

Due or Undue Influence: How Do You Draw the Line?

Course level: Intermediate

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Course Objectives:

- The guardian will be introduced to the legal concepts and issues of undue influence.
- The guardian will understand ways to apply the legal concept of undue influence to benefit the ward.
- The guardian will understand how to protect wards from undue influence.
- The guardian will avoid the ethical pitfall of undue influence.



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The legal concept of undue influence has been around for centuries—at least since there were disappointed heirs who didn't get the inheritance they anticipated.

The two most commonly used hammers to break apart a Will are lack of testamentary capacity and undue influence. Within the Will context, we all know that a Last Will and Testament is supposed to be the free and voluntary act of a competent person. If the person—or testator—didn't have capacity to know that they were deciding who would get their property after their death, then the Will they signed wasn't their will and thus is not a valid document.

Likewise, even if the person had capacity, if they distributed their money in their Will – for now let's call it the “wrong way”—then they must have been influenced to do so in some way. Their true will would be considered to be overpowered so they were psychologically compelled to do what they really didn't want to do.

As the US Supreme Court said in 1890, “influence obtained by flattery, importunity, threats, superiority of will, mind or character -- or by what act so ever that human thought, ingenuity, or cunning might employ -- which would give dominion over the will of the deceased to such an extent as to destroy free agency, -- or constrain him against his will to do what he was unable to refuse, was such influence as the law condemned as undue.”

This legal concept of undue influence is applied to other sorts of disputes or transactions including contracts, mortgages, trusts, pre-nuptial agreements, elder abuse, financial exploitation, domestic violence, and fraud.

In just about every situation it is used to argue that what looks like what the person did, really didn't happen, so no legal affect should be given to that act.

At the core of undue influence is whether there has been inappropriate manipulation of the person's will. But when is manipulation inappropriate?

When is influence undue?

We all are subject to influence. Pretty much since the day we were born our will has been influenced. Our parents in our first months influenced us to sleep all night and to control our bladder. Our teachers influenced us to have good study habits. Our religious leaders influence us to follow religious concepts. Our doctors influence us to live healthy lives. Our peers influence us to conform to group norms. Advertisers influence us to buy the products they are selling. Family and friends are our principal influences throughout our lives. Everyday normal social interaction is some form of influence.

The legal concept of undue influence is not just to provide a forum for disgruntled heirs to contest wills so they can try to get what they think is their fair share. Rather it is intended to protect our freedom to make a Will, -- or gift, contract, deed, or power of attorney -- and not have it be the product of coercion, trickery or duress. As the maxim goes, “Fear, fraud, and flattery: three unfit accidents to be at the making of a Will.”

In the Will context, what the law is supposed to do is to protect simultaneously against manipulation of the person's wishes during the Will's creation and the manipulation of the person's wishes during the probate process.

A basic concept is that the court should not interfere with the wish of the testator as set out in the Will. A Will is presumed valid, but if the will of another person is substituted for that of the testator, it is not a Will at all.

But where to draw the line between everyday—good-- influence and undue—bad-- influence? Unfortunately the doctrine of undue influence is amorphous, and has been described as “one of the most bothersome concepts in all the law.”

A very typical undue influence Will challenge is when a widower marries a younger person and disinherits the children from the first marriage. Or the widow who leaves her fortune to the next door neighbor. Or the son with AIDS leaves his estate to his partner, rather than to his family who disapproved of the relationship.

Should Wills in which the beneficiary is a younger wife, neighbor, or gay partner be subject to greater scrutiny because they conflict with what the courts, juries, or society thinks is “fair,” or is socially approved, or somehow “natural”?

Are the natural objects of affection only the testator's first family or immediate family? At times it seems there a strong societal belief in “inheritance” – that spouses and children of decedents should be the only beneficiaries of an estate, so that Wills that fail to provide for family in favor of a non-traditional beneficiary are more likely to be held invalid. As Professor Larry Flolick wrote,

It's human nature for decedents to promote the interest of their descendants even if others, such as a friend, other relatives, or faithful employees, seem more deserving based on their behavior. In recognition of the nearly universal desire to favor descendants, and in particular, children, the law has crafted the doctrine of undue influence to overturn gifts to nonlineal descendants, second spouses, lovers, friends, loyal housekeepers, to direct the inheritance to the testator's descendants.... One of the seven basic sins, greed is part of our elemental nature. Many a potential heir secretly awaits the death of a benefactor and the receipt of a hoped for legacy. While the benefactor's death may not be welcomed, it is at least softened by inheritance. But if the expected windfall is not forthcoming, if another reaps the bounty, how sharp is the sting of the loss. It is not only a financial loss, but an emotional rejection; one so deep that it can be healed only by a lawsuit that will reveal the treacherous behavior of the favored legatee.

When do acts of kindness become undue influence? A common scenario is the neighbor who cares for the elderly person. The family is scattered and gone. The neighbor drives the person to the doctor and grocery store, makes sure the grass is

mowed, and the sidewalk is shoveled. He spends many hours alone with the elderly gentleman, who because of illness is in a weakened condition and must depend on the neighbor to take care of him. The neighbor becomes a loving caregiver, a true friend, a companion. The neighbor also has the opportunity to develop a dependent and trusting relationship. The neighbor further has the opportunity to suggest that a testamentary gift might be a good way to show appreciation. Did he do so?

It's somewhat likely that if our elderly gentleman leaves a substantial estate to the neighbor and not his daughter, that the daughter will contest the Will. Dad's not around to testify; there is just the piece of paper that says he wants his money to go to the caring neighbor, rather than the distant daughter. Who knows what happened behind closed doors? Did Dad really want to acknowledge the neighbor's care and the daughter's neglect in his final years? Will the kind and neighborly acts be rewarded or be removed because of undue influence?

Not all undue influence issues arise in the context of family versus stranger, or even only in Will contests. You may have recently read on the NGA listserv about an ongoing Texas case, where an older son contends that his brothers and sisters persuaded their mother to cut him out of her Will. One interesting twist is that Mom is still alive and all she owns is a home worth \$130,000. The eldest son claims he had been caring for his mother for several years and she promised to leave the house to him in return for his care. However, mom now says that she took him in when he was unemployed, but now he's more demanding, spending her money, and isn't looking for work. She doesn't want him to have the house and has revised her Will to leave it in equal shares to her other seven children from three marriages. We don't know all the facts, but was he exercising undue influence in trying to convince her to leave the house solely to him, or were the other children exercising undue influence in convincing her to change her Will to leave the house to the seven of them, to the exclusion of the one son who had taken care of her?

In probate language, the court looks to a confidential relationship and suspicious circumstances. It could find that the neighbor's status or the son's role as the sole caregiver created a confidential relationship and that the change in the Will to disinherit the family, or to leave the house to the one son and not the other family members, was a suspicious circumstance. In many instances, the question will be to try to discern the motives of the benefactor. If the neighbor was acting kindly with no thought of reward, the neighbor would not be guilty of undue influence. Or was the generous or caring behavior actually a plot to obtain the assets of the testator? Somewhere along the continuum between altruism and greed is a point that self-serving behavior is so excessive that the courts will not allow the neighbor to be rewarded with a testamentary gift.

Many legal scholars have argued that the problem with this focus on the motives of the beneficiary is that it does not protect the intent of the testator. Rather, it is a misapplication of the undue influence doctrine to protect the testator's biological family from disinheritance. Instead of protecting the freedom of testation, it denies the freedom

of testation for people who deviate from the societal norm that, of course, it is only natural that we want our kids to inherit everything. Testamentary freedom is the basically the right to do as one pleases with what is his. It is the right to not have the judge or jury rewrite the testator's will or pass judgment on his wisdom in making a Will.

Now since most of you are guardians, rather than probate lawyers, who aren't ever going to be involved in the drafting of Wills or Will contests, you may be wondering, how does undue influence apply to my role as guardian, as a fiduciary and protector of my ward? Because almost all of the undue influence law is found in the Will contest arena, we have to take what we can from those cases and apply that law to other situations that you are more likely to be concerned with. There are four specific areas, each with significant ethical implications.

The most obvious is that, as a fiduciary, you are legally and ethically mandated to always act in the best interest of your ward. You are in a position of trust and have the opportunity to create a situation where your ward is totally dependent on you. You are, by statutory definition and court order, the primary caregiver. As a conservator, you have control over all finances. You can control who the person sees, where they live, what they do, and how their money is spent.

You are the ultimate influencer. As the ultimate influencer, you must be vigilant that nothing you do could be considered "undue." Even if your ward is a family member, or you had some relationship with the ward before being appointed guardian, you should never get into a situation where the ward makes you a beneficiary under a Will. Because the level of capacity to execute a Will has a much lower threshold than for guardianship, it is certainly likely your ward could need to write a Will. If the ward has capacity to write a Will, depending on your state's law, you must be resolute that you do not influence the provisions in that Will. Just as a lawyer drafting a Will has an ethical obligation not to be seen as benefiting in any way from that document, you as a fiduciary have the same, if not stronger, ethical obligation not to benefit in any way from that Will.

One of the reasons that you were appointed as guardian could be that your ward has already been subject to undue influence, not in the context of drafting a Will, but as the victim of financial exploitation. You may be able to use the doctrine of undue influence to your ward's advantage. Remember that in its purest form, it means that if the will of someone was so influenced by another that it actually wasn't what they wanted to do, the law sets aside the act as if it had never happened.

For example:

- Mrs. Smith is very dependent on her daughter, Beth. Beth promises to take care of her forever and keep her out of a nursing home. Mrs. Smith makes generous gifts of stock to Beth; Beth fails to care for her; and Mrs. Smith now has no money for her care. You become guardian over Mrs. Smith. You may be able to use evidence that Beth used undue influence to obtain those gifts in an action to get back the stock.

- Mr. Brown used his home, his only asset, as surety on a loan at the request of his son Tom to help finance Tom's business. When the bank seeks to foreclose on Mr. Brown's home when Tom's business fails, you may be able to argue that Tom exercised undue influence over his father in getting him to sign the mortgage as you try to prevent the foreclosure.
- Mrs. Black was befriended by a distant nephew who learned that she was recently widowed. He showered her with attention and helped her through her grieving process. She deeded a valuable piece of property to him. You are now her guardian, and Mrs. Black needs that property to pay for her care. Again, you may be able to use undue influence in an action to set aside the deed.
- Caroline convinced her mother, Mrs. Jackson, to give her a power of attorney. She used the power to get a mortgage on the family home, and quickly used the proceeds for her own travel, drugs, and friends. You are now the guardian tasked with the responsibility to retrieve her assets. The money's gone and you want the bank to set aside the mortgage.

In each example you may be able to use influence. You will probably have to be able to prove more than just strong influence, or family pressure, or in improvident financial transactions. In Mr. Brown's case, if Tom failed to disclose that his business was failing, or promised his father that he would be a millionaire in a year, or otherwise deliberately concealed essential information, you may be more successful. If Mrs. Smith was financially very inexperienced and did not know the value of the transaction, and Beth did nothing to get her independent advice, or better yet, kept her from getting such advice, the transaction may be set aside. With Mrs. Jackson's mortgage, was the bank aware of how emotionally dependent she was on Caroline and how financially disadvantageous the loan was to Mrs. Jackson's financial security?

Without going into the multitude of factors that might equal success in such recovery actions, I want to point out how Maine law helps guardians use undue influence in the context of financial exploitation. Under Section 1022, a presumption of undue influence arises when an elder dependent person has transferred real estate or in other major transfers of personal property or money for less than full consideration. The transfer may be set aside, unless the person was represented in the transfer by an independent attorney who only represents their interest. It applies to persons 60 years or older, who must be dependent on one or more persons for care or support. The dependency does not have to be on the person benefiting from the transfer. A major transfer is defined as more than 10% of assets.

This statute, or if you have a similar one in your state, could be used with success in some of our hypotheticals. In Mrs. Smith's case, if there was lack of consideration in that Beth did not provide the promised care and the stock was more than 10% of her assets, the transfer may be set aside. If Mrs. Black had no independent counsel before signing the deed over to her nephew, she may get her home back.

Moving to another context, you as guardian have the responsibility to protect your ward from falling under the influence of others who would manipulate your ward's will while under your care. You need to be alert to the subtle signs of financial exploitation through undue influence.

Financial exploitation is the illegal or improper use of a vulnerable person's funds, assets or property. It can happen multiple ways, including duress, threats harassment, deception, false representation, false pretenses, or other deceits—as well as by undue influence. Seventeen states specifically include undue influence as one of the methods by which financial exploitation can be proven.

Your wards are particularly susceptible to influence by others. Their reduced capacity increases their vulnerability, increases their dependence on others, and decreases their decision making ability or discernment.

The perpetrator probably works very hard to keep their victim—and you—unaware of what is happening. You not only need to watch for what family members are doing, but also caregivers you hire to provide care. Or it may be other third parties who have access to your ward and the potential to influence their actions. The suspects could be opportunists, career criminals, a fiduciary, caregiver, or family member. This long list could include ministers, charitable organizations, financial advisors, and telemarketers, who are intent on convincing a vulnerable person that they are to be believed that they have their best interests at heart and can be trusted, as they influence them to part with their money.

In a final context, undue influence can be a factor in many financial crimes. This could include theft, forgery, embezzlement, false pretense, and other crimes that use trickery to accomplish the larceny, rather than force or assault. Undue influence can be a crucial element in proving the crime, or in countering a defense that the victim willingly parted with his or her assets. The undue influence can both explain the victim's behavior – when it may appear on the surface that he consented and the money was freely given—or disprove the defendant's justification—she wanted to me have it. For example, the defendant charged with the theft of an ATM card might claim that the older person willingly gave her card to the caregiver to use to pay her own bills, and that the card wasn't stolen. Evidence of undue influence would be used to prove that the caregiver used the dependent relationship to convince the owner to turn over her card, and disprove that the victim had freely and voluntarily consented or had true knowledge of what the caregiver intended to do with the card.

As you might guess, all of these cases are very much dependent on what ever circumstantial evidence can be gathered. You may be talking about an Adult Protective Services case, or a civil case, or a criminal prosecution, depending on the circumstances and your state laws. When so many possible facts need to be corralled, it is good to have a checklist or worksheet to coalesce the bits and pieces that would either prove or disprove undue influence. Noted physician Bennett Blum, who specializes in both forensic psychiatry and geriatric psychiatry, is one of the noted experts in undue influence. He's developed the IDEAL Protocol to help clarify the

complex situations that may or may not involve influence, whether in the probate or elder abuse/exploitation arenas. IDEAL is a mnemonic that stands for the psychological and social factors that must be considered. IDEAL stands for Isolation, Dependence, Emotional manipulation or Exploitation of a vulnerability, Acquiescence, and Loss.

- **Isolation.** This would be evidence that the person was isolated or cut off from pertinent information, or friends, or relatives. This could happen many ways. They may have been moved away from family. The perpetrator could start screening mail, calls, or visitors. It could be a medical condition that restricts mobility, depression, or dementia. The person may have a personality that just doesn't make friends or cuts them off from others. There could be hostile family relations that would isolate the person. Like mushrooms or mold, influence happens best when done in dark, secret places.
- **Dependence.** The person has to rely on the other for physical care, emotional support, or even as source of information. They may depend on another for food. The unemployed son who moves in with the widowed mother could be a red flag. Financial advisors could misuse their trust and control to manipulate the victim.
- **Emotional manipulation.** This could be the promise to continue care, the threat to abandon or cut off support, the promise of greater love or ongoing companionship.
- **Exploitation of a vulnerability.** Blum sees that this overlaps with emotional manipulation but expands it to include other types of vulnerabilities. For example, it could involve providing an alcoholic with alcohol in exchange for benefits, having someone who is vision-impaired sign a legal document, or misrepresenting the significance of documents to someone who is impaired by illness, grief, or medication.
- **Acquiescence.** This is shown by the victim's apparent consent or submission. If undue influence is involved, then the consent or acquiescence has been manipulated by the perpetrator. This is the core of undue influence, in that what appears to have been the act or choice of the victim, really is not.
- **Loss.** The loss could be financial or physical harm. This element would be necessary to prove to be successful in most criminal and civil cases, as an element of the crime or of the damage claim.

The line between due and undue influence may be indefinite. It certainly does depend on many factors. But as guardians, you can use the law to your ward's advantage in recovery actions. You want to be certain that you are alert to the risks and susceptibility of your ward to undue influence. And you should guard against the suggestion that you are unduly influencing the actions of your ward.