release, the hostages refused to cooperate with law enforcement or to testify against their captors. They saw law enforcement as the villains, and one hostage later married one of the captors.

Although there is little published academic research on the Stockholm syndrome and the diagnosis is not described in any international classification systems (Namnyak et al., 2007), the syndrome is acknowledged by prominent law enforcement organizations, including the FBI, which defines it as a psychological response in which positive bonds develop between hostages and captors. According to the FBI's Hostage Barricade Database System, which contains data on over 4,700 reported federal, state, and local hostage/barricade incidents, 27% of captives show some evidence of Stockholm syndrome (deFabrique, N.; Romano, S.J.; Vecchi, G.M.; & Van Hasselt, V.B., 1999).

An FBI directive states that the following conditions are generally believed to be necessary for the syndrome to occur (deFabrique et al, 1999):

- A person held in captivity cannot escape and depends on the hostage taker for life.
- Captors control their captives' basic needs and their lives.
- The hostages are isolated from others and have only their captors' perspectives available. The captors keep information about the outside world's response to their actions from captives.

- Hostage takers threaten to kill victims and give the impression they will do so. The captives judge it safer to align with the perpetrators, endure the hardships of captivity, and comply with their captors than to resist and face murder.
- Captives see the perpetrators as showing some degree of kindness. Although kindness is viewed as the cornerstone of the syndrome, some have noted that captives often misinterpret a lack of abuse as kindness or benevolence.

The Stockholm syndrome was originally seen as a barrier to the negotiation process. More recently, however, hostage negotiators and FBI officials have concluded that encouraging the process may in fact reduce victims' risk. This conclusion is based on the assumption that if victims develop a bond with their captors, it may result in the hostage takers feeling compassion toward their victims (deFabrique et al, 1999).

### **The Patty Hearst Case**

The 1974 kidnapping of 19-year-old publishing heiress Patty Hearst by members of the Symbionese Liberation Army (SLO) became a landmark in the debate about mind control. The SLO, a leftist terrorist organization, kidnapped Hearst and held her in captivity for almost two months, during which she appeared to align herself with her captors and join their ranks. Hearst participated in a San Francisco bank robbery with her abductors, for which she was arrested. Her defense attorney, F. Lee Bailey, was the first to introduce psychiatric testimony in an American courtroom that a defendant had been influenced by pressures that some people considered "brainwashing." Margaret Singer was among those who served as expert witnesses.

According to the defense, Hearst was:

- Isolated and made to feel that no one was going to rescue her;
- Physically and sexually abused by members of the group;
- Told that she might die;
- Told how the establishment was oppressing her captors; and
- Forced to record messages that disparaged those she loved.

The “brainwashing” defense proved unsuccessful, and Hearst was convicted. She served nearly two years in prison before her sentence was commuted by President Jimmy Carter. She was later pardoned by President Bill Clinton.

### **The Battered Woman Syndrome**

From the time that domestic violence theory was first articulated in the 1970s, advocates, psychologists, victimologists, and others have tried to understand why battered women often refuse to leave violent relationships, do not press charges against their abusers, refuse help, or even become aggressive to those who try to help them. In doing so, analysts have noted similarities between the tactics used by batterers and those used by captors against prisoners of war (Romero, 1985). Others have suggested that battered women may experience the Stockholm syndrome (McCue, 2008).

The “Battered Women’s syndrome” was advanced by Psychologist Lenore Walker (2000, 2009). An underlying assumption is that batterers (mostly male) are intrinsically more powerful than their intimate partners (mostly female) as a result of historical gender-based injustices. Batterers use violence and the threat of violence to maintain control and assert their power and privilege.

Walker further described the syndrome as a process that develops over time, acknowledging that violence does not occur randomly, but rather, in distinct and predictable phases. The first is the tension-building phase, followed by the explosion or acute battering incident, which culminates in a calm, loving respite that is often referred to as the honeymoon phase. According to Walker, women must experience at least two complete battering cycles before they can be labeled "battered women."

Walker explained that victims stay in abusive relationships for many reasons, including the positive reinforcement they receive for their compliance during the honeymoon phase. Other factors include the cultural expectation that women are responsible for making their marriages work. Strong impediments to leaving relationships also exist, include adverse economic consequences, the fact that research has shown that it is more dangerous to leave than to stay, threats by batterers to kill themselves or kill or take their children, lost self-esteem, and a lack of psychological energy.



Walker identified four general characteristics of the syndrome:

- The woman believes that the violence was her fault;
- The woman is unable to place the responsibility for the violence elsewhere;
- The woman fears for her life and/or her children's lives; and
- The woman has an irrational belief that the abuser is omnipresent and omniscient.

Walker and others have identified other symptoms experienced by victims, including the “fight or flight” response, cognitive changes, and “learned helplessness.” The “fight or flight” response refers to the fact that the body and mind prepare to deal with danger by becoming hyper vigilant to cues of potential violence, resulting in an exaggerated startle response. The automatic nervous system becomes operational and the individual becomes more focused on the single task of self-defense. This impairs concentration and causes physiological responses usually associated with high anxiety. In serious cases, fearfulness and panic disorders are present and phobic disorders may result. Irritability and crying are typical symptoms of this response. The “flight” response, which often alternates with the fight pattern, is the natural inclination to run away from danger. When physical escape is actually or perceived as impossible, mental escape may be triggered. This is the avoidance or emotional numbing stage where denial, minimization, rationalization, and disassociation are used to psychologically escape from the threat or presence of violence.

Some victims of domestic violence experience changes in their cognitive abilities and memory. Victims may begin to have intrusive memories, including flashbacks of abuse, or they may not remember the events or important details. They may have trouble following their thoughts in a logical way or become distracted. Some “disassociate” themselves when faced with painful events, memories, or reoccurring nightmares.

The principle of “learned helplessness” is premised on research conducted by Martin Seligman (1991) during the 1960s, in which dogs were placed in cages with a divider and subjected to electrical shocks. Initially, when one side of the cages was charged with electricity, the dogs jumped to the other side. Subsequently, shocks were administered on both sides so that it did not matter where the dogs went. After a short period, the dogs stopped trying to avoid the pain; they had learned that they were helpless. The battered women’s syndrome assumes that the

process is similar in battering relationships. At first, victims believe they can control the violence by doing what abusers want or refraining from conduct that precipitates the violence. When they discover over time that this doesn't work, they become passive and lose the ability to perceive alternatives.

Social psychologists who have studied domestic violence have observed that unequal power relationships can become increasingly unbalanced over time. As the power imbalance magnifies, victims feel more negative in their self-appraisal, more incapable of fending for themselves, and more dependent on their abusers. This cycle of dependency and lowered self-esteem repeats itself over and over and eventually creates a strong effective (emotional) bond to abusers. At the same time, abusers develop an exaggerated sense of their own power, which masks the extent to which they are dependent on their victims to maintain their self-image. If the roles that maintain this sense of power are disturbed, the masked dependency of the abuser on the victim is suddenly made obvious. One example of this sudden reversal of power is the desperate control attempts made by the abandoned battering husband to bring his wife back into the relationship through threats and/or intimidation.

In comparing battered women's experiences to those of prisoners of war, Romero (1985) suggests that both groups experience coercion and threats, intimidation, emotional abuse, and isolation. In comparing battered women's syndrome to the Stockholm syndrome, McCue (2008) observed that members of both groups are likely to experience displaced rage (focusing rage on themselves or others instead of their abusers), see abusers as either all good or all bad, lose their sense of self, which results in a belief that they deserved the abuse, and are caught up in a push-pull dynamic, in which their impulse is to push the men away and pull them toward them at the same time. Some advocates for battered women have objected to the association of abuse with Stockholm syndrome, stating that there is a distinct difference between hostages and battered women, including the fact that hostages are usually male, their captivity is not lifelong, there is no intimate relationship between hostages and their captors, and hostages know that someone is advocating for their release (McCue, 2008).

Battered women's syndrome has been identified as a subcategory of posttraumatic stress disorder (PTSD) in the DSM-IV-TR (APA 1994). Six groups of criteria have been identified as part of the syndrome: intrusive recollections of the trauma event(s), hyperarousal and high levels

of anxiety, avoidance behavior and emotional numbing, disrupted interpersonal relationships, body image distortion and/or somatic and/or physical complaints, and sexual intimacy issues.

Although battered women's syndrome is not a legal defense in itself, courts in the U.S. and other countries have accepted evidence of it to explain the conduct of women in battering relationships who fight back and kill their abusers. Specifically, it may constitute self-defense, provocation, and diminished responsibility. The "battered woman's defense" argues that a battered woman is a normal, reasonable person caught in irrational circumstances, responding as any reasonable person would. For a lawyer handling a woman's self defense case, it provides the tools to argue that what happened to the woman would happen to anybody under similar circumstances and that reasonable persons would use force in self-defense.

This use of the battered women's defense syndrome has been controversial. Legal and feminist scholars have criticized it on the grounds that it focuses on women's passivity and its portrayal of a singular profile (Jones, 1994). In addition, as men's groups and others have challenged the emphasis on gender in explaining domestic violence, the syndrome's focus on women has also been challenged. In 1994, as part of the Violence Against Women Act, the United States Congress ordered an investigation into the role of battered woman syndrome expert testimony in the courts to determine its validity and usefulness. Investigators concluded that an extensive body of scientific and clinical knowledge strongly supports the validity and relevance of battering as a factor in the reactions and behavior of victims of domestic violence (National Institute of Justice, 1996). It therefore affirmed the utility within the trial process, and at various stages of the criminal justice process, of evidence concerning the effects of battering. However, it also concluded that the term "battered woman syndrome" is too narrow, has some negative implications, and is no longer useful or appropriate. The term has been replaced with "battering and its effects."

### **Influence of Caretakers on Their Charges**

A few studies have explored how caregivers exert power over those they care for. In studying dementia caregivers, Dunham & Cannon (2006) concluded that to be successful, family caregivers must establish relationships of power over those they care for and substitute their

judgment over them. Paradoxically, the researchers observe that in achieving power, caregivers experience a sense of powerlessness.

Mandeville and Hanson (2000) describe how caregivers of persons with developmental disabilities exercise power and control at both the individual and systems levels. At the individual level, caregivers and family members may use isolation and abusive tactics to maintain power and control. At the systems level, caregiving agencies depend on hierarchical and authoritative styles that grant powerful roles to caregivers in their relationships with consumers. The service models employed by agencies can also add to the isolation of both caregiver and consumer. Caregivers who must meet agency expectations to manage the lives of consumers and contain their behavior, without full consideration for their equality and interdependence, can act out their authoritative role in an abusive manner.

### **Persuasion in the Consumer Context**

The use of both normal and unfair persuasion has also been explored in the consumer context. In the mid-1950s advertisers began incorporating the insights of psychology into their work. “Motivation research” investigated the psychological reasons why individuals buy specific types of merchandise and why they respond to specific advertising appeals. It was further used to influence their choices about goods and services. It viewed consumers as governed by irrationality and insecurity and moved by eroticism (Richards, MacRury, & Botterill, 2000).

The more sinister aspects of marketing were revealed to the public in Vance Packard’s popular book *The Hidden Persuaders* (Packard, 1957), which explored how advertisers use psychological methods to tap into unconscious desires in order to persuade consumers to buy their products. Packard exposed how motivation research was used not only to probe people’s minds, but to control their actions, providing examples of how ad campaigns were tailored to exploit vulnerability and how subliminal messages were embedded into advertisement to produce desired responses. Among the studies he cited was one by James Vicary, who claimed to have provoked a rush to concession stands at a New Jersey movie theater by flashing orders to buy food on the movie screen at speeds faster than the eye could perceive.

Subsequent studies failed to support Packard’s theory or demonstrate that efforts to manipulate the unconscious did in fact lead to behavioral changes favorable to specific marketers

and Vicary later retracted some of his claims. Despite these conflicting findings, more than three-quarters of the U.S. population currently believe that marketers use subliminal messages to sell products or services (Rothenberg, 1997).

Robert Cialdini brought widespread public attention to how consumers' purchasing behavior is influenced. His 1984 bestseller *Influence: The Psychology of Persuasion* is based on three years of working “undercover” —applying for jobs and training at used car dealerships, fund-raising organizations, and telemarketing firms—to observe real-life situations of persuasion. *The Psychology of Persuasion*, also published as a text under the title *Influence: Science and Practice*, reviews theories and experiments in social psychology and has been updated several times.

Cialdini identifies rules or principles that govern behavior in everyday life. Although they are instilled by culture, these rules can be exploited to gain control over others. They include:

- **The Rule of Reciprocity.** According to sociologists and anthropologists, culture instills in people a natural inclination to repay others for gifts, favors, or considerations. This sense of obligation or indebtedness can be manipulated to induce compliance and prompt people to reciprocate with substantially larger favors or gifts. There are several variations on the theme. The exchange may involve concessions, as is the case when manipulators make extreme requests, which they know their subjects will reject. When the requests are rejected, as expected, the requesters make smaller requests, which are the ones that were desired all along. The desired requests are therefore accepted because they appear to be concessions.
- **Commitment and Consistency.** People want to appear consistent in their words, beliefs, attitudes, and deeds. This desire is exploited when manipulators lead people to take initial positions that are consistent with the behaviors they want to induce. Then, when the manipulator requests the desired behavior, the victim feels inclined to comply.
- **Social Proof.** When prompted to behave in ways that are new or unfamiliar, people are likely to follow the lead of others. Compliance can therefore be induced by informing people that others, particularly role models, have performed the desired behavior. A shortcut is to solicit the behavior in groups where the other group members serve as models. The technique is most effective when the role models are similar to the people being influenced.

- **Liking.** People are more likely to comply with people they like. Enhancing influencers' likeability can therefore, increase their effectiveness. Research shows that physical attractiveness has a "halo" effect that leads people to believe that attractive people are also talented, kind, and intelligent. People also tend to like people they perceive as similar to themselves and who praise and compliment them. Repeated contact and positive associations (the person is associated with favorable people, places, or activities) also contribute to likeability.
- **Authority.** Socialization instills in people the belief that obedience is "correct" and that people who have achieved authority have done so because they are knowledgeable, wise, and powerful. Compliance can therefore be achieved when requests are made by figures of authority. Authority can be demonstrated symbolically by symbols like titles, dress, and possessions.
- **Scarcity.** People assign greater value to opportunities and objects that are less available. This belief is exploited when salespersons claim that there are only a limited number of products available or there is a deadline for purchases. The scarcity principle further applies to the way that information is evaluated. Research indicates that the act of limiting access to a message may cause individuals to want it more and to perceive it as more persuasive.

## **Personal Fraud**

Fraud refers to crimes that involve issues of trustworthiness and honesty. The term "personal fraud victims" distinguishes individual victims from governments, corporations, or other institutions that are also likely to suffer losses from fraud. The types of fraud that individuals commonly fall victim to include scams, telemarketing, fraudulent financial advice, or fraudulently gaining access to victims' property or assets.

Jonathan J. Rusch (1998, 1999), a litigator with the U.S. Department of Justice and an expert in telemarketing, cites social influence theories and motivation research to explain the "sustained psychological warfare" used in telemarketing fraud. Drawing from Cialdini's principles of social influence, Rusch describes how those experienced at deceiving others gradually gain the compliance of people who have little experience or skill in recognizing and

protecting themselves against manipulation. This is accomplished through sustained, intensive personal contact and a three-stage process that includes:

- 1) Excitement. Criminals make prospective victims more susceptible by making statements at the outset of their interactions that trigger excitement. They may, for example, offer substantial prizes. The resulting surge of excitement may distract the victim from thinking rationally.
- 2) Authority. Social psychology experiments have shown that people are less likely to scrutinize persuasive messages closely when they perceive the source to have authority and to be honest.
- 3) Encouraging victims to treat their relationships with scammers as family relationships.

Criminologists have also developed models to explain why certain people appear to be predisposed to personal fraud victimization. In particular, they have focused on individuals who are victimized repeatedly. The key, according to experts, seems to rest in the fact that these crimes involve varying levels of victim cooperation. Titus, Heinzelmann, & Boyle (1995) describe a continuum of cooperation and provide examples:

- No cooperation: A woman discovers in her monthly credit card statement that she has been the victim of an identity fraud, having done nothing to facilitate the crime.
- Some cooperation: A man responds to a "cold" phone call and contributes to a charity without investigating and learning that it was phony.
- Considerable cooperation: Over a period of years, a woman loses many thousands of dollars in a series of scams but continues to participate. The authors point out that this apparent cooperation with abusers has led observers to blame victims, a tendency that they equate to that which is frequently observed in relation to domestic violence.

### **Abuse of Professional Role**

Certain professional/client relationships are believed to have intrinsic power differentials and imbalances. Doctors, psychotherapists, psychiatrists, social workers, pastors, lawyers, teachers, and workplace mentors are among those who are assumed to wield a high degree of power over their patients or clients. In the case of psychiatrists, psychotherapists, and clergy,

they may hold in trust the intimate, wounded, vulnerable, or undeveloped parts of those they serve. Clients suffering from psychological or spiritual injuries are considered to be particularly vulnerable. Under these circumstances, patients and clients may develop emotional and psychological dependencies on professionals. The nature of these relationships creates power disparities in which the professionals hold high levels of power over those they serve. Recognition of these power disparities have led to strong ethical, moral, and legal strictures against accepting gifts or become sexually involved with clients or patients.

Attention to abuses of power by professionals have tended to focus on sexual contact and, in particular, abuse by male professionals toward female clients. Because professional have the greater power in these settings, sexual behavior is always prohibited regardless of who initiates it or how willing clients appear to be. Because the dynamics of these situations are believed to render victims unable to *withhold* consent, professionals have the responsibility to maintain the boundaries (Rutter, 1991).

### **Summary of the Psychology of Undue Influence and Its Implications for Elder Abuse**

The psychological studies described in this section provide rich insights into seemingly paradoxical behavior. They have further identified factors that heighten vulnerability to unfair persuasion and specific techniques or technologies used by controllers. They further suggest why certain methods are successful with some subjects and not others, and suggest ways to prevent manipulation. As new patterns of unfair persuasion are identified, researchers and practitioners have attempted to determine if and when past explanations apply.

Although the settings and circumstance in which unfair persuasion has been identified are far ranging, the tactics associated with them share many common elements. Tactics used to break down victims' resistance to persuasion that have been identified in multiple settings include isolation, degradation, and the deprivation of food and information. Further, researchers have attempted to pinpoint techniques, circumstances, or conditions that *must* be present to achieve control in various settings. For example, in attempting to explain why some prisoners of war switched loyalties or turned on fellow prisoners while others did not, researchers have attempted to determine if it was the length of confinement, the infliction of pain, or other specific strategies that were applied that ensured the desired results. Similarly, because the majority of hostages do



not exhibit Stockholm syndrome, law enforcement professionals have attempted to identify what features are key. They, too, have considered the duration of the victims' confinement as well as the intensity of the situations, whether the hostage takers used violence, and whether the captors demonstrated kindness toward the hostages (Bejerot, 1974; de Fabrique et al, 1999; & Namnyak et al, 2007).

In attempting to understand why some victims are more vulnerable than others to persuasion, researchers have looked at such victim characteristics as the psychological strength or resiliency of those being persuaded.

Apparent commonalities in how persuasion is exercised in multiple settings have led researchers and practitioners to explore parallels among diverse areas of inquiry. Those who have studied cults have turned to the literature on prisoners of war for explanations, while those in the field of domestic violence have looked to the research on the Stockholm syndrome to explain the bonds that battered women develop with their batterers. Similarly, those who have attempted to understand scams have turned to the literature on marketing.

Although applying theories and insights derived from one set of circumstances to other settings appears to have been fruitful in some instances, there are dangers to these shortcut approaches. Often at stake is the integrity of the theory or explanation itself. When established theories are applied to new circumstances, they are often not an exact "fit," resulting in the theories themselves becoming over-generalized and imprecise. Because much of the research on the psychology of persuasion has been controversial and widely debated, there is further danger of "infecting" new areas of exploration with the sensationalism or polarization generated by others.

### **Applying Psychological Theories of Undue Influence to Elder Abuse**

Increasingly, practitioners in elder abuse prevention have turned to the theories described earlier to understand why seemingly competent elders surrender assets to predators or are repeatedly taken advantage of by swindlers and con artists. The work of Singer and Cialdini in particular are increasingly appearing in the literature on elder abuse (Nerenberg, 1996; Pratkanis & Aronson, 1992; Pratkanis & Shadel, 2005; Quinn, 1998, 2000, 2001, 2002; Rusch, 1998, 1999; Turkat, 2003; YWCA of Omaha, 2006). Undeniably, the most direct link between these

past efforts and the field of elder abuse prevention is through Margaret Singer, who drew from her work with POWs and cults to formulate a model of undue influence in elder abuse, which has become the basis for subsequent analyses. Singer identified the following six tactics used by perpetrators of elder financial abuse (Nerenberg, 1996).

- **Isolation.** Perpetrators may isolate their victims from family members, friends, trusted advisors, and professionals. Other factors that may contribute to isolation include decreased mobility, communication problems, illness, sensory deficits, and lack of transportation. Perpetrators may contribute to isolation by preventing seniors from accessing assistive devices (hearing aids, walkers) or services that could overcome these natural barriers. The elder may also become isolated as a result of grief and depression.
- **Creation of a “siege mentality.”** Perpetrators may convince their victims that they are the only ones that can be trusted and that others in fact pose a danger to them.
- **Dependency.** Perpetrators foster dependency by failing to provide assistive devices like glasses, canes, walkers, and hearing aids to elders. They may further fail to provide adequate food, water, or medication, leading to decline and increased dependency on abusers for sustenance, help, emotional support, information, and companionship.
- **Creation of powerlessness.** As the other tactics take their toll, victims begin to feel powerless.
- **Fear and deception.** The victim is fearful and afraid of everything that is different from what the manipulator wants. The world is a dangerous place for the victim. Only the suspect can make him or her feel safer.
- **Victim is kept unaware.** Perpetrators in essence create false worlds where they control the information available to victims. They can shape victims’ world to make them more dependent and compliant.

Others in the field of elder abuse prevention have offered additional insights into undue influence against elders. Some have focused on victims’ characteristics or vulnerabilities (Quinn, 2005). For example, Pennant (1999) used the case of Anne Morrow Lindbergh to suggest how unresolved grief can be exploited by unscrupulous service providers to achieve compliance for

financial gain. Others have focused on specific vulnerabilities, such as the role of subtle, undetected deficits that appear to heighten vulnerability.

Several experts have proposed broader models or constellations of contributing factors including victim vulnerabilities, abuser characteristics, tactics used, and outcomes. Psychiatrist Bennett Blum has developed the “IDEAL” model of undue influence assessments (Blum, 2010). The model draws from the fields of psychiatry, psychology, and sociology to describe psychological and social factors that commonly coexist in undue influence. IDEAL is an acronym for isolation; dependency; emotional manipulation and/or exploitation of a vulnerability; acquiescence; and loss. Blum further describes the factors as follows:

1. Isolation – This refers to isolation from pertinent information, friends, relatives, and usual advisors. Causes include medical disorders, a history of poor relationships with others, perpetrator interference, geographic changes (e.g., travel), and technological isolation (e.g., loss of telephone services).
2. Dependency – This refers to dependence upon the perpetrator for physical support, emotional factors, or information.
3. Emotional manipulation – This usually manifests as promises, threats, or a combination of both regarding issues of safety and security, or companionship and friendship. Exploitation of a vulnerability may overlap with emotional manipulation
4. Acquiescence – The victim appears to consent or submit, but does so because of items 1, 2, and 3.
5. Loss – This refers to actual financial loss.

Turkat, an attorney, drew from social influence theories to describe characteristics of the influencers, victims, and the forms of control he has observed in elder abuse cases. In particular, he focused on power imbalances between abusers and victims that are derived from character traits, intelligence, strength, social class, and education. He further suggests that these power imbalances can be magnified by “vulnerability enhancements,” which include:

- Increasing victims’ dependency by giving them extra medications or depriving them of nutrients;
- Self-promotion;

- Relationship poisoning;
- Restricting access;
- Deceptive manipulations used to deliberately foster attitudes, beliefs, and feelings;
- Reinterpreting events;
- Inactive relatives;
- “Timing the strike,” which is exploiting normal fluctuations in mental states to take advantage of elders when they are most amenable to influence;
- Increasing the vulnerable person’s discomfort;
- Applying pressure; and
- Puppeteering, which refers to the fact that as a result of the trust, dependency, or submissiveness that has been established, victims mindlessly follow whatever demands or requests the exploiters make.

Turkat also identifies three categories of influencers:

- Con artists;
- Psychologically damaged persons who seek self-gratification by manipulating others; these individuals need to feel power over others, and enjoy their suffering; and
- Individuals who did not originally set out to exploit the vulnerable person, but who over time found the temptation too great to resist.

Susan Bernatz, a neuropsychologist, drew upon Robert Cialdini’s principles of influence, as well as the work of Singer and Blum, in developing SCAM, “a conceptual framework for understanding the psychological, neuropsychological, medical, social, financial, legal, and environmental factors that pose a threat to informed consent in legal transactions” (American Bar Association & American Psychological Association, 2008). Also an acronym, SCAM stands for susceptibility, confidential, active procurement, and monetary loss. Susceptibility factors include declines in victims’ physical, psychological, or neuropsychological health, dependence, and isolation. “Confidential” refers to the nature of the relationship between victims and abusers, and the “active procurement” of finances and financial instruments assumes that suspects actively sought and obtained changes in victims’ preexisting financial matters. Monetary loss is the end

result or outcome of the undue influence. The SCAM model reflects a blending of legal and psychological conceptualizations of undue influence, as evidenced by the inclusion of “confidential relationships” and "active procurement," which are legal concepts. This merging of the legal and psychological conceptualizations is also evidenced in the work of Nieivod (1992), whose work is described in “The Legal Context of Undue Influence” section of this report along with additional legal terminology.

### **Undue Influence and Elder Fraud**

Although studies have shown that older people are not actually at greater risk of fraud victimization than younger people (Titus et al., 1995), advocates and law enforcement officials are increasingly encountering elderly victims of scams and fraud (AARP, 2003), and some criminals admit to targeting elders (Rusch, 1998, 1999). Particularly common are offers of "free" prizes that may not actually exist or that result in costs to victims; scams promising unnecessary or useless goods or services; the unauthorized use of victims’ bank or credit card numbers; scams involving bogus charities; predatory lending; and identity theft.

Several studies of elder fraud have focused on elderly victims’ vulnerability to persuasion and the tactics used against them. An AARP-sponsored study focused on achieving a clearer understanding of how telemarketers target their victims, the tactics they use, and who is at greatest risk. Working with law enforcement agencies, researchers Anthony Pratkanis and Doug Shadel obtained 645 audiotapes of con artists and swindlers making pitches to people they thought were potential victims but who were in fact undercover law enforcement officers. Pratkanis and Shadel then reviewed the transcripts, identifying in each case social influence tactics defined by Robert Cialdini. In their book *Weapons of Fraud: A Source Book for Fraud Fighters* (2005), which draws from the study, the authors provide examples of how the telemarketers used the principles of friendship, authority, scarcity, reciprocity, and social consensus to defraud their victims. California courts are beginning to appoint conservators in situations where proposed conservatees are found to be unable to resist the influence of telemarketers (Quinn & Nerenberg, 2005).

## **The Building Blocks of Undue Influence**

Although the psychology of undue influence is not yet well understood, a framework for understanding it seems to be emerging, which highlights the following features:

- 1) Factors affecting susceptibility or vulnerability;
- 2) Roles and relationships between victims and abusers;
- 3) Psychological manipulations and techniques; and
- 4) Outcomes.

### ***1. Victims' Vulnerability***

The literatures on undue persuasion and mind control contain numerous examples of “normal” people being induced or persuaded into doing things they would not have done otherwise. There is no evidence to suggest, for example, that prisoners of war who renounced their governments or turned on comrades were different from those who did not in terms of their cognitive functioning. Similarly, there is no reason to believe that hostages, victims of domestic violence, or cult inductees fall outside the boundaries of normalcy. Some experts in fact have posited that “virtually anybody can be unduly influenced if the influencers or techniques used against them are powerful enough” (Singer, 1992). However, certain conditions are believed to render certain people more vulnerable or susceptible. These include either permanent or temporary impairments that result from illness, accidents, or decline, or induced states (e.g, by withholding food, water, medications, or care). Some conditions, such as debilitating grief reactions, are related to situations or circumstances.

Perhaps the most commonly cited vulnerability associated with undue influence is diminished mental capacity. In fact, some analysts believe that there must be some level of cognitive impairment for undue influence to occur. Others concede that while diminished capacity is not a requirement for undue influence, it is easier to unduly influence those who have impairments.

Courts, in evaluating undue influence, have tended to focus on victims' cognitive capacity and lawyers have noted that it is easier to prove undue influence in cases where victims have cognitive impairments (American Bar Association and American Psychological

Association, 2008). Naimark (2001) suggests that courts' reliance on cognitive capacity assessments stems from the fact that capacity is measurable, whereas such factors as emotional vulnerability and dependency, power differences between victims and influencers, and the pressure that perpetrators bring to bear on their victims are more difficult to calibrate.

In general, that which can be measured is given great weight and that which cannot be measured is given less weight. In the case of undue influence, this approach may lead to missing an important aspect of the analysis.

The emerging literature on fraud suggests that extremely subtle cognitive impairments increase vulnerability to certain types of fraud. For example, a recent study Jacoby, Bishara, Hessels, & Toth (2005) suggests a link between memory deficits and vulnerability to scams.

Shulman et al (2007) suggest that the relationship between cognitive capacity and susceptibility to undue influence is directly proportional. That is, the lower an individual's cognitive status, the less pressure is needed to undermine their will. Conversely, a highly functional individual requires a higher level of pressure or persuasion.

Other cognitive impairments that are believed to heighten vulnerability to undue influence stem from developmental disabilities and mental illness. Spar, Hankin, & Stodden (1995) suggest that mania, which impairs judgment and impulse control, heightens susceptibility. Other mental health problems that are believed to increase susceptibility to undue influence include depression, anxiety, and substance abuse.

Some have suggested that "characterologic weaknesses" or personality disorders may also contribute to vulnerability. Dependent personality, in particular, has been frequently cited (Hall, Hall, Myers, & Chapman, 2009; Turkat, 2003).

The Diagnostic and Statistical Manual, DSM-IV, defines persons with dependent personality disorder as individuals who are emotionally dependent on other people and who spend great effort trying to please others (American Psychiatric Association, 1994). Individuals diagnosed with the disorder tend to display needy, passive, and clinging behavior, and have a fear of separation. Other common characteristics associated with dependent personality disorder include:

- Inability to make decisions without the advice and reassurance of others;
- Avoidance of personal responsibility, including the avoidance of jobs that require independent functioning and positions of responsibility;
- Intense fear of abandonment and a sense of devastation or helplessness when relationships end; persons with the disorder often move right into another relationship when one ends;
- Over-sensitivity to criticism;
- Pessimism and lack of self-confidence, including a belief that they are unable to care for themselves;
- Avoidance of disagreeing with others for fear of losing support or approval;
- Inability to start projects;
- Difficulty being alone;
- Willingness to tolerate mistreatment and abuse from others;
- Placing the needs of their caregivers above their own; and
- Tendency to be naïve and to live in fantasy.

Courts may also consider multifaceted medical, social, and environmental histories that analyze the processes, interactions, conditions, and circumstances of the person alleged to be have been unduly influenced or susceptible.

Situational events and circumstances, such as the loss of a loved one, may also play a role. Several researchers and practitioners have noted that elders who are recently widowed are particularly susceptible to the advances of persons who seek to exploit. The vulnerability associated with life events or circumstances may be permanent or temporary (Pennant, 1999; Quinn, 2005).

Victims who are not impaired to begin with may be rendered so by those who seek to influence them. This can be done through such means as depriving them of nourishment or over- or under-medicating them (Turkat, 2003).



## ***2. Power Differentials***

Undue influence involves powerful individuals getting those who are less powerful to do things they would not have done otherwise. Influencers draw their power from a variety of sources.

- Persons in positions of trust or confidence are believed to hold power over those who trust or confide in them.
- Personality traits. Some perpetrators are naturally charismatic or persuasive.
- Granted power. Some influencers are placed in positions of power by others, as was the case with those charged to guard prisoners of war. These individuals were granted authority to control, confine, reward, punish, and even terrorize their charges. Similarly, caregivers may be granted high levels of control over those they are charged to serve.
- Professional authority. Social influence theories describe how the power to persuade may be derived from the natural authority attached to jobs, professions, or social class. Caregivers in particular have high levels of control, as victims may depend on them for food, water, medications, and other necessities.
- Privilege. Domestic violence theory holds that batterers derive their power from social, historical, and economic forces. Power that is derived from gender, class, race other socioeconomic forces is reinforced by institutions like the criminal justice system.

## ***3. Tactics of Undue Influence***

Specific actions that perpetrators use depend on the outcomes being sought. When the motive is financial, the persuasion may focus on getting someone to surrender assets or property, whereas in the case of domestic violence, the motive is domination, power, or control. The tactics that perpetrators use may also reflect their assessments of victims' specific vulnerabilities. It has frequently been noted that perpetrators assess the psychological makeup of their victims and "customize" their approaches (Pratkanis & Shadel, 2005). Specific tactics that appear in the literature include:

- Isolating victims;
- Controlling the flow of information to keep victims unaware;

- Emotionally manipulating the victim by inducing fear, anxiety, agitation, paranoia and suspiciousness (includes “creating a siege mentality”);
- Relationship poisoning (implanting the idea that the victim’s relatives and friends are only there because they want to exploit the elder);
- Encouraging dependency;
- Actively procuring finances and financial instruments;
- Presenting themselves as healers, advocates, and protectors; and
- Randomly bestowing rewards and punishments, thereby promoting “learned helplessness.”

#### **4. Outcomes**

Most characterizations of undue influence in elder abuse have focused on the use of undue influence for financial gain. Some state elder and dependent adult abuse laws, however, address undue influence in relation to sexual abuse, suggesting that undue influence may be a tactic in achieving compliance in sexual acts (Stiegel & Klem, 2007). This association has not, however, been systematically explored in the elder abuse literature. Brandl, Stiegel, & Heisler (YWCA of Omaha, 2006) explore the relationship between undue influence and late life domestic violence, suggesting that control and domination are, in themselves, goals.

#### **The Legal Context of Undue Influence**

The law assumes that unimpaired people are fully capable of making decisions and are thus responsible for their own actions. However, the legal system also recognizes that capable persons may be unfairly persuaded to do things they would not have done otherwise. Undue influence has therefore been characterized in law as an activity that destroys “free agency” and “substitutes another person’s will” in legal transactions. Findings of undue influence “negate contractual consent” and are reason to rescind or nullify agreements. Courts also consider undue influence in determining the need for protective interventions like conservatorship (Quinn, 2005).

The legal system has recognized undue influence for centuries. The term is believed to have been coined and popularized by Henry Bolingbroke in 1735 in an essay about improper electoral practices being used to influence voters (Slapper, 2007, para, 2). The concept, however,

goes back even further. Abraham Nievod (1992) describes a 1617 case in which Chancellor Francis Bacon found that a woman, known as Mrs. Death, had used undue influence to obtain a deed and will from “an old man about the age of eighty years and being weak of body and understanding and having a great estate of goods and land.”

In determining if undue influence has occurred, courts, lawyers, and legal professionals look at many of the same factors described in the psychological literature. These include vulnerability that results from infirmity or diminished capacity, power differentials between the parties involved, the specific actions taken by influencers, and the harm that is produced. Perhaps the greatest difference between legal and psychological analyses and conceptualizations of undue influence is the legal system’s emphasis on evaluating specific transactions or decisions. Whereas the psychological literature focuses on patterns of conduct (e.g., relationships that are considered to be exploitative or artificially induced loyalties), legal discussions of undue influence typically focus on specific legal actions such as the signing of contracts, giving consent, or granting authority, and those actions or events leading up to the event in question. Courts look at subjects’ state of mind at the time documents were executed or decisions were made. The following sections describe how these factors have been addressed in the legal system.

### **Imbalances in Power**

Just as psychologists recognize that certain individuals, by virtue of their knowledge, training, or relationships, wield power over others, the legal system recognizes that persons in “positions of trust and confidence” have an unfair advantage over those whose trust and confidence they hold. It also imposes on them a duty to act in the others’ best interest. When undue influence is alleged, courts typically begin by establishing whether a relationship of trust and confidence exists, and hence, the duty.

Positions of trust and confidence may be established by law or informally. The Restatement third of property (2003) §8.3 divides confidential relationships into three categories: fiduciary, reliant, and dominant-subservient (Welden-Smith, 2009). A fiduciary relationship is one in which the powerful person has a legal duty toward the other. The powerful person is called a fiduciary and the person to whom they owe the duty is called the “principal.” Professionals (and others) who are likely to have a fiduciary duty are trustees, conservators,

guardians, real estate agents or brokers, lawyers, estate executors or administrators, and stockbrokers. Non-professionals may also have a fiduciary responsibility. Relatives or friends, for example, may serve as guardians, conservators, or trustees.

“Reliant relationships” are ones in which the weaker parties rely on others for judgment or advice. An example is the doctor/patient relationship. In “dominant-subservient relationships” the weaker person is subservient to the dominant person. Persons likely to be in subservient relationships include those who are mentally or physically impaired. These categories are not mutually exclusive and there is potential for overlap among them.

Family members and friends may also have an informal duty of trust and confidence toward weaker members. When undue influence has been alleged in contracts involving family and friends, courts have looked at whether the weaker parties were very old, mentally incapacitated, suffering from debilitating sicknesses, or otherwise physically or psychologically impaired. In general, family relationships between husbands and wives and between parents and children are considered confidential relationships (Nievod, 1992).

In situations involving parties where there is no confidential or fiduciary relationship, courts may still determine that an individual has taken advantage of another’s weakness through the use of his or her own disproportionate strength. The courts have found that “disproportionate strength” may be based upon knowledge, experience, training, or relationship. Factors that contribute to the weaker parties’ weakness include diminished mental capacity, failing health, isolation, and/or distress. In these cases, courts also consider what benefits the powerful parties provided to the weaker (Frolik, 2001).

### **Undue Influence in the Execution of Contracts and Wills**

Undue influence is among the most commonly asserted grounds for invalidating contracts, including wills, deeds, or trust instruments. It is addressed under a branch of law called “constructive fraud,” which covers situations in which someone is manipulated into doing something with legal consequences through the actions of others who have an unfair advantage.

In these situations, courts may decide that the person is not exercising free and independent judgment and that the action should be treated as fraud even if all of the technical elements of fraud have not been proven. If undue influence is proved to have been exercised in

the signing of contracts, the contracts are voidable by the innocent party, and the remedy is rescission.

In contract law, if a contract is obtained by undue influence, the document is invalid and no contract has been formed (Nievod, 1992). In determining whether contracts are the products of undue influence, courts consider:

- Imbalances in power between signers and beneficiaries;
- The circumstances in which the contracts were negotiated;
- Specific actions taken; and
- The inherent fairness or “naturalness” of transactions.

Imbalances in power result from the nature of the relationship (is it a relationship of trust or confidence). Weaker parties may also be at a disadvantage as result of diminished capacity. Therefore, courts consider whether weaker persons were of full capacity at the time they signed documents, if they understood the facts and their rights, if they had time to reflect, and if they had independent advice (Nievod, 1992). In evaluating the results or products of the exchanges or transactions in question, courts attempt to determine if the transactions give an obvious advantage to the stronger parties. They may consider, for example, whether properties are sold at fair value, if employees are compensated at reasonable rates, and whether gifts are commensurate with the length and quality of relationships. They may also look at whether exchanges are “natural,” or what one would ordinarily expect. For example, courts may scrutinize wills that leave inheritances to new friends as opposed to family members.

Approximately 3% of wills are challenged and 1% are found to be invalid (Mohr, 1997). A survey of will contestations showed that wills are likely to be contested when decedents have no biological children (this is true in 52% of will contests) and when the will was written less than one year prior to the testators death (this accounts for 48% of contests) (Hall, Hall, Myers, & Chapman, 2009). There are two primary reasons that wills are contested. The first is dramatic or “radical” changes from previous wills or inconsistently expressed wishes of the testators. This factor accounts for 72% of contested wills.

Specific circumstances in which wills are likely to be challenged are when testators have psychiatric conditions, including dementia (accounting for 40%), alcohol abuse (28%), and other neurological/psychiatric conditions (28%). In these situations, courts must determine whether “testators,” those executing wills, had “testamentary capacity.” The criteria for testamentary capacity were defined by Lord Cockburn in 1870. Known as Lord Cockburn’s Rule, they remain the basis for most American and English commonwealth inheritance laws.

- 1) The testator understands the nature of the act he or she is engaging in. The individual must know that he or she is writing a will and what a will is.
- 2) The testator has to appreciate the effect of the act (the distribution of wealth).
- 3) The testator must know the extent of his or her bounty (property) in order to appreciate the significance of the decision.
- 4) The testator comprehends and appreciates the claims to which he ought to give effect (those who should be included and excluded, or, as it is commonly phrased in current language, “know their natural heirs”).
- 5) The final component is that no insane delusion shall influence his will.

In the Mohr study, allegations of undue influence were made in 56% of contestations, and most challenges to wills based on undue influence were successful (Mohr, 1997). Although definitions of undue influence with respect to wills vary by state, most laws contain the notion of a power imbalance or dependency between the parties that is used to influence (through coercion, compulsion, or deception) the weaker party to secure changes in how assets are distributed to the stronger individual. Courts require a showing that the will of the testator is subjugated to the will of another. It must also be shown that testators’ disposal of property is different from that which would have occurred otherwise (Nievod, 1992).

### **The Presumption of Undue Influence**

Ordinarily, those who seek to show that certain acts or transactions were the product of undue influence have the responsibility for proving that undue influence has occurred. However, in certain situations in which the likelihood of wrongdoing is high, it may trigger a “presumption” of undue influence. When a presumption exists, the onus shifts from the accuser

to the accused to show that there was no wrongdoing. The presumption of undue influence, in one form or another, exists in all states (Meyers, 2005).

The presumption of undue influence typically arises when confidential relationships exist between the parties and the weaker or dependent persons make substantial gifts to or execute contracts with the dominant parties. For example, when lawyers and other fiduciaries profit or gain from contracts with their clients, the contracts are “presumptively invalid.”

Several states have acknowledged that certain circumstances are especially indicative of undue influence and refer to them as “badges” of undue influence. They include:

- The person executing the will (the testator) is physically weak and or mentally impaired;
- The will is “unnatural” in its provisions;
- The relationship between the testator and beneficiary has developed recently and is of comparatively short duration;
- The beneficiary actively participated in the preparation of the will;
- The beneficiary has the will in his or her possession;
- The beneficiary has made efforts to restrict the person’s contacts with the “natural objects of his or her bounty”; and
- The beneficiary has absolute control of the testator’s business affairs.

A presumption of undue influence can be rebutted or dissolved by contrary evidence that shows that transactions were in fact the result of free deliberation and that the person entering into the contract had full capacity, knowledge of all the facts of the contract, time to reflect on the contract, and the opportunity to consult with outside fiduciaries or experts. To trigger the presumption of undue influence in cases alleging undue influence in will cases, persons contesting transfers must show that:

1. The person executing the will (the testator) was susceptible to the influence of others;
2. The testator and alleged influencer had some type of confidential relationship;
3. The alleged influencer used the confidential relationship in order to secure a change in the testator’s post-death distribution of property;

4. The testator actually did change his or her post-death distribution plan as a result of the influencer's actions; and
5. The change was unconscionable.

Proponents of wills can defend them by presenting rebuttal evidence, which disproves any of the five elements.

Blinder (2003) identified the following elements that have proven to be the most persuasive to the judiciary in demonstrating undue influence in cases involving wills:

- The provisions of the will are “unnatural” (different from what might be expected);
- The dispositions in the will appear to be at war with the wishes of the decedent, expressed both before and after the execution of the will;
- The physical and mental condition of the decedent was such to permit a subversion of the decedent's free will; and
- The primary beneficiaries under the will were active in procuring the execution of the will.

Ross & Reed (1999) identified five types of relationships that courts consider subject to undue influence when someone executes a change of a post-death plan by the victim in favor of the influencer:

1. A “David and Bathsheba” relationship, in which a second spouse obtains the disinheritance of children of an earlier marriage;
2. An “Esau and Jacob” relationship, in which a child attempts to obtain the disinheritance of one or more children.
3. A “Judge Jeffrey Pycheon” relationship, which resembles # 2, but a brother, sister, niece, nephew, or cousin obtains the lion's share of the estate at the expense of other kin;
4. A “Uriah Heep” relationship, in which a helping professional obtains all or part of the victim's estate instead of the victim's heirs; and
5. A “Mary Worth” relationship, in which a neighbor or acquaintance obtains the victim's estate at the expense of the victim's heirs.



The authors note that courts tend to be more hostile to the latter three relationships than to the first two.

### **Undue Influence and Conservatorship**

Undue influence is included in some states' conservatorship statutes as a criterion to justify the need for probate conservatorship (Grant & Quinn, 1996). If a court finds that a person is unable to resist undue influence, it can lead to an appointment of a conservator of the person's estate. As Turkat (2003), however, points out, courts are unlikely to deprive people of basic rights unless they have cognitive impairments. The extent to which this assertion is true remains unclear since most conservatorship filings involve individuals with some level of cognitive impairment (Quinn & Nerenberg, 2005). Some have noted limitations in the effectiveness of conservatorship in preventing or remediating undue influence. Coffey and Cummings (2000), for example, point out that conservatorships can protect those assets that belong to wards at the time the court acts, but that they are not a particularly effective remedy for already lost assets. Whether conservatorships can be established to protect persons who are vulnerable to undue influence (but who have not yet been victimized) also remains to be seen.

### **Other Legal Proceedings in Which Courts Consider Undue Influence**

In the 1966 case of *Odorizzi v Bloomfield School District*, an elementary schoolteacher, Odorizzi, alleged that the school board had used undue influence (among other forms of coercion) to make him resign from his position. Odorizzi had been arrested and jailed for homosexual activity. During the process of the arrest, police questioning, booking, and release, Odorizzi went 40 hours without sleep. Shortly after his release, the principal and superintendent of his school went to his apartment and told him that if he didn't resign immediately, the District would dismiss him and publicize what had happened. The charges against Odorizzi were later dismissed and he tried to get his job back. When the school district refused to reinstate him, he filed a lawsuit against the district asserting that his resignation was invalid because it was obtained through duress, fraud, mistake, and undue influence and given at a time when he lacked capacity to make a valid contract.

Reversing a trial court's earlier decision in the case, the California Court of Appeal held that while the facts of the complaint were insufficient to state a cause of action for duress,

menace, fraud, or mistake, they set out sufficient elements to justify rescission of consent because of undue influence. The court explained “the essence of undue influence is the use of excessive pressure by a dominant person over a servient person resulting in the will of the servient person being overborne.” It further described undue influence as “a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, or overpersuasion.” It identified factors that generally accompany overpersuasion, which, in combination, may be characterized as excessive:

1. Discussion of the transaction at an unusual or inappropriate time;
2. Consummation of the transaction in an unusual place;
3. Insistent demand that the business be finished at once;
4. Extreme emphasis on untoward consequences of delay;
5. The use of multiple persuaders by the dominant side against a single servient party;
6. Absence of third-party advisers to the servient party; and
7. Statements that there is no time to consult financial advisers or attorneys.

### **Legal Issues in Undue Influence Cases Involving Cults**

Courts have addressed undue influence in several circumstances involving cults. These include cases in which parents of cult inductees have attempted to have their children placed under conservatorship, and tort cases brought by ex-members alleging that the cults had used unlawful and unethical recruitment practices (Lewis, 1998). Lawsuits involving undue influence by cults have also focused on whether or not donations of money, property, or time were given willingly and with deliberate judgment. Gifts to cults have been challenged on the basis that they were the result of persons exercising power through confidential or quasi-confidential relationships, rather than on donors’ use of deliberate discretion. The fundamental issue in these cases is when the relationship between the advisor in a cult and the recipient of the advice rises to the presumption of confidentiality that would require the advisor to defend an undue influence charge (Hominik, 1995).

Nievod (1992) cites *Molko v. Holy Spirit Association* (1989), a case in which former Association member Molko alleged that the church had used coercive persuasion to unduly influence him to extract a monetary gift. The California Supreme Court held that Molko could

bring a claim that the church had used its dominant psychological position and its confidential relationship with Molko for the purpose of obtaining unfair advantage (*Molko v. Holy Spirit Association for the Unification of World Christianity et al.*, 46 Cal. 3d 1092, 252 Cal Rptr. 122, 762 P. 2d 46. *en banc, cert. denied*, 190S. Ct 2110 (1989)).

### **Undue Influence in Elder Abuse Laws**

Many states have added undue influence to definitions of elder abuse in their adult protective service (APS) laws. A review of state APS laws conducted by the American Bar Association for the National Center on Elder Abuse revealed the context in which undue influence is addressed (Stiegel & Klem, 2007):

- Part of a broader definition of financial exploitation or of sexual or physical abuse/exploitation;
- Included as a distinct definition that makes clear that the context relates to one or more types of abuse; and
- Part of a general definition that does not clearly reference financial exploitation or physical or sexual abuse/exploitation.

Some states have created presumptions of undue influence in cases involving elder abuse. Maine's Improvident Transfer of Title Act is among the most comprehensive (Maine Revised Statutes Annotated §1022). It applies in situations in which "there is a transfer of real estate or a major transfer of personal property for less than full consideration by an elderly person to someone who has a confidential or fiduciary relationship with that person." Transfers that are covered under the statute are presumed to be the result of undue influence unless the elderly or dependent person was represented in the transfer or execution by independent counsel.

Confidential or fiduciary relationships that are covered include:

- A. A family relationship between the elderly dependent person and the transferee...including relationships by marriage and adoption;
- B. A fiduciary relationship between the elderly dependent person and the transferee...such as with a guardian, conservator, trustee, accountant, broker or financial advisor;

- C. A relationship between an elderly dependent person and a physician, nurse, or other medical or health care provider;
- D. A relationship between the elderly dependent person and a psychologist, social worker or counselor;
- E. A relationship between the elderly dependent person and an attorney;
- F. A relationship between the elderly dependent person and a priest, minister, rabbi or spiritual advisor;
- G. 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;
- H. A relationship between an elderly dependent person and a friend or neighbor; and
- I. A relationship between an elderly dependent person and a person sharing the same living quarters.

Hall et al (2009) drew from civil law and the literature on financial elder abuse to propose “red flags” or warning signs of undue influence.

1. An elderly person’s actions are inconsistent with past longstanding values or beliefs;
2. An elderly person makes sudden changes in financial management that enrich one individual;
3. An elderly person suddenly changes his or her will or disposition of assets, belongings, or property and directs assets toward one individual, who is not a natural “object of their bounty”;
4. A caretaker dismisses previous professionals and directs an older person to new ones (e.g., bankers, stockbrokers, attorneys, physicians, realtors);
5. An elderly person is isolated from family, friends, community, and other stable relationships;
6. A non-family caretaker moves into the home or takes control of an elderly person’s daily schedule;
7. An elderly person directs his or her income flow (e.g., Social Security benefits, pensions, trust distributions) to a caretaker;

8. An elder's will, living will, or trust is altered with a new caretaker or friend as beneficiary or executor;
9. An elderly person develops mistrust of family members, particularly about financial affairs, with this view supported by a new friend, acquaintance, or caretaker;
10. An older person finds a new caretaker who guarantees lifelong care in exchange for the elder's assets;
11. An elderly person is in a relationship characterized by a power imbalance between the parties, with the caretaker assuming restrictive control and dominance;
12. A caretaker or friend accompanies an elderly person to most important transactions, not leaving him or her alone to speak for himself or herself;
13. An elderly person writes checks for cash, in round numbers or large amounts, or gives cash gifts to the caretaker or the caretaker's family;
14. An older person becomes increasingly helpless, frightened, or despondent, feeling that only the caretaker can prevent his or her further decline; and
15. An elderly person sees an acquaintance or caretaker as exalted, with unusual powers or influence.

### **California Codes Pertaining to Undue Influence**

Like most states, California addresses undue influence in its contract and conveyance laws. California Civil Code §1575 describes undue influence as:

- The use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
- Taking an unfair advantage of another's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another's necessities or distress.

In 2002, the California Supreme Court defined undue influence as “pressure brought to bear directly on the testamentary act, sufficient to overcome the testator’s free will, amounting in effect to coercion destroying testator’s free agency” (Rice v. Clark (2002) 28 Cal. 4<sup>th</sup> 89).

Civil Code §1575 also describes a presumption of undue influence when fiduciary or confidential relationships exist and when perpetrators participate in obtaining an undue profit or unfair advantage over the elders. A long line of California cases has held that a presumption of undue influence is created when there is a confidential relationship between the testator and the influencer, a transfer for no consideration, an opportunity to exert undue influence, a particular susceptibility to undue influence on the part of the transferor, and an undue benefit to the party who participated in the transfer (*Ross v Conway* (1892) 92 Cal.632, 635). Confidential relationships can be established by the close proximity of the perpetrator to the elderly victim, and may include caregivers, nurses, friends, or relatives.

California's "prohibited transfers statute" (Probate Code §21350) creates a presumption of undue influence that prevents certain professionals from inheriting assets from clients unless they can demonstrate that they didn't use fraud, menace, duress, or undue influence to get them. The presumption also covers "care custodians," and specifies that those who receive last-minute bequests from dependent adults are presumed to have exercised undue influence, even if they were close friends of the deceased. There are several exceptions, including gifts to family members and gifts that have been reviewed by independent attorneys who certify that the gifts were not the product of menace, duress, fraud, or undue influence.

The prohibited transfers statute was originally enacted in response to a high-profile case involving an estate-planning attorney who named himself and members of his family as fiduciaries for, and beneficiaries of, clients' estates. Hence, law firms, lawyers, and employees of law firms associated with them are included in the list of people who cannot inherit unless they can prove that transfers weren't the product of fraud, menace, duress, or undue influence.

The presumption also applies to "care custodians," which has prompted debate and controversy about what constitutes a care custodian. *Bernard v. Foley* involved 97-year-old Carmel Bosco, who left her half million-dollar estate to two friends who cared for her during the last months of her life. While under their care, Bosco amended her living trust several times, giving more each time to the caregivers until, a few days before her death, she made them the beneficiaries of her entire estate. Bosco's family, the original beneficiaries, sued, claiming that the caregivers had exerted undue influence over Bosco while she was gravely ill and heavily sedated. The case focused on whether the friends were in fact "care custodians," and therefore,

covered under the prohibited transfers law. The caregivers claimed that they were just “performing acts of kindness on a purely volunteer basis as good friends often do for others.” (Bernard v. Foley, 139 P. 3d 1 1196 (Sup. Ct., Calif., 2006))

The court found in the caregivers’ favor, but the family appealed and the appeals court reversed the decision, stating that “a caregiver may be a personal friend, and in fact, personal friends are uniquely positioned to unduly influence the elderly for whom they care.” It affirmed that the caregivers were covered under Probate Code §21350 and had failed to satisfactorily rebut the statutory presumption of undue influence. The presiding justice in the case agreed, but suggested that the law be amended to differentiate between long-term caregivers and those who provide care for short periods of time.

In response, the California Assembly passed AB 2034, sponsored by the State Bar Trusts and Estates Section, which directs the California Law Revision Commission to study Section 21350. The Commission was asked to review “the proper scope of the statutory presumption of fraud and undue influence that applies when a ‘dependent adult’ makes a gift to that person’s ‘care custodian.’” Specifically, it was asked to consider:

- How should caregivers or caretakers be defined? Should the law differentiate between long- and short-term caregivers and between those who are paid and unpaid?
- Who needs protection and how should “dependent adult” be defined?
- Will the law inhibit old friends or acquaintances from assisting elders for fear of losing any transfers that the elder may make?
- Should the law exempt families, the most common offenders in financial abuse cases?

The Commission concluded that the care custodian presumption is broader than it needs to be, protecting people who are not necessarily subject to any heightened risk of undue influence (adults with physical disabilities) and gifts to care custodians that do not seem to be “unnatural” (i.e., gifts to friends and other volunteer caregivers). The Commission is further proposing to narrow the definition of “care custodian” to only include caregivers who provide services for remuneration (i.e., volunteers would not be included).

Undue influence is also addressed Probate Code §850, which allows a personal representative to bring a case on behalf of a decedent holding a claim to real or personal property that is possessed or held in title of another. By utilizing Section 850, a personal representative may make a claim of undue influence on behalf of a decedent under Civil Code §1575.

Although in most will contests, contestants allege both lack of mental capacity and undue influence, California courts have ruled that mental incapacity is not required to show undue influence. In the California case of *Estate of Baker*, 131 Cal.App.3d 471, the Court upheld the jury's determination that although a decedent was "of sound mind in making certain gifts and dispositions by will," the transfer was obtained by undue influence.

The case involved Dorothy Mae Baker, who was convinced by an acquaintance named Potter that she was a psychic who could communicate with Baker's deceased relatives. Potter told Ms. Baker that the deceased relatives wanted Baker to turn over money, stocks, and a condominium to Potter, and to name her as the primary beneficiary under Baker's will. The Court noted "the record demonstrates that Potter's control over Baker's mind and her influence so pervaded Baker's thought processes that they completely subverted her will to the wishes and domination of Potter, and this imposition continued from the moment Baker was convinced Potter was a true psychic and medium to immediately before her death." (*Baker, supra*, at 482). The transfers to Potter were set aside, and probate was denied as to the provisions of the will that benefited Potter. The Court cited *Estate of Olson*, 19 Cal.App.379, 386 (1912), as follows:

Soundness of mind and body does not imply immunity from undue influence. It may require greater ingenuity to unduly influence a person of sound mind and body, and more evidence may be required to show that such a person was overcome than in the case of one weak of body and mind. But history and experience teach that minds of strong men and women have been overborne, and they have been by a master mind persuaded to consent to what in their sober and normal moments, and free from undue influence, they would not have done.

Undue influence may be also alleged in civil lawsuits under California Welfare and Institutions Code. A 2008 California law (Senate Bill 1140) added undue influence to the Code. By including undue influence as a basis for elder financial abuse, the new law allows for the



recovery of damages, attorneys' fees, and court costs, making it more feasible for victims to initiate lawsuits.

The number of civil lawsuits alleging undue influence is increasing dramatically in California. In 2006, more than 760 civil lawsuits claiming elder abuse, mostly financial abuse, were filed, a 98% increase from five years earlier (Duhigg, 2007 para.12), a trend that is likely to continue.

### **Susceptibility to Undue Influence as a Criterion for Conservatorship in California**

In California, a conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Under California Probate Code §1801 (b):

A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence, except as provided for that person as described in subdivision (b) or (c) of Section 1828.5.

Little is known about the extent to which conservatorship is sought as a protection against or remedy for undue influence in the state. In a study of conservatorships established in San Francisco in 2000, court investigators noted that 44 out of 125 people with diminished capacity were at risk for undue influence. Of that number, the investigators reflected a suspicion that financial abuse had already taken place in 25 of the cases (Quinn & Nerenberg, 2005).

### **Undue Influence as a Crime**

In 2007, the California District Attorney's Association sponsored legislation that would have added undue influence to the definition of elder financial abuse contained in the state's elder abuse criminal code, Penal Code §368. SB 1259, which did not pass, defined "criminal undue influence" as:

The exploitation by a person of a known physical or mental infirmity or other physical, mental, or emotional dysfunction in a vulnerable elder or dependent adult for financial gain by one of the following methods:

1. Using a position of trust or confidence or using any real or apparent authority over the vulnerable elder or dependent adult for the purpose of obtaining an unfair advantage over the vulnerable elder or dependent adult.
2. Knowingly taking an oppressive and unfair advantage of a vulnerable elder or dependent adult's weakness of mind, necessities, or distress.

### **How Do Courts Evaluate Undue Influence?**

Courts consider various forms of evidence in determining whether undue influence has occurred in the signing of document or other transactions, and in determining the need for conservatorship. Foremost among these are neuropsychological examinations, which assess for impaired judgment, cognition, and impulse control.

Despite assertions about the limited value of cognitive testing in assessing susceptibility to undue influence, courts have tended to focus on them when assessing claims of undue influence.

A multi-state survey of probate judges suggests the importance of expert witnesses in rulings (Spar, Hankin, & Stodden, 1995). The majority of experts testifying on both competence and undue influence were physicians, of which about half were psychiatrists. Non-physicians accounted for 30% of experts. The responding judges found expert testimony to be “extremely influential” 51% of the time regarding incompetence and 37% of the time regarding susceptibility to undue influence.

A few models or constellations of contributing factors have been proposed to help courts and others evaluate undue influence. The "SODR factors" model was designed to help courts determine whether to deny probate of a will based upon the theory of undue influence. "SODR" factors are: (1) susceptibility to undue influence, (2) opportunity to influence, (3) disposition to influence, and (4) coveted result. Some have adopted the factors with modifications. For example, Wisconsin uses the SODR factors as one of two tests for undue influence in will contests. Contesters must prove the four elements by clear, satisfactory, and convincing evidence. However, once three of the elements are proven, there need only be a slight showing of the fourth (Welden-Smith and *Miller v. Vorel*, 105 Wis. 2d 112, 116, 312 N.W.2d 850 (Ct. App. 1981).

As noted earlier in this literature review, psychiatrist Bennett Blum developed the “IDEAL” model to assist professionals in conducting undue influence assessments, help law enforcement conduct investigations, and help attorneys organize cases for court (personal communication, July 24, 2009). The model further suggests ways that undue influence can be prevented. “IDEAL” is an acronym for isolation, dependence, emotional manipulation and exploitation of vulnerability, acquiescence, and loss.

## **Discussion**

Although significant progress has been made in understanding the role of undue influence in elder abuse, and addressing it through the legal system, much remains to be done. As is the case with other forms of conduct that negates free will, undue influence has been controversial.

Experts have noted the difficulties involved in translating an essentially “psychological” process into legal terms. Others have added that courts are generally distrustful of psychological explanations for conduct.

More specifically, there remains widespread disagreement with respect to what undue influence is and what it is not. Some legal experts have, as a starting point, attempted to define what it is not. Blinder (2003) for example, states that “in all probability, there can be no undue influence” if an alleged victim:

- Knows his or her own mind;
- Can readily distinguish his or her interests from those of others; and
- Can distinguish a neutral, disinterested assertion from an active, persuasive one.

Spar, Hankin, & Stodder (1995) observed disagreement among probate judges as to whether those who unduly influence must be doing so intentionally. They found that a majority of probate judges did not believe that undue influence had to be intentional.

Courts have at times gone against traditional conceptualizations of undue influence. For example, in *Odorizzi v Bloomfield School District* (1966), the court discounted the common assertion that a confidential relationship must exist between the parties to constitute undue influence. It determined that “while most reported cases of undue influence involve persons who

bear a confidential relationship to one another, a confidential or authoritative relationship between the parties need not be present when the undue influence involves unfair advantage taken of another's weakness or distress.”

Some have attempted to distinguish “normal” influence from that which is “undue” (Blinder, 2003; Quinn, 2001). Blinder (2003) contends, for example, that while convincing frail or disabled people to take actions they might otherwise not take may be influence, it only becomes “undue“ when the action is in the service of the influencer’s own interests and the other elements are present. Coffey & Cummings (2000) observe that even when influence is exercised in the execution of a will, even when it coercive, is not “undue” if it does not change the preexisting disposition of the testator. That, is, if the bequest or gift would have been made anyway, absent the influence, then no undue influence has occurred. Making this determination obviously, requires knowledge of the testator’s long-term wishes and intentions.

Disagreement also surrounds the factors that render people susceptible to undue influence, or what makes “weaker” parties weak. Perhaps the most controversial factor is cognitive impairment. Although most experts list cognitive impairment, including dementia, as a significant factor, most also contend that it is not required and that anybody can be unduly influenced under the right circumstances. As described earlier, however, many have observed reluctance by courts to determine that someone with capacity has been unduly influenced (Naimark, 2001; Turkat, 2003).

Distinguishing undue influence from other factors affecting free will is difficult because multiple factors are often present in cases. For example, in will contests, contestants frequently allege both lack of mental capacity and undue influence (Blinder, 2003). Similarly, conservatorship petitions frequently cite lack of mental capacity as well as undue influence among the reasons for the filing. Duress, which is “any unlawful threat or coercion used...to induce another to act [or not act] in a manner [they] otherwise would not [or would],” (Black’s Law Dictionary, 1990) is another threat to free will that is likely to be alleged along with undue influence. Duress is often used interchangeably with menace.

The extent to which other specific impairments play a role has also been the subject of disagreement. Spar, Hankin, & Stodder (1995) note that there is disagreement among expert

witnesses with respect to the importance of mania in affecting judgment as it relates to undue influence.

Beyond determining what factors *must* be present to constitute undue influence, some suggest that certain factors are more important than others in specific circumstances and that the strength of certain factors renders others less important. Shulman et al (2007), for example, observed that elders whose physical and mental health is severely compromised may require lower levels of manipulation to gain their compliance than those who are less impaired. Similarly, when applying the "SODR factors" to evaluate undue influence in will contests, contestants in Wisconsin must prove the four elements by clear, satisfactory, and convincing evidence. However, once three of the elements are proven, there need only be a slight showing of the fourth (Welden-Smith 2009, and Miller v. Vorel, 105 Wis. 2d 112, 116, 312 N.W.2d 850 (Ct. App. 1981). The extent to which these variables interact inversely or proportionately has not been systematically addressed, but may suggest promising areas for further inquiry.

Predicting the risk of undue influence in the future is also problematic. Clearly, there are situations in which a person who has not been unduly influenced is at risk. In determining the need for conservatorship, for example, courts hope stop loss or harm before it occurs again, as opposed to other legal interventions involving undue influence that attempt to correct past losses or harm. However, there are no instruments or precedents with which to assess imminent risk posed by undue influence. Risk assessment theory posits that past victimization raises the risk of future victimization, suggesting that those who have been unduly influenced in the past are more likely to be unduly influenced in the future. There is, however, a need for prospective, as opposed to retrospective, remedies if undue influence is to be prevented.

Tools to measure undue influence are clearly needed to provide guidance to legal professionals, courts, and practitioners. This includes evidence-based tolls that measure such factors as the strength of relationships, the efficacy of specific tactics employed and their relative strength, and psychological manipulations. IDEAL, the only existing tool that has been developed to date to assess undue influence in elder abuse, has not been validated (personal communication, July 24, 2009).

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**APPENDIX D**  
**Capacity Declaration Form**  
**California Judicial Council Form GC-335**

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):  TELEPHONE NO.: _____ FAX NO. (Optional): _____ E-MAIL ADDRESS (Optional): _____ ATTORNEY FOR (Name): _____	<b>FOR COURT USE ONLY</b>
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**SUPERIOR COURT OF CALIFORNIA, COUNTY OF \_\_\_\_\_**

STREET ADDRESS: \_\_\_\_\_  
 MAILING ADDRESS: \_\_\_\_\_  
 CITY AND ZIP CODE: \_\_\_\_\_  
 BRANCH NAME: \_\_\_\_\_

CONSERVATORSHIP OF THE  PERSON  ESTATE OF (Name): \_\_\_\_\_

CONSERVATEE  PROPOSED CONSERVATEE

<b>CAPACITY DECLARATION—CONSERVATORSHIP</b>	CASE NUMBER
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**TO PHYSICIAN, PSYCHOLOGIST, OR RELIGIOUS HEALING PRACTITIONER**

The purpose of this form is to enable the court to determine whether the (proposed) conservatee (check all that apply):

- A.  is able to attend a court hearing to determine whether a conservator should be appointed to care for him or her. The court hearing is set for (date): . (Complete item 5, sign, and file page 1 of this form.)
- B.  has the capacity to give informed consent to medical treatment. (Complete items 6 through 8, sign page 3, and file pages 1 through 3 of this form.)
- C.  has dementia and, if so, (1) whether he or she needs to be placed in a secured-perimeter residential care facility for the elderly, and (2) whether he or she needs or would benefit from dementia medications. (Complete items 6 and 8 of this form and form GC-335A; sign and attach form GC-335A. File pages 1 through 3 of this form and form GC-335A.)

(If more than one item is checked above, sign the last applicable page of this form or form GC-335A if item C is checked. File page 1 through the last applicable page of this form; also file form GC-335A if item C is checked.)

**COMPLETE ITEMS 1-4 OF THIS FORM IN ALL CASES.**

**GENERAL INFORMATION**

1. (Name): \_\_\_\_\_
2. (Office address and telephone number): \_\_\_\_\_
3. I am
  - a.  a California licensed  physician  psychologist acting within the scope of my licensure  with at least two years' experience in diagnosing dementia.
  - b.  an accredited practitioner of a religion whose tenets and practices call for reliance on prayer alone for healing, which religion is adhered to by the (proposed) conservatee. The (proposed) conservatee is under my treatment. (Religious practitioner may make the determination under item 5 ONLY.)
4. (Proposed) conservatee (name): \_\_\_\_\_
  - a. I last saw the (proposed) conservatee on (date): \_\_\_\_\_
  - b. The (proposed) conservatee  is  is NOT a patient under my continuing treatment.

**ABILITY TO ATTEND COURT HEARING**

5. A court hearing on the petition for appointment of a conservator is set for the date indicated in item A above. (Complete a or b.)
  - a.  The proposed conservatee is able to attend the court hearing.
  - b.  Because of medical inability, the proposed conservatee is NOT able to attend the court hearing (check all items below that apply)
    - (1)  on the date set (see date in box in item A above).
    - (2)  for the foreseeable future.
    - (3)  until (date): \_\_\_\_\_
    - (4) **Supporting facts** (State facts in the space below or check this box  and state the facts in Attachment 5): \_\_\_\_\_

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.  
Date: \_\_\_\_\_

(TYPE OR PRINT NAME)	 (SIGNATURE OF DECLARANT)
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CONSERVATORSHIP OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE OF (Name):  <input type="checkbox"/> CONSERVATEE <input type="checkbox"/> PROPOSED CONSERVATEE	CASE NUMBER:
---	--------------

**6. EVALUATION OF (PROPOSED) CONSERVATEE'S MENTAL FUNCTIONS**

**Note to practitioner:** This form is *not* a rating scale. It is intended to assist you in recording your *impressions* of the (proposed) conservatee's mental abilities. Where appropriate, you may refer to scores on standardized rating instruments.

**(Instructions for items 6A–6C):** Check the appropriate designation as follows: **a** = no apparent impairment; **b** = moderate impairment; **c** = major impairment; **d** = so impaired as to be incapable of being assessed; **e** = I have no opinion.)

**A. Alertness and attention**

- (1) Levels of arousal (lethargic, responds only to vigorous and persistent stimulation, stupor)  
 a  b  c  d  e
- (2) Orientation (types of orientation impaired)
  - a  b  c  d  e  Person
  - a  b  c  d  e  Time (day, date, month, season, year)
  - a  b  c  d  e  Place (address, town, state)
  - a  b  c  d  e  Situation ("Why am I here?")
- (3) Ability to attend and concentrate (give detailed answers from memory, mental ability required to thread a needle)  
 a  b  c  d  e

**B. Information processing. Ability to:**

- (1) Remember (ability to remember a question before answering; to recall names, relatives, past presidents, and events of the past 24 hours)
  - i. Short-term memory      a  b  c  d  e
  - ii. Long-term memory      a  b  c  d  e
  - iii. Immediate recall      a  b  c  d  e
- (2) Understand and communicate either verbally or otherwise (deficits reflected by inability to comprehend questions, follow instructions, use words correctly, or name objects; use of nonsense words)  
 a  b  c  d  e
- (3) Recognize familiar objects and persons (deficits reflected by inability to recognize familiar faces, objects, etc.)  
 a  b  c  d  e
- (4) Understand and appreciate quantities (deficits reflected by inability to perform simple calculations)  
 a  b  c  d  e
- (5) Reason using abstract concepts. (deficits reflected by inability to grasp abstract aspects of his or her situation or to interpret idiomatic expressions or proverbs)  
 a  b  c  d  e
- (6) Plan, organize, and carry out actions (assuming physical ability) in one's own rational self-interest (deficits reflected by inability to break complex tasks down into simple steps and carry them out)  
 a  b  c  d  e
- (7) Reason logically.  
 a  b  c  d  e

**C. Thought disorders**

- (1) Severely disorganized thinking (rambling thoughts; nonsensical, incoherent, or nonlinear thinking)  
 a  b  c  d  e
- (2) Hallucinations (auditory, visual, olfactory)  
 a  b  c  d  e
- (3) Delusions (demonstrably false belief maintained without or against reason or evidence)  
 a  b  c  d  e
- (4) Uncontrollable or intrusive thoughts (unwanted compulsive thoughts, compulsive behavior).  
 a  b  c  d  e

(Continued on next page)

CONSERVATORSHIP OF THE <input type="checkbox"/> PERSON <input type="checkbox"/> ESTATE OF (Name):  <input type="checkbox"/> CONSERVATEE <input type="checkbox"/> PROPOSED CONSERVATEE	CASE NUMBER:
---	--------------

6. (continued)

D. **Ability to modulate mood and affect.** The (proposed) conservatee  has  does NOT have a pervasive and persistent or recurrent emotional state that appears inappropriate in degree to his or her circumstances. (If so, complete remainder of item 6D.)  I have no opinion.

*(Instructions for item 6D: Check the degree of impairment of each inappropriate mood state (if any) as follows: a = mildly inappropriate; b = moderately inappropriate; c = severely inappropriate.)*

Anger	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>	Euphoria	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>	Helplessness	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>
Anxiety	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>	Depression	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>	Apathy	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>
Fear	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>	Hopelessness	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>	Indifference	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>
Panic	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>	Despair	a	<input type="checkbox"/>	b	<input type="checkbox"/>	c	<input type="checkbox"/>							

E. The (proposed) conservatee's periods of impairment from the deficits indicated in items 6A–6D

(1)  do NOT vary substantially in frequency, severity, or duration.

(2)  do vary substantially in frequency, severity, or duration (*explain; continue on Attachment 6E if necessary*):

F.  (Optional) Other information regarding my evaluation of the (proposed) conservatee's mental function (e.g., diagnosis, symptomatology, and other impressions) is  stated below  stated in Attachment 6F.

### ABILITY TO CONSENT TO MEDICAL TREATMENT

7. Based on the information above, it is my opinion that the (proposed) conservatee

a.  has the capacity to give informed consent to any form of medical treatment. This opinion is limited to medical consent capacity.

b.  lacks the capacity to give informed consent to any form of medical treatment because he or she is **either** (1) unable to respond knowingly and intelligently regarding medical treatment **or** (2) unable to participate in a treatment decision by means of a rational thought process, **or both**. The deficits in the mental functions described in item 6 above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of medical decisions. This opinion is limited to medical consent capacity.

*(Declarant must initial here if item 7b applies: \_\_\_\_\_.)*

8. Number of pages attached: \_\_\_\_\_

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ (TYPE OR PRINT NAME)		_____ (SIGNATURE OF DECLARANT)
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## APPENDIX E

### Court File Review – Detailed Data Tables

**Table 1. Was undue influence explicitly raised in an official document?**

	Number	Percent
Yes	23	92%
No	2	8%
TOTAL	25	100%

**Table 2. Type of conservatorship requested in petition**

	Number	Percent
Person and estate	19	76%
Estate only	6	24%
Person only	0	0%
TOTAL	25	100%

**Table 3. Who petitioned for conservatorship?**

	Number	Percent
Private professional conservator	12	48%
Public Guardian	8	32%
Family member	6	24%
Friend or acquaintance	1	4%
Multiple petitioners	3	12%

Note: Percentages do not sum to 100 because some cases had multiple petitioners.

**Table 4. Did the alleged abuser file a competing petition or contest the conservatorship?**

	Number	Percent
Yes	2	8%
No	23	92%
TOTAL	25	100%

**Table 5. Purpose of conservatorship with respect to alleged undue influence**

	Number	Percent
Provide court supervision of assets in jeopardy	22	88%
Prevent further loss of assets	20	80%
Take control out of hands of alleged abuser	6	24%
Ensure proper care	4	16%
Recover misappropriated assets	3	12%
Revoke contracts (including marriage)	2	8%
Need for third party legal action to stop abuse	1	4%
Other	1	3%

Note: Percentages do not sum to 100 because some cases involved more than one purpose.

**Table 6. Was APS involved in the case?**

	Number	Percent
Yes	24	96%
No	1	4%
TOTAL	25	100%

**Table 7. Gender of proposed conservatee**

	Number	Percent
Male	12	48%
Female	13	52%
TOTAL	25	100%

**Table 8. Age of proposed conservatee**

	<b>Number</b>	<b>Percent</b>
Younger than 60	2	8%
60 to 70	0	0%
70 to 80	5	20%
80 to 90	11	44%
90 or older	7	28%
TOTAL	25	100%
<i>Mean</i>	<i>80.9 years</i>	
<i>Median</i>	<i>82.0 years</i>	

**Table 9. Proposed conservatee's marital/relationship status**

	<b>Number</b>	<b>Percent</b>
Widowed	11	44%
Never married	5	20%
Currently married	3	12%
Divorced	4	16%
Unable to determine	2	8%
TOTAL	25	100%

**Table 10a. Proposed conservatee's residence or placement at time of petition**

	<b>Number</b>	<b>Percent</b>
Private residence	25	100%
Nursing home	0	0%
Assisted living facility	0	0%
Congregate living	0	0%
TOTAL	25	100%

**Table 10b. Proposed conservatee's living situation, if in private residence**

	<b>Number</b>	<b>Percent</b>
Alone	10	40%
With spouse or partner	1	4%
With other family	4	16%
With caregiver/attendant	5	20%
With roommate/friend	3	12%
With caregiver who is also spouse	2	8%
<b>TOTAL</b>	<b>25</b>	<b>100%</b>

**Table 11. Does the proposed conservatee have involved family members?**

	<b>Number</b>	<b>Percent</b>
Yes	16	64%
No	7	28%
Unable to determine	2	8%
<b>TOTAL</b>	<b>25</b>	<b>100%</b>

**Table 12. Proposed conservatee's impairments**

	<b>Number</b>	<b>Percent</b>
Diminished mental capacity	22	88%
Cognition	21	84%
Executive functioning	18	72%
Mobility	15	60%
ADLs	13	52%
Mental health issues	13	52%
Depression	11	44%
Continence	5	20%
Anxiety	6	24%
Hearing	3	12%
Vision	3	12%
Speech	2	8%
Substance abuse	1	4%
<i>Multiple impairments</i>	23	92%

Notes: Percentages do not sum to 100 because some proposed conservatees had multiple impairments. Percentages represent proposed conservatees with any level of impairment.

**Table 13. Other traits of proposed conservatee**

	Number	Percent
Lack of insight	22	88%
Poor judgment	22	88%
Acquiescence	9	36%
Lonely	6	24%
Hoarding/cluttering	5	20%
Suffered recent loss	4	16%
Experiencing a life transition	2	8%
Under effects of medications	2	8%
Sleep deprived	1	4%
Seeks attention	0	0%
Dependent personality	0	0%
Other	11	44%

Notes: Percentages do not sum to 100 because some proposed conservatees had multiple traits.

**Table 14. Single or multiple alleged abusers?**

	Number	Percent
Single	10	40%
Multiple	15	60%
TOTAL	25	100%

**Table 15. Gender of alleged abuser**

	Number	Percent
Male	21	48%
Female	15	30%
Unknown	9	23%
TOTAL	40	100%

Notes: Because some cases involved multiple abusers, percentages are based on the total number of abusers reported (40), not the total number of cases (25). Percentages do not sum to exactly 100 due to rounding.

**Table 16. Other traits of alleged abuser**

	Number	Percent
Substance abuse history	5	13%
Criminal history	5	13%
Homeless/housing issues	2	5%
Mental health history	1	3%

Notes: Because some cases involved multiple abusers, percentages are based on the total number of abusers reported (40), not the total number of cases (25). Percentages do not sum to 100 because some alleged abusers had none of these traits. More than one trait was possible for any given alleged abuser.

**Table 17. Alleged abuser's relationship to conservatee**

	Number	Percent
Friend/neighbor	11	28%
Any family member	10	25%
<i>Son/daughter</i>	4	10%
<i>Spouse/partner</i>	1	3%
<i>Other family</i>	5	13%
Telemarketer/lottery	10	25%
Caregiver/attendant	6	15%
Stranger	2	5%
Fiduciary	0	0%
Doctor/therapist	0	0%
Attorney	0	0%
Bank/trust company/financial manager	0	0%
Other	1	3%
TOTAL	40	100%

Notes: Because some cases involved multiple abusers, percentages are based on the total number of abusers reported (40), not the total number of cases (25). Percentages do not sum to exactly 100 due to rounding.

**Table 18. Relationship dynamics**

	Number	Percent
AA financially dependent on proposed conservatee	6	15%
Romantic relationship	5	13%
AA dependent on proposed conservatee in other ways	1	3%
Sexual relationship	1	3%

Notes: Because some cases involved multiple abusers, percentages are based on the total number of abusers reported (40), not the total number of cases (25). Percentages do not sum to 100 because some cases involved none of these dynamics. More than one dynamic was possible in any given relationship.

**Table 19. Type(s) of abuse/neglect alleged in petition or court investigator's report**

	Number	Percent
Financial abuse	24	96%
Neglect	10	40%
Psychological abuse	5	20%
Isolation	4	16%
Physical abuse	1	4%
Sexual abuse	1	4%
Self-Neglect	1	4%
Abandonment	1	4%
<i>Multiple types of abuse/neglect</i>	<i>12</i>	<i>48%</i>

Note: Percentages do not sum to 100 because some cases involved multiple types of abuse.

**Table 20. Does the proposed conservatee acknowledge the abuse?**

	Number	Percent
Yes	3	12%
No	19	76%
Unable to determine	3	12%
TOTAL	25	100%



**Table 21. How long has the alleged abuse been going on?**

	Number	Percent
Less than 1 year	3	12%
1 to 2 years	4	16%
2 to 5 years	5	20%
More than 5 years	5	20%
Unable to determine	8	32%
TOTAL	25	100%

**Table 22. Type(s) of material/financial impact experience by proposed conservatee**

	Number	Percent
Loss of cash/savings	21	84%
Loss of real property	8	32%
Change in will or trust	5	20%
Unauthorized loans	5	20%
Unauthorized purchases	2	8%
Other	5	20%
Unable to determine	1	4%

Notes: Percentages do not sum to 100 because some cases involved more than one type of impact. Attempts that fell short of an actual loss are included in the counts.

**Table 23. Tactic(s) used by alleged abuser**

	<b>Number</b>	<b>Percent</b>
Playing on weaknesses	19	76%
Lying or deception	17	68%
Repeated solicitations	10	40%
Fostering dependence	9	36%
Relationship poisoning	8	32%
Increasing closeness or intimacy in relationship	8	32%
Isolation	6	24%
Reinforcing feelings of helplessness	5	20%
Use of romantic overtures or sex to gain compliance	5	20%
Invoking family loyalty	5	20%
Multiple persuasions (multiple arguments/ inducements)	4	16%
Eliciting sympathy	4	16%
Multiple persuaders (multiple people going along with influencer)	3	12%
Knowingly ignoring or violating an advance directive	2	8%
Aggressive initiation of transactions	2	8%
Discouragement of third party advisors or independent advice	2	8%
Transaction in unusual setting	1	4%
Secrecy	1	4%
Emphasis on haste	0	0%
Transaction at unusual time	0	0%
Appealing to elder's affinities	0	0%
Other	4	16%
<i>Multiple tactics</i>	<i>25</i>	<i>100%</i>

Note: Percentages do not sum to 100 because all cases involved multiple tactics.

**Table 24. Other elements/characteristics of the undue influence**

	<b>Number</b>	<b>Percent</b>
Transaction unfairly benefits others	20	80%
Elder is ignorant of facts or cannot explain facts of transaction	12	48%
Level of elder's care not commensurate with amount paid	8	32%
Changes in wills, trusts, etc., diverge significantly from past	3	12%
Behavior of caregiver falls outside of professional responsibility or violates professional ethics	2	8%
Lottery scam, sweepstakes, etc.	2	8%
Level of elder's care not commensurate with assets	1	4%
A person in a position of power/responsibility did not take steps to prevent the act that benefited him or her	1	4%
Other	9	36%

Note: Percentages do not sum to 100 because some cases involved multiple elements/characteristics.

**APPENDIX F**

**Court File Review Instrument**

# Borchard grant file review

## 1. Case Characteristics

\* 1. Case number/code

2. Type of conservatorship

Person only

Estate only

Person and estate

3. Who petitioned for conservatorship? (Check all that apply)

Public Guardian

Family member

Private professional conservator

Friend or acquaintance

Attorney

Other (please specify)

4. Was APS involved in the case?

Yes

No

Unable to determine

5. Was the issue of undue influence explicitly raised in the petition, court investigator's report, neuropsych, or other official document?

Yes

No

6. What kinds of abuse or neglect were alleged in the petition or in the court investigator's report? (Check all that apply)

Physical abuse

Abandonment

Sexual abuse

Financial abuse

Neglect

Isolation

Self-neglect

Psychological abuse

7. Does the proposed conservatee acknowledge the abuse?

Yes

No

Unable to determine

## Borchard grant file review

8. Did the alleged abuser try to file a competing petition or contest the conservatorship?

Yes

No

Unable to determine

9. How long has the alleged abuse been going on?

Less than 1 year

1 to 2 years

2 to 5 years

More than 5 years

Unable to determine

10. What type of material or financial impact has the proposed conservatee experienced? (Check all that apply)

Loss of real property

Unauthorized purchases

Loss of cash/savings

Change in will or trust

Unauthorized loans

Unable to determine

Other (please specify)

11. What is the purpose of the conservatorship with respect to the alleged undue influence? (Check all that apply)

To take control out of the hands of the alleged abuser (e.g., a trustee)

Need for third party legal action to stop the abuse

To provide court supervision of assets that are in jeopardy

To recover misappropriated assets

To prevent further loss of assets

To revoke contracts (including marriage)

To replace an abusive conservator

Unable to determine

Other (please specify)

# Borchard grant file review

## 12. Tactics used by alleged abuser (Check all that apply)

- Aggressive initiation of transactions
  - Emphasis on haste
  - Repeated solicitations
  - Transaction in unusual setting
  - Transaction at unusual time
  - Knowingly ignoring or violating an advance directive
  - Multiple persuaders (multiple people going along with influencer)
  - Multiple persuasions (multiple arguments/inducements)
  - Discouragement of third party advisors or independent advice
  - Isolation
  - Relationship poisoning
  - Other (please specify)
- Secrecy
  - Lying or deception
  - Fostering dependence
  - Reinforcing feelings of helplessness
  - Increasing closeness or intimacy in relationship
  - Use of romantic overtures or sex to gain compliance
  - Eliciting sympathy
  - Invoking family loyalty
  - Appealing to elder's affinities (e.g., church, ethnic group affiliations)
  - Playing on weaknesses
  - Unable to determine

## 13. Other elements/characteristics of the undue influence (Check all that apply)

- Transaction unfairly benefits others
- Level of elder's care not commensurate with assets
- Level of elder's care not commensurate with amount paid
- Elder is ignorant of facts or cannot explain facts of transaction
- Changes in wills, trusts, etc., diverge significantly from past
- Behavior of caregiver falls outside of professional responsibility or violates professional ethics
- A person in a position of power/responsibility did not take steps to prevent the act that benefited him or her
- Unable to determine
- Other (please specify)

## 2. Characteristics of Proposed Conservatee

### 14. Age (Leave blank if unknown)

# Borchard grant file review

## 15. Gender

Male

Female

## 16. Race/ethnicity

White, non-Hispanic

Asian or Pacific Islander

Hispanic or Latino

Mixed race/ethnicity

Black or African American

Unable to determine

Other (please specify)

## 17. Marital/relationship status

Currently married

Domestic partner

Never married

Significant other

Widowed

Unable to determine

Divorced

Other (please specify)

## 18. Residence or placement at time of petition

Private residence (i.e., home or apartment)

Nursing home

Assisted living facility

Congregate living

Unable to determine

Other (please specify)

## 19. Living situation, if in private residence

Alone

With a roommate/friend

With spouse or partner

Unable to determine

With other family

Not applicable (not in private residence)

With a caregiver/attendant

Other (please specify)



# Borchard grant file review

20. Does the proposed conservatee have involved family members?

Yes

No

Unable to determine

21. Impairments

	None	Mild	Moderate	Severe
Hearing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mobility	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cognition	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Speech	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Substance abuse	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mental health issues	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Continence	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
ADLs	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Executive functioning	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Depression	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Anxiety	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Diminished mental capacity	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Further describe impairments

22. Other traits of proposed conservatee (Check all that apply)

- Suffered recent loss
- Experiencing a life transition
- Sleep deprived
- Under effects of medications
- Lonely
- Other (please specify)
- Seeks attention
- Poor judgment
- Lack of insight
- Dependent personality
- Acquiescence

## 3. Characteristics of Alleged Abuser

23. Single abuser or multiple abusers?

Single

Multiple

24. Age (Leave blank if unknown)

Abuser #1

Abuser #2

# Borchard grant file review

## 25. Gender

	Male	Female	Unable to determine
Abuser #1	jn	jn	jn
Abuser #2	jn	jn	jn

## 26. Relationship to conservatee

	Relationship
Abuser #1	<input type="text"/>
Abuser #2	<input type="text"/>
Other (please specify)	<input type="text"/>

## 27. Alleged abuser's relationship with proposed conservatee (Check all that apply)

	Financially dependent on proposed conservatee	Dependent on proposed conservatee in other ways (i.e., not financially)	Romantic relationship with proposed conservatee	Sexual relationship with proposed conservatee
Abuser #1	€	€	€	€
Abuser #2	€	€	€	€
Other (please specify)	<input type="text"/>			

## 28. Other traits of alleged abuser (Check all that apply)

	Substance abuse history	Mental health history	Criminal history	Homeless or has housing issues
Abuser #1	€	€	€	€
Abuser #2	€	€	€	€
Other (please specify)	<input type="text"/>			

## 4. Additional Notes/Comments

### 29. Please note any other relevant aspects of the parties or the case.