

TAB 11

Part 5: Influence – “Due” and “Undue”

The Wills of Older People: Risk Factors for Undue Influence

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REVIEW

The wills of older people: risk factors for undue influence

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ABSTRACT

Background: As people live longer, there is increasing potential for mental disorders to interfere with testamentary distribution and render older people more vulnerable to “undue influence” when they are making a will. Accordingly, clinicians dealing with the mental disorders of older people will be called upon increasingly to advise the courts about a person’s vulnerability to undue influence.

Method: A Subcommittee of the IPA Task Force on Testamentary Capacity and Undue Influence undertook to establish consensus on the definition of undue influence and the provision of guidelines for expert assessment of risk factors for undue influence.

Results: International jurisdictions differ in their approach to the notion of undue influence. Despite differences in legal systems, from a clinical perspective, the subcommittee identified some common “red flags” which might alert the expert to risk of undue influence. These include: (i) social or environmental risk factors such as dependency, isolation, family conflict and recent bereavement; (ii) psychological and physical risk factors such as physical disability, deathbed wills, sexual bargaining, personality disorders, substance abuse and mental disorders including dementia, delirium, mood and paranoid disorders; and (iii) legal risk factors such as unnatural provisions in a will, or provisions not in keeping with previous wishes of the person making the will, and the instigation or procurement of a will by a beneficiary.

Conclusion: This review provides some guidance for experts who are requested by the courts to provide an opinion on the risk of undue influence. Whilst international jurisdictions require different thresholds of proof for a finding of undue influence, there is good international consensus on the clinical indicators for the concept.

Key words: will, testamentary, undue influence, capacity, older people

Introduction

With aging societies and the increased wealth of elderly people in developed societies, the posthumous distribution of wealth will be of unparalleled magnitude. The twentieth century not only brought about unprecedented aging worldwide, but its political ideology also redistributed considerable wealth. As a result, in many societies today’s older people have more assets and personal wealth than ever before. Natural frugality and notions of “saving for retirement” and “leaving something behind to

be remembered by” have added to this bounty. As people in all countries live longer, there is increasing potential for mental disorders to interfere with the testamentary distribution of this bounty, or to render the older person more vulnerable to “undue influence.”

The modern day Common Law approach to undue influence emanates from nineteenth-century England, when social influences were very different from those of the twenty-first century, with most of the nation’s wealth in the hands of a few people in the upper tiers of society. While the traditional thinking has stood the test of time, its applicability to modern-day social situations requires integration of its fundamental principles with twenty-first-century knowledge and research. There is considerable case law on undue influence and extensive research on dementia, its staging and clinical aspects, as well

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as the psychosocial issues of older people. Yet, although case law and modern day research may stand side by side, they rarely touch in the scientific literature.

It is clear that this is an area that will gain increasing importance in the years ahead. The aim of this paper is to define the concept of undue influence, to outline some of the differences in approach to this concept across various international jurisdictions and, most importantly, to offer some guidance to the expert in identifying risk factors of vulnerability to undue influence based on our current understanding of mental disorders in old age.

Definitions

Undue influence is a legal construct, and is defined by the courts according to the respective national jurisdiction. The clinician's role is to advise the court about a person's vulnerability to undue influence; the determination that undue influence has actually occurred is a decision that remains with the court. If undue influence is found by the court to have been present at the time instructions for a will were given (e.g. to an attorney) or when it was executed, it has the effect of rendering a will invalid.

An understanding of the historical evolution of the concept is important because the courts rely on historical precedents. One of the earliest and most commonly cited descriptions of "undue influence" in relation to will-making in countries where Common Law exists was given by Sir James Hannen in 1885 (*Wingrove v Wingrove* (1885) 11 PD 81, 82), as follows:

To be undue influence in the eye of the law there must be – to sum it up in a word – coercion.

This threshold of requiring coercion for undue influence arose out of mid-nineteenth century English Case Law, which acknowledged the social acceptability of lobbying or pressuring testators for bounty on the basis of appeals to affection, ties of kindred relationships or sentiments of gratitude or pity, providing such influences fell short of coercion (Ridge, 2004).

Historically, Common Law courts further defined undue influence as an overpowering or overbearing of the testator's volition, judgment or wishes by *substitution* of one mind for another (*In the will of Wilson* (1897) 23 VLR 197, 198–199; *Hall v Hall* (1868) LR 1 P & D 481, 482). From a clinical perspective, the concept of "subversion of will" is a more useful term that allows for influence to be defined relative to the vulnerability of the testator. Therefore, in a cognitively or emotionally vulnerable individual, a less "coercive" influence

could still be determined to be "undue" (Shulman *et al.*, 2007). In *Wingrove v Wingrove* (1885) LR11PD 81 at 82–83, Sir James Hannen elaborated:

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble that very little pressure will be sufficient to bring about the desired result . . .

International standards

Many Commonwealth nations (e.g. U.K., Australia, Canada and New Zealand) base their legal systems on British Common Law, and the requirement that undue influence be established to the standard of "coercion" makes it difficult to prove in these jurisdictions. Consequently, a contention of undue influence rarely succeeds in a claim against a disputed will (Posener and Jacoby, 2002; *Revie v Driutt* [2005] NSWSC 902, [54]).

In the U.S.A., the degree of coercion required to invalidate a will can be much more subtle. Although proving undue influence can sometimes be difficult in this jurisdiction, successful challenges are not rare. Langbein (1994) offers the following reasons to explain the striking divergence between American probate law and that of the Continental, English and Commonwealth legal systems in regard to undue influence claims:

- (a) U.S. law is unique in how strongly it protects the parent's right to disinherit the child or how little it protects children against disinheritance, unlike English and Commonwealth systems where "family provisions" statutes empower the court to make discretionary provision for children (see also Dainow, 1938; Champine, 2006);
- (b) In the U.S.A. will contests are resolved by civil jury trials which are not applied to probate matters elsewhere;
- (c) U.S. law does not automatically use the "loser pays" principle for litigation costs adopted in Commonwealth systems (Canadian law allows judicial discretion for allocation of costs);
- (d) Legal systems in Continental Europe allow for the authentication of a will before a quasi judicial officer who has to be satisfied of the testator's capacity. The presumption of capacity afforded by this process is said to render wills "practically immune" to post-mortem challenge on grounds of incapacity or undue influence.

In Israel, under the Law of Inheritance (Harpaz and Zaslansky, 1990), the claim for undue influence is raised at least in equal frequency if not more than testamentary incapacity; and annulling a will by the court on the basis of undue influence is not a rare occurrence (personal communication, J. Heinik).

In other countries, issues of testamentary capacity and undue influence have received little, if any, attention due in part to a relative lack of sensitivity to the primacy of individual autonomy in decision-making as reflected by laws that prescribe significant portions of one's estate to be left to family members. This is the case in Brazil, for example (personal communication, L. Machado). In Portugal, a will is not valid if it is found that the testator was subject to undue influence, although the legal system is directive in prescribing mandatory proportions of the estate to immediate family members who cannot be excluded as beneficiaries except under certain circumstances (personal communication, H. Firmino).

The relationship between undue influence and testamentary capacity

For a court to make a finding of undue influence, it must first have ruled that the testator possessed testamentary capacity. The clinical criteria needed to establish testamentary capacity are discussed in detail elsewhere (Shulman *et al.*, 2007; 2008). Lack of testamentary capacity and undue influence are, therefore, legally mutually exclusive in Commonwealth countries such as Australia, Canada and the U.K., and in the U.S.A. can only be used as alternative claims against a will.

Lawyers sometimes rely on a claim of undue influence as a "fall back position" or alternative argument in will challenges in case the court finds that testamentary capacity was present. Accordingly, experts are often asked to give an opinion both on testamentary capacity, and, in case the court finds that testamentary capacity was present, on vulnerability to undue influence. Ultimately of course, teasing out which is the predominant issue in the legal challenge is the work of the lawyers and the courts rather than the clinical expert, although in some European and Asian countries the courts rely more on the expert's opinion.

Testamentary undue influence versus *inter vivos* undue influence

Testamentary undue influence needs to be distinguished from equitable *inter vivos* (Latin: "between the living") undue influence, i.e. influence exerted when gifts are made during life. In Commonwealth countries different laws and different courts apply to testamentary and *inter vivos* dispositions, equitable undue influence being regulated by the equity courts and testamentary undue influence by the probate courts. Accordingly,

the doctrine of equitable undue influence differs from the doctrine of testamentary undue influence. A gift given when the donor was alive in circumstances of *inter vivos* undue influence is much easier to rescind than a testamentary disposition made in the same circumstances (Ridge, 2004; P.B., 1913).

This distinction between the two types of undue influence has led to criticisms of some jurisdictions having a "timid" approach towards testamentary undue influence and vulnerable testators: "English Law provides scandalously little protection for the old and infirm" (Kerridge, 2000).

In Australia, it has been suggested that the failure to use principles of equitable undue influence in regards to testamentary gifts indeed "permits, if not encourages, pressure" on vulnerable testators (New South Wales Law Reform Commission, 1986). This has led to debate regarding the merits of applying the principles or doctrine of equitable *inter vivos* undue influence (which includes a presumption of influence, a less onerous means of proving undue influence) to testamentary gifts (Ridge, 2004).

The legal tests for conditions under which undue influence occurs

Courts in the U.S.A. and Commonwealth countries have used a range of "tests" or legal standards for proving undue influence (Spar and Garb, 1992; The State of Wisconsin United States Court of Appeal (1999, No. 98-2511, *Estate of George Milas, Deceased Judith Fischer and Raymond Milas (Appellants) v. Vanessa Henningfield*; C.E.C., 1916; *Johnson v Johnson* [2003] QSC 075, [28] and [29], *Winter v Crichton* (1991) 23 NSWLR 116, 121-122; *Bank of Credit and Commerce International v Aboody* (1990) 1 QB 923, 967). These tests, which acknowledge some of the clinical factors that render testators vulnerable to influence, include various combinations of:

- (i) a confidential relationship creating opportunity for the influencer to control the testamentary act;
- (ii) vulnerability or susceptibility of the testator to undue influence;
- (iii) the influencer had an "inclination" or "disposition" to influence;
- (iv) the influence was undue;
- (v) the influencer used the relationship to secure a testamentary change which would not have been made except for the undue influence;
- (vi) suspicious circumstances surrounding the making of the will.

Similarly, the Israeli courts use the following four tests to determine undue influence, with the existence of one (preferably more) being sufficient: (i) the test of independence – the determination

of the extent to which the testator was physically and, particularly, mentally independent; (ii) the test of aid – the determination of the extent to which the beneficiary aided the testator; (iii) the test of relationships – the determination of the nature and strength of relationships between the testator and persons other than the beneficiary; and (iv) the test of circumstances under which the will was executed (Shoet, 2001).

Which and how many of these elements need to be proven to uphold a case of undue influence varies from country to country, and even within the same country, from jurisdiction to jurisdiction. Accordingly, the questions asked of the expert vary. However, irrespective of jurisdiction, the contribution of the expert most often lies in addressing the question of the testator's vulnerability to undue influence.

Risk factors that may predispose to influence

In assessing a person's vulnerability to undue influence the clinician needs to consider the various risk factors that may predispose to influence. Undue influence is more likely to occur in the following common situations: (i) where there is a special relationship in which the testator invests significant trust or confidence in another; (ii) where there is relative isolation (whether due to physical factors or communication difficulties) which limits free flow of information and allows subtle distortion of the truth; and (iii) where there is vulnerability to influence through impaired mental capacity or emotional circumstance (such as withholding of affection, or persuasion on grounds of social, cultural or religious convention or obligation). Such influences may be subtle, insidious, and powerful, requiring little pressure to bring about the desired result.

The following risk factors or "red flags" may assist the expert in assessing the likelihood of undue influence. The more red flags there are in a particular case the more likely it is that undue influence is occurring or has occurred.

Social environment of the testator

RELATIONSHIP WITH THE "INFLUENCER"

Relationships that create opportunity for undue influence are diverse and occur in many social situations. Situations of adverse influence usually occur between an elderly cognitively impaired person and the following persons:

- (i) a cohabiting family member such as an adult child;
- (ii) a non-resident child;
- (iii) a helpful neighbor or friend;

- (iv) a formal or informal carer;
- (v) a more distant family member such as a niece or nephew;
- (vi) a "suitor" who may, or may not, become a de facto partner or spouse, usually significantly younger and cognitively intact;
- (vii) professionals such as attorneys, clergy, doctors, accountants, policemen.

Sometimes several people are involved in influencing vulnerable testators. For example, an elderly nursing home resident with mild dementia was importuned by her long lost stepson to change her longstanding pattern of bequeathing the bulk of her estate to her friend, in favor of the stepson. The stepson's lawyer (previously unknown to her) visited her on a daily basis over several months to ensure that she changed her will and Power of Attorney and to ensure that the friend could no longer visit the elderly lady.

SOCIAL CIRCUMSTANCES OF THE TESTATOR
The following social circumstances predispose to undue influence:

- (i) Sequestration and isolation of the impaired person such that outside contact is inhibited (e.g. telephone numbers are changed or disconnected or telephone contact with the impaired person is limited by the carer; the house in which the impaired person lives is heavily barred or no-one ever seems to be home);
- (ii) Previously trusted family members or friends are no longer favored or trusted by the cognitively impaired person;
- (iii) Family conflict is present. It is not unusual for an older wealthy person who is surrounded by conflict between family members and friends vying for their influence to be drawn into that conflict. Most commonly, the person in the position of influence is a family member, often a child. Recent research lends support to clinically-based observations of family relations in older life which suggest that having a dependent parent provides an opportunity for siblings to play out a competition to be the best, or most caring child (Peisah *et al.*, 2006). The role of carer sometimes allows a previous "black sheep" to become newly respected for their competence or to be listened to for the first time. (Knight, 1986). When such family disagreements align with the older person's views (e.g. "Mum hasn't got dementia", "she doesn't need any help," or "she doesn't need to go into a home") family members may collude with the older person's denial or lack of insight. Problems with decision-making may be exacerbated in this way.
- (iv) Physical and /or psychological dependency on a carer. For example, a cognitively impaired older person with physical dependency living in the community is especially vulnerable to a situation in which a carer becomes central to maintaining the person at home. The carer may or may not

be living with the impaired person, but close and frequent contact between the carer and the impaired person leads to a special relationship that puts the carer in a unique position of influence. The carer may be paid or be a family member who has lived with the older person for some time. The carer may be a friend or neighbor or more distant family member who was previously uninvolved until they became aware that the older person needed assistance. Often the relationship is newly formed or there has been a change in the impaired testator's attitude to the other person, coinciding with the onset of the former's disability or frailty. When this involves a change in previous alliances, the older person is often persuaded to make changes in their will to ratify their new-found faith in or gratitude to the carer. Sometimes they even marry the carer. Often there are threats or promises – sometimes unrealistic – to keep the aging person out of residential care. Changes in documents, such as wills, may be made in a desperate attempt to garner care, support or comfort at a time when the impaired person feels increasingly vulnerable or threatened (Shulman *et al.*, 2007)

Vulnerability of the testator

PHYSICAL FACTORS

Physical disabilities, such as impairment in vision, hearing and mobility, isolate and/or impair communication rendering a testator more vulnerable.

NON SPECIFIC PSYCHOLOGICAL FACTORS

A range of psychological factors such as loneliness, sexual bargaining, haste and death-bed issues may make a person emotionally vulnerable to the influence of others. Terminally ill patients who are often delirious are particularly vulnerable in highly medicalized, acute-care settings which encourage regression and dependency.

Sexual bargaining and exploitation of older people within sexual relationships is a form of abuse (Peisah *et al.*, 2008) and provides a means by which undue influence can be exerted. To illustrate, Mr. F. was a 72-year-old thrice divorced man who was living in a nursing home. He suffered from severe Parkinson's disease. A 49-year-old female paid companion of a fellow resident began to visit him frequently and offered to take him home and look after him on the condition that he married her, bought her a car and generally provided for her. The solicitor engaged by his son ascertained that she had formed several similar liaisons in the past and had been married previously, although the details were sketchy because she had recently migrated from Europe to Australia and her former husband was deceased. Mr. F. was subjected to enormous pressure from his fiancée who threatened

to leave him if he didn't change his will and power of attorney to favor her, which he subsequently did. On examination, he had mild cognitive impairment with a Mini-mental State Examination score of 24 and subtle, patchy, frontal deficits on screening (e.g. poor planning on clock-face drawing, and decreased verbal fluency, generating only six animals in a minute). He told the psychiatrist that he was lonely and unhappy at the nursing home, although there was no evidence of a depressive syndrome. There had been some intimacy between Mr. F. and the woman for which he was grateful. He went home with the woman who neglected his care and made covert telephone calls at night about her impending return to Europe. Mr. F. returned to the nursing home a month after discharge.

Family dynamics interacting with the testator's personality may create vulnerability due to guilt, sense of martyrdom, anxiety, or fear of abandonment.

Finally, the mourning and grief associated with the loss of a powerful relationship may render a person vulnerable, as might the vacuum left after the partner in a "mirror will" (one in which each member of a couple makes a will that is the mirror image of the other's; perhaps the commonest example is where the estate is left to a surviving spouse, on whose own death it is divided up equally between the surviving children) passes away. In a recent case, an elderly woman had been single all her life and lived with her only confidante, her sister. They made mirror wills but her sister died unexpectedly. She was lost and lonely and she was befriended by the priest who buried her sister. She changed her will in favor of the priest.

PERSONALITY

Personality disorders, in which there is a significant disturbance of social relationships or excessive dependency, such as dependent or schizoid personality disorder, may confer vulnerability to undue influence.

SUBSTANCE ABUSE

Individuals with substance abuse may be susceptible to undue influence by virtue of the effects of dependency or substance-induced neurotoxicity and accompanying cognitive changes. For example, with regards to alcohol abuse, the compounded effects of self- or other-enforced isolation, a dependent relationship between friends or relatives who supply alcohol to the person who craves it, and cognitive changes such as retrograde amnesia and impaired planning and judgment, may all render vulnerability to undue influence (Clayton, 2008).

MENTAL DISORDER

A range of mental disorders such as delirium, dementia, chronic schizophrenia, paranoid and mood disorders may predispose a person to undue influence. For example, depression and associated symptoms of negative thoughts, poor concentration and impaired processing may influence decision-making.

Paranoid ideation may poison affections, and new alliances may be formed based on the exploitation of these altered affections. When the testator suffers paranoid ideation, their suspiciousness of potential beneficiaries may be fuelled by an “influencer” (Peisah *et al.*, 2006). This may be associated with a lifelong or late onset paranoid disorder.

Cognitive disorders such as intellectual disability (i.e. developmental disability or mental retardation) and dementia may render a person vulnerable to the influence of others. Appraisal of others may be tainted by dementia even in the early stages. People with dementia may change their attitudes towards significant others during the course of the illness. This change is usually triggered or fed by the disease process as well as by the natural frictions within families. The person with dementia may develop antipathy towards previous loved ones or show favor towards family members previously disfavored and who in turn can exploit such situations (Peisah *et al.*, 2006).

Shulman *et al.* (2007) suggested a threshold concept. The severity of cognitive impairment affects vulnerability of a person to undue influence. An individual with only mild impairment of cognitive function or mild dementia (e.g. Functional Assessment Staging (FAST) stages 3–4, Global Deterioration Scale (GDS) stages 3–4, see Reisberg *et al.*, 1982; Sclan and Reisberg, 1992; or Clinical Dementia Rating (CDR) stages 0.5–1, see Hughes *et al.*, 1982) might have to be subjected to a relatively severe level of influence, such as coercion or containment, for that influence to be considered undue. As the disease progresses to more advanced dementia (FAST/GDS stages 5–7; CDR stages 2–3), the person would be more susceptible to undue influence and even subtle influences might be considered undue. More specific consideration of an individual’s cognitive and functional deficits and emotional and social situation must also be taken into account. Someone with mild global impairment, but with significant frontal lobe deficits affecting reasoning and judgment or with comorbid emotional/mental disorder or adverse psychosocial circumstances, may only need to be subjected to a minimal level of “influence” for this to be considered undue influence. Thus, the threshold concept can be broadened to incorporate

an interaction between the “vulnerability load” (including emotional factors, cognition, mental disorder, personality and psychosocial situation) and the “amount” of influence which might be considered “undue” (Shulman *et al.*, 2007).

NEUROPSYCHOLOGICAL FUNCTIONS

It is assumed by the courts that a person subject to undue influence has testamentary capacity, i.e. sufficient cognitive capacity to understand the concept of a will, have knowledge of their assets, awareness of who might have claim on those assets, and is able to communicate the disposition of the estate after their own death. Even in persons having these broad capacities, vulnerability to undue influence is more likely if the person has deficits in specific cognitive abilities. For example, deficits in memory may cause a person with dementia to forget that family members have visited and the person with dementia may form adverse opinions about specific family members as a result. It is not uncommon to hear the complaint: “no-one comes to see me,” despite regular daily visits by family members.

Furthermore, impairment in autobiographical memory may make recall of past relationships, good times and bad times, including past disputes, difficult. For example, an elderly man had a 20-year history of conflict with two of his three children expressed in pages of vitriolic correspondence, a court case over property, and a pattern of wills which favored his other son. When he began to suffer from dementia he forgot his previous conflict and began favoring the two previously disfavored children.

Additionally, impaired judgment and reasoning (Kertesz and Clydesdale, 1994; Ready *et al.*, 2003) may render the affected person with dementia unable to consider the meaning, significance or moral import of another’s behavior, weigh up priorities and come to well-reasoned decisions. This may render them prone to making shallow, superficial, and impulsive judgments of people.

Impaired working memory (Masterman and Cummings, 1997) may also render a person with dementia unable to appraise their relationships in the context of the past and present simultaneously, and they may be particularly vulnerable to those with whom they are in frequent visual contact (or to the beneficiary who is sitting inside or outside the room when the will is made – but note that it is, of course, very poor practice for a beneficiary to be present when instructions for a will are given to an attorney, and most attorneys will not permit it).

Finally, personality changes towards apathy and passivity may render a person with dementia

vulnerable to the influence and opinions of others. For example, having been previously forthright, opinionated and impartial to rivalries between her children, an elderly lady with dementia sat passively and accepted her two eldest daughters' criticism of her previously beloved youngest daughter. She thereafter questioned the integrity and loyalty of her youngest daughter.

THE COMPOUNDING EFFECTS OF SEVERAL MORBIDITIES

In many cases several factors operate simultaneously to render a person vulnerable to undue influence. For example, in a recent Israeli court verdict, a will was revoked on the basis of undue influence due to the combined effects of dependent personality disorder, borderline mental retardation and a malignant terminal disease, even though testamentary capacity was preserved (I.L. vs S.D. [2005] File (Tel Aviv) 015230/99).

The issue of compounded morbidity is particularly relevant in dementia which is usually complicated by a range of behavioral and psychological symptoms (e.g. depression, delusions and anxiety) which may render testators vulnerable to undue influence. This in turn may be compounded by social circumstances which often involve significant dependency on others who provide support.

Circumstances surrounding the making of the will

The following factors related to the will itself or the making of the will have been identified as indicators or "indicia" (Spar and Garb, 1992) of undue influence, and as such may be considered to arouse suspicion that undue influence might have occurred or may be occurring:

THE MAKING OF THE WILL

- The person of influence instigates a change to a will (e.g. finds the lawyer);
- The person of influence is involved in the procurement of such changes (e.g. takes the person to the lawyer and assists in the drafting of the will);
- The lawyer whose professional services are sought is not well known to the testator;
- The lawyer is well known to the person of influence.

THE CONTENTS OF THE WILL

- Unnatural or "inofficious" provisions in the will;
- A beneficiary actively participated in or initiated procurement of the will;
- Undue benefit to the beneficiary;
- Recent radical change in the pattern of distribution of the assets.

CHANGES TO OTHER DOCUMENTS

- Longstanding patterns of formalized trust in the form of other documents, such as power of attorney or guardianship, are changed in proximity to the time the will is changed;
- *Inter vivos* gifting to the "influencer";

Protective or mitigating factors

The rigidity that sometimes accompanies progressive dementia may render a person resistant to the opinion and advice of others. Also, suspiciousness and paranoid ideation are common in dementia and may have a general or specific focus. While suspiciousness with a specific focus may render a person with dementia more amenable to undue influence, non-specific suspiciousness directed at all and sundry may protect a person against undue influence.

Furthermore, having previously noted the vulnerability of disabled older people to carers, it should also be noted that some older people use their wealth to manipulate others to care for them. It is not unusual for older persons with financial resources to bargain with carers, using promises of will bequests to secure promises of care.

Finally, the nature of family dynamics and strong family moral or ethical values may also be protective against undue influence. Families do not invariably splinter in response to the friction created by caring for a person with dementia. "Collectivist" families emphasize kinship ties, belongingness and family responsibility over other personal roles and obligations (Pyke and Bengston, 1996). A sense of common goal in caregiving is promoted and negative perceptions and distorted views expressed by the person with dementia may be glossed over or dismissed.

Clinical assessment

In practice, two situations might be encountered by a clinician engaged as an expert: (a) the testator is alive, and the clinician while conducting the assessment suspects undue influence, or (b) the testator is deceased and a retrospective evaluation of undue influence is requested. Regardless of whether it is contemporaneous or retrospective, an assessment of risk factors for undue influence should include an assessment of the following elements of the testator's life:

- (i) medical and psychiatric history;
- (ii) personal history including an account (preferably corroborated by third parties) of the nature and history of relationships with family and significant others;

- (iii) will-making pattern, and if relevant, the history of execution of other documents such as powers of attorney and guardianship, looking for changes in longstanding patterns of trust and expressed wishes with respect to the distribution of assets;
- (iv) mental state (e.g. mood, presence of psychotic features) and personality function; and
- (v) cognition (both global and in reference to relevant cognitive functions including memory and executive function) and associated functional limitations in activities of daily living.

“Red flags” for undue influence

Relationship risk factors

- Anyone in a position of trust or upon whom the testator is dependent for emotional or physical needs

Social or environmental risk factors

- Isolation and sequestration of the person
- Change in family relationships/dynamics
- Recent bereavement
- Family conflict

Psychological and physical risk factors

- Physical disability
- Non-specific psychological factors such as death-bed wills, sexual bargaining, serious medical illness with dependency and regression
- Personality disorders
- Substance abuse
- Mental disorders including dementia, delirium, mood and paranoid disorders

Legal risk factors

- Beneficiary instigates or procures the will
- Contents of the will include unnatural provisions
- Contents favor the beneficiary
- Contents not in keeping with previous wishes
- Other documents have changed at the same time

Conclusion

“Undue influence” is a complex concept and can be difficult to prove. When a will is challenged, undue influence is one of the factors considered by the court in determining validity of a will. The clinical expert serves a role in advising the court by opining about susceptibility of the testator to undue influence, rather than providing definitive determinations. In this paper, we review precedents that clarify the concept of undue influence in various jurisdictions, and summarize the clinical, social and legal risk factors that indicate the possibility or probability of undue influence. Such information can be used to tailor a clinical evaluation to provide a suitably informed opinion to assist the court.

Conflict of interest

None.

Description of authors’ roles

All authors participated in the Taskforce Consensus meeting and provided background information for the preparation of the paper as well as contributing to the text.

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Doctrine of Undue Influence

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Sunnybrook Health Sciences Centre
University of Toronto

Special Lectures 2010 **A Medical-Legal Approach to Estate Planning, Decision-Making, and Estate Dispute Resolution for the Older Client**



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CONTINUING LEGAL EDUCATION

Doctrine of undue influence

- **Allows low threshold for testamentary capacity**
- **'Coercion' vs subversion of will**

Indications of undue influence

Beneficiary

- **Opportunity to control**
- **Confidential relationship**
- **Initiates procuring of Will**
- **Undue profit**

Undue influence

Relationship risk

- **Position of trust**
- **Testator is dependent for emotional and physical needs**

(Peisah et al, 2009)

Undue influence

Social/Environmental risk factors

- **Isolation of person**
- **Change in family relationships**
- **Recent bereavement**
- **Family conflict**

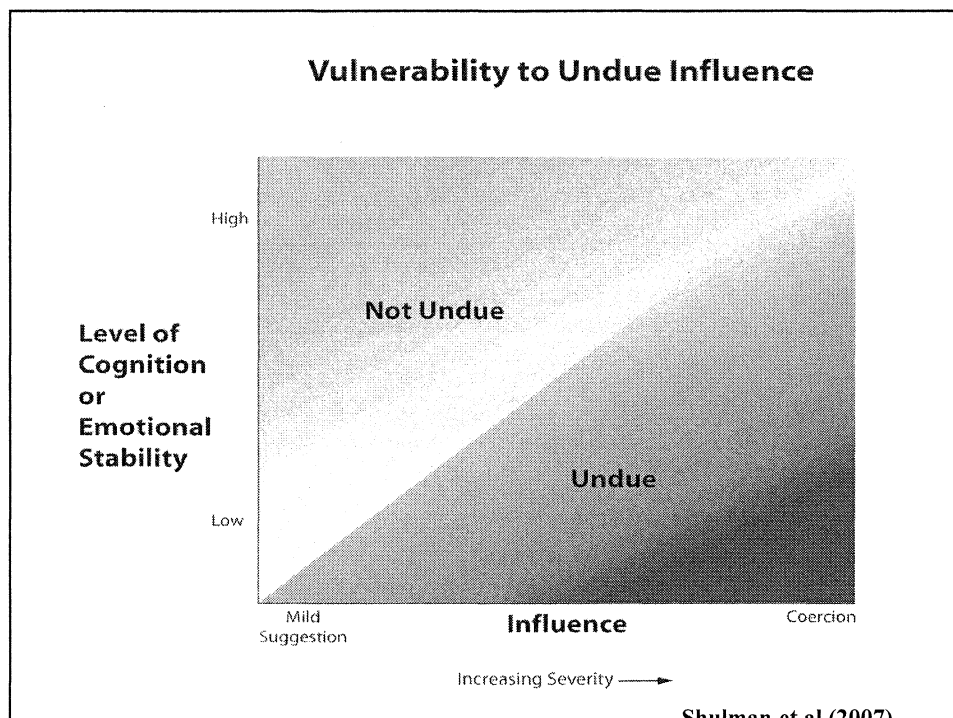
(Peisah et al, 2009)

Undue influence

Legal risk factors

- Beneficiary instigates or procures Will
- 'Unnatural' provisions
- Favors beneficiary unduly
- Not consistent with prior Wills
- Changes in other legal documents

(Peisah et al, 2009)



Undue influence: Expert's role

- **NOT to determine whether influence was exerted**
- **To elucidate 'vulnerability' to influence**
- **To define level of cognitive impairment or emotional instability**
- **To identify misperceptions or delusions**