# The Encyclopedia of Elder Care

## The Comprehensive Resource on Geriatric Health and Social Care

Fourth Edition

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# Undue Influence Assessment in Elder Care

As elderly populations increase around the world, there is a concomitant increase in the concern about possible elder abuse and associated undue influence, especially as it relates to financial exploitation. Unlike *mental capacity*, *undue influence* is a legal construct that refers to a dynamic in a confidential relationship, wherein a dominant party exploits its influence or position of power over a weaker party, often for financial gain. The dominant party acts in such a way to distort the victim's assessment of risks and benefits and thus surreptitiously gains control over the victim's decision making. The perpetrator typically exploits the trust, dependency, and fear of the victim and uses a variety of tactics that heighten the victim's reliance and dependence to accomplish this goal. Common tactics include flattery, importunity, and deceit. Undue influence may be alleged in legal transactions, such as executing a will, entering a contract, or conveying property to another, as well as in cases of financial abuse, sexual abuse, and even homicide (American Bar Association [ABA] Commission on Law and Aging & American Psychological Association [APA], 2008). A proof of undue influence may be used to reverse or negate a previous transaction in civil or probate litigation or may be considered an aggravating factor in criminal prosecution. Although specific statutory definitions vary, in most legal systems, the core elements of an undue influence case are (a) existence of a confidential relationship, (b) suspicious circumstances, and (c) an adverse outcome. Cognitive impairment of the victim increases susceptibility and dependence, but it is not a necessary component of undue influence (ABA Commission on Law and Aging & APA, 2008).

The forensic psychiatric or psychological evaluation is frequently a central piece of evidence in these cases, despite the variation in legal definitions among countries and the fact that this is an emerging area of study with little empirical research to guide clinicians (ABA Commission on Law and Aging & APA, 2008). Despite the limitations, many clinical issues are considered to be important components of a thorough, professional assessment.

The first task for a psychiatric evaluator is to distinguish between a victim's vulnerability to undue influence versus whether the psychosocial conditions of undue influence exist. The former involves a more traditional clinical assessment, whereas the latter involves assessment using various accepted behavioral models of undue influence.

Assessment of a given person's vulnerability, or "susceptibility," to undue influence involves a classic biopsychosocial evaluation, meaning that the forensic evaluator should include the information usually referenced for a capacity assessment plus consider the psychological, social, and environmental factors that have contributed to the older adult's susceptibility. A variant of this approach relabels some social and environmental factors as "legal" but otherwise seems to be equivalent (Peisah et al., 2009). Common potential "vulnerability indicators" to consider are age, recent widowhood, geographical isolation, or victim's significant or unexplained emotional or behavioral changes (see Table U.1; Hall, Hall, & Chapman, 2005). Everyone—regardless of age, health, education, or experience—is susceptible to undue influence. Medical issues, whether physical or mental, make it easier for a perpetrator to manipulate or overwhelm a victim but are not necessary and do not have to be present. Many neuropsychologists and psychiatrists do not understand this, focus primarily on a cognitive assessment, and do not consider a large amount of non–capacity-related behavioral research in forming their assessments. This mistaken approach creates unnecessary confusion and erroneous findings. We agree with the statement that "(t)he only factor that would require the expertise of a neuropsychologist would be whether the testator was vulnerable to undue influence due to the presence of cognitive impairment or other mental condition" (Mart, 2016). An attempt to address this issue has been made by Lichtenberg, Stoltman, Ficker, Iris, and Mast (2015). The Lichtenberg Financial Decision Making Rating Scale (LFDRS) considers undue influence and vulnerability to financial exploitation to be important "contextual factors" when evaluating financial capacity and contains a small number of self-report items to test for these concerns (Lichtenberg et al., 2015). However, the self-report primarily assesses duress-related forms of undue influence.

*Table U.1*
VICTIMS' AND PERPETRATORS' FEATURES

| *Victims* | *Perpetrators* |
|---|---|
| Advanced age (older than 75 years) | Sociopathic or antisocial character disorder/traits |
| Female | Related to victim and often living with victim |
| Middle or upper income bracket | History of mental illness, substance abuse, or health p |
| Financially independent without financial caretakers | History of unstable relationships |
| Unmarried/widowed/divorced | False credentials or embellished position |
| Living alone or with the abuser | Recurrent behavior |
| Estranged from family—socially isolated | |
| Physically, mentally, or emotionally disordered | |

*Source*: Modified from Hall et al. (2005).

Because these evaluations are often requested after an older adult has died or has become incompetent, the contemporaneous assessment may not be possible or relevant, so only a retrospective evaluation can be performed. In all cases, medical and legal records should be reviewed and information obtained from collateral informants. It is often also helpful to develop a timeline of events.

After noting the factors that increase the given person's vulnerability, the forensic evaluator should then review the nature of the relationship with the beneficiary, the statements and behaviors of the beneficiary regarding both the supposed victim and the transaction(s) in question, and the consistency of the supposed victim's previous spending habits, financial transactions, or previous wills. The evaluator should also consider the degree to which the acts in question are consistent with the supposed "victim's" established values and beliefs (Restatement, 2003). This information, plus the vulnerability factors, are then analyzed to determine whether the psychological and behavioral indicia of undue influence are present. Many theoretical frameworks for undue influence have been proposed, but the five models described later are the most commonly used. Each has unique strengths and limitations; therefore, it is recommended that the evaluators use multiple methods of analysis for this determination to increase the overall accuracy.

Note: Because these models emphasize analysis of behaviors, they retain their usefulness in many Western hemisphere courts.

The five theoretical models are as follows:

1. SODR (The Restatement [Third] of Property, 2003): SODR is a model that is based on case law in the United States. It is defined as (a) the donor was susceptible to undue influence, (b) the alleged wrongdoer had an opportunity to exert undue influence, (c) the alleged wrongdoer had the disposition to exert undue influence, and (d) there was a result appearing to be the effect of the undue influence [The Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 cmt. e].
2. SCAM (ABA Commission on Law and Aging & APA, 2008): SCAM is the behavioral variant of SODR. The elements of this model are (a) susceptibility of the victim, (b) a confidential and trusting relationship between the victim and perpetrator, (c) active procurement of the legal and financial transactions by the perpetrator, and (d) monetary loss of the victim.
3. IDEAL (ABA Commission on Law and Aging & APA, 2008): This model was created in the 1990s primarily for use in cases involving elder financial abuse, although it is used in many types of cases involving excessive or inappropriate manipulation tactics. Five categorical factors are analyzed in this model, isolation, dependency, emotional manipulation and/or exploitation of weaknesses, acquiescence, and loss.

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

*Dependency: Dependency* refers to the victim's dependence on the perpetrator (e.g., for physical support, emotional intimacy, or information).

*Emotional manipulation or exploitation of weaknesses: Emotional manipulation* usually manifests as promises, threats, or a combination of both and involves issues of safety and security, or companionship and friendship.

*Acquiescence: Acquiescence* refers to the victim's apparent consent or submission. Such "consent" is based on the factors noted earlier—dependency on the perpetrator, emotional or other vulnerability factors, and exposure to inadequate, misleading, or inaccurate information.

*Loss: Loss* refers to the loss, damages, or harm resulting from the claimed undue influence (such as inter vivos financial loss).

4. The Brandle/Heisler/Steigel Model (ABA Commission on Law and Aging & APA, 2008): This model is based on domestic violence relationships, stalking, and sexual assault. It assumes that undue influence parallels these other situations. This model is currently taught by the National College of District Attorneys and the National District Attorneys Association for use in criminal prosecutions, but it is also applicable in some civil or probate proceedings. There are eight factors:
   - •Keep the victim unaware
   - •Isolate the victim from others and information
   - •Create fear
   - •Prey on vulnerabilities
   - •Create dependencies
   - •Create lack of faith in own abilities
   - •Induce shame and secrecy
   - •Perform intermittent acts of kindness
5. The "Thought Reform" or "Cult" Model of Margaret Thaler Singer, PhD (ABA Commission on Law and Aging & APA, 2008): Dr. Singer's model of thought reform developed from her work on the tactics used by cults and cult leaders. The model is based on the following six stages: creating isolation, fostering a siege mentality, inducing dependency, promoting a sense of powerlessness, manipulating fears and vulnerabilities, and keeping the victim unaware and uninformed. The specific tactics are (a) to keep the person unaware of what is going on and what changes are taking place; (b) to control the victim's time and, if possible, physical environment; (c) to create a sense of powerlessness, covert fear, and dependency; (d) to suppress much of the person's old behavior and attitudes; (e) to instill new behavior and attitudes; and (f) to put forth a closed system of logic, allowing no real input or criticism.

All elder care professionals, but especially forensic psychiatrists and psychologists, who work with civil or probate courts should expect to encounter questions about the decision-making capacity and impact of potential undue influence on elders or those with serious or chronic illnesses. Effective assessment can prevent needless emotional and financial losses of the victims and help them maintain their financial independence.

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*Web Resources*

National Center on Elder Abuse: http://www.ncea.aoa.gov

National Centre for the Protection of Older People: http://www.ncpop.ie/educationandtraining_onlinemodules

National Committee for the Prevention of Elder Abuse: http://www.preventelderabuse.org