

Undue Influence and Financial Capacity: A Clinical Perspective

Older adults are particularly susceptible to undue influence—the exploitation of the weak, typically for the financial gain of the strong.

As many of those who work frequently with older adults know, cases of undue influence abound. In such instances, typically a second party (the “influencer”) coerces the elder to act in a manner that is not in their best interest, taking advantage of the elder’s vulnerabilities, typically for financial gain. Although there have been cases of such influence that include ends other than financial gain (i.e., sexual abuse), the focus of this article is to provide a clinical framework for understanding the dynamic of undue influence (UI), and to present case examples illustrating aspects of the problem. These cases often involve a gray area that may or may not include issues of financial capacity, cognitive impairment, dependency, and complicated family dynamics.

Constructs of Undue Influence: A Short History

Undue influence is a legal construct defined differently by the courts dependent upon jurisdiction (Peisah et al., 2009). Definitions typically require some combination of the following elements (Peisah et al., 2009; Spar and Garb, 1992):

- there is a confidential relationship;
- there are factors that increase the susceptibility of the elder (physical dependence, depression, cognitive impairment, etc.);
- there is a power differential resulting in susceptibility to coercion; and
- the coercion results in suspicious financial or testamentary decisions (i.e., not proportionate to services provided).

Theoretical frameworks have included work from social psychology, work with cult members (Singer, 1993), and work on domestic violence (Cialdini, 2008; Singer, 1993; American Bar Association Commission on Law and Aging/the American Psychological Association, 2008). These theoretical accounts share the element of a power differential between the alleged influencer and the older adult.

Despite the rich theoretical and historical work done elucidating the construct of undue influence, empirical data to support these conceptual models have lagged. However, Quinn and colleagues recently completed a study examining definitions and applications of UI in California’s probate courts and based on the observation that UI, while used, is not clearly

Undue Influence: A Closer Look

Undue influence refers to a coercive dynamic between two individuals that involves unfair persuasion. More formally, an authoritative legal source defines UI as follows: “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 (Restatement of Contracts, 1981).

defined (Quinn et al., 2010). The report reviewed definitions of UI in all fifty states. To obtain data, the authors conducted a chart review of twenty-five cases in San Francisco Superior Court, with each case being selected because probate court investigators or researchers had determined it had elements of UI.

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The preliminary data from the Quinn study (2010) described a population, half of which was male and half female, less likely to be married, more likely to live in some sort of living facility versus in independent homes, cognitively impaired, and frequently experiencing multiple other impairments in such areas as executive functioning, judgment, and insight. Alleged abusers were noted to be friends, neighbors, family members, or scam artists (25 percent). In this small sample there were no cases of people in authority (a party acting in a fiduciary capacity, for example) accused of abuse.

In summary, although, conceptually, undue influence and cognitive impairment are independent constructs, at least in this preliminary sample, cognitive impairment was ubiquitous, underlying the commonsense belief that it is easier to influence individuals who are not

mentally intact (Spar and Garb, 1992). More research on UI is needed to more fully characterize the older adults who have fallen victim to this type of exploitation.

Clinical Models of Undue Influence

Various clinical models, all with considerable overlap, have been put forth to help clinicians provide a framework for considering undue influence and to build a legal case regarding its presence (American Bar Association Commission on Law and Aging/American Psychological Association, 2008; Blum, 2005; Shulman et al., 2007; Shulman et al., 2009; Singer, 1993; Spar and Garb, 1992). To discuss them all is beyond the scope of this article, but for illustration purposes, three models are described here.

The IDEAL model

Psychiatrist Bennett Blum, M.D., created a model emphasizing the social conditions prevalent in cases of alleged undue influence. Blum’s IDEAL model is organized around five categories: isolation from family and friends, dependency on the perpetrator, emotional manipulation of the victim, acquiescence of the victim because of previous factors, and financial loss (Blum, 2005).

The SCAM model

The SCAM model, developed by Susan I. Bernatz, Ph.D., has four domains of undue influence: susceptibility factors of the victim, the presence of a confidential and trusting relationship between the victim and perpetrator, initiation (active procurement) of financial transactions by the perpetrator, and monetary loss of the victim (American Bar Association Commission on Law and Aging/American Psychological Association, 2008).

The IPA analysis framework

More recently, The International Psychogeriatrics Association (IPA) formed a task force on

Testamentary Capacity and Undue Influence. This series of papers reviews international law and presents commonalities among legal definitions of undue influence (Shulman et al., 2007;

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Shulman et al., 2009). Specifically, the IPA subcommittee noted several red flags in cases of suspected UI: social or environmental risk factors, psychological and physical risk factors, and legal risk factors.

In the area of social or environmental risk factors, the authors note examples such as social isolation, family conflict, and dependency, especially if there has been some change in circumstances. In terms of psychological or physical risk factors, physical disability, substance use, cognitive impairment, and mental illness are listed as factors that increase susceptibility to undue influence. Regarding legal risk factors, the authors discuss the importance of noting unnatural provisions in a will or evidence of active procurement. This model has considerable overlap with the other clinical frameworks of UI mentioned earlier. However, it may provide another useful framework to help clinicians organize data and court case presentation. To illustrate, the next sections present two case studies on undue influence, employing the IPA conceptual framework.

Case Study 1: The Aged Testator

Mr. J, eighty-eight years of age and a widower, had approached his longtime attorney to make changes in his estate planning and will. At the time, his grandson was living in Mr. J's home, assisting with some of his care, and attending college. Mr. J had four adult children and six grandchildren. A previous will had split his estate equally among his children, with no specific mention of grandchildren. Now he

wanted to change his will to leave his current home to his grandson, and to provide funds to pay for his grandson's tuition. The estate attorney requested an evaluation of capacity and susceptibility to undue influence based upon the client's age and the increased possibility of litigation given the shift from past dispositions.

In the case of Mr. J, a superficial examination of the facts reveals a number of risk factors that should be evaluated for the potential of UI.

Social or environmental risk factors

The first element of the IPA model is social or environmental conditions that increase risk. Mr. J had become a widower within the past two years, following a long and happy marriage. Further, the alleged influencer (the grandson) was living with him and providing some care, suggesting dependency, increasing his risk of influence. Also, although Mr. J could still drive, a back injury kept him home more often than in the past, curtailing his social life and making it difficult for him to fix meals and clean his home.

Psychological risk factors

Mr. J was reported to be mentally sound, but he had made questionable business decisions in the past year. He had augmented his retirement funds with income from four rental properties, purchased twenty years earlier. However, he had heavily leveraged two of them, and with changing market conditions and unfilled units, he was at risk of losing the buildings.

At the attorney's request an assessment was made, including a clinical interview, neuropsychological testing, collateral interviews, and a home visit. Although Mr. J was described as mentally sound, changes in financial management skills had been reported. Impairments in financial capacity are known to be early symptoms of Alzheimer's Disease (Marson et al., 2000).

Mr. J tested well on neuropsychological testing, with mild declines in the area of executive

functioning. There was no evidence of depression on a depression-screening instrument.

When asked about his arrangement with his grandson, he reported that he enjoyed the company and needed the assistance of his grandson around the house since his wife had died. He reported that he provided room and board, and that his grandson assisted with up to twenty hours of care per week. He reported that two of his adult daughters also visited him weekly and helped with meal preparation. Mr. J remained active in his church and attended several group meetings weekly.

Legal risk factors

In terms of legal risk factors, the change from an equitable distribution to a will that favored one grandchild over others was somewhat “unnatural” and certainly a shift from the wishes of his wife when she was living.

When asked about his decision to change his will, Mr. J noted that his wife had been an educator, and that through less formal mechanisms they had supported the other children and grandchildren through college. Mr. J noted that in that way, the other children had already benefited financially, and that his current choices were “fair.” When asked about the potential loss of his investment properties, Mr. J was able to articulate how the current market conditions had impacted him personally and noted that he retained three properties that were unencumbered.

Case Study 1 Summary

In summary, although risk factors for undue influence were present, it was the evaluator’s opinion that Mr. J was not being unduly influenced in his decision making. He was not isolated from other family members, he was making changes that reflected long-term values (education), and his potential loss of two investment properties was related to broad market values impacting the state as a whole. The evaluator

recommended that Mr. J consider consulting with a financial planner to assist him with his complex investment portfolio, as there was evidence of mild deficits in executive functioning.

Case Study 2: The New Friend of an Elderly Lady

Ms. K, a seventy-seven-year-old woman, developed a relationship with a contractor after she discovered they shared a passion for aviation. The contractor had been living in a garage apartment while completing work on the main home. After about two months, he moved into the main home and developed a close friendship with Ms. K. She gave him permission to use her private plane housed at a nearby airport. Neighbors reported that Ms. K had been less social, and reluctant to talk about her new friend. They indicated that she had also demonstrated changes in her habits—which included purchasing new furnishings and a car—when she had been noted to be very frugal in times past.

In the case of Ms. K, several suspicious facts provide a rationale for a retrospective assessment of capacity and undue influence.

Ms. K was divorced and had no children. Her sister was still living, and their relationship was civil but not close. After about six months, Ms. K fell and was hospitalized for a broken hip. Her friend, the contractor, visited her at the hospital with some legal documents, including a power of attorney and a quitclaim deed. Following her hospitalization, he had her moved to an assisted living facility on the far side of the community; he moved into her main home and continued to use her plane. After her death a few months later, her revised estate plans came to light, leaving everything to the new friend. Her sister contested the new will, raising concerns of undue influence.

In the case of Ms. K, several suspicious facts provide a rationale for a retrospective assess-

ment of capacity and undue influence. Unlike the case of Mr. J, it is not possible to complete an in-person interview. Instead, record reviews (legal, medical, financial, e-mail, cell phone) and collateral interviews (neighbors, friends, family members) must be drawn upon for the assessment. Although the approach is different in a retrospective assessment, that is, one that occurs after the death of the alleged influenced person, one can use the same framework for data collection and presentation.

Environmental or social risk factors

There was evidence of family conflict (no close family members) and an increase in dependency. Ms. K had friends in her community, especially other pilots, and was noted by several collaterals to have become less social and more isolated after her relationship with the contractor had started. Most of her friends suspected that the relationship was romantic, but they were not certain. Other collaterals reported that the contractor continued to be involved with another younger woman throughout his relationship with Ms. K, without her knowledge. The interviews described Ms. K as increasingly infatuated with the contractor and willing to capitulate to his desires for nicer furnishings and a new car. These behaviors were described in sharp contrast to a frugal woman whose only luxury was her plane.

Psychological risk factors

Medical records noted some risk factors for cognitive impairment (hypertension), and admission records at the hospital described her mental status on the Mini-Mental Status Exam (24/30), as being consistent with some mild cognitive impairment, especially in the area of memory. Prior to her hospitalization, she was reported to have become increasingly dependent upon her tenant for assistance around the house secondary to those changes. But at the same time, she was described as lucid by neighbors.

After her admission to the assisted living facility, Ms. K attempted to leave against medical advice, and a psychologist was asked to complete an assessment of her cognitive functioning and mood. The report indicated that although Ms. K presented well, there were notable impairments in the areas of executive functioning, judgment, and insight. Furthermore, Ms. K reported that she would only be staying at the facility until her friend returned from a business trip in about a month. She was unaware that he remained in the community, living in her home, with access to her financial resources.

Legal risk factors

The time of the change in estate planning when Ms. K was hospitalized and her lack of awareness of the implications support a finding of undue influence. A review of financial records indicated that the contractor had been using her ATM to withdraw as much cash as possible, beginning when she was hospitalized, and there was no indication that he was employed. Ms. K contacted an attorney to discuss her situation, but never followed up because her health declined further, and she eventually died due to the effects of a stroke.

Case Study 2 Summary

Ms. K presented with increased environmental, psychological, and legal risk factors that supported a finding of undue influence. Mild cognitive impairment, physical disability, declining health, and social isolation increased her susceptibility to UI. The unnatural aspects of her estate planning, the evidence of active procurement, and the timing of these events further support a finding of UI. In this matter, a settlement was reached that favored her sister and the case did not go to trial.

Summary

Undue influence refers to a dynamic between two individuals in which the weaker individual is exploited, often financially. In work with

older adults, UI is most frequently discussed in terms of testamentary capacity, but can occur with other financial transactions as well.

Undue influence is a separate construct from financial or testamentary capacity. A number of clinical frameworks have been put forth to help with assessing and presenting data in these cases. Evidence of factors that may increase dependency (physical, psychological, cognitive), the presence of an uneven personal relationship, and evidence of unusual transac-

tions may serve as red flags to potential cases involving undue influence. 

Stacey Wood, Ph.D., is an associate professor and Chair of Psychology at Scripps College in Claremont, California, and a licensed neuropsychologist with research and practice in the area of elder financial mistreatment. Pi-Ju (Marian) Liu, M.A., is a doctoral student at Claremont Graduate University, and is the winner of the 2011 ASA Graduate Student Research Award.

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