Capacity and Undue Influence

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The Changing Landscape
of Elders in America

- People are living longer, living alone and increasingly at risk.
- Cognitive and physical impairments (dementia, depression, grief)
- Elders living alone- Isolated and lonely (varying amounts of resources)
Elder Abuse....a growing problem

- Estimated that 1 in 10 elders have been abused
- Estimated that for every 1 elder abuse incident reported, 23 go unreported
- Estimated that 90% of abusers are family members or known to the victim
- Most financial abuse is financial
- The annual cost of consumer financial fraud is $50 billion dollars
- Abused elders are twice as likely to die as non-abused elders

PRESUMPTION OF CAPACITY

AUTONOMY:
You have the right to make your own decisions: good, bad, or indifferent

As long as you have capacity and are not unduly influenced
**CAPACITY AND DECISION MAKING**

**Capacity for What Purpose?**

**What decision needs to be made?**

*Capacity is relative to the complexity of the decision to be made*

- Estate Planning (Wills and Trusts) = Testamentary Capacity (very low) CA Probate Code
- Marriage = requires “consent” (CA Family Code 300)
- Medical = Can you understand risks and benefits?

**Neuro Psych Testing**

**Doctor’s Assessment of Capacity**

**Cognitive Functioning**
- Alertness
- Orientation
- Retrieval
- Language
- Visual-spatial
- Reasoning

**Executive Functioning**
- Logic
- Consequences
- Judgment
- Insight
- Organization
- Planning

**Other Deficits**
- Depression
- Anxiety
- Hallucinations
- Delusions
Understanding the Decision
Lawyer’s assessment of capacity

Can the client articulate and understand:

- Reasons for the decision
- Consequences of the decision
- Benefits and risks of the decision
- Alternatives Considered
- Consistency of the decision

Undue Influence

Exerting inappropriate influence (by excessive persuasion) over a vulnerable person in order to change his/her decision or behavior.

Examples:
- Isolating an elder and telling them their family doesn’t care about them so that they will marry the abuser so abuser can inherit or get access to elder’s property.

- Threatening an elder with nursing home placement if they don’t add caregiver to the title of the property
Vulnerability to Undue Influence

Any condition severe enough that another person could use it to unduly influence you or take advantage of you.

Loneliness, isolation, cognitive impairment, grief, overmedication, hearing or vision loss, language/literacy barriers...

Undue Influence does not require Incapacity

- “Undue Influence is the substitution of one person’s will for the true desires of another” Mary Joy Quinn

- Most undue influence is done by people who the elder or vulnerable person knows and trusts

- Under the new paradigm of Supported Decision-Making in lieu of Guardianship, more losses due to undue influence are likely to happen
New Legal Approach

- California W&I Code 15610.70

4 Factors Court must consider in Undue influence:

1. Vulnerability of the Victim (age, cognition, etc.)
2. Influencer’s Status or Authority (family member, expert, spiritual advisor, professional)
3. Actions or tactics used (controlling necessaries of life; Use of affection, intimidation, or coercion; Initiation of changes in personal or property rights and use of haste or secrecy in effecting those changes.
4. Inequity of Result (required) (economic consequences to the victim, divergence from the victim's prior intent, value of services received, or the appropriateness of the change in light of the length and nature of the relationship

Detecting Undue Influence

<table>
<thead>
<tr>
<th>Action</th>
<th>Evidence</th>
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<tbody>
<tr>
<td>“It was a loan”</td>
<td>- Capacity of Lender, Amount of Loan, How often were loans made, evidence of loan or repayment</td>
</tr>
<tr>
<td>“It was a gift”</td>
<td>- Capacity of Donor, value of gift, relationship of receiver to donor, evidence of intention to make gift</td>
</tr>
<tr>
<td>“He wanted to marry me”</td>
<td>- Capacity of person, duration of relationship, relative ages of spouses</td>
</tr>
<tr>
<td>“I had her permission”</td>
<td>- Capacity of Elder, How was permission granted and used? Mutual consideration? Value of the transaction</td>
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Criminal and Civil Responses

<table>
<thead>
<tr>
<th>Criminal Justice System</th>
<th>Civil Actions</th>
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<tbody>
<tr>
<td>Possible Crimes:</td>
<td></td>
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<tr>
<td>- Theft</td>
<td>- Sue for Breach of Fiduciary Duty</td>
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<tr>
<td>- Exploitation</td>
<td>- Revoke DPOA</td>
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<tr>
<td>- Embezzlement</td>
<td>- Ask court to order accounting</td>
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<tr>
<td>- Forgery</td>
<td>- Sue to un-do the transaction (recession)</td>
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<td>- Fraud</td>
<td>- Petition for Conservatorship to protect victim and act on her behalf.</td>
</tr>
<tr>
<td>- Larceny</td>
<td>- Enhanced remedies including treble damages and attorneys fees under EADACPA</td>
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Capacity Declaration

- Doctor must give evidence as to incapacity (memory, orientation, judgment, executive functioning, hallucinations, emotional lability)
- Doctor must make specific finding as to capacity to make medical decisions
- Doctor must make specific finding regarding dementia and need for psychotropic drugs, dementia medications and/or placement in locked facility
- Doctor must list all medications used or needed by C’ee (Court is concerned about over-medication)
Temporary Conservatorship

- Only use when emergency circumstances require
- Probate Investigator must see client before hearing
- Private attorney for conservatee must visit before hearing and appear at hearing
- Appropriate in Elder Abuse situations (financial, physical)

Types of Conservatorships

- Probate
  - Regular- For older people who have lost capacity
  - Limited – For intellectually/developmentally disabled adults need substantial assistance
  - Alzheimer’s – When dementia medication or a locked facility is needed

- Note: In California a Conservatorship over the Estate does NOT require incapacity determination but rather “Substantial inability to resist fraud or undue influence”
Role of the Court in Conservatorship

- Make Sure Conservatee Needs a Conservatorship
  - Probate Investigator Report
  - Capacity Declaration
- Protect the Rights of the Conservatee
  - PVP Attorney assigned to represent Conservatee.
- Jury Trial
  - Litigate a contest by Conservatee of Conservatorship
- Protect Conservatee’s Assets
  - Bond
  - Accountings, Inventory & Appraisals
- Ongoing Monitoring of Case
  - Yearly Investigator’s Report

Alternatives to Conservatorship

- Have planning documents appointing an agent to act when you lose capacity
  - POA
  - Wills
  - Trusts
- Mediate disputes instead of litigating
Resources

- National Center on Elder Abuse (NCEA) [http://www.consumerfinance.gov/older-americans/]
- CFPB Office of Financial Protection for Older Americans Department of Justice Elder Justice Initiative [https://www.justice.gov/elderjustice/]
- Elder Justice Roadmap Project
  [https://ncea.acl.gov/Library/Gov_Report/docs/EJRP_Roadmap_and_Appendices.pdf]
- Ageless Alliance [http://agelessalliance.org/]
- Elder Justice Coalition [http://www.elderjusticecoalition.com/]
- Women’s Institute for a Secure Retirement [http://www.wiserwomen.org/index.php?id=661]
- Elder Financial Protection Network [http://www.elderfinancialprotection.org/]
- National Adult Protective Services Association [http://www.napsa-now.org/cases/]
- National Long-Term Care Ombudsman Resource Center [http://ltcombudsman.org/]
- World Elder Abuse Awareness Day

Resources: General

- California Undue Influence Screeing Tool (CUIST), 2016
- California Probate Code Section 86
- California Welfare and Institutions Code Section 15610.70