

# UNDUE INFLUENCE UPDATED: A FRAMEWORK FOR RECOGNIZING, INVESTIGATING, AND RESPONDING

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NATIONAL ADULT PROTECTIVE SERVICES ASSOCIATION

AUGUST 20, 2019

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CANDACE HEISLER, JD

# Overview of Session

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Psychological aspects of undue influence

Legal aspects of undue influence

Consent and capacity issues

Two research studies

- 2010 Exploratory study of undue influence
- 2016 Development of screening tool for undue influence

Case Studies

California Undue Influence Screening Tool (CUIST)

# Undue Influence as a Psychological Process

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- Psychological process, not one time event
- One person gradually takes over the thoughts, actions, and decision making powers of another person and benefits by doing so.
- Accomplishes this by deceit, isolation, threats, deprivation of sleep or necessities of life, manipulation of medication, withholding information, inducing guilt, creating siege mentality, dependency, fear, fake worlds, relationship poisoning

# Legal Perspective

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- Legal proceedings: deal with results of undue influence
  - Transfer of property
  - Changes in beneficiaries of a will,
  - Change in ownership of bank accounts.
  - Consent? Capacity?
- Federal laws
  - Elder Justice Act and Older Americans Act –Do not define undue influence or include the term in their definitions of financial exploitation or abuse
- State laws vary
  - May mention the term undue influence but not define it
  - May include undue influence as part of another definition: e.g., APS, Civil, Probate or Criminal
  - Definition may be out of date and inconsistent with contemporary thought and practice
  - State courts laws commonly include undue influence in wills, trusts, gifts, contracts

# Mr. L.

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81 old man makes a new will leaving everything to caregiver of 2 years, his only social support person.

Out of state niece, only relative, finds out and calls Adult Protective Services certain her uncle has been unduly influenced. Tells APS that uncle near death in hospital.

APS determines Mr. L. lives in senior housing and needs help with activities of daily living, but is cognitively intact.

Undue influence? Need other information?

# Mrs. C.

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Mrs. C. , age 75, gave \$14,000 to neighbors to buy a boat shortly after her husband's death.

Neighbors said they had always wanted a boat and said Mrs. C. wanted to help them.

Relatives and friends told APS that Mrs. C. had never been a generous person and did not contribute to charities.

Furthermore, she never liked boats.

Undue influence? Need further information?

# Characteristics of Undue Influence

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- Can happen to **anyone** with capacity given the right circumstances
  - Estate of Olson (1912) 19 Cal. App. 379, 386.
- Easier to unduly influence someone who has cognitive or capacity issues
- Historically raised as a legal issue, often in will contests

# Characteristics of Undue Influence (Cont.)

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- Historically poorly understood
- Occurs behind closed doors
- Determined by circumstantial evidence
- Frequently present with financial abuse
- Can be present with sexual abuse or when younger people (family, friends, or strangers) move in under guise of “taking care” of elder or dependent adult
- Present in cults, hostage situations, totalitarian regimens, domestic violence, prisoners of war, caregivers, telemarketers

# Consent

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- Most common defense or explanation by influencer to rationalize behavior
- Elements of true consent (CALCRIM 1.23)
  - Mental capacity
  - Knowledge of true nature of
  - Acted freely and voluntarily
- Is there true consent when undue influence is used? Or is it really “apparent consent”?

# Decision-Making Capacity

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- Ability to understand circumstances and consequences of a decision and to communicate the decision
- The rights, duties, and responsibilities created by or affected by the decision (California Probate Code §812)
- Level of understanding required varies by type of decision e.g. medical decision, for a will, marriage and can fluctuate (e.g., sun downing, illness, medications)
- Diminished capacity increases vulnerability to undue influence
  - Dependence is increased
  - Ability to make sound decisions is compromised
  - Ability to resist influencer is weakened

# Undue Influence: Exploratory Study

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- Study funded by Borchard Foundation Center on Law and Aging
- 2010 exploratory study by San Francisco Superior Court and California Administrative Office of the Courts  
<http://www.courts.ca.gov/documents/UndueInfluence.pdf>
- Components
  - Review of 25 recent conservatorships where undue influence a factor
  - Review of California law and case law on undue influence
  - Review of other states' laws on undue influence: civil and criminal laws
  - Review of social service literature: psychology, criminology, victimology, elder abuse
  - Focus Groups of Public Guardian and probate attorneys

# California Civil Code §1575

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## Elements

1. The use, by one in whom a confidence is reposed by another, or who holds real or apparent authority over him, of such confidence or authority for the purpose of obtaining unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; and
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

Applicable to all civil matters including Probate from 1872 to 2014

Still used for contract law disputes where undue influence is involved

# Summary of 2010 Study

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- Findings from legal perspective and social services literature on undue influence or coercive persuasion had features in common
  - Victim characteristics
  - Influencer power, formal or informal
  - Tactics
  - Unfair, improper, “unnatural” unethical outcomes
- Study called for development of undue influence screening tool for APS staff who are likely to see undue influence before most other professionals.

# 2014 California Legislation

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- New definition of undue influence, effective January 1, 2014
- Probate Code §86 and Welfare and Institutions Code §15610.70
- “Undue influence means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.”

# Elements of 2014 Legislation

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- Vulnerability of victim
  - Influencer apparent authority
  - Tactics
  - Unfair outcome
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- Not all four elements need to be present for a judge to determine that undue influence has taken place
  - No one element has more weight than another
  - Judges must consider all four factors when undue influence is alleged.

# Class Discussion

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What evidence or information would you gather to establish victim vulnerability?

# Vulnerability of Victim

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- Evidence may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and
- Whether the influencer knew or should have known of the alleged victim's vulnerability

# Class Discussion

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What information or evidence would you gather to establish the influencer's apparent authority?

# Influencer's Apparent Authority

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- Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

# Class Discussion

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What evidence or information would you gather to establish the influencer's actions or tactics

# Actions or Tactics Used by Influencer

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- Evidence of actions or tactics used may include, but is not limited to, all of the following:
  - (A) Controlling necessities of life, medication, the victim's interactions with others, access to information, or sleep
  - (B) Use of affection, intimidation, or coercion.
  - (C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

# Class Discussion

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What information or evidence would you gather to illustrate the inequity or unfairness of the result of the alleged undue influence?

# Equity of the Result

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- Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship or the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.
- Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

# Caution

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A person (with capacity and free of undue influence) is free to dispose of their possessions and property (even if others think the disposition is unfair) as long as the disposition results from the victim's exercise of free will.

# Developing the California Undue Influence Screening Tool (CUIST)

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- 2016 research study funded by Borchard Foundation Center on Law and Aging
- Four APS focus groups in two California counties
- Review of existing undue influence models and Risk Assessment tools
- Interviews with four elder abuse experts and two APS administrators who reviewed the preliminary screening tool
- Piloting of preliminary screening tool by APS staff
- <https://www.elderjusticecal.org/undue-influence.html>

# California Undue Influence Screening Tool (CUIST)

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- Created using feedback from APS personnel, administrators, current undue influence models, and experts in the field of elder abuse and undue influence
- Uses jargon-free language
- Mirrors California legislation but can be used in other states
- Four elements listed in law: victim vulnerability, influence authority, tactics and unfair outcome.
- Real life examples are provided for each category
- Can be used by anyone: professionals and public

# Using California Undue Influence Screening Tool (CUIST)

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- Roadmap to building a case for prosecution, conservatorship/guardianship of estate, will contests, trust litigation, or other legal matters
- Screening tool **not** assessment or diagnostic tool
- Offers a way to gather and focus on information and evidence “from the field”
- Guidance for referrals for assessment

# Criminal Law and Undue Influence

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- Undue influence is not a crime under California criminal law
- It is included in other jurisdictions' crimes: e.g., Minnesota, North Dakota, District of Columbia, Missouri, Georgia
- A state may rely on definition of undue influence found in civil law if it cannot be found in criminal statutes

# People v. Brock (2006) 143 Cal. App. 4<sup>th</sup> 1266

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- People v. Brock, held that undue influence based on the only existing definition of undue influence in California law
- Civil Code 1575
  - Cannot support a criminal prosecution for a financial crime
  - Vague and overbroad and fails to provide notice of prohibited acts.
- Case not retried

# People v. Brock Case Facts

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Victim : over 65 years of age, anxiety disorder, unable to work, need someone to manage his finances and shopping. Met defendant when Brock worked in a law office where victim sought legal help.

Brock spent a lot of time with victim, served as his driver, helped him through anxiety attacks, and traveled with victim at victim's expense. In 8 years the two exchanged over 2500 calls . Brock frequently asked for and received money from the victim. If victim did not give him a requested check, Brock would fill out the check, follow and hound the victim until he signed it. Brock asked victim to keep these payments secret.

# People v. Brock Case Facts-2

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

Defendant failed to carry out commitments he made to victim, including filing victim's tax returns over a 6-year period resulting in liens and penalties against victim, repaying a mortgage he convinced victim to take out on his behalf, pocketing \$30,000 the victim gave him to invest for him, and keeping the proceeds from 2 sales of victim's cars.

# People v. Brock Case Facts-3

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At trial a psychologist and a psychiatrist testified in substance that victim suffered from a cognitive disorder; neurocognitive impairment, and borderline intellectual functioning. The psychologist testified victim had been subjected to undue influence by a person with whom he had formed a dependent relationship; and focuses on immediate results and not long-term implications of actions. The psychiatrist testified victim was unable to focus on a topic, deal with details, make calculations, recall facts about his life, or understand the long-term consequences of depleting his assets, concluding that victim had a strong desire to please, and was vulnerable to undue influence, and his cognitive disorder was obvious to lay persons.

\$600,000.00 loss. Defendant convicted of elder financial abuse (Pen C 368(d)) and grand theft (Pen C 487)

# Criminal Law and Undue Influence: After People v. Brock

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- Since Brock, theory of undue influence has not been used in CA criminal prosecutions
  - New law and definitions have not yet been used by CA prosecutors to argue that undue influence should again support a criminal prosecution for a theft or other crime
  - Prosecutors use the tactics and behaviors of influencers to prove lack of consent to transaction by highlighting such evidence as deceit, misrepresentation in how money/asset to be used

# Case Study

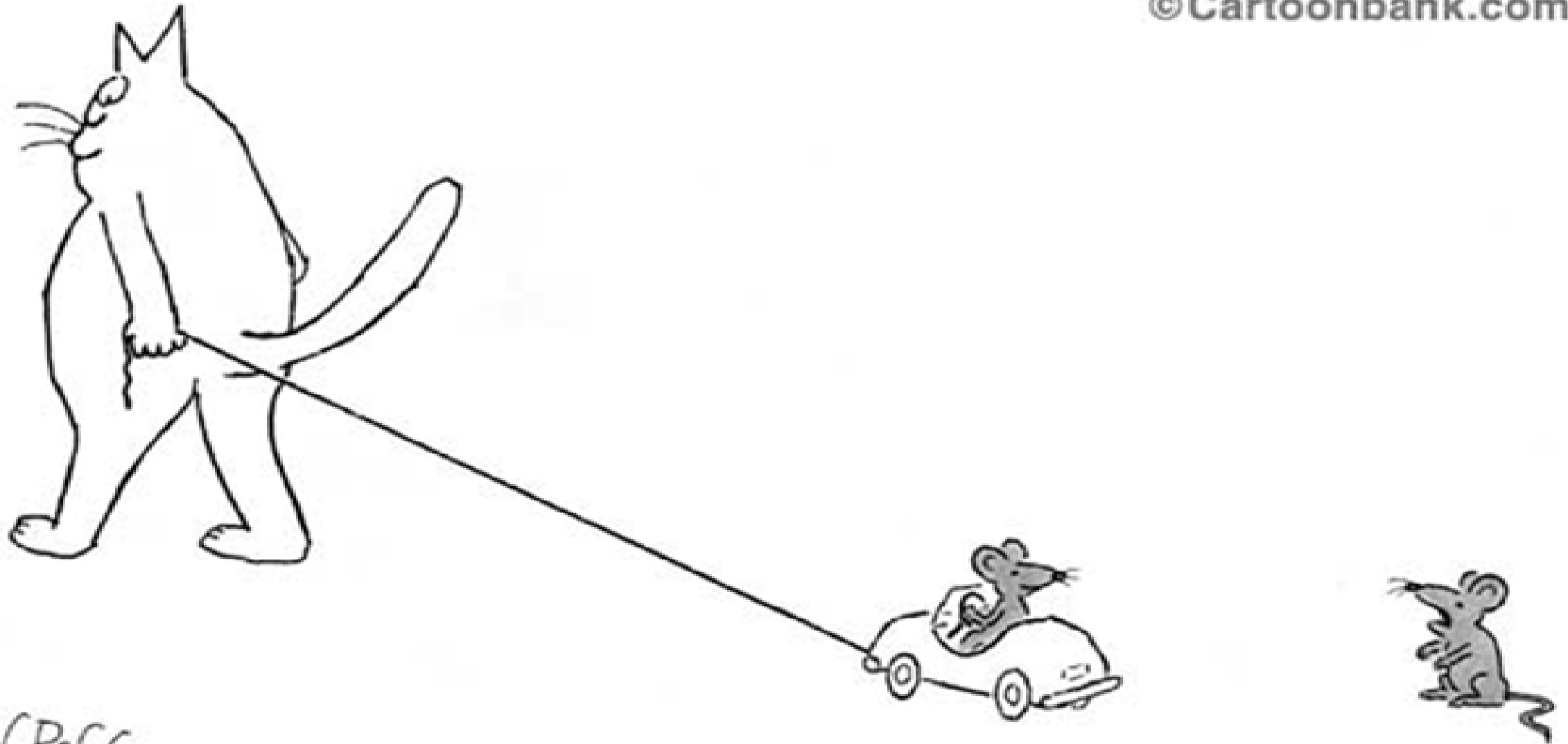
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- Consider the Brock case discussed earlier
- How do the facts fit with the CUIST?
- Evidence of:
  - Vulnerability of the victim
  - Influencer's apparent authority
  - Actions or tactics used by the influencer
  - Equity of the result
- Do the facts support a finding of undue influence under the California Welfare and Institutions §15610.70?

# Conclusions

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- Undue influence is a psychological process to manipulate and control a person's decision-making.
- Undue influence undermines self-determination and may provide legal justification for voiding documents or transactions.
- Undue influence is difficult to detect as it transpires, and persons subject to it often side with the influencers.
- Learning the signs of undue influence is crucial to competently and safely provide services.
- The new California Undue Influence Screening Tool will likely be useful to APS, lawyers, and other professionals – in California and other states.



S. GROSS

*"For God's sake, think! Why is he being so nice to you?"*

# Questions?

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Thank You!

Mary Joy Quinn

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Candace Heisler

◦ [cjheisler@aol.com](mailto:cjheisler@aol.com)




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- Legal aspects of undue influence
- Consent and capacity issues
- Two research studies
  - 2010 Exploratory study of undue influence
  - 2016 Development of screening tool for undue influence
- Case Studies
- California Undue Influence Screening Tool (CUIST)

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- Furthermore, she never liked boats.
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### Characteristics of Undue Influence

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- Historically poorly understood
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- **Characteristics of Undue Influence (Cont.)**
- Can be present with sexual abuse or when younger people (family, friends, or strangers) move in under guise of "taking care" of elder or dependent adult
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## Consent

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  - Review of 25 recent conservatorships where undue influence a factor
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## Summary of 2010 Study

- Findings from legal perspective and social services literature on undue influence or coercive persuasion had features in common
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## 2014 California Legislation

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## Elements of 2014 Legislation

- Vulnerability of victim
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## Class Discussion

What evidence or information would you gather to establish victim vulnerability?

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## Vulnerability of Victim

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### Influencer's Apparent Authority

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### Actions or Tactics Used by Influencer

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### Equity of the Result

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## Caution



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## Using California Undue Influence Screening Tool (CUIST)

- Roadmap to building a case for prosecution, conservatorship/guardianship of estate, will contests, trust litigation, or other legal matters
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  - Cannot support a criminal prosecution for a financial crime
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- Defendant represented himself as the victim's legal advisor (he is not an attorney but has a law degree) to victim's bank and ordered that an annuity be canceled. He represented to the police he was victim's advisor. He also convinced victim to cancel an annuity benefitting victim's niece, and wrote a letter for victim to effect the cancellation
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## Case Study

- Consider the Brock case discussed earlier
- How do the facts fit with the CUIST?
- Evidence of:
  - Vulnerability of the victim
  - Influencer's apparent authority
  - Actions or tactics used by the influencer
  - Equity of the result
- Do the facts support a finding of undue influence under the California Welfare and Institutions §15610.70?

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## Conclusions

- Undue influence is a psychological process to manipulate and control a person's decision-making.
- Undue influence undermines self-determination and may provide legal justification for voiding documents or transactions.
- Undue influence is difficult to detect as it transpires, and persons subject to it often side with the influencers.
- Learning the signs of undue influence is crucial to competently and safely provide services.
- The new California Undue Influence Screening Tool will likely be useful to APS, lawyers, and other professionals – in California and other states.

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## Questions?

- Thank You!

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## **UNDUE INFLUENCE REFERENCES**

### **National Law and Aging Conference**

**November 2019**

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## California Undue Influence Screening Tool (CUIST)<sup>1</sup>

**Client's Name:** \_\_\_\_\_

**Date:** \_\_\_\_\_

The purpose of CUIST is to aid Adult Protective Service personnel screen for suspected undue influence. Undue influence means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.<sup>2</sup> CUIST is divided four categories: Client Vulnerability, Influencer's Authority/Power, Actions/Tactics, and Unfair/Improper Outcomes. Check all the factors that apply to the victim's circumstances and provide examples. For more details and examples, see *Instructions for Completing California Undue Influence Screening Tool (CUIST)*.

Client's Vulnerability	Examples/ Comments
<ul style="list-style-type: none"> <li><input type="checkbox"/> Poor or declining health or physical disability</li> <li><input type="checkbox"/> Depends on others for help or care</li> <li><input type="checkbox"/> Problems with hearing, vision, or speaking</li> <li><input type="checkbox"/> Problems with memory</li> <li><input type="checkbox"/> Problems communicating and understanding</li> <li><input type="checkbox"/> Does not understand consequences of decisions</li> <li><input type="checkbox"/> Developmental disability</li> <li><input type="checkbox"/> Dependent or passive behavior</li> <li><input type="checkbox"/> Emotional distress (e.g., grief, anxiety, fear, depression)</li> <li><input type="checkbox"/> Language/literacy barriers</li> <li><input type="checkbox"/> Isolated from others</li> <li><input type="checkbox"/> Lives in chaotic or dysfunctional environment</li> <li><input type="checkbox"/> Influencer knew or should have known of person's vulnerability</li> <li><input type="checkbox"/> Other (please specify) _____</li> <li><input type="checkbox"/> No apparent vulnerability</li> </ul>	

<sup>1</sup> CUIST was developed under a grant from the Borchard Foundation Center on Law and Aging

<sup>2</sup> Probate Code §86 and Welfare and Institutions Code §15610.70

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

Actions or Tactics	Examples/ Comments
<input type="checkbox"/> Manipulates or controls the client's access to food, sleep, medication or personal care <input type="checkbox"/> Makes promises to help the client get rich <input type="checkbox"/> Makes false claims or promises, or misrepresents self (e.g. claims to be an expert) <input type="checkbox"/> Professionals or paid caregivers involve clients in their personal lives or ask for gifts/loans <input type="checkbox"/> Controls access to information <input type="checkbox"/> Isolates from visitors, telephone/computer, or mail <input type="checkbox"/> Instills distrust and fear (e.g., nursing home placement, abandonment, threats of violence, "poisons relationships") <input type="checkbox"/> Moves into client's residence or changes their residence <input type="checkbox"/> Changes clients's usual providers (e.g. physicians, lawyers, bankers, accountants) <input type="checkbox"/> Makes frequent/repeated requests that benefit the influencer <input type="checkbox"/> Pressures during periods of distress, illness, transition <input type="checkbox"/> Uses affection, sex, intimidation or coercion <input type="checkbox"/> Rushes client to make decisions secretly and at inappropriate times and places <input type="checkbox"/> Solicits or encourages gifts, loans, bequests, or cash <input type="checkbox"/> Other (Please specify) _____ <input type="checkbox"/> No apparent use of actions or tactics described above	

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Unfair or Improper Outcome(s)	Examples/ Comments
<ul style="list-style-type: none"> <li><input type="checkbox"/> Economic losses (e.g. money, property, investments)</li> <li><input type="checkbox"/> Changes in prior intent, conduct, or practices (e.g., new beneficiaries on wills; new signatories on bank accounts, changes in property ownership, changes to estate plans or charitable contributions)</li> <li><input type="checkbox"/> Excessive gifts, payments, or donations in light of length and nature of relationship</li> <li><input type="checkbox"/> Loss of home or residence, or eviction</li> <li><input type="checkbox"/> Deterioration of home and environment</li> <li><input type="checkbox"/> Loss of control of credit cards, bank accounts, or property</li> <li><input type="checkbox"/> Identity theft</li> <li><input type="checkbox"/> Unexplained physical decline or injury including weight loss, physical function</li> <li><input type="checkbox"/> Negative mental or emotional changes including depression, loss of will to live, suicidal thoughts</li> <li><input type="checkbox"/> Violation of rights (e.g., to live where one wants, to marry or divorce, agree to or refuse treatment)</li> <li><input type="checkbox"/> Other (please specify)_____</li> <li><input type="checkbox"/> No apparent unfair or improper outcomes</li> </ul>	

## Summary

Check the following boxes that you believe apply to this client :

- ☐ Victim appears to be vulnerable
- ☐ Suspected influencer appears to have power or authority over the client.
- ☐ Suspected influencer has taken steps suggestive of undue influence.
- ☐ Influencer's actions appear to have resulted in unfair, improper, or suspicious outcome.

Further steps may include but are not limited to: referral for conservatorship, neuropsychological evaluation, multidisciplinary team review, capacity assessment, or medical evaluation; interviews with friends, family, neighbors or professionals; maintain form in agency file for future reference; contact law enforcement to discuss case or client's bank to request information or monitoring. Specific action will depend on supervisor input and agency policy.

## DEFINITION OF UNDUE INFLUENCE

### California Welfare and Institutions Code §15610.70

- (a) “Undue influence” means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:

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

This chart reflects the exact language contained in California Welfare and Institutions Code Section §15610.70. NOTE: No one category is weighted more than another. Not all categories are required for a legal finding of undue influence.

California Probate Code §86 states that “undue influence” has the same meaning as defined in Section §15610.70 of the California Welfare and Institutions Code.