

Defining Undue Influence:

A Look at the Issue and at California's Approach

by Mary Joy Quinn

A Growing Problem Without a Consistent Definition

Understanding undue influence, dissecting it, defining it, and understanding the term, has proven elusive in social service and legal settings. Some people have said, "I know it when I see it," making the term a matter of personal interpretation. Some state probate laws reference the term, and a few states have definitions that can be summarized as: Undue influence occurs when a fiduciary or confidential relationship exists in which one person substitutes his own will for that of the influenced person's will. Other states have definitions in criminal or other codes. Of course, judicial decisions on individual cases exist but they are usually known only in legal circles.

Most undue influence cases are seen in probate courts with petitions for guardianships, conservatorships, and with disputed wills and trusts. Undue influence situations are also seen in contract law with documents such as deeds, powers of attorney, and contracts. It may also be present in some criminal cases. In all those situations, courts consider evidence indicating that undue influence may or may not have *already* happened.

With the emergence of elder abuse and mandatory reporting of elder abuse over the last three decades, community practitioners such as Adult Protective Services staff, hospital discharge planners, physicians, and public health nurses who work directly with elders have identified situations where it seems that undue influence is *currently* taking place. Community professionals encounter circumstances where they believe it is happening, where families feel helpless to intervene, and where elders are left penniless by scams, sometimes by lottery scams initiated in other countries.

The issue is particularly important because the number of people over 65 is increasing nationwide. According to federal statistics (see: http://www.aoa.gov/AoARoot/Aging_Statistics/), in the year 2000, people 65+ represented 12.4% of the population. That number is expected to grow to 19% of the population by 2030. With this demographic shift comes increased focus on the telemarketers and lottery scams that target these vulnerable adults.

Legislating the Definition

Definitions of undue influence have been difficult to legislate for many reasons. Undue influence usually takes place behind closed doors and there are no witnesses. And, adults are legally able to make decisions about their affairs unless a court has appointed a guardian or conservator. For instance, an elder who is unduly influenced has the legal right to spend his money on telemarketers even though it may jeopardize his assets. Complicating the matter is that undue influence is often linked to impaired cognitive capacity even though it frequently occurs when the elder clearly has capacity.

Complicating the matter even further, undue influence is present in many other circumstances such as hostage situations, families, telemarketers, domestic violence, prisoners of war, cults, and white

collar crime. It could even apply to totalitarian regimes that act to control populations since the elements are similar. Such a variety of complex circumstances with varying levels of intensity have made it difficult to formulate an overarching definition of undue influence.

California's Approach to Defining Undue Influence

In California, there have been two responses to the lack of a definition of undue influence in the probate code where it is mentioned over 25 times. The first response was a research study which focused on conservatorships of estate because undue influence is specifically mentioned in Probate Code section § 1801 as one of the reasons to appoint a conservator of estate. In 2009, the San Francisco Probate Court, aided by the California Administrative Office of the Courts, undertook a research study with funding from the Borchard Foundation Center on Law and Aging.

The design of the project included a review of California law for definitions of undue influence, a review of other states' probate codes searching for definitions of undue influence, and a literature review of social service and psychological publications on undue influence. Focus groups composed of various professional groups including Adult Protective Services professionals, Public Guardian professionals, and private bar attorneys discussed their perspectives on undue influence.

The project also included a review of 25 court files where a conservatorship of estate was established within the previous year because it was thought that undue influence had occurred. In 2010, the California Administrative Offices of the Courts (AOC) electronically published the results of that research study (see: www.courts.ca.gov/documents/UndueInfluence.pdf).

Surprisingly, the review of state law revealed that the only definition of undue influence in state law was in California Civil Code § 1575 which had been enacted in 1872. The elements of that definition which are still in effect for contract law 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.

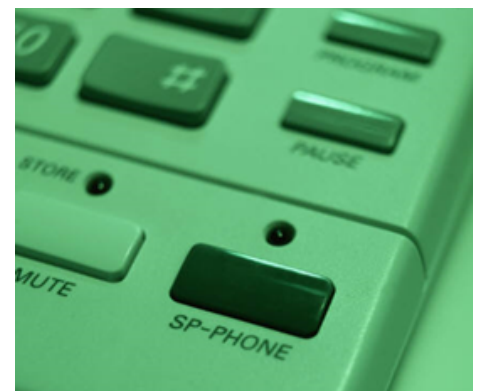
The research study prompted the second response: landmark legislation modernizing the definition of undue influence. The new definition took effect January 1, 2014, and affects probate matters such as conservatorships, wills, and trusts. The new definition was also placed in the state's Welfare and Institutions Code, addressing

Undue Influence Case

A petition was filed for the Public Guardian to be appointed the guardian of person and estate for Ms. R. The Western Union office had contacted Adult Protective Services with concerns about the amount of money Ms. R. was wiring to another country. Her sister in Canada received notice of the petition and was certain that Ms. R. was being "railroaded" into a guardianship. She immediately came to visit Ms. R. and observed her speaking on the phone in a secretive manner several times a day. Ms. R. would not tell her sister who the caller was or what the call was about.

Later it was learned that Ms. R. was talking to her "dear friend" who lived in a different country and who was going to make certain that Ms. R. received a million dollars if only she would send more money now—it was a Jamaican lottery scheme. Ms. R. thought she was making investments. The sister became convinced that Ms. R. needed the guardianship because she could not be talked out of speaking with her "dear friend" and sending the money. She was on the way to impoverishing herself.

The court appointed a public guardian to serve as guardian of person and estate.



Undue Influence Case

A daughter was living with her father who was in his 80s and in poor health. She convinced him to give her \$8,000 per month because "I'm taking care of you." She would not allow the other children to visit saying their father was too ill and weak to receive visitors. She also told her father, "Well the other kids won't help. They never visit. I'm the only one who cares about you. You'd end up in a nursing home if I wasn't here."

After the father died, it was learned that the daughter had induced her father to make a will leaving the family home to her as well as all his stocks and bank accounts. A will contest took place. A jury found that undue influence had taken place, but that the father would have wanted to leave something to his daughter. Eventually, it was determined that the assets should be split between the four children.



the financial abuse of an elder or a dependent adult. The language is the same in both codes and consists of the following:

"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. In determining whether a result was produced by undue influence, all of the following shall be considered:

1. Vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency where the influencer knew of, or should have known of, the alleged victim's vulnerability.
2. The influencer's apparent authority. Evidence of apparently authority may include but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification
3. The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:
 - A. Controlling necessities of life, medication, the victim's interactions with others, access to information or sleep.
 - B. Use of affection, intimidation, or coercion.
 - C. Initiation of changes in person or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate time and places, and claims of expertise in effecting change.
4. The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship. Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

The new law requires that judges and juries *consider* the law when making determinations about undue influence. The four factors are weighted equally, which means that no factor is more important than another. In addition, all four are not required to determine if undue influence has occurred. In fact, a judge or jury could decide that undue influence has taken place where the four factors are not present. While this is not likely, it is possible because the new definition and factors merely requires that the judge or jury *consider* them.

Definition Implementation and What the Future Holds

With this new statutory definition of undue influence, courts, attorneys, and community practitioners have guidelines to assist them in determining if undue influence has occurred or is occurring. The definition was purposefully written in lay terms so community practitioners can utilize it more easily. Since specific examples of evidence are included, undue influence may be more easily detected.

Implementation of the new definition, “where the rubber hits the road,” remains to be seen. Education and training will be needed for the various professionals who encounter undue influence. Attorneys will likely begin including the definition in their petitions for conservatorship, wills, and trusts. Courts will then consider if undue influence has taken place and if the decision is that it has occurred, will reflect that finding in court rulings and opinions. Community practitioners may better able to articulate what undue influence means and to describe the specific circumstances in individual cases. The new law represents a sea change in defining undue influence. Time will tell how the definition will be implemented.

Mary Joy Quinn is the Commission’s liaison from the National College of Probate Judges and Director (ret.), Probate Court at San Francisco Superior Court in San Francisco, CA. She is currently active in the fields of conservatorship, guardianship, elder abuse, and undue influence. ■



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