

Undoing Undue Influence



About Undue Influence

- Undue influence occurs when one person takes over the decision making of a victim and benefits, while harming the victim.
- Historically poorly understood
- Occurs behind closed doors with no witnesses.
- Determined by considering circumstantial evidence
- Can occur when people have full capacity
- A process, not a one time event.

About Undue Influence (cont.)

- Adults with impaired judgement and insight more easily influenced.
- Historically known as a legal issue
- Usually financial abuse but can be for sexual activity or when younger people move in elder's home under guise of 'taking care of you and keeping you out of a nursing home.'

Impetus for Exploring Undue Influence

- Curiosity
- Criteria for conservator of estate (California Probate Code §1801(b) “unable to resist fraud or undue influence”
- Term mentioned over 25 times in Probate Code (gifts, wills, trusts, conservatorships) No definition.
- California Civil Code §1575 enacted in 1872. Only statutory definition until 2014.
- Judges relied on case law & Civil Code §1575

Civil Code Section 1575

- 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

Exploring Undue Influence

- 2010 Study: Undue Influence: Definitions and Applications
www.courts.ca.gov/documents/UndueInfluence.pdf
- Funded by the Borchard Foundation Center on Law and Aging
- Several elements
 - Conservatorship case reviews (25)
 - Law review of California statutory law and case law on undue influence
 - Review of other state laws on undue influence
 - Literature review of social services literature
 - Focus groups of professionals

Social and Psychological Literature Perspective

Coercive persuasion

- Totalitarian regimes
- Prisoners of war
- Cults
- Domestic Violence
- Caregiver
- Hostage situations
- Professionals who don't adhere to accepted professional laws and standards
- Con Artists e.g. telemarketers

Commonalities in Legal Arena and Social Service Literature

- Victim characteristics
- Influencers' power
- Improper actions or tactics
- Unfair, improper, “unnatural” or unethical transactions or outcomes

2014 California Legislation

New definition of undue influence January 1, 2014

California Probate Code §86 and California 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.”

Four factors: victim, influencer authority, tactics, outcome

Developing an Undue Influence Screening Tool for Adult Protective Services

- The 2010 study calls attention to the need for a screening tool.
- The 2014 legislation made it possible to consider developing a screening tool because it spelled out specific factors and behaviors.
- Adult Protective Services (APS) sees the most undue influence cases: first responders.
- Also funded by Borchard Foundation Center on Law and Aging

Elements of 2017 Study

- Focus Groups with APS Personnel (4)
- Literature Review
- Draft undue influence tool
- Field testing of draft tool with APS
- Review of draft tool by experts
- Creation of California Undue Influence Screening Tool (CUIST) with Instructions

Focus Groups

“the tool would help a lot to organize our thinking and documentation for presenting to the public guardian or to somebody else.

“It would be great if we had a tool for undue influence that we could fill out for every client that gave us a score or language suggesting the need to ask specific questions.”

“...there’s more of a uniform language that we use, that would be very helpful.”

“We already have what we call a RAT, a risk assessment tool, that we use and I can just see it as a part of that tool.”

“[A] tool that triggers people documenting these four [categories] would be really helpful, I think in the long run in terms of taking to law enforcement, taking it to your supervisor, explaining why it’s undue influence.”

“To get people to start ... documenting something in each of the four categories would be helpful...”

“What’s challenging is getting other authorities...to actually recognize why it’s such a problem. If there’s some threshold that can be shown .., then maybe law enforcement will say, this is important””

APS Field Testing of the Draft Tool

- Asked Focus Groups participants to complete the draft tool
- Nineteen people could potentially complete the survey: they had caseloads.
- Of that number 58% (n=11) completed the survey for a total of 15 cases.
- Provided comments

Comments from Experts & APS Administrators

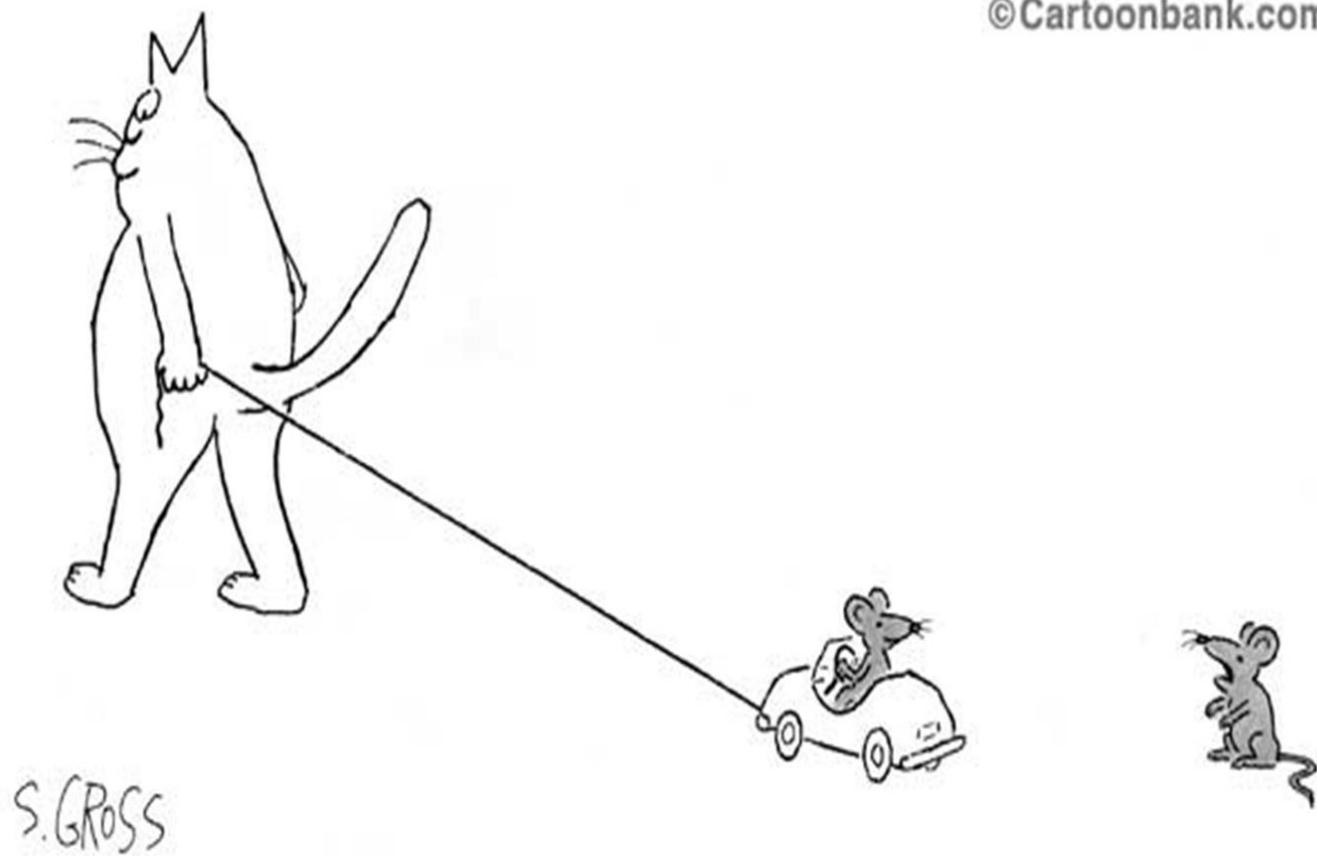
- “I wish I’d had this tool 20 years ago when I was first starting.”
- “The content is “spot on” as to what I see.”
- “Even if you don’t find UI, (the tool) may get people thinking about undue influence.”
- “I would absolutely use the tool as evidence in criminal cases—it would strengthen the case.”
- “Really interesting. There will be broad interest in the field of aging.”
- “(The tool) puts parameters on an issue we all need to know more about”.
- “The categories make sense given the literature on undue influence. They are clear. Everything is there. Succinct. “
- “(It would) help attorneys present cases by giving them categories to work from.”

Other Groups That Can Benefit

- Public officials, including city attorneys, public defenders, district attorneys, public guardians, and probate court investigators
- Private attorneys can use in estate planning
- Law enforcement personnel, including police detectives who investigate crimes with an eye towards possible prosecution
- Families who are concerned about a loved one
- Can be used in other states.

CONCLUSIONS

- California Undue Influence Screening Tool:
 - Organizes thinking about undue influence
 - Provides guidelines
 - Contains elements consistent with California law
 - Is jargon free and in lay language
 - Has potential to create common language among various professionals



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

References for CUIST

- Quinn, M. J., Nerenberg, L. Navarro, A. E., Wilbur, K. H.. (2017) Developing an undue influence screening tool for Adult Protective Services. *Journal of Elder Abuse & Neglect*, 29(2-3), 157-185.
- California Elder Justice Coalition
 - <https://www.elderjusticecal.org/undue-influence.html>
California Undue Influence Screening Tool (CUIST), Instructions to complete CUIST, Final Report to Borchard Foundation Center on Law and Aging.