

# INFLUENCE: DUE OR UNDUE?<sup>1</sup>

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## I. INTRODUCTION.

In the probate context, the doctrine of undue influence “protects against overreaching by a wrongdoer seeking to take unfair advantage of a donor who is susceptible to such wrongdoing on account of the donor’s age, inexperience, dependence, physical or mental weakness, or other factor.” Restatement (Third) of Property (Wills & Don. Trans) § 8.3 cmt. e.<sup>3</sup> While there have been a number of articles written in recent years which criticize the doctrine of undue influence in that context, it remains an important tool for families and others who have had relationships destroyed and estates plundered by persons resorting to such tactics.

Despite protests that it should be abolished (see below), the doctrine of undue influence is alive and well—as it should be. The doctrine has followed developments in estate planning trends and is being used not just to invalidate simple wills but also to invalidate trust agreements and pour-over wills as the case of *In re Will of Catelli*, 825 A.2d 1209 (N.J. Super. 2003) demonstrates.

In that case, the decedent was an elderly widow who executed a will leaving her estate to a variety of friends and relatives and a power of attorney naming her nephew as her attorney-in-

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<sup>1</sup> In presenting this paper, the authors have attempted to adhere to general principles which apply to the subject. Because the law governing undue influence varies from state to state, the reader is encouraged to consult the statutory and common law of the controlling jurisdiction.

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<sup>3</sup>The Restatement (Second) of Contracts § 177 states the following rule for establishing undue influence in the context of contracts: “**Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.**”

fact in the event a certain friend was unable to serve. Later that year, she suffered a stroke which left her debilitated with partial paralysis and limited speech and sight, and her friend (who was serving as her agent under the power) died. The nephew began serving as the alternate agent and made monetary transfers to himself with that authority. He then hired an out-of-state attorney to draft a living trust and pour-over will. The nephew took those documents to the decedent, and over the course of three days, read them to her while she dozed on and off in bed at the nursing home. He then made arrangements at the nursing home to have the documents executed, which decedent signed with an “X.” The nephew then quit his job as a truck driver and made demand on the general partner of a business in which decedent had an interest to turn over her interest in the partnership. The general partner refused on the grounds that the trust agreement was invalid. The nephew filed suit, and the validity of the trust was put at issue. The Court determined that the instrument was the product of undue influence.

Not only is the doctrine of undue influence used to attack wills and trust agreements as was the case in *Catelli*, but also powers of attorney, contracts and beneficiary designations. The presence of undue influence or susceptibility to undue influence may also be relevant in a guardianship or conservatorship proceeding or investigations into allegations of elder abuse.<sup>4</sup> See e.g., Mary Joy Quinn, *Undoing Undue Influence*, Generations 68 (Vol. XXIV, No. 2. 2000).

As Americans age, it is expected that the number of undue influence claims will rise. For example, a 2006 study by the American Association of Retired Persons (AARP) and the ABA discussed the need to create and enforce court monitoring systems in guardianships and conservatorships. While not directly related to undue influence claims, the concerns articulated in the study are implicated in such claims (mainly, the need to protect against abuse and exploitation of the vulnerable). The study aptly notes:

The need for effective court monitoring practices is heightened by the ongoing demographic trends that will sharply boost the number of guardianships in coming years, including growing numbers of older people, individuals with Alzheimer’s disease and other forms of dementia, and people with mental retardation or intellectual disabilities. Moreover, incidents of elder abuse are on the rise, as is the number of not-for-profit, for-profit, and public guardianship agencies that make critical decisions about multiple wards, sometimes with high caseloads. All of those trends combine to underscore the dire need for oversight when fundamental rights and financial resources are transferred to guardians, leaving at their mercy individuals with diminished capacity.

Naomi Karp, AARP Public Policy Institute, and Erica Wood, ABA Commission on Law and Aging, *Guardian monitoring: A National Survey of Court Practices*, pg. V (2006).

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<sup>4</sup> See e.g., Lori Stiegel and Erica Wood, *The Role of Undue Influence in Elder Abuse*, National Consumer Law Center, 7 (Power Point Presentation, June 8, 2011) (noting that undue influence may undermine self-determination).

Karp and Wood point to increasing incidents of elder abuse, and a report published in June of 2011 attempts to quantify the problem:

The annual financial loss by victims of elder abuse is estimated to be at least \$2.9 billion dollars, a 12% increase from the \$2.6 billion estimated in 2008.

The MetLife Study of Elder Financial Abuse, Crimes of Occasion, Desperation, and Predation Against America's Elders, Executive Summary (June 2011).

In light of these trends, any argument that the doctrine of undue influence should be abolished is short-sighted, at best. To the contrary, the practitioner and trust and estate litigator should be even more aware of the doctrine so that it can be utilized where appropriate. The purpose of this paper is to lend assistance to litigators in understanding the basic principles of undue influence law to assist in evaluating, investigating and litigating undue influence claims. In doing so, it will answer some of the criticism which has recently been leveled against the doctrine, explain how undue influence operates in will contests and similar claims and discuss important principles in the field of undue influence scholarship and neuro-psychology which will assist in explaining the factors at work in undue influence claims. The aim of this paper is to provide insights for litigators who do not routinely encounter undue influence claims.

## **II. GENERAL PARAMETERS OF AN UNDUE INFLUENCE CLAIM.**

The authors of training materials prepared for the YWCA of Omaha, Nebraska identify undue influence as a pattern of manipulative behavior by which one uses his or her position of power to exploit the trust, dependency and fear of another. Bonnie Brandle, Candace Heisler, Lori Stiegel, *Undue Influence: the Criminal Justice Response*, 11 (2006). "Undue influence is a pattern of manipulative behaviors that enable an exploiter to get a victim to do what the exploiter wants, even when the victim's behaviors are contrary to his or her previous beliefs, wishes and actions." *Id.* The authors wisely point out that undue influence "is a process, not an event." *Id.* at 12.

In the context of will contests, because undue influence is, in fact, "a process and not an event," simply interviewing the witnesses to the will execution is rarely going to provide a complete understanding of the influence alleged. A thorough understanding of the facts leading up to the execution of the instrument at issue and of the relationship between the testator and the influencer are needed. "What happened on a particular date is the endpoint of a series of actions undertaken by the suspect that quietly and steadily robs the victim of free will. In [undue influence cases], what the victim does is ... actually a reflection of what the suspect wants and has done, rather than an expression of what the victim wants." *Id.* at 87.

The investigation of an undue influence case will rarely yield direct proof of the influence. Undue influence is most often proved by inference raised from the presence of certain facts in a

given case. The Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 cmt. e explains the use of circumstantial evidence in undue influence cases:

In the absence of direct evidence of undue influence, circumstantial evidence is sufficient to raise an inference of undue influence if the contestant proves that (1) the donor was susceptible to undue influence, (2) the alleged wrongdoer had an opportunity to exert undue influence, (3) the alleged wrongdoer had a disposition to exert undue influence, and (4) there was a result appearing to be the effect of the undue influence.

The contestant in an undue influence claim is often aided by a presumption of undue influence if he can prove the existence of certain facts. Whether the contestant will be able to rely upon a presumption will depend upon the law of the jurisdiction involved. In the treatise *Will Contests*, the authors note that only three states (Indiana, Iowa and North Dakota) hold that undue influence cannot be presumed, while most states recognize some form of a presumption of undue influence. Eunice Ross and Thomas Reed, *Will Contests*, § 7:11 (1999).

Generally speaking, a presumption of undue influence arises if at the time of the transaction a confidential or fiduciary relationship is shown between the testator or donor and the undue influencer and one or more suspicious circumstances also exist. Restatement (Third) of Property (Wills and Don. Trans.) § 8.3 cmt. f; *Will Contests*, § 7:11.

Once the presumption arises, the proponent of the challenged instruments bears the burden of introducing evidence which proves that the presumed fact (undue influence) is false, not necessarily that the facts forming the basis of the presumption are false.<sup>5</sup> See e.g., *Estate of Kurrle*, 2011 WL 1198198 (Mich. Ct. App. 2011) (unpublished opinion). The presumption of undue influence may continue to have evidentiary force up to the time that the matter is submitted to the fact finder for decision. See e.g., *Chapman v. Varela*, 213 P.3d 1109, 1116 (N.M. 2009). Once evidence is offered to rebut the presumption, a judge or jury will be called to determine whether the alleged influence was “due or undue.”

The Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 cmt. f contains a general statement as to the effect of the presumption on the proponent’s case (emphasis added):

A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer

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<sup>5</sup> As Ross and Reed discuss, there are significant differences among the states as to the effect of the presumption. *Will Contests*, § 7:13. Some hold the burden of going forward with the evidence shifts to the proponent, and some require the proponent to carry the burden of persuasion as to the lack of undue influence. The Uniform Probate Code states that the contestant has the burden of proving undue influence and the burden of persuasion as to that issue. Uniform Probate Code, U.L.A. 3-407.

of any other type. *The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.*

A presumption of undue influence upon the showing of a confidential relationship and one or more suspicious circumstances is allowed by the courts out of recognition of the difficulty of obtaining direct proof in such cases. See e.g., **Chapman v. Varela**, 213 P.3d at 1114; see also, Broun, et. al., McCormick on Evidence, § 343 (6<sup>th</sup> Ed. 2006) (noting that presumptions can be created to correct an imbalance resulting from one party's superior access to proof and to further social policies).

Allowance of a presumption of undue influence in will contests and similar cases is akin to the allowance of presumptions in cases concerning the abuse of confidential and fiduciary relations in other legal contexts, including the beneficiary/trustee relationship.<sup>6</sup> See, e.g., Restatement (Third) Trusts § 100 cmt. f (Tent. Draft 6, March 14, 2011).

Courts have long recognized that indirect proof of undue influence should be allowed due to the difficulty of developing direct proof in such claims. Two older cases typify the reasoning used by the courts to justify this result. In **Cardenas v. Ortiz**, 226 P. 418, 421 (N.M. 1924), the New Mexico Supreme Court wrote:

Human experience teaches that a case could be rarely imagined where direct conversations of persuasion and coaxing such a feeble-minded person to execute such an instrument could be proven, except by the person so unduly influenced. Persons who resort to such shady transactions are too shrewd and designing to be thus caught.

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<sup>6</sup> As stated in George Gleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees § 544 (1993), when it appears that parties to a transaction occupy unequal positions by virtue of a fiduciary or confidential relationship and that the person in the superior position has gained an advantage because of that relationship, *the law intervenes on behalf of the weaker party to require the other to prove the legitimacy of the transaction.* This is so because of the great potential for fraud and abuse at the hands of the superior party. This rule has had broad application to various disputes over transactions between a trustee and his beneficiary, individuals in confidential and fiduciary relationships and interested persons litigating the validity of wills, deeds and other donative transfers. *Id.*

**Donivan v. Tibbles**, 135 N.E. 7, 8 (Ind. Ct. App. 1922), an early Indiana case, typifies the historic operation of the principle in a dispute between a personal representative and a beneficiary:

...When it appears that the parties occupy such unequal positions, and that the one occupying the superior position has gained a substantial advantage over the other, the law intervenes on behalf of the weaker person or the one from whom such advantage has been so gained, and raises a presumption of fraud, or unfair or unconscionable dealing in his favor, which, when duly presented, makes out a prima facie case in his favor entitling him to redress, unless the other party by proper proof overcomes such inference or presumption of fraud.

The Arkansas Supreme Court also long ago noted the difficulty in proving undue influence:

Undue influence is generally difficult of direct proof. It is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by the evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes.

*Hyatt v. Wroten*, 43 S.W.2d 726, 728 (Ark. 1931).

### III. CRITICISM OF THE UNDUE INFLUENCE DOCTRINE.

The contestant's ability to resort to indirect proof and the ability to rely upon a presumption of undue influence (Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 at cmts. b and e) no doubt fuel frustration with the undue influence doctrine. Admittedly, wills and instruments which were in fact executed free of improper influences may become trapped in a litigation quagmire, because the facts present in the case give rise to a presumption of undue influence which necessitate a trial to resolve. See, *In re Will of Jones*, 669 S.E.2d 572, 575 (N.C. 2008) ("Undue influence is an inherently subjective term, and finding its existence thus requires engaging in a heavily fact-specific inquiry.").

The perceived subjective nature of the undue influence doctrine has fueled much of the debate over its application, leading one commentator to write that "[u]ndue influence is truly in the eye of the beholder." Lawrence Frolik, *The Biological Roots of Undue Influence: What's Love Got to Do With It?*, 57 U. Pitt. L. Rev. 841, 865 (1996). Critics of the undue influence doctrine attempt to demonstrate the perceived subjective nature of the claim by arguing that fact patterns exist which can give rise *both* to a presumption of undue influence as well as to a conclusion that the disposition at issue made sense under the circumstances.

A classic fact pattern fitting this description is the sibling who cares for an aging home-bound parent and, while performing that service, takes the parent to an attorney who then revises the parent's will to provide the care-giving child with a greater share of the parent's estate. On one hand, the care-giving relationship and change in the will may provide the confidential relationship and suspicious circumstance needed in order to support a presumption of undue influence in order to survive summary judgment. On the other hand, the inheritance can be read to be entirely natural because, in that scenario, the parent logically decided to express gratitude to the care-giving child to the detriment of one or more other children who may have been absent. In truth, whether the disposition was the product of undue influence will depend upon whether the evidence shows independent decision-making by the testator or abuse of a confidential relationship by the care-giving child who used his position of trust and confidence to hijack the decision-making process at a time when the parent was susceptible to undue influence.

Adding to the complexity of the doctrine and coming to the aid of those who criticize it is the fact that whether undue influence exists is often decided on a case-by-case basis and may not be subject to any fixed formulation. While there is similarity in the governing principles of undue influence claims from state to state, many courts have intentionally kept the doctrine flexible, as evidenced by this excerpt from *In re Will of Jones*, 669 S.E.2d at 575, citing *In re Will of Andrews*, 261 S.E.2d 198, 200 (N.C. 1980) (emphasis added):

*It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty.*

Another old New Mexico case explains why the doctrine is and should not be specifically defined (emphasis added):

We make no attempt to define “undue influence.” Neither is it susceptible of any fixed formula. Whether undue influence is present is always a question to be determined from the circumstances of the particular case, *and any attempt to define it may well suggest a clear path of evasion.* But, undue influence in the sense as used means influence, improperly exerted, which acts to the injury of the person swayed by it or to the injury of those persons whom [he or] she would have benefitted.

*Brown v. Cobb*, 204 P.2d 264, 266 (N.M. 1949); *see also, Chapman v. Varela*, 213 P.3d at 1114, citing *Brown v. Cobb* and stating New Mexico Courts have hesitated to provide precise elements for undue influence because “any attempt to define it may well suggest a clear path of evasion.”

Another criticism is that the doctrine allows the fact finder to impose his own value system to change the testator’s will to conform to what he believes should have been done. In *The Biological Roots of Undue Influence: What’s Love Got to Do With It?*, *Id.* at 843, Frolik argues that the doctrine of undue influence is really an agent to ensure that wealth stays in families (emphasis added):

The attraction and the stability of the undue influence doctrine are attributable to its grounding in basic, instinctual human attitudes towards one's offspring. Simply put, it is human nature for decedents to promote the interests of their descendants even if others, such as friends, other relatives, or faithful employees, seem more deserving based upon their behavior. *In recognition of the nearly universal desire to favor descendants, and in particular, children, the law has created the doctrine of undue influence to overturn gifts to nonlineal descendants, second spouses,*

*lovers, friends, loyal housekeepers, and the like, and, relying on intestacy laws, direct the inheritance to the testator's descendants.*

It is true that in determining the naturalness of a gift (whether a gift is “unnatural” is sometimes important in considering whether suspicious circumstances exist) intestate disposition schemes may have some relevance. However, the above criticism ignores the facts that (i) will contests based on undue influence do not all simply rely on intestacy statutes to determine that a devise is unnatural; (ii) an estate plan favoring a non-family member can be completely natural in the context of a given case; and (iii) the doctrine of undue influence can be used by a non-family member to set aside a donative transfer if the non-family member has an expectancy which gives him standing to complain about a particular disposition.

Most importantly, the criticism fails to note that courts often reject the notion that a will is invalid simply because a family member does not benefit under it. In *Estate of Glogovsek*, 618 N.E.2d 1231, 1240 (Ill. App. Ct. 1993), for example, the Court wrote:

A blood relationship between testator and the person excluded from the will can be considered, but a blood relationship in and of itself does not necessarily give the person a claim to testator's bounty which is superior to that of a person who is not directly related to the testator.

In *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 U. Kan. L. Rev. 245, 283 (2010), Carla Spivack also asserts that courts use undue influence to “routinely ignore testamentary freedom to impose social norms and moral judgments on testators’ decisions...”<sup>7</sup>

In support of her argument that the undue influence doctrine should be abolished, Spivack is content with the notions that (a) dependent elderly individuals devise their estates to the very care-givers upon whom they are dependent and who may properly also have a financial motivation for providing the care; and (b) the doctrine of undue influence should not be allowed to operate to void a donative transfer in such a scenario. *Id.* at 308.

Her willingness to accept this scenario exists even though she acknowledged in the same article that one study “estimates that about forty percent of reported elder abuse cases concern financial

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<sup>7</sup> Interestingly, Spivack wrote another article in which she proposes that domestic violence should be a complete bar to the abuser’s inheritance under the will of the victim. Ironically, in support of her hypothesis, she wrote,

Relying on scholarship about the law’s expressive function - that is, its role in teaching social values - I urge that a spousal abuse bar is necessary to “teach” that society cares as much about battered spouses as it does about children and elders in the inheritance context.  
[http://works.bepress.com/carla\\_spivack/18/](http://works.bepress.com/carla_spivack/18/).

While it is clear that our legal system should never tolerate domestic abuse and should discourage it whenever possible, it is curious that Spivack appears content to allow the abuse of the spousal relationship to serve as the basis for disinheritance but not the abuse of a confidential one, which of course is the basis for an undue influence claim. See e.g., *Galvan v. Miller*, 445 P.2d 961, 968 (N.M. 1968). Both behaviors should be discouraged.



exploitation” and that “the current generation of elderly will make the largest intergenerational transfer of wealth in American history.” *Id.* at 297. At the end of the day, the author acknowledges that the abolition of the undue influence doctrine would deprive some cases of justice, but “how harmful would this be?” *Id.* at 308.

Spivack further criticizes the doctrine of undue influence because she believes that it is based partly on a fiction of individual autonomy in the decision-making process. *Id.* at 268. She points to the fact that “the ‘real’ self and its ‘real’ intent are all forms of fiction constructed through relationships with others...” *Id.* at 275. The point seems to be that testators should be able to rely on the input of family and non-family alike when making important testamentary decisions without the doctrine of undue influence intervening.

Most courts are not so naïve as to accept a model of rigid individual autonomy when assessing whether undue influence has occurred. The case law itself does not support such a conclusion and is replete with recognition that individuals generally do not make decisions in a vacuum and that we all naturally rely on the input of others when making a decision. *In re Will of Jones*, 669 S.E.2d at 574, is one of many cases which acknowledge this point. In that case, the North Carolina court wrote:

...undue influence requires more than *mere* influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action.

In the *Estate of Slusarenko*, 147 P.3d 920, 930 (Or. Ct. App. 2006), the Oregon Court of Appeals similarly stated:

...every will is the product of some kind of influence. It is the task of the courts to determine whether the influence in the particular case is “undue.”

#### **IV. THE PURPOSE OF THE UNDUE INFLUENCE DOCTRINE.**

The criticisms of Spivack and others seem to miss the whole point of the undue influence doctrine, which exists not to keep wealth in families, but to prevent the operation of improper influences when estate planning and other important decisions are made by those who are susceptible to undue influence due to a special relationship with an alleged influencer.

Ideally, an individual should be allowed to make important decisions about his or her estate plan in a way that allows, as much as possible, for full consideration of all factors which go into the decision-making process. The doctrine of undue influence operates to invalidate decisions when such consideration is limited due to a variety of causes.

In deciding an undue influence case, the court’s function is not to decide whether the ultimate testamentary disposition comports with social norms (as Frolik, Spivack and others suggest courts might covertly do). Instead, its function is to determine (a) whether the testator made his

or her decision when certain factors exist which are known to corrupt the decision-making process; (b) whether other facts are present which suggest that the decision-making process has in fact been corrupted by the other person; and (c) if these factors are present, whether there is an adequate explanation for the resulting disposition.

What the law prohibits and what the doctrine of undue influence seeks to remedy is the use of certain relationships to corrupt the decision-making process. Thus, the doctrine is not designed to ensure a particular result as Frolik and others suggest but is designed to protect the integrity of the decision-making process as much as can practically be done. *See e.g., Estate of Slusarenko*, 147 P.3d at 932 (rejecting undue influence claim by children of prior marriage against second wife, because disposition was the result of a “bargaining process” in which decedent wanted a certain type of care at the end of his life and knowingly made his will favoring the second wife in order to obtain that care).

The presence of a confidential relationship between the decedent and the alleged influencer and one or more suspicious circumstances creates a presumption that the decision-making process has been corrupted and demands an explanation.

## V. CONFIDENTIAL RELATIONSHIPS.

According to Ross and Reed’s treatise, most American jurisdictions agree that the existence of a confidential relationship between the “victim” and the influencer is an important – if not required – element in assessing whether undue influence occurred. Ross and Reed, § 7:5.<sup>8</sup> In some jurisdictions, the existence of a confidential relationship is included within the broader element of the opportunity to exert undue influence. *Id.* This makes logical sense as the confidential relationship ultimately provides the influencer with the opportunity to exert the influence.

While the showing of a confidential relationship is usually critical in proving an undue influence claim, facts still must be shown that the opportunity was, in fact, used to exert the influence. *See e.g., Estate of Bussler*, 247 P.3d 821, 832 (Wash. Ct. App. 2011) (“Although Karen may have had the opportunity to exert influence over Jacquelyn, Kathleen has not met her burden of demonstrating that Karen actually exerted influence that ‘controlled the volition of the testat[rix],

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<sup>8</sup> “While a few jurisdictions hold out the intellectual possibility the undue influence could be proved without proving the victim and the influencer had a confidential relationship, we could find no cases in which a court had actually done so.” *Id.* at 7:5 (most notably, Illinois, Missouri, North Carolina, Texas and Wisconsin). *See, however*, the case of *Odorizzi v. Bloomfield School District*, 246 Cal.App.2d 123, 130 (Cal. Ct. App. 1966), which found that complaint to rescind resignation based on actions of school officials stated a claim on the grounds of undue influence and further holding:

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.

interfered with h[er] free will, and prevented an exercise of h[er] judgment and choice’”); *Cotten v. Cotten*, 169 S.W.3d 824, 827 (Tex. App. 2005) (“The exertion of undue influence cannot be inferred by opportunity alone.”).

Some states equate fiduciary and confidential relationships for the purposes of undue influence cases. Fiduciary relationships such as those between an attorney and a client can be of the type necessary to make out a *prima facie* case of undue influence. In fact, there are a number of relationships that are fiduciary in character that create the kind of relationship needed to satisfy the requirements of an undue influence claim.

Ross and Reed explain that the relationships of guardian/ward; trustee/beneficiary; agent/principal; attorney/client; doctor and nurse/patient; and clergyman/congregation member are the types of relationships which courts generally find to be confidential for the purposes of an undue influence claim. Ross and Reed, § 7.5. Ross and Reed observe that “[a]ny type of relationship between two human beings in which the parties do not keep each other at arm’s length may be deemed confidential if one of the parties shows any type of trust or confidence in the other.” *Id.* at § 7:5.

A common fiduciary relationship that appears in undue influence cases is that arising from a power of attorney. A power of attorney can and often does create the type of confidential or fiduciary relationship from which a presumption of undue influence can arise if other facts are present. *Id.*; see, e.g., *Estate of Kurrle*, 2011 WL 1198198 (Mich. Ct. App. 2011) (unpublished opinion); *Estate of Duebendorfer*, 721 N.W.2d 438, 445 (S.D. 2006); but see, *Estate of Farr*, 49 P.3d 415, 431 (Kan. Ct. App. 2002) (declining to adopt the view that a durable power of attorney necessarily places parties in a confidential relationship but may be a persuasive fact in determining whether a confidential relationship existed). *In re Will of Sechrest*, 537 S.E.2d 511, 517 (N.C. Ct. App. 2000), states the concern that arises out of this relationship as it impacts undue influence claims:

[w]hen one is the general agent of another, who relies upon him as a friend and adviser, and has entire management of his affairs, a presumption of fraud, as a matter of law, arises from a transaction between them wherein the agent is benefited, and the burden of proof is upon the agent to show by the greater weight of the evidence, when the transaction is disputed, that it was open, fair and honest.

At least two courts, however, have attempted to put some limits on the impact of a power of attorney on a finding of a confidential relationship. In *Sechrest*, the contestant attempted to establish a confidential relationship in part through the existence of a health care power of attorney in which the testator named the alleged influencer. The North Carolina Court of Appeals rejected this attempt stating:

Because the health care power of attorney dealt exclusively with medical decisions, it did not create a fiduciary relationship between Mowery and testatrix concerning her May 1994 Will.

*Id.*

In that case, the alleged influencer also was the testatrix's agent under a general power of attorney for financial matters. The Court held that, because the influencer did not know about his appointment as the testatrix's agent and did not act as such, the trial court was correct in refusing to submit to the jury the issue of whether a fiduciary relationship existed due to the existence of this power of attorney. *Id.* at 517.<sup>9</sup> In *Estate of McCorkle*, 27 So. 3d 1180, 1186 (Miss. Ct. App. 2009), the court affirmed a finding of no confidential relationship even though alleged influencer was power of attorney for decedent where alleged influencer never used the power.

Aside from the relationship arising out of powers of attorney (which are common in undue influence claims), legally recognized fiduciary relationships such as those discussed above are not the only ones that will support finding a "confidential relationship" for the purposes of an undue influence claim. Most typical undue influence cases do not involve such legally distinct relationships as the one between an attorney/client and trustee/beneficiary.

More likely to be tested in an undue influence case such as in will contests are relationships based on familial ties or friendship. Of these cases, claims by a decedent's children from a first marriage are common against a second, third or fourth spouse, with the likelihood of the claim to be inevitably tied to the length of the marriage at issue. As will be discussed in more detail below, however, the spousal relationship may by itself be insufficient to create a confidential relationship. *Estate of Chapman*, 966 So.2d 1262, 1264 (Miss. Ct. App. 2007); *Ruestman v. Ruestman*, 111 S.W.3d 464, 479 (Mo. Ct. App. 2003); *Jacobs v. Vaillancourt*, 634 So.2d 667, 672 (Fla. Dist. Ct. App. 1994) ("The confidential relationship which exists between a husband and wife is not one which may be considered in the law governing will contests."); *Estate of Glogovsek*, 618 N.E.2d 1231, 1237 (Ill. App. Ct. 1993); *Morse v. Volz*, 808 S.W.2d 424, 432 (Mo. Ct. App. 1991) (husband/wife).

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<sup>9</sup> In support of its decision, the court cited the case of *In re Estate of Ferguson*, 518 S.E.2d 796, 798 (N.C. 1999), in which the Court held "The evidence is that Testator executed a power of attorney naming Propounder attorney-in-fact contemporaneously with the execution of her will. Testator delivered the power of attorney to Propounder around June 1988, more than eighteen months after the execution of the will. The record does not contain any evidence that Propounder served as Testator's attorney-in-fact at the time Testator executed her will... The issue of whether Testator and Propounder shared a fiduciary relationship based on Testator's appointment of Propounder as her attorney-in-fact therefore should not have been submitted to the jury." *Id.*

Similarly, a familial relationship such as parent/child, by itself, may be insufficient to create a confidential relationship for the purposes of an undue influence claim. *Estate of Kurrle*, 2011 WL1198198 (Mich. Ct. App. 2011) (unpublished opinion); *Estate of Schisler*, 316 S.W.3d 599, 609 (Tenn. Ct. App. 2009) (parent/child); *In re Ingersoll Trust*, 950 A.2d 672, 692 (D.C. 2008) (parent/child; husband/wife); *In re Estate of Angle*, 777 A.2d 114, 123 (Pa. Super. Ct. 2001) (parent/child); *Bills v. Lindsay*, 909 S.W.2d 434, 440 (Tenn. Ct. App. 1993) (parent/adult child); *Estate of Henke*, 561 N.E.2d 314, 318 (Ill. App. Ct. 1990) (parent/child); *Roybal v. Morris*, 669 P.2d 1100, 1106 (N.M. Ct. App. 1983) (parent/child).

As to undue influence claims not involving a readily identifiable fiduciary relationship, most states define the confidential relationship as one in which the testator “puts special trust and confidence” in the influencer. *See, Id.*; *Theriacault v. Burnham*, 2 A.3d 324, 326 (Me. 2010) (“A confidential relationship is one in which an individual placed trust and confidence in the defendant and there was a great disparity of position and influence in the relationship.”). The existence of a confidential relationship is decided on a case-by-case basis.

*Owens v. Mazzei*, 847 A.2d 700, 709 (Pa. Super Ct. 2004), states the manner in which confidential relationships should be determined for the purpose of an undue influence claim in Pennsylvania (emphasis added):

Our Supreme Court has acknowledged that “[t]he concept of a confidential relationship cannot be reduced to a catalogue of specific circumstances, invariably falling to the left or right of a definitional line.” *In re Estate of Scott*, 455 Pa. 429, 316 A.2d 883, 885 (1974). The Court has recognized, nonetheless, that “[t]he essence of such a relationship is trust and reliance on one side, and a corresponding opportunity to abuse that trust for personal gain on the other.” *Id.* Accordingly, “[a confidential relationship] appears when the circumstances make it certain the parties do not deal on equal terms, but, on the one side there is an overmastering influence, or, on the other, weakness, dependence or trust, justifiably reposed [.]” *Frowen v. Blank*, 493 Pa. 137, 425 A.2d 412, 416-17 (1981) (emphasis added).

Cases from many jurisdictions hold that a confidential relationship can and often does arise from a state of dependence by the testator on another and often is the consequence of a power dynamic in a given relationship. *Estate of Coleman*, 738 So.2d 773, 776 (Miss. Ct. App. 1999), is representative of these decisions to the extent that it holds:

Where there is a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of the mind or body or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character.

That these cases would so hold follows from the principle that the confidential relationship creates an opportunity for one to exercise undue influence over another.

For example, in *Estate of Schisler*, 316 S.W.3d at 609, a partially incapacitated parent who was dependent on a daughter for care, food, housing and transportation had a confidential relationship with such daughter for the purpose of an undue influence claim. The same parent was also in a confidential relationship with her son when she was dependent on him for her financial well-being, and they shared joint accounts which son completely controlled and where parent's social security checks and family farming operation income checks were deposited.

In *Estate of McCorkle*, 27 So.3d at 1185,<sup>10</sup> the Mississippi Court of Appeals relied on a set of factors to determine if a confidential relationship existed:

- (1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.

An earlier Mississippi Court of Appeals decision, *Estate of Coleman*, 738 So.2d 773, 776 (Miss. Ct. App. 1999), found decedent to be in a confidential relationship with her neighbor when decedent was entirely dependent upon the neighbor to provide meals, to handle other necessities of day-to-day living and to handle her financial affairs.

Another Mississippi case, *Estate of Grantham*, 609 So.2d 1220, 1224 (Miss. 1992), found a confidential relationship between the alleged influencers Goodwin and Roberts (one of whom held decedent's power of attorney) and decedent due to the following circumstances:

1. [Decedent] was uneducated, could not be left alone and had to be taken care of by others;
2. [Decedent] depended on and maintained a close relationship with both Goodwin and Roberts;
3. Goodwin provided her transportation and arranged for her medical care;

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<sup>10</sup> In *McCorkle*, decedent was neither physically nor mentally weak. Because the daughter accused of exercising improper influence was no closer to her parent than any other child would be to his or her parent, because she was an owner on her father's joint checking account but never used it except to pay his bills, because she had access to his safe deposit box but did not access it prior to his death, and because she never acted as agent under her father's power of attorney even though she was named as his agent, the Court affirmed the conclusion of the trial court that no confidential relationship existed for the purpose of a will contest based on undue influence.

4. [Decedent's] finances and business concerns were entirely within Roberts' hands;
5. Roberts and [Decedent] maintained joint checking accounts and certificates of deposit which contained funds actually belonging solely to [Decedent];
6. [Decedent]'s safe deposit box was established jointly with Roberts;
7. [Decedent] was extremely weak physically and confined to a wheelchair;
8. Given [Decedent's] advanced age and poor health, it is clear that both Goodwin and Roberts were in a position to exercise a dominant influence over her decisions.

One Texas decision, however, refused to find a confidential relationship simply because the granddaughter lived with and cared for her grandmother (emphasis added):

Neel argues on appeal that George had a “fiduciary relationship” with his mother and that relationship created a fact issue on undue influence. More specifically, he contends that because George's adult daughter lived with Frances and attended to her needs, there was a fiduciary relationship between George and the mother. *Appellant cites no authority, and we have found none, for the proposition that an adult granddaughter's living with and caring for her grandmother creates a fiduciary relationship between the grandmother and the granddaughter's father.* Because Neel failed to show the existence of a fiduciary relationship, he failed to raise a fact issue based on such a relationship.

**Cotten v. Cotten**, 169 S.W.3d at 828.

In **Cotten**, the testimony of decedent's physician as to her mental clarity and of her attorney that she was an “active eighty-four year old woman who had survived a stroke and had just returned from a trip to Alaska” and who was very engaged in her estate planning mitigated against the dependence so often present in cases where a confidential relationship is found. The opinion established the context of a woman who was not dominated by her granddaughter.

In **Owens v. Mazzei**, above, the extent of the decedent's mental impairment and apparent dependence caused the court to find the existence of a confidential relationship between the decedent and two bank employees.

The court found that bank employees who opened an account for the decedent which named them as beneficiaries were in a confidential relationship with the decedent when he was experiencing a rapid decline of mental status (MMSE scores dropped from 22/30 to 2/30 in about two years), sought financial advice from one of the bank employees which she provided

routinely, allowed the bank employees to handle his transactions and hold his account passbook and opened the account at their suggestion. *Id.*, 847 A.2d at 710.

The decisions in *Cotten* and *Owens* and those like them make the point that “[t]he issues are whether a level of trust and confidence exists between two people to the point that the testator trusts another to conduct the testator's business and whether that trusted person abuses that trust in some way to gain a benefit in the testator's will.” *In re Ingersoll Trust*, 950 A.2d at 692.

*Galvan v. Miller*, 445 P.2d 961, 966 (N.M. 1968) puts it another way (emphasis added):

The rationale for the rule in these cases is implicit. Where a transfer of property is made by a parent to his child, a husband to his wife, a brother to his sister, etc., it is ordinarily a natural result of the affection which normally is a concomitant of these relationships. It would be unfair under such circumstances to impose a presumption of undue influence upon the transfer. *But where, in addition to the usual circumstances, it is shown that the beneficiary of the transfer occupies a dominant position in the relationship, a position which is not the usual circumstance in such relationships, then it is proper to impose a presumption of undue influence upon the transfer.*

In *Simmons v. Harms*, 695 S.E.2d 38, 42 (Ga. 2010), the Georgia Supreme Court found that a confidential:

...relationship is one where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another. ... In order to give rise to the rebuttable presumption ..., the evidence must show a confidential relationship wherein the primary beneficiary was capable of exerting the power of leadership over the submissive testator.

A similar case is *Salvner v. Salvner*, 84 N.W.2d 871 (Mich. 1957), which was summarized by the Michigan Court of Appeals in *Estate of Kurrle*, *supra*, as follows (emphasis added):

In support of his position that no fiduciary relationship existed, respondent relies heavily on *Salvner v. Salvner*, 349 Mich. 375, 383–384, 84 N.W.2d 871 (1957), in which the plaintiff sought to have set aside certain conveyances to his children, the defendants, on the basis of undue influence. Our Supreme Court held in relevant part that no fiduciary relationship existed between the plaintiff and the defendants even though the defendants “unquestionably did many things to assist their father, a perfectly natural course of conduct in view of his physical condition.” *Id.* at 384, 84 N.W.2d 871. *Instead, the critical issue in that case was whether the plaintiff was governed by the defendants' advice or dependent on them to make decisions. Id. According to the Salvner Court, the plaintiff was not so governed; he capably made decisions on his own behalf and refused to act*



*against his own inclinations. Id.* Accordingly, no fiduciary relationship existed because the defendants' assistance “amounted to no more than would be prompted normally by the existing relationship.” *Id.*

## **VI. SPECIAL SIGNIFICANCE OF SPOUSAL RELATIONSHIPS.**

### **A. Recognition That the Marital Relationship is Expected to Involve Influence.**

Undue influence cases generally acknowledge that legitimate influences on a decedent's estate planning are not improper and that influence obtained by kindness and affection may not be regarded as undue. *See, e.g., Estate of Farr*, 49 P.3d at 430. Nevertheless, deciding what influences are legitimate still presents challenges, despite this acknowledgment. When attempting to answer the question of what is “undue” influence, decisions where spouses are accused of exercising undue influence are informative. There are a number of these cases, both reported and unreported, between children of a prior marriage against a stepparent. Because these decisions typically balance the amount of influence a spouse is expected to have in a marital relationship versus what actually occurred, these cases serve as a good starting venue for answering the question, “How much influence is too much?”

As noted above, courts generally refuse to find a confidential relationship for the purposes of an undue influence claim based solely on the familial relationship. Not surprisingly, the cases also generally refuse to find a confidential or fiduciary relationship based only upon the marital relationship. *But see, Estate of Waters*, 629 P.2d 470, 473 (Wyo. 1981) (dissent sharply criticizes majority's decision to affirm undue influence jury verdict against spouse when behavior exhibited is described by dissenting justice as not unusual for a spouse).

For example, in *Ruestman v. Ruestman*, 111 S.W.3d 464 (Mo. Ct. App 2003), the court refused to find a fiduciary relationship between spouses because there was no evidence that the decedent consulted with his wife with respect to his property or financial affairs or that he placed his trust in her with respect to these affairs. “Although it has been said that a proper relationship between a husband and a wife is often a “fiduciary” or “confidential” relationship, something beyond this normal spousal relationship must exist before a “fiduciary” or “confidential” relationship can be found for the purposes of a claim of undue influence.” *Id.* at 479. The court stated:

While there was evidence that Walter's will was a change in his predetermined testamentary intent, which was formulated when he was married to Ruth, there was nothing to indicate this change was due to Appellant's undue influence. *A wife may properly influence her husband to make a will for her benefit so long as her influence is not exercised in an improper manner or by improper means and her influence does not cause the substitution of the will of the wife for the will of the husband.*

*Id.* at 483.

The Illinois appellate court in *Estate of Glogovsek*, 618 N.E.2d 1231, 1237 (Ill. App. Ct. 1993) refused to find a presumption of undue influence in connection with an estate plan written by a man who favored his wife's children over his nieces. In that case, there was evidence of participation in the procurement of the instrument by the wife, but there was no evidence that the wife of 34 years dominated her husband or that her role in the household such as bill paying and tax preparation gave rise to the kind of relationship required to establish a *prima facie* case of undue influence.

In finding that the contestant failed to create a *prima facie* case of undue influence, the Court cautioned that "the use of the presumption of undue influence must be applied with caution as to marital relationships." *Estate of Glogovsek*, 618 N.E.2d at 1237. The Court wrote (emphasis added):

Every marriage varies as to the intimacy between the spouses. *However, we can properly assume that, in the vast majority of marriages, spouses influence each other for better or worse from the day they first date to the day they die or the divorce order is entered. We assume that good marriages involve give and take and compromises between spouses. The law does not and should not presume a spouse to be guilty of undue influence simply by reason of the marital relationship alone...or because the spouse has been able throughout the marriage to have considerable influence on her spouse.* If this were the case, the closer the spouse becomes to his or her mate, the more it could be said that the spouse is excessively, improperly, and illegally influencing the testator. On the other hand, the more estranged the spouses become the more reasonable, proper, and legal is the influence directed toward the testator. The law should make sense.

*Estate of Glogovsek*, 618 N.E.2d at 1238.

In order for the relationship to give rise to the kind of relationship necessary to create a presumption of undue influence, the Court wrote that "[t]here needed to be clear and convincing evidence that Frank entrusted the management of most of his personal and financial affairs to Margaret before a fiduciary relationship could be said to arise as to Frank's entire estate." *Id.* at 1238.

Similar to *Glogovsek* is the decision in *Keasler v. Keasler*, 973 S.W.2d 213, 220 (Tenn. Ct. App. 1997) which cites an older Tennessee case for the proposition (emphasis added):

The mere fact that one has an opportunity to influence the testator as where their relationship is that of husband and wife, which is highly confidential, is not sufficient. *We know of no rule whereby the wife is precluded from persuading her husband by fair and reasonable argument to make a will in her favor. The burden*

*is upon the contestant to show that the influence exercised was such as to destroy the free agency of the testator to such an extent that the stronger will of the wife overcame the will of her husband.*

The nature of the unique relationship between spouses was also acknowledged in the case of *Estate of Chapman*, 966 So.2d 1262, 1264 (Miss. Ct. App. 2007), where the court held that a marriage does not by itself create a confidential relationship to support a presumption of undue influence. The Court found that the marital relationship at issue did not “rise to the level that Betty was able to impart her will upon Leslie’s.” While the couple had been married for 33 years and while the wife accompanied the decedent to the attorney’s office where the will was drafted and executed, there was no evidence that the testator’s will was overcome, that he was controlled or that he was prevented from being a free agent with respect to his estate planning decisions. *Id.*

Similarly, *Morse v. Volz*, 808 S.W.2d at 432, holds (emphasis added):

A fiduciary relationship is not shown merely because the testator and beneficiary are husband and wife. That is because in any proper sense, the spousal relationship betokens a reposed mutual confidence that engenders the flow of generosity and affection from one to the other. *Snell v. Seek*, 363 Mo. 225, 250 S.W.2d 336, 343 (1952). It follows that “a husband or wife may properly influence the making of a will ... by the other for his or her own benefit, *so long as the influence is not exercised in an improper manner or by improper means, ... [and] is not sufficient to have, in effect, substituted the will of one for the other.*” *Id.* The distinctive mark of a fiduciary relationship is a trust and confidence reposed by one person in the other, especially in regard to transactions of property and business.

#### **B. Even a Spouse Can Go Too Far.**

*In re Will of Jones*, *supra*, is a case where the wife appears to have crossed the line of permissible influence, so much so that the North Carolina Supreme Court reversed the grant of summary judgment in her favor and remanded the case for trial on the undue influence claim against her. *Id.* at 582. The case merits in-depth attention because of the wife’s behaviors and the extent to which a spouse’s influence can become overpowering.

In that case, the decedent had executed wills in 1992, 2001, 2003 and 2004, all of which devised all his interest in a meat packing company to a trust under which his wife of 50 years retained a right to income. He executed a will in March of 2005 which contained similar provisions and which stated that upon his wife’s death certain long-time employees of the company would inherit his interest in the company.

At the time he executed the March 2005 will, decedent was “in decent health, ambulatory and still working.” *Id.* at 579. However, his condition changed after signing that will, and in September of 2005, a few weeks before his death, decedent executed another will which gave the entirety of his estate to his wife outright. *Id.* at 570.

A will contest was filed on the grounds of undue influence by decedent’s wife. The trial court granted summary judgment in favor of the surviving wife; the North Carolina Court of Appeals affirmed, and the state Supreme Court reversed.

In its opinion, the North Carolina Supreme Court reviewed the state court decisions recognizing “the particular closeness of the marital relationship...in the context of will contests,” concluding:

These cases demonstrate a strong respect for marriage and suggest that spouses are often accorded special consideration in undue influence cases in light of their close relationship with the testator.

*Id.* at 576-577.

Nevertheless, the constellation of facts presented clearly bothered the Court and fueled its decision to allow the undue influence claim to proceed to trial. In particular, the Court noted that between the time decedent executed his will in March of 2005 and the time he executed the subsequent will in September of 2005, he had begun “a steady downhill course” having been diagnosed with cancer, experiencing intense pain, exhaustion and confusion in the summer of 2005. He appeared worn down, exhausted, and completely dependent on his spouse. Decedent appeared to have a changed attitude and personality and “all of the fight was out of him by that point.” He appeared very weak, less alert and did not talk much; and was entirely dependent on his spouse who was his primary care-giver.

During decedent’s illness, decedent’s wife had installed a baby monitor in his room and removed his telephone; on three occasions would not allow decedent to speak with the attorney who was drafting his will; and never left the decedent for more than a couple of hours at a time.

While the above facts may also be indicative of a concerned and dutiful spouse, the following actions by decedent’s wife created an issue of fact as to whether her influence was undue:

1. The wife controlled a conversation with one of decedent’s business associates (also a specific devisee under the March 2005 will) regarding cattle even though she had not been involved in such discussions in the past;
2. When an estate planning attorney called for decedent, his wife repeatedly inquired into the purpose of the call and whether he was going to draft a new will for the decedent;

3. The wife implied to one of the estate planning attorneys that Decedent wanted to change his will and said that she was very upset at its contents; that she had “put up with” the decedent for fifty years; that “there was no way that she was going to let that Will remain as it was;” and that she was “going to fight for what was hers.” She told another person that the March will was “totally wrong” and that it did not provide enough support for her and that she was going to have someone look into a new will;
4. The wife told one of the estate planning attorneys that she wanted decedent to leave her everything outright and did not want anyone from the company to know that the attorney was coming to their home;
5. When decedent was in the hospital, his wife called one of the estate planning attorneys and told him that *she* wanted to see him about decedent’s will and power of attorney.
6. When the estate planning attorney met with decedent and his spouse, she led the conversation and repeatedly stated that the will needed to be changed so she got everything. When he stated that he wanted to meet with decedent alone, she stated “Why, he’ll just tell you the same thing.” After she left the room, decedent stated to the attorney, that he “should just do the will the way that [his spouse] wanted it.” When the attorney advised that he was there to do decedent’s will as *he* wanted it, he replied that he “didn’t really care anymore, that it wouldn’t be his problem who got what because he would be gone...” The decedent stated that he didn’t want to keep talking about his will and he wanted to focus on getting back on his feet. After the meeting, the spouse asked what they had discussed in private. The attorney stated that the conversation was private, and she continued to press the matter. At that point, the decedent stated, “[I]t’s the same thing as we talked about before, I didn’t tell him anything different.” Decedent’s wife then followed the attorney outside and insisted again that all the decedent needed was a simple will that gave everything to her; and
7. Around the time the revisions to the March 2005 will were being made, a separate discussion occurred with a specific devisee of certain cattle, decedent and decedent’s wife. At that meeting, it was insisted that the devisee sign a contract stating that one-half of the crop belonged to decedent’s wife. During that meeting, the decedent told the devisee, “just sign the contract like she wants.”

The facts created the inference that decedent’s wife exerted strong influence upon her husband at a time that he was not able to resist it, and he was dependent on her. Her insertion of herself into business discussions at the end of his life and control of those conversations suggests a change in

her relationship with her husband that allowed her to dominate areas of his life where she had not been previously involved. These facts strongly suggested his susceptibility to influence.

The change in decedent's long-held estate plan appears to be more an acquiescence to her recent insistence that she inherit, rather than the product of his own independent decision-making where he was able to weigh the pros and cons of her desires against his own values without surrendering control of that process to his wife and her own self interests. Her actions created an issue of fact that Decedent's decision to execute the September 2005 will was not the result of his "free will and agency." *Id.* at 576.

## **VII. SUSPICIOUS CIRCUMSTANCES.**

### **A. Indicators of Undue Influence in the Absence of Direct Proof.**

What makes influence "undue?" There is no easy answer, and perhaps that is why there has been criticism of the doctrine. In *Estate of Slusarenko*, 147 P.3d at 930, the Oregon Court of Appeals stated that to answer the question,

The emphasis in such cases is on the conduct of the person allegedly exercising undue influence and whether that person gained an unfair advantage by devices which reasonable people regard as improper.

*In re Will of Jones*, 669 S.E.2d at 574, the Supreme Court of North Carolina contended with the question:

Thus, while undue influence requires "more than *mere* influence or persuasion because a person can be influenced to perform an act that is nevertheless his voluntary action," ... it does not require moral turpitude or a bad or improper motive.... Indeed, undue influence may even be exerted by a person with the best of motives...Nevertheless, influence is not necessarily "undue," even if gained through persuasion or kindness and resulting in an "unequal or unjust disposition ... in favor of those who have contributed to [the testator's] comfort and ministered to his wants, [so long as] such disposition is voluntarily made.

*Id.* at 574.

One in a confidential relationship with another would be expected by virtue of that relationship to have a certain degree of influence over the other. As the above cases such as *In re Will of Jones* illustrate, there is a point when influence exercised in that relationship can become undue.

"More descriptively, undue influence occurs when a person uses his or her role and power to exploit the trust, dependency, and fear of another." *Assessment of Older Adults with Diminished Capacity: a Handbook for Psychologists*, American Bar Association Commission on Law and Aging, American Psychological Association, 114 (2008). Influence becomes "undue," according

to this study, “when the perpetrator exploits the victim’s dependency and trust for personal and financial gain.” *Id.* at 116.

The case of *Simmons v. Harms*, 695 S.E.2d at 42, states (emphasis added):

One who is found to have held a confidential relationship with the testator may exercise influence to obtain a benefit, *with that influence becoming what the law regards as undue when it gives dominion over the will to the extent that the testator's free agency is destroyed or the testator is constrained to do against his will what he is unable to refuse.*

How does a contestant prove that the influence has risen to this level? In the absence of direct proof (which is rarely available), he or she does so by proving the existence of certain indicators, which over the years have proven to be reliable evidence that improper influence may have occurred, that a confidential relationship may have been abused and the decedent’s decision-making process corrupted. *See, e.g.*, Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 cmt. e.

These indicators have been called “suspicious circumstances” by the courts which have resorted to such indicators because—as noted above—proof of undue influence is rarely in the form of direct evidence. Circumstances are deemed suspicious after reviewing the totality of the facts and not any one fact in isolation of the other. *Estate of Johnson*, 2011 WL535104 (Tex. Ct. App. 2011) states:

[A]ll of the circumstances shown or established by the evidence should be considered; and even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together they produce a reasonable belief that an influence was exerted that subverted or overpowered the mind of the testator and resulted in the execution of the testament in controversy, the evidence is sufficient to sustain such conclusion.

*In re Will of Jones*, 669 S.E.2d at 578, similarly states: “[u]ndue influence is generally proved by a number of facts, each one of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence.” *See also, Chapman v. Varela*, 213 P.3d at 1126.

## **B. Suspicious Circumstances Generally.**

What factors are “suspicious” will vary greatly in any given case, and there is ample authority in some states for the proposition that judicially created lists of suspicious circumstances are not exclusive. The Restatement (Third) of Property (Wills & Don. Trans) § 8.3 cmt. h, states as much and, in doing so, lists facts which may be considered suspicious (emphasis added):

In evaluating whether suspicious circumstances are present, *all relevant factors may be considered, including*: (1) the extent to which the donor was in a **weakened condition**, physically, mentally, or both, and therefore susceptible to undue influence; (2) the extent to which the alleged **wrongdoer participated** in the preparation or procurement of the will or will substitute; (3) whether the donor received **independent advice** from an attorney or from other competent and disinterested advisors in preparing the will or will substitute; (4) whether the will or will substitute was prepared in **secrecy or in haste**; (5) whether the donor's **attitude toward others had changed** by reason of his or her relationship with the alleged wrongdoer; (6) whether there is a **decided discrepancy** between a new and previous wills or will substitutes of the donor; (7) whether there was a continuity of purpose running through former wills or will substitutes indicating a **settled intent** in the disposition of his or her property; and (8) whether the disposition of the property is such that a reasonable person would regard it as **unnatural, unjust, or unfair**, for example, whether the disposition abruptly and without apparent reason disinherited a faithful and deserving family member.

While the above list contains useful general categories of facts, the following specific facts may indicate the presence of undue influence, depending upon the law of the jurisdiction involved:

1. Anonymous criticism of other potential beneficiaries made to the testator;
2. Suggestion, without proof, to the identified victim that other potential beneficiaries had attempted to physically harm him or her;
3. Withholding mail;
4. Limiting telephone access;
5. Limiting visitation;
6. Limiting privacy when victim is with others;
7. Discussion of the transaction at unusual or inappropriate times;
8. Consummation of the transaction at an unusual place;
9. Use of multiple persuaders against a single vulnerable person;
10. A demand the business be finished at once;



11. An extreme emphasis on the consequences of delay;
12. Influencer obtaining an attorney for the victim;
13. Influencer using victim's assets – such as property, money, credit cards, etc.;
14. Influencer becoming conservator, trustee, beneficiary, executor, etc.;
15. Influencer obtaining access to bank accounts;
16. Influencer obtaining access to safety deposit boxes; and
17. Influencer having the victim name the influencer on Power of Attorney forms.

**C. Participation in the Procurement.**

The influencer's participation in the procurement of the transfer at issue is often considered along with susceptibility to influence (discussed at length below) to be a principal suspicious circumstance that gives rise to the presumption. Recognizing that whether an alleged influencer participated in the procurement of the instrument at issue is determined on a case-by-case basis and acknowledging that the following factors are not exclusive, the Florida Supreme Court recognized the following indicators that may show that an influencer has participated in the procurement of the instrument or transfer at issue:

1. Presence of the beneficiary at the execution of the will;
2. Presence of the beneficiary on those occasions when the testator expressed a desire to make a will;
3. Recommendation by the beneficiary of an attorney to draw the will;
4. Knowledge of the contents of the will by the beneficiary prior to execution;
5. Giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will;
6. Securing of witnesses to the will by the beneficiary; and
7. Safekeeping of the will by the beneficiary subsequent to execution.

*Estate of Carpenter*, 253 So.2d 697, 702 (Fla. 1971).

## VIII. UNDUE INFLUENCE BEHAVIORAL MODELS.

*Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists* includes a section on the evaluation of undue influence claims and presents the following four behavioral models to be used when determining whether a given case presents a risk of undue influence or to determine whether undue influence has occurred.

These models are useful tools to assist the practitioner in identifying and evaluating facts which may be suspicious. Satisfaction of each of the elements of these models is indicative of either a heightened risk of undue influence or the occurrence of such influence. The models are:

1. SCAM
2. IDEAL
3. Thought-reform (or “Cult”)
4. UI Wheel

Each of these models has its particular strengths and limitations, and no single model is appropriate for all situations. That said, several models may be appropriate for any one case. If multiple models are appropriate, the evidence should be evaluated using each method.

There is also a fifth model known as “SODR” that was developed from the Restatement (Third) of Property (Wills & Don. Trans.) and associated case law. The letters of the acronym stand for certain circumstances which courts have repeatedly determined to be suspicious:

1. **S**usceptibility of the supposed victim;
2. **O**ppportunity for the exertion of undue influence;
3. **D**isposition<sup>11</sup> to exert undue influence; and
4. **R**esult of such undue influence.

Many other psychological models exist,<sup>12</sup> but these five should be most familiar to litigators and expert witnesses. The proper use of these models is to assist in the presentation of a case and to identify the risk or occurrence of undue influence (*see* § XII, *infra.*). None of them is meant to usurp the role of the court as the final decision-maker regarding undue influence or the requirements of state law for proving an undue influence claim.

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<sup>11</sup> “Disposition” may be understood as either a) motive or b) comparable behavior (such as prior financial malfeasance or abusive behavior).

<sup>12</sup> For example, not included here are the models and work of psychologists Ivan Pavlov, Kurt Lewin, or Edgar Schein, sociologist Robert Cialdini, or psychiatrist Robert Lifton, MD.

These models are useful to keep in mind when investigating an undue influence case because they readily identify certain behaviors that may be indicators of improper influence or heightened susceptibility. Like those present in SODR, many of the indicators present in the other four models are recognized in state common law as one or more “suspicious circumstances,” even though the models themselves may not be cited in appellate opinions.

#### **A. SCAM.**

The SCAM model was developed by clinical and forensic psychologist, Susan I. Bernatz, PhD. SCAM builds on prior models. The elements of SCAM are: 1) **S**usceptibility of the victim; 2) a **C**onfidential and trusting relationship between the victim and perpetrator; 3) **A**ctive procurement of the legal and financial transactions by the perpetrator; and, 4) **M**onetary loss to the victim or the intended beneficiaries.

#### **B. IDEAL.**

The IDEAL model, created by Bennett Blum, M.D., is used by attorneys, law enforcement agencies, and social services personnel throughout the United States and many other countries. IDEAL identifies five factors which, if present, show an increased risk of undue influence and may indicate that undue influence has occurred in a given transaction. The five factors are:

1. **I**solation
2. **D**ependency
3. **E**motional manipulation and/or exploitation of a vulnerability
4. **A**cquiescence
5. **L**oss

“Isolation” refers to isolation from pertinent information, friends, relatives or advisors. Frequent causes include medical disorders, perpetrator interference, history of poor relationships with others, geographic changes (e.g., travel) and technological isolation (e.g., loss of telephone services).

“Dependency” refers to the victim’s dependence upon the perpetrator such as for physical support, emotional intimacy or information.

As to “Emotional Manipulation or Exploitation of Weaknesses,” any emotion may be manipulated, but the most common emotion to be manipulated is *fear*. Emotional manipulation often centers on issues of companionship/friendship and safety/security. Promises that these will be maintained if the victim complies, or threats that these will be lost if the victim disobeys, are common. Fear of the loss of a care-giver is a type of fear which satisfies this component of IDEAL. Perpetrators may create an “Alice-in-Wonderland” belief in which the victim comes to view the perpetrator as their protector, and believes that outsiders want to interfere and are either malevolent or bumbling.

“Exploitation of weaknesses” includes behaviors such as providing alcohol to a drinker in exchange for benefits, having a vision-impaired person sign a legal document or presenting documents to be signed by one who has cognitive impairment or misrepresenting the terms of such a document to a person so impaired.

“Acquiescence” refers to the victim’s apparent consent or submission. Such “consent” is based upon the factors noted above—dependency upon the perpetrator, emotional or other vulnerability factors and exposure to inadequate, misleading, or inaccurate information.

“Loss” refers to the loss, damage or harm resulting from the claimed undue influence.

### C. “Cult” or “Thought Reform” Model.

This model was created by Dr. Margaret Thaler-Singer and was based upon her work on the tactics used by cults and cult leaders to gain control of a group. While borrowing from a “cult” model and applying the model to a will contest based on undue influence may seem like an extreme thing to do, it is important to recognize that studies of high demand groups have contributed to the present state of knowledge concerning undue influence, and many of the same tactics can be seen in undue influence behavior in the context of will contests. In particular, the stages of isolation, creation of siege mentality and dependence are often seen in will contests. The model is based upon the following six stages:

1. Isolation
2. Creation of a Siege Mentality
3. Dependency
4. Powerlessness
5. Fear and Vulnerability
6. Victim is Kept Unaware

When these behaviors are examined closely, parallels may be drawn in some will contests, even though the cult phenomenon is not also present:

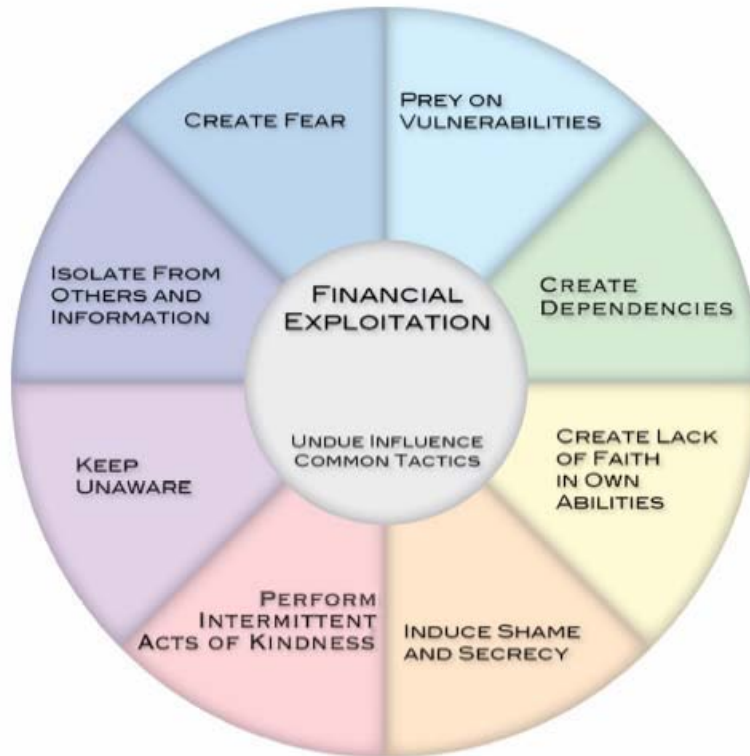
1. **Keep the person unaware of what is going on and how she or he is being changed a step at a time.** Potential new members are led, step by step, through a behavioral-change program without being aware of the final agenda or full content of the group. The goal may be to make them deployable agents for the leadership, to get them to buy more courses, or get them to make a deeper commitment, depending on the leader's aim and desires.

2. **Control the person's social and/or physical environment; especially control the person's time.** Through various methods, newer members are kept busy and led to think about the group and its content during as much of their waking time as possible.
3. **Systematically create a sense of powerlessness in the person.** This is accomplished by getting members away from the normal social support group for a period of time and into an environment where the majority of people are already group members. The members serve as models of the attitudes and behaviors of the group and speak an in-group language. Eventually, “us” against “them” mentality is fostered for the purpose of furthering the social isolation.
4. **Manipulate a system of rewards, punishments and experiences in such a way as to inhibit behavior that reflects the person's former social identity.** Manipulation of experiences can be accomplished through various methods of trance induction, including leaders using such techniques as paced speaking patterns, guided imagery, chanting, long prayer sessions or lectures, and lengthy meditation sessions.
5. **Manipulate a system of rewards, punishments, and experiences in order to promote learning the group's ideology or belief system and group-approved behaviors.** Good behavior, demonstrating an understanding and acceptance of the group's beliefs, and compliance are rewarded while questioning, expressing doubts or criticizing are met with disapproval, redress and possible rejection. If one expresses a question, he or she is made to feel that there is something inherently wrong with them to be questioning.
6. **Put forth a closed system of logic and an authoritarian structure that permits no feedback and refuses to be modified except by leadership approval or executive order.** The group has a top-down, pyramid structure. The leaders must have verbal ways of never losing.

[http://www.icsahome.com/infoserv\\_articles/singer\\_margaret\\_6conditions.htm](http://www.icsahome.com/infoserv_articles/singer_margaret_6conditions.htm)

#### **D. Undue Influence Wheel.**

This model is based upon domestic violence relationships, stalking and sexual assault. One of its assumptions is that undue influence parallels these other situations. This model is currently being promoted for use in criminal prosecutions but could be applicable in some civil or probate proceedings. The model is as follows:



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## IX. SUSCEPTIBILITY TO INFLUENCE.

As noted in a preceding section, the courts have identified a number of suspicious circumstances which are indicative of a heightened risk of undue influence in the presence of a confidential relationship and which are also probative of whether it has occurred. Also as noted above, there is variability from state to state as to what circumstances are suspicious, but the behavior models outlined above should be helpful to the litigator in readily identifying factors which may be suspicious.

Despite the variability that exists in state law governing undue influence claims, factors which increase a testator's susceptibility to undue influence are often considered as important—if not crucial—by many jurisdictions considering whether any given instrument is the product of undue influence. *Assessment of Older Adults with Diminished Capacity: a Handbook for Psychologists*, American Bar Association Commission on Law and Aging, American Psychological Association, 117; *see also*, Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 cmt. e.; Ross and Reed, § 7:4.

Advanced age, lack of intellectual capacity or firmness of character and physical disability are factors that may tend to show susceptibility to influence, although advanced age by itself is inadequate. *Undue Influence in Execution of Will*, 36 Am. Jur. Proof of Facts 2d 109 § 2 (1983).

In summarizing Margaret Singer's work, Mary Joy Quinn explains how the process of exploiting one's susceptibility to influence can lead to a desired result and, in doing so, highlights how circumstances can be "suspicious":

The process begins with the abuser courting the trust and confidence of the elder and then isolating him or her from most if not all sources of information and independent counsel. Dependency is induced, Singer says, and a "siege mentality" is created, wherein the victim is told that no one but the caregiver is concerned with the elder. All others, including professionals, are portrayed as wanting to take advantage of the elder or wanting to put her in a nursing home or abandon her. Even though the caregiver has engineered the isolation and methodically kept friends and family away, the caregiver tells the victim that others do not care and have abandoned the elder. Finally, according to Singer, the victim becomes fearful and recognizes her vulnerability. At that point, the victim is easily manipulated into financial and material abuse (Nerenberg, 1996).

Mary Joy Quinn, *Undoing Undue Influence*, Generations 66.

In 2008, the American Bar Association Commission on Law and Aging joined with the American Psychological Association to publish "Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists." This treatise identifies the following factors that increase one's susceptibility to undue influence:

1. Older women who are white and living alone;
2. Dependence for activities such as food preparation, assistance with medication, help with bill paying, checkbook management, reading bank statements, taking the victim to the doctor;
3. Debilitating physical or mental illnesses resulting in dependence on caretakers;
4. State of emotional dependence (such as emotional support and encouragement);
5. State of information dependence (such as financial or legal advice);
6. Recently widowed men and women;<sup>13</sup>

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<sup>13</sup> Mary Joy Quinn discusses this factor:

Among the newly widowed, those who have had long-term marriages are particularly likely to lose their bearings as they adjust to being single. Women who are accustomed to having a trusted man handle their financial affairs may look to another man, often a new acquaintance who is younger. The widow may even let her new friend move into her home. The man may make gestures of courtship such as taking the new widow out socially or bringing her flowers. Widowed men seem susceptible to young women who bring them food and claim to need financial help for

7. Individuals who are geographically isolated; and
8. Individuals with significant or unexplained emotional change such as marked depression, insidious memory loss or other cognitive deficits.

At page 116, the treatise notes that dependence is known to decrease a victim's ability to resist undue influence and then identifies the following possible markers of undue influence:

1. Significant changes in spending habits;
2. Financial transactions that are uncharacteristic of the victim;
3. Changes to a will or trust which are inconsistent with prior dispositions; and
4. The absence of third party advisors.

The MetLife Study of Elder Financial Abuse, Crimes of Occasion, Desperation, and Predation Against America's Elders, 3, suggests an additional factor that may increase an elder's susceptibility to influence or the likelihood that he or she may be targeted:

The display of observable vulnerabilities such as limited mobility, displays of confusion, or living alone.

This study explains:

The highest numbers of victims were in the 80 to 89 age range, involving 68 elders: 26 men and 42 women. The typical victim in this age group was visible to potential perpetrators in the community through activities at banks, grocery stores, churches or driving around town, and was currently exhibiting some noticeable signs of mild to severe cognitive or physical impairment. In almost all cases, there existed a combination of tenuous, valued independence and observable vulnerability that merged in the lives of victims to optimize opportunities for abuse by every type of perpetrator—from the closest family members to professional criminals.

The MetLife Study of Elder Financial Abuse, Crimes of Occasion, Desperation, and Predation Against America's Elders, 8.

As Stanley Milgram's obedience experiments showed, most people are susceptible to socially-sanctioned forms of influence—such as sales tactics, political campaigns or the typical interactions with family, friends or other authority figures. To the extent that “undue influence”

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their children or to obtain costly career training. The men see the young women as needy daughters (Nerenberg, 1996).

Mary Joy Quinn, *Undoing Undue Influence*, Generations 65.



represents the use of excessive or inappropriate manipulation tactics, most people would be similarly susceptible. The differences between normal and “undue” influence tactics are matters of context and often involve concerns of: 1) the degree to which the tactics are socially sanctioned (classic examples of tactics that are not usually sanctioned include lying, intentional attempts to mislead or deceive by telling partial truths or threatening to harm someone); and 2) the extent to which the intent is personal gain, especially gain obtained to the detriment of the victim.

“While we are all vulnerable to having our fears and needs manipulated, there are certain circumstances that create situations ripe for undue influence.” Mary Joy Quinn, *Undoing Undue Influence*, Generations at 66. These circumstances are assessed by understanding one’s personal and situational vulnerabilities. Personal vulnerabilities include the individual’s medical, psychological and sociological makeup. Some examples:

1. A man with dementia will be more vulnerable than someone with normal brain function.
  - a. *Any medical condition that affects the brain, directly or indirectly, will likely increase vulnerability to undue influence.*
  - b. *Any disease affecting ability to interact with others will likely increase vulnerability (ex. hip fracture).*
  - c. *Note: Susceptibility to undue influence may exist even if the person has good cognitive abilities and intact physical health.*
2. Someone who is lonely, depressed or anxious is more vulnerable than someone who is happy and content.
  - a. *A surprising finding is that people who are overly controlling or suspicious may also be easy to manipulate and, therefore, may be more vulnerable.*
3. A person with limited education is often more vulnerable than someone with advanced knowledge.
4. Financial status, marital status, religion, culture, military experience and legal history may also impact vulnerability.

Situational variables help clarify the context in which the events in question occurred, and include:

1. Nature of the relationship between victim and perpetrator
2. Whether the victim lives with the perpetrator
3. Whether the victim lives in the perpetrator's home
4. Perpetrator's use of manipulation tactics (in past or present)
5. Perpetrator's use of deception tactics (in past or present)
6. Whether the perpetrator targeted the victim
7. Perpetrator's activity regarding the events in question
8. Whether multiple perpetrators were involved
9. Location of the events in question
10. Reliance upon the perpetrator
11. Perpetrator access to relevant documents or assets
12. Availability of independent advisors with relevant knowledge
13. Significant disparity between the victim and perpetrator, such as regarding age or physical and mental health.

In each case, an analysis of the situational variables is necessary to identify whether suspicious circumstances are present. When considering whether an individual is or was susceptible to undue influence and whether suspicious circumstances are present, the personal vulnerabilities of the victim/testator should be considered along with the situational vulnerabilities which may impact him or her.

Much has been written in undue influence appellate opinions about testators' personal vulnerabilities. Indeed, it is the mix of situational and personal vulnerabilities that give rise to an undue influence claim. It is not surprising then, that when speaking of undue influence claims, Ross and Reed state that "[t]he courts first look at the mental and physical condition of the victim of undue influence." Eunice Ross and Thomas Reed, *Will Contests*, § 7:4. This approach is essentially designed to assess the individual's personal vulnerabilities.

Evidence of the testator's mental and physical condition is highly material to the issue of undue influence. *Estate of Hock*, 322 S.W.3d at 581. The greater the level of incapacity, the more susceptible a person is to undue influence, the less likely that person is able to have insight into the influencer's tactics, the less likely the person will be able to resist the influence exerted, and the more dependent the person becomes on others. Lori Stiegel and Erica Wood, *The Role of Undue Influence in Elder Abuse*, 21.

While the mental and physical conditions of the testator are probative of the question of his or her susceptibility to undue influence, susceptibility does not equate with testamentary capacity, and Ross and Reed note that "the degree of impairment necessary to find susceptibility to influence is much less than that required to find lack of testamentary capacity." Ross and Reed

at § 7.4. In some courts, the claim of undue influence in connection with a will presupposes a mind of testamentary capacity subjected to the influence of another. *See e.g., Keasler v. Keasler*, 973 S.W.2d 213, 219 (Tenn. Ct. App. 1997); *Estate of Johnson*, 2011 WL535104 (Tex. Ct. App. 2011). One authority on the subject states that the presence of undue influence negates consent. Lori Stiegel and Erica Wood, *The Role of Undue Influence in Elder Abuse*, 20.

When assessing personal vulnerabilities, the litigator should keep in mind that, just as familial relationships and opportunities to commit undue influence are insufficient to create a presumption of undue influence without more, so are allegations of poor health. *See, e.g., Estate of Harmon*, 2011 WL 1491849 (Mont. 2011); *Chapman v. Varela*, 213 P.3d at 1119. In *In re Rudolph*, 60 A.D.3d 685, 686 (N.Y. App. Div. 2009), the decedent suffered from terminal cancer and ovarian cancer, but “was alert, strong-minded, and financially, mentally, and emotionally independent” when she executed her will, thus precluding a claim of undue influence.

*Estate of Walker*, 47 P.3d 911, 915 (Or. Ct. App. 2001) makes the point. In that case, the decedent was dependent on those around her because of her weakened health, and one of her sons who had a dominant attitude provided her with assistance. However, the evidence of her financial independence overcame any inference that she was susceptible to her son’s influence:

...the trial court's findings with regard to Walker's influence over Luella's finances and her execution of the 1997 will do not match up with the undisputed evidence that, in the last years of her life, Luella was fiercely independent with regard to her personal finances. She guarded her finances closely, keeping her check book and paper work in her room or by her side. There was evidence that she was suspicious of Walker, perhaps as a result of past financial difficulties; she had removed his name from joint accounts. She guarded her documents, maintained her own check book, managed her own finances and kept her personal financial information private. She did not share her personal finances with any family member, including Walker. Those facts negate an inference that she was subject to influence over her financial affairs.

*See also, Hicks v. Eubanks*, 2006 WL 3333481 (Ky. Ct. App. 2006) (no undue influence where alleged influencer not in control of decedent’s business affairs and decedent not mentally weak, although suffering from physical ailment).

The disease of alcoholism has been held to create a state of susceptibility to undue influence. *See e.g., Estate of Hock*, 322 S.W.3d at 586 (“Charles's alcoholism and Randy's encouragement of that disease alone is sufficient to raise a reasonable inference that Charles was vulnerable to influence exercised by Randy.”); *but see, In re Will of Stotlar*, 1987 WL 6091 (Del. Ch. 1987) (“The mere fact of alcoholism does not destroy testamentary capacity or establish undue influence but if severe enough it may destroy testamentary capacity, and clearly less influence is

required to control the mind of an elderly person suffering from alcoholism than a younger person in good health.”); *but see, Estate of Edmark*, 1997 WL 755117 (Wash. Ct. App. 1997) (unpublished opinion holding that the evidence only showed that the influencer influenced decedent with respect to drinking and not with respect to his estate plan).

Clearly, susceptibility to influence is an important factor in undue influence cases. As the section below illustrates, cognitive impairment such as that resulting from dementia can also increase one’s susceptibility to influence. (However, cognitive impairment is not necessary to prove susceptibility to influence.) When one considers the occurrence of Alzheimer’s-related dementia in our aging population and the fact that dementia may render a person susceptible to undue influence, especially as the disease progresses as it does in the case of Alzheimer’s. Experts suggest that as many as 5.1 million Americans may have Alzheimer’s disease. *See: <http://www.nia.nih.gov/Alzheimers/Publications/adfact.htm>*. The Alzheimer’s Foundation of America reports that the incidence of the disease is rising in line with our aging population. Thus, as the population ages, the disease impacts a greater percentage of Americans. One projection reports that the number of people 65 and older will more than double between 2010 and 2050. <http://www.alzfdn.org/AboutAlzheimers/statistics.html>.

As will be discussed below, Alzheimer’s dementia and other dementias can impact executive functioning and thus increase one’s susceptibility to undue influence.

## **X. COGNITIVE IMPAIRMENT AND RISK FOR SUSCEPTIBILITY TO UNDUE INFLUENCE.**

The preceding text suggests that a number of medical, psychiatric and socio-cultural conditions can reflect *personal vulnerabilities* that render an individual more susceptible to undue influence. *Situational vulnerabilities* involving power inequities between perpetrator and victim, evidence of access to victim and historical evidence of intentionality can help document the presence of suspicious circumstances.

Undue influence is based primarily on the manipulation of emotions, and such manipulation is easier to achieve when there is cognitive impairment. The presence of cognitive impairment represents an important aspect of personal vulnerability and can also serve as a red flag for some of the situational vulnerabilities that can set the stage for undue influence. A specific domain, referred to here as *executive dysfunction*, is particularly critical to consider.

Serious medical illness alone is unlikely to create a presumption of undue influence. However, diagnoses of psychiatric, neurologic or other medical illness in combination with circumstances that create or contribute to potential vulnerability can create or contribute to increased risk of undue influence. The following paragraphs explain how neuropsychological examination can document the level and type of cognitive impairment that might potentially provide cognitive evidence of circumstances that increase susceptibility to undue influence.

This section, then, is intended to address three issues:

1. What is the role of cognitive impairment in contributing to susceptibility to undue influence?
2. What is *executive dysfunction* and why is it considered to be such a critical aspect of cognitive impairment when undue influence is a concern?
3. How can examination procedures assist in documenting the presence of *executive dysfunction* when risk for susceptibility to undue influence is at issue?

Executive functioning is central to the ability to weigh the advantages and disadvantages of any particular decision. Impairment in executive functioning can lead not only to a loss of capacity but also to dramatically increased susceptibility to undue influence.

#### **A. The Role of Neuropsychology in Evaluating Cognitive Executive Functioning.**

Neuropsychology is a specialty area that relies on psychometric measures of cognitive abilities in order to generate an objective and repeatable measure of an individual's level of functioning. Interpretation of the individual's test performance is based on a normatively-based comparison to the results of large numbers of individuals with similar age and education, although ethnicity, geographic region and other cultural factors are sometimes considered as well. Neuropsychological examination results take into account the context of the individual's unique history of medical, psychiatric and psychosocial background in order to offer a clinical diagnosis, recommendations for treatment or various other professional opinions. Neuropsychological results can also provide a sound basis for a variety of clinical and medico-legal opinions, including an individual's capacity to make decisions having to do with financial, healthcare or testamentary issues, as well as opinions about the individual's capacity to engage in specific activities, such as driving or the highly skilled work of an air traffic controller or a surgeon.

#### **B. What Are Executive Functions?**

One of the principal texts in the field of neuropsychology describes executive functions as “intrinsic to the ability to respond in an adaptive manner to novel situations,” as well as, “the basis of many cognitive, emotional, and social skills.” Lezak, M.D., Howieson, D.B., & Loring, D.W. *Neuropsychological assessment* (4<sup>th</sup> ed.) (2004). Core components of executive functioning include:

1. volition
2. planning
3. purposive action
4. effective performance

Another definition refers to executive functions as "metacognitive capacities that allow an individual to perceive stimuli from his or her environment, respond adaptively, flexibly change direction, anticipate future goals, consider consequences, and respond in an integrated or common-sense way, utilizing all these capacities to serve a common purposive goal." Baron, I.S, *Neuropsychological Evaluation of the Child*, 135.

### **C. Decision-Making Relies On Executive Functions.**

Although there is no single "decision-making center" in the brain, the complex process of decision-making relies on the integrity of executive functioning in order to gather and act on information that is relevant to a decision. Consideration of possible alternatives, prioritizing available options and identifying irrelevant or distracting information to reject from consideration are all related to executive functions.

Critical aspects of decision-making such as the weighing of advantages and disadvantages, evaluating the potential risks and benefits of a decision and anticipation of likely consequences of a decision all depend on executive capability for abstract thought. It is the executive ability to imagine, "what if..." that allows one to think outside the confines of the immediate environment and imagine possibilities and circumstances that have not yet come to pass.

Of course, this ability to anticipate what some future outcome might look or feel like provides a basis for the decision-making process, in which the individual decides in favor of one particular action, or rules against another possibility, based on the imagined outcome of each possibility.

Although some preliminary research has indicated that declines in executive functions were associated with competency loss in patients with Parkinson's disease dementia syndrome, there has been little or no published research investigating the conceptual or empirical bases of testamentary capacity and undue influence. Marson, D.C. & Hebert, K. (2005). Assessing civil competencies in older adults with dementia: Consent capacity, financial capacity, and testamentary capacity. In G.J. Larabee (Ed.). *Forensic neuropsychology: A scientific approach*. New York: Oxford University Press.

### **D. How Does Executive Dysfunction Affect Susceptibility to Undue Influence?**

*Executive dysfunction* is an aspect of cognitive impairment that results in significant problems with planning and organizing complex problem-solving abilities, decreased ability to initiate independent goal-directed activity and impaired ability to self-monitor and self-correct behavioral responses within the context of the specific circumstances. Judgment, reasoning and insight are all considered integral parts of the executive functions that tend to be disrupted in the face of executive dysfunction.

Executive dysfunction may be caused by many forms of injury to the brain, including but not limited to:

1. traumatic brain injury
2. developmental problems (e.g., developmental disability)
3. toxicity (e.g., alcoholism)
4. progressive dementing conditions such as Alzheimer's disease

When executive abilities that support decision-making are limited and no longer support abstract thought, that individual is more or less destined to make decisions based on a much more narrow range of options and must increasingly rely on information that is already highly familiar or concretely present in the immediate environment.

The great risk that executive dysfunction poses for the decision-making process is that the cognitively compromised individual is less able to create and control his or her own environment and is increasingly dependent on the structure and information that is already present in the environment. The presence of executive dysfunction creates significant potential for a perpetrator to exploit *situational vulnerabilities*, such as power disparities, or physical access and control over a victim's assets. The risk for undue influence is further heightened if the perpetrator already exerts control over the victim's access to other people, perspectives and information within the isolating circumstances of a shared residence.

*The cognitive activities that are involved in decision-making are, thus, related to the broad domain of executive functioning. Conditions that result in cognitive impairment with "executive dysfunction" have the potential to undermine an individual's ability to successfully engage in the decision-making process and, depending on the presence of situational vulnerabilities, may be associated with increased risk for susceptibility to undue influence.*

#### **E. Preserved Executive Functioning as a Protective Factor.**

Preserved insight and self-awareness is a particularly critical aspect of executive functioning and probably serves as an important protective factor in consideration of susceptibility to undue influence.

*Persons with executive dysfunction who lack insight and self-awareness, on the other hand, have few if any defenses and are poorly equipped to effectively defend themselves from unscrupulous perpetrators.*

The inability to appreciate one's own problems leaves that individual unable to seek appropriate assistance and vulnerable to a perpetrator who offers support for positions that most others would see as clearly irrational. For example, with whom is the frail, demented elder who steadfastly refuses to leave her longstanding home more likely to align: the concerned children who support

moving her to an assisted living facility or the helpful “friend” who has kindly offered to move in and help with meals, transportation and the checkbook?

The presence of executive dysfunction is thus regarded as a particularly risky factor for undue influence that exceeds the risk posed by physical disability alone.

Compare the abilities of an individual with intact executive functions to one with impaired abilities in this arena. Whether physically impaired or mildly cognitively impaired, the individual with preserved executive functioning is more fully capable of maintaining independence and better able to defend oneself against the bad intentions of a perpetrator due to:

- a. **Intact insight and self-awareness:** recognizes his own limitations and appreciates the need for assistance. Impairment in this area can cause the person to deny or fail to appreciate problems which are obvious to others and to be unaware of his impairment.
- b. **Intact judgment and problem-solving:** knows when to ask for help and is able to responsibly arrange for reliable care. Impairment in this area can cause a person not to seek help on matters in which help is needed.
- c. **Intact ability to initiate activity:** reliably initiates and maintains as many usual activities as possible, including self-care activities, recreation, work and relationship-building activities; is able to manage medications and responsibly pay bills. Impairment in this area can cause dependence upon another person to initiate such activities for the impaired person. This result causes obvious concern in the context of estate planning.
- d. **Intact self-monitoring:** reliably observes self and is usually able to identify and self-correct errors; is able to identify a developing medical or financial problem in time to seek help or intervene appropriately. Impairment in this area will diminish a person’s ability to adjust to changing circumstances.

**F. Ways in Which Impaired Executive Functions Increase Susceptibility to Undue Influence.**

Neuropsychological evaluation of a subject’s cognitive functioning can result in identification of factors that might represent heightened risk for susceptibility to undue influence. As discussed above, the *Assessment of Older Adults with Diminished Capacity: a Handbook for Psychologists*, summarizes a number of models which are to be used by practitioners and others in identifying whether a given situation presents an increased risk of undue influence.

These undue influence models refer to a number of factors which are associated not only with social, cultural or geographic factors, but also with impaired executive functioning. Impaired



executive function may cause or contribute to one's isolation, dependency, vulnerability and powerlessness.

1. **Isolation.** Regardless of the cause, cognitive impairment with executive dysfunction is likely to decrease an individual's social sphere, particularly when the impairment is acquired later in life. An individual who is experiencing problems with attention, memory or communication skills often develops patterns of avoiding social situations, possibly due to fear of looking or feeling foolish if the individual has preserved insight. Formerly enjoyable gatherings with friends or colleagues may become uncomfortable, painful or irritating for an individual who now has difficulty following a conversational thread or contributing to a discussion.

Emotional symptoms of depression and difficulty controlling anger commonly accompany cognitive impairment, and these symptoms can contribute to isolation and avoidance as well. The individual with executive dysfunction who lacks self-awareness, acts out inappropriately, or is unable to empathize and see the world through the eyes of another person may be subtly dropped from an invitation list or overtly ostracized by others. Persons with executive dysfunction often lose capacity to independently navigate the electronic world of the internet or keep up with friends, family or other social contacts through correspondence, e-mail and other social media.

The examples above focus on physical and psychological isolation. However, *informational isolation* is also common for persons with executive dysfunction who not only have difficulty reading and comprehending a newspaper but also may lack initiative to even pick up and read the newspaper. Such individuals might maintain that they read the newspaper regularly, especially if that is part of their longstanding self-identity, but there is frequently a significant disconnect between what the individual with executive dysfunction says they do and what they actually do.

Similarly, information that is highly relevant to the well-being of the affected individual, such as court documents, bank statements, medical information and personal letters from family or friends, might be difficult to read and comprehend, creating a situation where that person may be dependent on others to interpret the document for him. However, even when the individual is perfectly capable of reading, the same individual with executive dysfunction might lack the initiative and intellectual curiosity to review financial records or to pursue communication with

friends and family. After all, the ability to initiate and maintain communication with friends or family who are not physically present is itself a relatively abstract function that is closely tied to the integrity of the executive functions.

2. **Dependency.** Persons with executive dysfunction are at high risk for increased dependence on others.<sup>14</sup> Problems in attention, self-monitoring and poor insight commonly lead to dependency on others in order to assist with many instrumental activities of daily living, such as reliably managing medications, paying bills, meal planning and preparation, maintenance of the home and shopping and transportation and, in the case of will contests, document review. There is frequently a significant gap between the individual's **ability** to perform activities of daily living, and the likelihood of actually initiating and performing the activity independently.
3. **Vulnerability and Powerlessness.** Although many aspects of cognitive impairment can increase vulnerability and powerlessness, loss of insight is a critical aspect of executive dysfunction that leaves the affected individual unable to arrange for and to compensate appropriate assistance. The cognitively impaired individual who cannot appreciate deficits that are obvious to others is truly at the mercy of others for assistance. The cognitively compromised individual who fails to recognize his or her need for assistance in managing financial affairs may fall prey to an unscrupulous sales person or other professional who sees an opportunity to exert improper influence.

Emotional vulnerability is an important aspect of vulnerability that can be exacerbated by loneliness. Emotional longing for affection or sexual desire can lead a vulnerable adult—including widows and widowers—to seek relationships with potential perpetrators who recognize an opportunity to exploit or unduly influence.

#### **G. Where are Executive Functions Located?**

Historically, executive functions have been associated with the frontal lobe region of the brain. The frontal lobe regions are considered to be at high risk for injury in cases involving brain trauma, which can lead to executive dysfunction in individuals of all ages. The most common type of dementia among older persons, Alzheimer's disease, involve neuronal cell loss in the

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<sup>14</sup> Physical limitations which occur along with a condition creating cognitive impairment, such as mobility problems, might also lead to loss of independence.

frontal and temporal regions of the brain. The loss of cell tissue in these frontal lobe regions is thought to play a key role in the tendency for persons with Alzheimer's type dementia to show prominent "frontal lobe" signs, including lack of awareness, poor insight and inability to appreciate the symptoms of cognitive decline that are obvious to others.

There is a significant volume of research finding impaired components of executive functions in the context of frontal brain injury. One of the most notable historical cases involves that of a railroad excavation crewman, Phineas Gage, who was injured in 1848 when a blast drove a 3 foot, 7 inch tamping iron through his skull. The pointed end of the object entered the left side of his face above the left corner of his mouth and passed through the skull and brain, emerging more or less at the midline crown of his head, as shown in the image (1868, public domain). Thanks to a contemporaneous account of the injury, as well as a 20-year follow-up article by his attending physician, this classic case provides a highly detailed account of behavioral changes that are associated with damage to the frontal lobe region of the brain. According to the article, Gage had changed from a formerly hard-working, responsible foreman to a fitful, irreverent man, indulging in "the grossest profanity" and "manifesting little deference for his fellows." Harlow famously wrote that, "In this regard his mind was radically changed, so decidedly that his friends and acquaintances said he was 'no longer Gage.'" Harlow, J.M. (1868). Recovery from the Passage of an Iron Bar through the Head. *Publications of the Massachusetts Medical Society*, 2, 327–347.



Executive functions are also known to be affected by damage in other parts of the brain. This is because the core components of executive functioning are based on the efficient and reliable exchange of input and output among virtually all other areas of the brain. The frontal and prefrontal regions of the brain must rely on input from sensory, memory, language, attention and emotional processing areas of the brain. If those sources of input are damaged, then the resulting output of abstract thought, self-awareness, anticipation of consequences, complex problem-solving and decision-making are likely to be corrupted as well.

Therefore, the executive functions are based on a highly complex network of interwoven cognitive processes and neuro-biological systems. Breakdown in any of those cognitive and neuro-biological building blocks can lead to increased risk for impaired executive functioning, with the possibility of adversely affecting an individual's decision-making ability and increasing that person's susceptibility to undue influence.

## **H. Examples of Neuropsychological Domains That Can Reflect Executive Dysfunction.**

The following sections provide several examples of ways in which specific domains of cognitive functioning contribute to the integrity of executive decision-making ability. Impairment in these areas can reflect executive dysfunction and potentially contribute to the risk for susceptibility to undue influence.

**Attention.** Attention is one of the most fundamental cognitive building blocks. Almost all other aspects of cognitive processing depend on an individual's capacity to focus attention in order to process and take in almost any type of information.

Basic attention span is actually quite limited. In fact, a healthy adult is expected to have an attention span of only about 6 or 7 unique bits of information G.A. Miller, *The magical number seven, plus or minus two: Some limits on our capacity for processing information. The Psychological Review*, vol 63, pp. 81-97 (1956). For example, if we were ask to a person to repeat a series of increasingly longer strings of numbers, it would be challenging for many people to repeat more than seven digits in a row, the same number of digits that make up a typical telephone number.

The span of attention does not exist in a vacuum, but is an ongoing, non-stop process that is ever-present throughout an individual's waking hours. In other words, the healthy adult is constantly processing thousands of bits of information that pass through consciousness. A great deal of irrelevant or redundant information must be efficiently filtered out and lost to further recall in order to focus on relevant information. However, those bits of data that are relevant or associated with familiar information must be encoded for more in-depth processing and storage to occur.

*Any medical or psychiatric problems that significantly interfere with basic attention and concentration have the potential to lead to significant limitations to an individual's ability to engage in the usual decision-making process of simultaneously considering pros and cons of different decisions.*

For example, if an individual with severe delirium were to demonstrate severely limited attention span, then it might be difficult for that person to go through the medical decision-making process of methodically weighing and considering risks and benefits of a recommended treatment or procedure. Such an individual might focus unduly on an emotionally gripping possibility ("There is a 1% chance that you could develop complications and die.") while failing to register an important alternative ("The treatment has a 99% chance for success!"). This is why it would be important to take steps to compensate for the attention problems, such as asking the individual to summarize the alternatives in their own words. If, due to this condition, the individual were dependent

upon another individual to compensate for these deficits, the resulting risk for susceptibility to influence is obvious.

This same delirious individual would almost certainly have difficulty thinking about the risks and benefits associated with a particular financial investment. If that same attentionally-impaired individual were asked to sign a Power of Attorney that would give another person access to financial assets, would the impaired individual be able to adequately consider all the relevant risks and benefits associated with the decision to sign?

This example raises several familiar issues regarding decisional capacity, but it also reminds us that the context of diagnosis and prognosis are as important as the evidence of impairment.

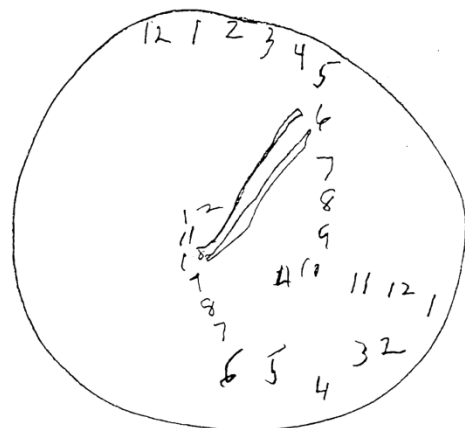
In this case, the diagnosis of delirium suggests a relatively better prognosis for improvement, since delirium can often resolve once underlying medical issues have been addressed. In contrast, a diagnosis of Alzheimer's type dementia would imply a permanent state of significant functional impairment as well as the prospect of progressive deterioration in the future. In each case—delirium versus dementia—the individual might be considered highly susceptible to undue influence during the attentionally-impaired phase of illness. However, in the case of delirium, the individual might be expected to regain capacity, whereas the individual with dementia would be more likely to be considered to be at permanent risk for susceptibility to undue influence, as well as lacking other decisional capacity.

**Language.** In the domain of language, symptoms of aphasia are often discussed, including problems with word finding or naming, inability to fluently express ideas (sometimes called *Broca's aphasia*) and problems with comprehension (*Wernicke's aphasia*) that, in extreme cases can result in the individual apparently speaking gibberish, without appreciation for grammatical structure of language. These frank aphasic symptoms are most frequently seen in association with a stroke or brain tumor that affects some focal area of the brain, usually in the left temporal or parietal region. Aphasic language deficits in communication may or may not be associated with loss of decisional capacity. In fact, they might serve as examples of cognitive impairment without executive dysfunction. For example, an individual who is unable to fluently speak following a dominant hemisphere stroke might still be able to communicate wishes and express his/her will with the aid of an assistive communication device. That individual might still be capable of hiring a care manager and effectively directing his or her care or identifying a trusted family member or advisor who could carry out his or her wishes through a Power of Attorney.

However, it is relatively common for executive dysfunction to result in subtle problems with language that might not be evident in a superficial conversation with the individual. Due to the non-obvious nature of the symptoms, this circumstance can put the individual at high risk for undue influence, especially since an attorney or care provider can unwittingly endorse poor decision-making by failing to recognize the subtle problems that are present. For example, consider a scenario in which a potential victim has been “prepped” by a perpetrator to seek legal consultation for purposes of estate planning. If the attorney does not engage in significant discussion with the individual, but assumes that the client is fine because he can engage in superficial discussion regarding highly familiar information, that attorney may prepare dispositive documents for that individual based on a belief that there is no impairment.

In the neuropsychological approach, an individual might present with seemingly intact ability to express ideas and to comprehend basic commands or to engage in “pat” conversation about the weather and other common exchanges. However, more detailed cognitive examination of that individual’s ability to respond to a series of “yes – no” questions might reveal that the individual actually has significant executive problems that undermine his ability to reliably process the deeper meaning of a statement or question. The questions are not particularly challenging, so that errors in the responses call attention to the individual’s difficulty in logically analyzing non-familiar statements. For example, consider an individual with no obvious aphasic language problem and intact social conversation, but who has incorrectly answered “no” for the question, “Do two pounds of nails weigh more than one?” One might consider the error in light of possible hearing problems or a simple lapse of attention. However, assuming that those possibilities have been ruled out, this type of error should raise concern about the individual’s ability to process and make sense of complex information.

**Clock Drawing as a Sensitive Indicator of Executive Dysfunction.** The clock drawing test requires individuals to draw a picture of a clock, place all the numbers on the clock, and set the hands to a specific time. This task can be challenging for persons who present with specific visual-spatial problems due to focal brain injury, often in the right parietal region of the brain. However, this task is also very sensitive of the problems of executive dysfunction that are so frequently present in persons diagnosed with Alzheimer’s and other dementias, including problems of planning and organization, difficulty with self-monitoring



and poor insight. The example shown in the accompanying figure illustrates several problems that are commonly seen in individuals with significant executive dysfunction.

**Organization and Planning.** The numbers are poorly arranged on the clock, with no evidence that the individual has any appreciation for the expectation that numbers would be placed at regular intervals around the circle. There is no evidence of planning, foresight or ability to anticipate consequences. The tendency for the majority of the numbers to be grouped on the right hand side of the clock also raises a question about the possibility that this individual tends to “neglect” or fail to attend to stimuli on the left side. Although the neurological syndrome of “neglect” is not usually strictly considered as part of executive dysfunction, it is frequently associated with significant loss of awareness and inability to recognize one’s own impairment.

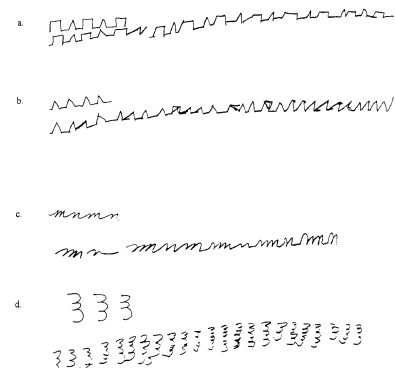
**Perseveration.** This individual demonstrates perseveration, or the tendency to repeat a response that is no longer appropriate or relevant to the current circumstances. In this case, the individual has repeated the set of numbers (more or less) from 1 to 12 with no indication that this is inappropriate or attempts to correct the error.

**Poor Insight and Lack of Self-Awareness.** Despite numerous problems with the drawing, this individual was seemingly unaware that the drawing reflected so much difficulty.

**Self-Monitoring and Inability to Self-Correct.** Although this aspect of executive dysfunction overlaps with the other problems of perseveration and poor insight, it is important to recognize that this individual is unable to effectively self-monitor or self-correct obvious errors in the performance.

Although the cognitive problems represented by this clock drawing appear obvious, it should be noted that it is not unusual to find individuals with similarly impaired clock drawings who are able to engage in superficial conversation and manage very basic activities of daily living with minimal prompting.

**Other Evidence of Executive Dysfunction.** The neuropsychological examination provides many different psychometric measures that are formally scored as well as *qualitative measures* of impairment. A commonly used qualitative measure of executive functioning is based on the work of the Russian neuropsychologist, Alexander Luria. Luria, A.R., *Higher cortical functions in man* 1966. New York: Basic Books. The task requires an individual to copy



a series of geometric patterns. The patterns themselves “pull” for errors of repetition and perseveration, so that the individual must inhibit a natural tendency to perseveratively add extra loops or break the sequence shown in the model. Problems on this task are not usually seen unless the individual has significant executive dysfunction in controlling and regulating responses. Although a neuropsychologist would not necessarily administer this task alone, problems on this procedure usually are closely associated with a number of other difficulties that reflect underlying problems with executive dysfunction.

**The Potential Role of Emotions in Decision-Making.** Emotionally evocative issues are likely to be a significant factor in the decision-making process, especially when the issue involves susceptibility to undue influence. It is one thing to have a conversation about a person's background that covers the most familiar highlights of a long life. It is a much different prospect to have a complex discussion about issues involving finances, healthcare or independence, many of which touch on highly emotional issues. (“I want to stay in my own home where I've always been.” “I've been driving for 60 years and I've never had an accident.”).

The emotional factors to consider cannot be conveniently summarized, since they will of course be closely tied to the circumstances and hot button issues of the specific individual. However, it is important to stress that, for an individual with executive dysfunction, emotional processing may appear to be totally disconnected from the actual content of a situation or discussion. In some cases, the impaired individual might be responding to emotion that is evoked or sparked by a resemblance, a name or confusion that could never be identified by the individual.

**Case Note:**

In a routine review of the monthly bills between an impaired father and his caregiver daughter, father suddenly lashes out with anger and accuses daughter of using his funds to buy a car. The bewildered daughter denies the claim but the damage to the relationship is already done. Father goes on to change his Power of Attorney to another child, who eventually exploits him. At a later point, daughter realizes that her father's emotional response had resulted from confusion about bank statements that indicated “auto-pay” for several automatic payments that had been set up. The situation presents an opportunity for undue influence by one who is in a position to take advantage of the impaired person's emotionally charged reaction which is fueled by his cognitive impairment.



In another circumstance, the impaired individual might pick up on the emotional tenor of a situation and respond to that, instead of tracking and responding to the actual content of the situation.

**Case Note:**

A confused, but pleasant woman is invited to spend Sunday lunch with her daughter's family that includes several young children. The visit seems to go well, despite occasional disruptions from the children. At the end of the visit, when daughter is taking mother back to the assisted living facility, mother unexpectedly accuses daughter of selfishness and not caring about her own mother. Daughter realizes that mother was offended and jealous that the children had required so much of her attention, and she apologized, resolving to spend more "one to one" time with her mother on the next visit. Another with an improper motive could use the opportunity to exacerbate this emotional reaction and use it to foster division with the daughter.

Many of the risk factors for susceptibility to undue influence that were reviewed in previous sections are closely associated with emotionally powerful triggers. "Isolation" signals the likely prospect of loneliness and the possibility of yearning for attachment, affiliation and affection. "Dependency" is likely to be associated with losses involving declines in physical capability, cognitive capacity or both. Issues involving capacity to drive or manage one's own funds are closely tied to core emotional issues involving loss of independence, and these can be some of the most painful issues to address, especially in the face of cognitive impairment that includes lack of self-awareness and poor insight.

*Such individuals are especially susceptible to undue influence especially by others who appear to "take their side" against well-intended family or care providers who are trying to install protections or remove driving privileges.*

Various conditions of cognitive impairment have been reviewed here, all of which provide examples of ways in which the neuropsychological examination can assist in identifying individuals who can be considered to be at risk for susceptibility to undue influence. There are certainly many other examples of cognitive impairment that can contribute to risk for susceptibility to undue influence, including the most common and obvious problems associated with memory impairment. However, the goal of the examples offered here is to highlight some of the more subtle cognitive problems that actually reflect underlying executive dysfunction. While it would be an over-generalization to say that cognitive impairment alone represents heightened risk for susceptibility to undue influence, this article asserts that individuals with evidence of executive dysfunction should be considered to be at heightened risk for susceptibility to undue influence. This is because executive dysfunction so frequently is associated with loss

of insight, and inability to appreciate one's own impairment, to see the deficits that are obvious to others.

## **XII. CONCLUSION-TIPS FOR LITIGATORS.**

### **A. Consider Application of Behavioral Models.**

A litigator should consider using the undue influence behavioral models to investigate, evaluate, develop and present his undue influence case. As discussed above, all of the models are psychological frameworks for understanding the process of undue influence. Each behavioral model presents a different perspective on the process of undue influence.

The “thought-reform” (or “cult”) model is designed to describe the social influence tactics used by leaders in cults and cult-like interactions. These tactics are commonly used by perpetrators of elder financial abuse. The “undue-influence wheel” is designed to demonstrate the similarity between undue influence and domestic violence. The IDEAL model focuses on the perspective of the victim in financial exploitation situations and the associated disparities between the victim and perpetrator. The case fact pattern gives guidance for choosing the most appropriate model(s), and the model(s), in turn, may provide the scaffolding for creating the presentation to a judge or jury.

In a particularly complex and confusing case, a legal team used the IDEAL model to clarify the matter to the following essence, which was later effectively used in Court: A widowed, elderly woman who had mild dementia changed her will and trust, bequeathing almost everything to her son, whom she said was the only person she could rely upon. The documents were executed while she was in the hospital awaiting heart surgery. Her stated reason for excluding her daughter was that the daughter did not call or visit. The woman was unaware that her son told others he did not relay messages from his sister before their mother entered the hospital, and had not informed the sister of their mother's impending surgery. There were also third-party witnesses who heard him say he wanted to inherit his mother's estate, to the exclusion of his sister.

Undue influence cases can easily become long, highly detailed contests involving abstract concepts, vague descriptions of behavior, and circumstantial information. Consider keeping the judge and jury attentive to your most salient points by using the behavioral models highlighted in this paper. Litigators have reported to one of the authors that they will sometimes include a behavioral model in their opening statements, refer to it during the course of testimony and emphasize it in closing arguments:

In one of many probate cases reported<sup>15</sup>, the litigator opened with: “You will hear evidence that Mrs. Jones was susceptible to undue influence; that she was in a confidential relationship with the Defendant; that the Defendant actively encouraged and participated in the transactions in question; and that the Defendant got the money. Keep those in mind: Susceptible victim; confidential relationship; active perpetrator; and the money. Take the first letter of each S-C-A-M. That’s what this case is about, a scam.”

The litigator should consider using all appropriate behavioral models to evaluate his or her case. If prosecuting a claim, use the models that are appropriate given the fact pattern and available evidence. If defending, use every model. The results will either be consistent, demonstrating the strength of your case regardless of the theoretical perspective taken regarding undue influence, or they will reveal potential weaknesses that you need to address.

1. In a recent probate case that included claims of undue influence, the evidence was assessed using the IDEAL, Undue Influence Wheel, SODR, SCAM, and “thought–reform” models. None of the analyses indicated undue influence. This set of analyses became important in subsequent settlement negotiations.
2. Alternatively, the litigator in a contested guardianship case cross-examined an opposing mental health expert by raising the IDEAL, Undue Influence Wheel, SODR, and SCAM models, and showed how the evidence fit each of the elements (the “thought-reform” model did not apply). The judicial ruling confirmed that the consistency of the results were an important factor in finding that undue influence occurred.

Awareness of the behavioral models helps when questioning alleged “experts” on undue influence assessments. It is appropriate to ask “Are you aware of any accepted behavioral models?” Unfortunately, many psychiatrists and psychologists are unaware of these basic models.<sup>16</sup> Each of the behavioral models has limitations as well as strengths. Therefore, it is reasonable to ask: “Which models do you use?” “Is more than one model right for this case? (Why or why not?)” “What are the strengths and weaknesses of each method you use?” “Are you familiar with the other models? Why did you not use them?”

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<sup>15</sup> Personal communications to one of the authors (BB).

<sup>16</sup> This, despite the fact that the ABA text “Assessment of Older Adults with Diminished Capacity: A Handbook for Psychologists,” 2008, was co-published with the American Psychological Association. In the field of psychiatry, “Kaplan and Sadock’s Comprehensive Textbook of Psychiatry” – a text used in every US medical school and psychiatry training program – has included the IDEAL model (created by one of the authors – BB) since 2000.

## **B. Consider Neuro-Psychological Applications.**

Look for signs of executive dysfunction to discuss with your expert witness. As discussed above, evidence of executive dysfunction on examination **and** in daily life is a particularly powerful indicator of risk for susceptibility to undue influence. If prosecuting a claim, look for evidence of impaired executive functioning. If defending a claim, be aware of behavioral problems that might signal executive dysfunction and be prepared to explain those problems to the court.

1. **Poor insight.** Are there examples of ways in which the individual lacks awareness or denies problems, especially those that are obvious to others? Does the individual have difficulty grasping the notion that cooperation with the court-appointed Guardian *ad Litem* Visitor or Healthcare Professional might be to their advantage?
2. **Impaired ability to initiate coping strategies.** Does the individual have problems carrying out compensatory activities? Is the individual able to independently hire and direct a care manager? Is the individual able to reliably make medical appointments, call in prescriptions and arrange for transportation?
3. **Poor self-monitoring.** Does the individual have difficulty adjusting emotional reactions to the circumstances? Outbursts in the attorney's office might raise concern as to ability to self-monitor. Does the individual notice memory gaps or cognitive errors that others notice?
4. **Inconsistency between words and action.** The impaired individual might talk a good game, but does he actually follow through with problem-solving and compensatory strategies, or is there a striking disconnection between what he says he will do and what actually gets done?
5. **Objective indicators of problems with executive dysfunction.**
  - a. **Driving.** Recent citations, accidents or lapses in insurance.
  - b. **Financial.** Recent lapses in bill paying, failure to manage financial assets in usual way.
  - c. **Healthcare.** Recent changes, such as lapses in medications, failure to make routine medical appointments, medical evidence of nutritional problems.
6. **Evidence of executive problems in compensating for isolation.** Isolation is a major indicator of risk for susceptibility to undue influence, and should always be considered when family, friends, longstanding attorney or medical providers have difficulty in accessing an individual directly. Changes in access would be fairly

obvious, but a “quirky” individual who has been a longstanding “loner” might also be at high risk for undue influence. The critical question is whether the individual has the possibility of independently compensating for isolation by contacting others on their own **if they choose to do so.**

### **C. Discovery Considerations.**

The litigator should consider obtaining the following information in a contest over a donative document on the grounds of undue influence:

1. Decedent’s medical, mental health and substance abuse treatment records, including blood test results and original films if expert needs them.
2. The complete file of the attorney (if one was involved) who prepared the instrument at issue, including notes, telephone messages, correspondence, memos, draft documents and instruments, signed instruments, revoked instruments, powers of attorney, asset lists, video and audio recordings and all billing records (crucial).
3. All correspondence between the alleged influencer and the decedent during the relevant time period.
4. Evidence of all gifts to the alleged influencer and his or her family from the decedent, including identification of all non-probate transfers.
5. For the relevant period, review of decedent’s bank records (particularly checking and brokerage accounts) to identify unusual transactions made during lifetime (this information can reveal not only gifts to the alleged influencer but the involvement of other paid professionals who may have discoverable information).
6. Title search of decedent’s residence to determine the existence of suspicious conveyances and activity concerning the title to the property.
7. All correspondence by or to the alleged influencer concerning decedent, including e-mail.
8. All correspondence to the alleged influencer concerning decedent, including e-mail.
9. If the alleged influencer operated as decedent’s attorney in fact, an accounting of his activities in this regard.
10. Evidence of visits to decedent’s safe deposit box.

11. Cell phone records showing contact with the alleged influencer and other relevant individuals.
12. All photographs, video and audio recordings of decedent during the relevant period.
13. Evidence showing decedent's functioning in any business he might have owned.
14. Decedent's calendar, diary, notes and financial journals/ledgers for the relevant period.
15. All police reports concerning decedent or originating from decedent's address during the relevant time period, if any.
16. All adult protective service records concerning decedent, if any.
17. Complete educational, litigation and criminal history of the alleged undue influencer in the state of decedent's death as well as any others where the influencer resided.
18. Evidence of asset purchases by the alleged influencer which are inconsistent with his means.

Obviously, in keeping with the fact intensive nature of undue influence claims, the litigator will want to speak not only with the will witnesses but also with all persons who have information concerning the decedent such as family, care-givers, friends, lawyers, paralegals, business associates, doctors, nurses and clergy and should not overlook even seemingly minor players such as neighbors, hair stylists, exterminators, club members and housekeepers. Information sought should not be limited to the decedent's physical and mental condition but also the relationship between him and the influencer and the people who were disinherited by the suspect document with an eye toward developing or refuting a record of suspicious circumstances. The models and other information contained in this paper should help the litigator in developing his case.