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Financial Exploitation: When “Consent” is Obtained by Undue Influence

Candace Heisler, JD

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Overview of Session

- Define undue influence
- Describe tactics used by influencers
- Describe the relationship between consent and undue influence
- Become familiar with a tool developed in California, called “CUIST”, as a way to organize and document case information and better identify undue influence

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Your Experience

- Have you handled a case you believed was undue influence?
- What issues or challenges did you face in establishing or attempting to establish it was a case of undue influence?

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Why Discuss Undue Influence?

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- Historically poorly understood
- Occurs behind closed doors
- Determined by circumstantial evidence
- Historically raised in civil legal contexts, e.g., wills, trusts, land conveyances
- When present it can vitiate a claim of consent
- While most often it is part of an allegation of financial abuse it can arise in sexual abuse or when younger people (family, friends, or strangers) move in under guise of "taking care" of an elder or dependent adult

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What Is Undue Influence?

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- Psychological Construct
- Legal Definition

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Undue Influence—A Psychological Construct

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- "The substitution of one person's will for the true desires of another." (Singer, 1996)
- It occurs when "one person uses his or her role and power to exploit the trust, dependency, and fear of another." (Singer, 1996)
- Fraud, duress, threats or other types of pressure often accompany it. (Quinn, 1998)
- Typically arises with a claim of consent
 - Real vs. "Apparent Consent"

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Minnesota Law

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- Term not defined by statute
- Developed through case law, e.g., wills, trusts
- "Undue influence is influence of such a degree exerted upon the individual by another that it destroys or overcomes the individual's free agency and substitutes the will of the person exercising for the influence of that of the individual"
 - In re Wilson's Estate, 27 N.W.2d 429, 432

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Case Law

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- A showing of undue influence requires that the influence exerted was "so dominant and controlling of the testator's mind that" the testator "ceased to act of [her] own free volition and became a mere puppet of the wielder of that influence."
- In re Estate of Pundt, 280 Minn. 102, 104-05

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Case Law (2)

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- The existence of undue influence is determined by ascertaining the effect of the influence, which in fact was exerted, on the testator's mind, considering that person's physical and mental condition, the person by whom the influence was exerted, the time, place, and all the surrounding circumstances.
- In re Estate of Marsden, 217 Minn. 1; In re Estate of Stephens, 207 Minn. 597

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The Undue Influence "Process"

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- Find a likely target
- Gain confidence of potential victim
- Induce dependence through exploitation of weakness
- Gain dominance of victim's life circumstances and wealth

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Understanding Undue Influence

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- Because a process, not an event
 - Must examine relationship from beginning
 - Look for grooming when no previous relationship or when significant change in relationship
- Several psychological frameworks/models; one is highlighted here (Omaha YWCA)

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Undue Influence

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Common Tactics

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Case Example

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- Victim Norman R: over 65 years of age, life long anxiety disorder, unable to work, needed someone to manage his finances and shopping. His mother did so until her death. Norman met Ronald Leon Brock when Brock worked in a law office where Norman R. sought legal help.
- Brock spent a lot of time with Norman R., served as his driver, helped him through anxiety attacks, and traveled with him at Norman's expense. In 8 years the two exchanged over 2500 calls.
- Brock frequently asked for and received money from Norman R. If Norman R. did not give him a requested check, Brock would fill out the check, follow and hound Norman until he signed it.
- Brock asked Norman to keep these payments secret so his employer law practice would not learn about them.

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Case Example (2)

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- Brock represented himself as Norman's legal advisor (he is not an attorney but has a law degree) to Norman's bank and ordered that an annuity be canceled. He represented to the police he was Norman's advisor. He also convinced Norman to cancel an annuity benefitting his niece, and wrote a letter for Norman to effectuate the cancellation

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Case Example (3)

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- Brock **failed** to carry out various commitments he made to Norman:
 - filing his tax returns over a 6-year period, resulting in liens and penalties
 - repaying a mortgage he convinced Norman to take out on Brock's behalf
 - pocketing \$30,000 Norman gave him to invest for him, and
 - keeping the proceeds from the sale of 2 cars belonging to Norman

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Case Example (4)

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- Norman was examined by a psychologist and a psychiatrist who concluded:
 - Norman suffered from a cognitive disorder, neurocognitive impairment, and borderline intellectual functioning. His cognitive disorder is obvious to lay persons.
 - Norman had a dependent relationship with Brock and a strong desire to please.
 - Norman focuses on immediate results and not long-term implications of actions. He is unable to focus on a topic, deal with details, make calculations, recall facts about his life, or understand the long-term consequences of depleting his assets
- Loss \$600,000.00

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What undue influence tactics do you see in the case study?



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Victims of Undue Influence

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True or False?

- For undue influence to have occurred the victim must have had a cognitive condition, such as dementia.

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"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 overcome, 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."

- Estate of Olson (1912) 19 Cal.App. 379, 386

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Victims of Undue Influence

- Under the right circumstances, **anyone** can be a victim of undue influence, including those...
 - With capacity
 - Who lack decisional capacity, and
 - Who have diminished capacity
- Easier to unduly influence someone who has cognitive impairments
 - Easier to hide what is occurring or be detected
 - Harder for victim to recognize the pattern of conduct
 - Less likely victim will be believed if do report

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Focus on What Makes a Victim Susceptible to Undue Influence

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- Lonely
- Frightened
- Naive, uninformed
- Dependent
- Ill or cognitively impaired
- Fatigued, exhausted
- Distracted
- Adverse life conditions (e.g., grief, trauma)
- Inexperience handling financial matters
- Illiterate or limited education

In the case study, what made Norman susceptible to undue influence?

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Working with a Capacity Evaluator

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- Undue influence evaluation
- Includes all that would go into a capacity evaluation -
 - Purpose of the evaluation—capacity to do what?
 - History of the problem
 - Medical, social, occupational history
 - Neuropsychological testing
 - Discussion of results
 - Capacity findings

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Working with a Capacity Evaluator (2)

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- Plus-
 - Capacity to resist undue influence
 - Assessment of the nature of the relationship between victim & influencer
 - Mechanism of influence (facts that may have contributed to undue influence)
 - Exact issue for assessment
 - Specific vulnerabilities and susceptibilities
 - Often requires review of extensive records (medical, law enforcement, legal and financial, deposition testimony, estate planning documents, interviews with the victim and collateral informants)

From: Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists © American Bar Association Commission on Law and Aging- American Psychological Association

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Perpetrators and Their Tactics

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Who are the Perpetrators?

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- Perpetrators may be
 - Family
 - Friends and neighbors
 - Caregivers
 - Fiduciaries
 - Professionals
 - Others
- Those able to gain (or have gained) the elder's trust/confidence
 - Opportunists
 - Predators/career criminals
- Relationship between influencer and victim
 - Confidential
 - Fiduciary
 - Trusted
 - Grooming/new relationship

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Confidential Relationships

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- Confidential relationship" is one in which there is confidence reposed on one side and the resulting superiority and influence on the other.
- Relationship and duties not limited to legal arrangements (e.g., trustees, guardians, agents (POA), attorney) may include close familial, social, moral, relationships in which one person trusts and relies on another who has resulting superiority and influence
 - Presumption of undue influence does not apply to spouses

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Fiduciaries and Professionals As Perpetrators

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- There is a relationship of trust
- There is an inherent power imbalance between the exploiter and victim
- There may be professional codes of conduct and practice for that professional
- There may be ethical standards for that professional
- There may be a professional body that oversees the conduct of members

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The Presence of a Confidential Relationship...

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Relationship is often strong evidence supporting inference of undue influence when:

- influencer benefits from transaction and
- was active in procuring the result

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Undue Influence

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- The influence must overpower the free will of the victim so that the action/choice expresses the wishes of influencer contrary to the wishes of the victim
 - If victim had known all of this would victim have consented?
- Insufficient to prove Undue Influence
 - Mere opportunity to exercise influence; or
 - Existence of a confidential relationship; or
 - Susceptibility to influence; or
 - An unnatural disposition

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Factors Supporting a Finding of Undue Influence (Wills)

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- An opportunity to exercise influence;
- A confidential relationship between the testator and the person purportedly exercising the influence;
- Active participation in the preparation of the will by the person purportedly exercising undue influence;
- Disinheritance of those who would likely have been named in the will;
- Singularity of the will or trust's provisions; and
- The use of influence or persuasion to induce the testator to make the will or trust in question.
 - *Norwest Bank Minnesota North, N.A. v. Beckler*, 663 N.W.2d 571 (2003); *In re Estate of Peterson*, 283 Minn. 446, 449 (1969)

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Defenses/Justifications

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- It wasn't undue influence, it was ...

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Consent

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- The most common influencer explanation in undue influence cases
- When consent results from undue influence, consent vitiated

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Elements of Consent

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- Lawful Consent requires that the person giving consent...
 - Have decision-making capacity
 - Understand the true nature of the transaction (what they are consenting to...)
 - Freely and voluntarily agree (consented)

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Consent Questions

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- Does alleged victim have capacity to make a gift?
- Health status?
- What did s/he understand would happen as a result of the transaction?
- Whose idea was the transaction?
- What was victim told about the transaction?
- Were any promises made? Threats?
- Any lies told? Information withheld?
- If you knew then what you now know, would you have consented?

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Undue Influence Questions

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- What role does influencer play in victim's life? How long has victim known suspect?
- Nature of relationship. Has it changed over time? How does victim feel about the suspect? What does suspect do for victim and why?
- Have victim's activities changed since the influencer entered victim's life? How? Day in life then and now.
- When is the last time victim had contact with family/friends/groups? Is there a reason victim has not seen them? How often did victim see them previously?

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Undue Influence Questions (2)

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- Whose idea was the transaction?
- Did victim have time to think over the transaction? Was victim "rushed" to act? Were promises made? Threats?
- Did victim have the opportunity to consult with a neutral third party? With whom did victim discuss the transaction? With whom does victim historically discuss such matters? Reason did not consult on this matter?
- Who drew up the paperwork? Is that victim's usual attorney? Who selected this person?
- How does victim explain the meaning of the transaction?

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Undue Influence Questions (3)

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- What events preceded the discussion about the transaction?
- What are the relative benefits to victim and suspect?
- Have there been other "gifts" or transactions with the suspect?
- Prior plan for disposition of asset? Prior wills, trusts?
 - Changes in relationship with person who was to get the asset?

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California Undue Influence Law

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"Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.

Welfare & Institutions Code §15610.70

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California Undue Influence Law

- In determining whether a result was produced by undue influence, **all of the following shall be considered:**
 - Victim's vulnerability to undue influence
 - Influencer's apparent authority (e.g., confidential or fiduciary relationship)
 - Actions or tactics used by the influencer to overcome victims free will
 - Influencer benefit (outcome)

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California Undue Influence Screening Tool (CUIST)

- **Screening tool**, not assessment tool
- Roadmap for analyzing and assessing a case for possible legal action, protective measures, and/or referral
 - Offers a way to categorize and organize information and evidence to determine if elements can be proven and to identify gaps in information or evidence
 - May provide guidance for when to refer for assessment
- Modeled on California Undue Influence Statute (Welfare & Institutions Code §15610.70) but can be used in other states with similar legal elements

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CUIST

- Screening Tool
http://elderjusticecal.org/docs/UI_screening_tool.pdf
- Instructions for Use
http://elderjusticecal.org/docs/CUIST_instructions.pdf

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California Undue Influence Screening Tool (CUIST)

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Influencer Authority/Position of Power	Examples/Comments
<p>Stands in a position of trust, authority, or confidence resulting from:</p> <ul style="list-style-type: none"> Intimate/family relationship Caregiver Professional standing (e.g., legal professional, spiritual advisor, health care professional, real estate agent, banker, accountant) Legal authority (e.g., power of attorney, conservatorship, trust, representative payee) Controls older's finances Immigration sponsor Landlord or long-term care facility operator Predatory salesperson (e.g., telemarketer, annuity company, lottery) Has access to client's home/possessions, finances, documents, or private information (e.g., legal immigration status, sexual orientation/identity) Other (please specify): _____ No apparent authority, power, or access to assets and information 	

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Undue Influence as Criminal Conduct

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Is Undue Influence a Crime?

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- Undue influence is included in the vulnerable adult exploitation statute as a method to commit exploitation (MN Stats, 609.2335)
- Influencer's manipulation, deceptions, relationship and tactics can be used to prove crime

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What About The Brock Case Study?

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- Was this a case of undue influence?
 - Was the will of Brock substituted for the true desires of Norman?
- Could undue influence in this case be a crime?

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Resources

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- Quinn, M.J., Goldman, E., Nerenberg, L., and Piazza, D. (March 2010) "Undue Influence: Definitions and Applications, Final Report to the Borchard Foundation Center on Law and Aging, available at www.courts.ca.gov/documents/UndueInfluence.pdf
- Stiegel, L.A. & Quinn, M.J. (June, 2017) "Elder Abuse: The Impact of Undue Influence", Issue Brief, National Center on Law and Elder Rights, available at <https://ncler.acl.gov/pdf/Advanced-Elder-Abuse-The-Impact-of-Undue-Influence.pdf>
- Godfrey, D. (October, 2018) "Understanding Undue Influence", Practice Tip, National Center on Law and Elder Rights, <https://ncler.acl.gov/Files/Understanding-Undue-Influence.aspx>

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Resources-2

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American Bar Association & American Psychological Association
Capacity Assessment Guides:

www.americanbar.org/groups/law_aging/resources/capacity_assessment.html

- ABA Commission on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005)
- ABA Commission on L. & Aging, Am. Psychological Assn., & Nat'l College of Probate Judges, Assessment of Older Adults with Diminished Capacity: A Handbook for Judges (2006)
- ABA Commission on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists (2008)
- ABA Commission on L. & Aging & Am. Psychological Assn., Assessment of Older Adults with Diminished Capacities, 2nd Ed. (2021) [Chapter 6 addresses undue influence]

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Questions?

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Thank You!

- Candace Heisler
- cjheisler@aol.com



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