Undue Influence

The Gap Between Current Law And Scientific Approaches to Decision-Making and Persuasion

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With Evan Winet

I. Historical Precursors to Our Modern Concepts Of Undue Influence and Decision-Making

"And the devil hath power t'assume a pleasing shape. Yea, and perhaps out of my weakness and my melancholy, as he is very potent with such spirits, abuses me to damn me." Shakespeare, Hamlet, Act II, scene 2.

English Courts, as any viewer of Masterpiece Theater, or reader of Dickens or Trollope knows, have long dealt with undue influence. Francis Bacon, ruling in the High Court of Chancery in 1617, found undue influence where the 80 year old George Lydiatt, "being weak of body and understanding and having a great estate of goods and lands" was influenced by Anne, who "did so work upon his simplicity and weakness and by her dalliance and pretence [sic] of love unto him and of intention after the death of her then husband to marry him, and by sundry adulterous courses with him and sorcery and by kindred, telling him sometimes that they would poison him and sometimes that they would rob him," whereby she obtained his personal estate by transfers and execution of a will disinheriting his kindred. *Joy v. Bannister* (Chanc. 1617) in J. Ritchie, Reports of Cases Decided by Francis Bacon (1932), 33-34. Reliance on evidence of "sorcery" clearly predates the application of the scientific method to the question of the vulnerability of seniors to undue influence.

Analysis of mental processes and susceptibility to fraud and undue influence has been influenced by the classical dichotomy between the rational and emotional side of the mind and the struggle to control the impulses and desires of the body. As will be seen below, this tension can be observed in studies to this day.

Plato, in his dialogue "Phaedrus," analogized the problem of controlling the wild and emotional side of human nature to a charioteer with two horses, one which is obedient and sees the perfect form of beauty and rationality and the other which is wild and unruly. "And when they are near [the form of reason and beauty] he stoops his head and puts up his tail, and takes the bit in his teeth and pulls shamelessly. Then the charioteer is worse off than ever; he falls back like a racer at the barrier, and with a still more violent wrench drags the bit out of the teeth of the wild steed and covers his abusive tongue and jaws with blood, and forces his legs and haunches to the ground and punishes him sorely. And when this has happened several times and the villain has ceased from his wanton way, he is tamed and humbled, and follows the will of the charioteer…." Plato, *Phaedrus*, § 258. Scientific writing has become much less dramatic since 360 B.C.E.

Aristotle looked into the biology of sensing and the workings of the mind in his essay, "On the Soul." 'Soul" is an English translation of his Greek term "psyche," which should more properly be translated as a principle of life or principle of animation. By the time of Aristotle, Greeks had observed that injuries to the head impaired the ability of the mind to operate properly, but knowledge of the actual functioning of the matter within the human skull was quite general. Aristotle observed in his treatise that "In old age the activity of the mind…declines only through the decay of some other inward part." Aristotle, *The Basic Works of Aristotle—On the Soul* (1941), at p. 548. These historic studies focused on the split between rationality and animal desires. For example, "the spirit is indeed willing, but the flesh is weak." *Matt.* 26:41. This emphasis on the struggle between body and spirit dominated Western thought and legal analysis, until medical and scientific investigative tools illuminated the actual brain structure and processes involved.

It took two millennia to develop the scientific investigation of the psyche discussed by Plato, with the first experimental laboratory in psychology at the University of Leipzig in 1879, followed by a similar laboratory at Johns Hopkins University in 1883. John Hopkins granted its first doctorate of psychology in 1888.

The absence of scientific knowledge about mental capacity and susceptibility to fraud and undue influence did not, of course, slow down attorneys and courts in resolving disputes involving undue influence. The elements of undue influence were developed hundreds of years ago, long before Freud conjured up the ego and id and sorted through dreams to gain some insight into cognition and the workings of the human mind. Freud has now been supplanted by more than a hundred years of neurobiological and psychological investigation as discussed below.

The British common law developed concepts of undue influence based largely on the concept of coercion, C. Peisah, et al "The wills of older people: risk factors of undue influence" (2009) 21 *International Psychogeriatrics*, at 8. "One of the earliest and most commonly cited descriptions of 'undue influence' in relation to will-making in countries where Common Law exists was given by Sir James Hannen in 1885, (*Wingrove v. Wingrove* (1885) 11 PD 81, 82, as follows: *'To be undue influence in the eye of the law there must be –to sum it up in a word – coercion.* This threshold of requiring coercion for undue influence as an overpowering or overbearing of the testator's volition, judgment or wished by *substitution* of one mind for another…."

However, much of the case law reflects long outdated notions of decision-making and cognitive decline. Consider that California looked to "alienists" until the middle of the twentieth century to assist the courts in determining whether a person had capacity to stand trial, in the absence of psychologists, psychiatrists, and board certified neurologists. *People v. Leavel* (2012) 203 Cal.App.4th 823, 829 n 6. Penal Code section "Section 1027 originally referred to mental health examiners as "**alienists**." (Stats.1929, ch. 385, § 1, p. 702.) In 1965 the statute was amended to substitute "psychiatrists" for "**alienists**," (Stats.1965, ch. 568, § 1, p. 1894), and in 1978 the statute was amended to insert provisions relating to psychologists (Stats.1978, ch. 391, § 2, p. 1242)."

I. Proof of Undue Influence

The civil law has provided remedies where a contract has been executed by actions which result in an unfair advantage being obtained over another. For example, the rule related to invalidity of contracts was described by the court in *Gerimonte v. Case*, 712 P.2d 876, 877

(Wash.App. 1986): "We adopted the definition of undue influence found in Restatement of Contracts § 497 (1932) which states: Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is voidable." The Court went on to adopt the rule in Restatement (Second) of Contracts § 177 (1981) which it cited as follows:

> "(1) Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that persons will not act in a manner inconsistent with his welfare.
>
> (2) If a party's manifestation of assent is induced by undue influence by the other party, the contract is voidable by the victim....
>
> Comment (a). Required domination or relation. The rule stated in this Section protects a person only if he is under the domination of another or is justified, by virtue of his relation with another in assuming that the other will not act inconsistently with his welfare. Relations that often fall within the rule include those of parent and child, husband and wife, clergyman and parishioner, and physician and patient. In each case it is a question of fact whether the relation is such as to give undue weight to the other's attempts at persuasion....
>
> Comment (b). Unfair persuasion. Where the required domination or relation is present, the contract is voidable if it was induced by any unfair persuasion on the part of the stronger party. The law of undue influence therefore affords protection in situations where the rules on duress and misrepresentation give no relief..."

California adopted a similar model in Cal. Civ. Code §1575, which provides that undue influence consists:

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

The Restatement (Third) of Property (Wills & Don. Trans.) § 8.3 (2003) similarly provides a common law description of misconduct which can invalidate testamentary, trust or purported gifts because of improper conduct:

> "(a) A donative transfer is invalid to the extent that it was procured by undue influence, duress, or fraud.
>
> (b) A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."

Similarly the common law of trusts deals with the invalidity of trusts created by fraud or undue influence. Restatement (Third) of Trusts § 12 (2003) provides:

> "A transfer in trust or declaration of trust can be set aside, or the terms of a trust can be reformed, upon the same grounds as those upon which a transfer of property not in trust can be set aside or reformed.
>
> **Comment (b):** On the question of whether a settlor has been induced to create a trust by undue influence, the following factors may be of importance: (1) whether and to what extent a fiduciary or confidential relationship existed between the person charged with undue influence and the settlor at the time the settlor was persuaded to create the trust; (2) whether it was the trustee, a beneficiary, or a third person who persuaded the settlor to create the trust; (3) whether and to what extent it was improvident for the settlor to create the trust; (4) the settlor's age, health, intelligence, and business experience and whether the settlor had independent legal advice at the time of the decision to create the trust; and (5) whether the character and provisions of the trust are such that it would have been unnatural for a person in the settlor's position to create it. Most of these factors are also likely to be of importance in cases involving allegations of fraud."

Most recently, the common law of restitution has been updated to include undue influence and the remedies of rescission and restitution, including unjust enrichment. Restatement (Third) of Restitution and Unjust Enrichment § 15 (2011) provides:

> "(1) Undue influence is excessive and unfair persuasion, sufficient to overcome the free will of the transferor, between parties who occupy either a confidential relation or a relation of dominance on one side and subservience on the other.
>
> (2) A transfer induced by undue influence is subject to rescission and restitution. The transferee is liable in restitution as necessary to avoid unjust enrichment."

Courts have recited different sets of factors in determining whether undue influence has been practiced:

> "Eight factors have been identified as tending to establish undue influence. These are 1)whether the person has made any fraudulent representations to the deceased, 2) whether the will was hastily executed, 3) whether such execution was concealed, 4) whether the person benefitted was active in securing the drafting and execution, 5) whether the will was consistent with prior declarations of the testator, 6) whether the provisions were reasonable rather than unnatural in view of the testator's attitude, views, and family, 7) whether the testator was susceptible to undue influence, and 8) whether there existed a confidential relationship between the testator and the person allegedly exerting undue influence."

Evans v. Liston, *supra*, 568 P.2d at 1118. The Court in *Evans v. Liston*, 568 P.2d 1116, 1118 (Ariz.App. 1977) ruled that "Mental derangement sufficient to invalidate a will must be insanity so broad as to produce general mental incompetence or insanity which causes hallucinations or delusions. The will must be a product of such delusion or hallucination and the terms of the will must be also a product of such delusion or hallucination and must be actually influenced thereby."

> "On the record before us we are satisfied that the following *indicia* of undue influence were present: (1) The provisions of the will were unnatural. It cut off from any substantial bequests the natural objects of the decedent's bounty; (2) the dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution; (3) the relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act; (4) the decedent's mental and physical condition was such as to permit a subversion of his freedom of will; and (5) the chief beneficiaries under the will were active in procuring the instrument to be executed. In addition to these *indicia* a confidential relationship existed between at least one of the chief beneficiaries of the will and the decedent."

In Re Yale's Estate (1931) 214 Cal. 115, 122-23, 4 P.2d 153.

> "However, overpersuasion is generally accompanied by certain characteristics which tend to create a pattern. The pattern usually involves several of the following elements: (1) discussion of the transaction at an unusual or inappropriate time, (2) consummation of the transaction in an unusual place, (3) insistent demand that the business be finished at once,

(4) extreme emphasis on untoward consequences of delay, (5) the use of multiple persuaders by the dominant side against a single servient party, (6) absence of third-party advisers to the servient party, (7) statements that there is no time to consult financial advisers or attorneys. If a number of these elements are simultaneously present, the persuasion may be characterized as excessive."

Odorizzi v. Bloomfield Sch. Dist. (Ct. App. 1966) 246 Cal. App. 2d 123, 133, 54 Cal. Rptr. 533, 541

According to the Restatement Third of Property and Page on Wills, four factors are generally identified by the states as raising an inference of undue influence:

1. Susceptibility of the testator to undue influence.

a) Impact of knowledgeable testimony by a professional third party. In *Estate of Harms*, 149 P.3d 557, 562-63 (Mont. 2006) the court held that evidence presented by the testator's doctor and attorney were sufficient to prove that the testator was not susceptible to influence. In *Pittman v. Pittman*, 2007 WL 1217270 (Tenn. Ct. App.), the court affirmed the trial court's finding that there was no undue influence, a decision based partially on the testimony of the testators' attorney. "Reading the deposition testimony of [the attorney], it was fairly clear that [they] knew what they were doing . . . and so I think there's no question that they understood the implications of what they were doing." *Pittman,* 2007 WL 1217270 at *5. In *Hughes v. Hughes*, 2006 WL 2457418 *4 (Ky. App) (unpublished), the entire decision that the testator "retained the ability to understand her circumstances and that she continued to exercise her free agency despite her deteriorating physical condition and eventual hospitalization" was based on one social service worker's report of her investigation in response to contestant's allegation of neglect.

b) Impact of speculative testimony by a professional third party. In *Stanton v. Wells Fargo Bank Montana, N.A.*, 152 P.3d 115 (Mont. 2007), the court dismissed as speculative expert medical opinion based merely on hindsight and limited data. Instead the court favored testimony from those who knew as "mentally sharp and strong-willed even into her 90's" and "a 'pragmatic kind of woman of steely determination.'" *Stanton,* 152 P.3d at 120. The court further explained that "Dr. Williams never met or examined Frances and she never had undergone a neuropsychological

evaluation for him to review. Dr. Williams opined that Frances probably suffered some intellectual decline, but he could not state a level of impairment with a reasonable degree of medical certainty. Dr. Williams's testimony represents his speculation as to Frances's mental condition based on literature regarding the rate of intellectual decline of Alzheimer's patients. Speculative statements, however, are insufficient to raise genuine issues of material fact . . . Instead, the testimony from the individuals who knew Frances revealed that she was healthy, self-sufficient, aware, and actively involved in her investments." *Stanton*, 152 P.3d at 121.

c) Impact of evidence regarding testator's strong will. Some courts may use a higher standard where the testator does not appear to be susceptible. "'The true test of undue influence is that it overcomes the will without convincing the judgment.' This can happen but rarely in persons of normal strength of mind in the full possession of their faculties unimpaired by infirmity. The evidence which would justify the conclusion that it had occurred in any particular case of that character would have to be strong indeed." *Estate of Anderson*, 185 Cal. 700, 707 (1921). In *Pittman v. Pittman*, 2007 WL 1217270 (Tenn. Ct. App.) the court held that it could be inferred from the repeated descriptions of the testators as strong-willed that they were not susceptible to undue influence. The court affirmed the trial court finding that "'I've heard from a lot of people today, and I think even from [contestant], who described his grandfather as being a sort of a strong willed individual. I think if I heard strong willed one time, I probably heard it a hundred times today ... [and] I believe it was pretty clear ... that there was no undue influence, that they clearly understood what they were doing...." *Pittman*, 2007 WL 1217270 at *5. In *Estate of Hood*, 955 So. 2d 943, 948 (Miss. App. 2007), the court held that the fact that a beneficiary had a joint savings account with the testator and helped pay his bills was outweighed by the contestant's "own admission that her father was fiercely independent and had a mind of his own."

2. The wrongdoer had an opportunity to exert undue influence.

a) Mere opportunity to exercise undue influence is but one factor to be considered and not sufficient to prove undue influence. "Mere general influence in the affairs of life or method of living at the time of the execution of a will by a testator is not proof of undue influence in the contemplation of our statute, and, in order to establish it as a fact, it must be shown by proof that it was exercised upon the mind of the testator directly to procure the execution of the will. Mere

suspicion that undue influence may have or could have been brought to bear is not sufficient. It is never presumed, and must be proven like any other fact." *Estate of Harms*, 149 P.3d 557, 565 (Mont. 2006).

b) Existence of a confidential or fiduciary relations. "A confidential relationship exists 'where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with the ability, because of that confidence, to influence and exercise dominion over the weaker or dominated party.'" *Pittman v. Pittman*, 2007 WL 1217270 *9 (Tenn. Ct. App.). In *Van Cleave v. Fairchild*, 950 So. 2d 1047, 1052-53 (Miss. App. 2007), the court found sufficient facts to establish a confidential relationship based on the mother's physical dependence on and trust in her daughter. The mother's physical condition required the daughter to run errands for her, assist her with housekeeping, and provide transportation. The daughter also oversaw her mother's medications and was a signatory on her mother's bank account. In addition, "[t]here was evidence that [the mother] confided [her worries about her finances and desire to be secure to her daughter] as the reason she wanted to sell the Lost Gap property, and that she trusted and accepted Marie's advice that $5,000 was a good price to sell sixty acres of timber land [valued at $70,000].

3. The wrongdoer had a disposition to exert undue influence.

a) Isolating victim from support or independent advice. In *Van Cleave v. Fairchild*, 950 So. 2d 1047, 1054 (Miss. App. 2007), the court found facts sufficient to show that a daughter's acts had her preventing her mother from receiving independent advice regarding the sale property to the daughter's boyfriend. "[The mother] accepted [her daughter's] word about the sale, rather than consult with her long-time estate attorney . . . She did not communicate with the attorney who drew up the deed about the property description or the sales price. . . [The mother] did not set up the appointment. She was never left alone with the attorney to discuss the deed."

b) Preparing the gift in secrecy or haste. In *Van Cleave v. Fairchild*, 950 So. 2d 1047 (Miss. App. 2007), the court found undue influence where a daughter had orchestrated the sale of her mother's property to her boyfriend at a minimal price all within 24 hours. In addition, she had taken her mother to the boyfriend's attorney instead her mother's long-time attorney, failed to mention the

purchase price to the boyfriend's attorney, hidden the sale from family, and refused to disclose the sale price to family even after being asked.

c) Active procurement. In *Estate of Shay*, 196 Cal. 355 (1925), cited by the California Supreme Court in *Estate of Fritschi*, 60 Cal.2d at 374, the beneficiary, "George mentioned the subject of a will to his father. Thereupon the father requested George to get a pencil and paper and take notes of the manner in which he desired to leave his property and then to take those notes to the testator's intimate friend, John McDonald, and request the latter to have a will prepared in accordance therewith. This was done and Mr. McDonald turned the notes over to counsel...for the drafting of a will. When this had been done George called at Mr. McDonald's office and procured a copy of the proposed will, which he read to his father paragraph by paragraph, and the latter expressed himself as satisfied therewith." *Estate of Shay*, *supra*, 196 Cal. at 362. The Supreme Court concluded: "The things done by George in this connection as above related, when measured by the decisions, do not constitute such activity in procuring the execution of the will as to bring this rule into operation. *Estate of Shay*, 196 Cal. at 364. In *Calloway v. Bank One*, Texas, Action 91-1761-P3 (A), Dallas County, Texas, 1994, the court held that despite knowledge that the trustor's mental condition was impaired and declining due to Alzheimer's disease, the bank undertook to become a co-trustee of the trust, cutting its fees in order to beat out a competitor. It then allegedly acquiesced in an unfair transaction to sell the closely held stock in the trustor's company for a bargain price, failed to disclose the sale to the remainderperson, and then financed the purchase of the remainderperson's stock at a third of its value. In *Estate of Gruber*, Case No. 95-01161, Dade County, Florida, *rev. Raimi v. Furlong*, 702 So. 2d 1273, 1285 (Fla. App. 1997) rev. den. 717 So.2d 531 (Fla. 1998), the corporate fiduciary was surcharged, in part, because it was found to be "negligent and/or at fault in employing, training, preparing retaining and/or supervising" two trust officers who were found to have participated in a conspiracy with a beneficiary to exert undue influence in creating a trust for an incompetent person, which trust named the bank as a fiduciary. On appeal, the verdict was reversed, with the Court finding that there was insufficient evidence to support any conspiracy. The Court also reversed on the issue of negligent hiring, retention and supervision of the trust officer, since "this theory was never pled or tried by consent." 702 So.2d at 1285. In *Van Cleave v. Fairchild*, 950 So. 2d 1047, 1053-54 (Miss. App. 2007), the court held that

the daughter actively procured the sale of property to her boyfriend where it was the daughter who "set up the appointment for April 2 to have the deed executed. [The mother] executed the deed in the presence of [the beneficiary's] attorney and [the daughter]. The fee of $49 was paid by [beneficiary's] account. The check on [beneficiary's] account was written by [the daughter], . . .[and] the whole thing was orchestrated in a twenty-four hour period, without [the mother] having participated in one step of the planning."

In other cases, the court did not find active procurement. In *Raimi v. Furlong*, 702 So. 2d 1273, 1288 (Fla. App. 1997), the court held: "Although Manny was a substantial beneficiary under the challenged will and does not contest the fact that he enjoyed a confidential relationship with the decedent during her final years, there was insufficient evidence to establish that he was active in the procurement of this will. Although Manny was present when the decedent expressed her desire to revoke the Furlong "The Happy Family Will" and make a new will, the unrefuted evidence below does not support the lower court's finding that Manny procured attorney Barash for the decedent or that Manny was even familiar with this attorney for that matter. According to the only evidence adduced, Barash was randomly selected from the yellow pages by virtue of his proximity to the decedent and specialty. There was no evidence that Manny gave any instructions to attorney Barash as to the preparation of the challenged will and trust; nor was there any evidence that Manny had knowledge of the dispositive provisions of the decedent's proposed final will. Further, Manny was not present at the execution of the challenged will and all of the witnesses to the decedent's execution of this will were independently procured by Barash. Finally, Manny did not see or take possession of these documents after the decedent's execution of the same." In *Davis v. Adelphia Communications Corp.*, 475 F.Supp.2d 600 (2007) the court did not find sufficient evidence of undue influence where the testator, on his deathbed, had asked his son to hire a lawyer for him. Even though the son contacted an attorney, who was the father of a friend and co-worker, the son was not present when the testator changed the beneficiary designation on his life insurance policy and pension plan from his second wife to his children. Furthermore, the second wife was present when these changes occurred. Though present, she did not make any comments or ask any questions of the testator when signing the spousal consent form. "While it is apparent that . . . some of his children facilitated the

transactions to some degree, there is no evidence that they had any financial relationship with the decedent or that the circumstances were suspicious in any fashion. In short, the evidence shows that Greg made the decision to change beneficiaries based on his own inclinations and free will." *Davis,* F.Supp.2d at 605.

4. There was a disposition of the estate that appeared to be the result of undue influence.

a) Markedly changed or unnatural dispositive provisions. In *Stanton v. Wells Fargo Bank Montana, N.A.,* 152 P3d 115, 121 (Mont. 2007), the court held that a lack of connection between the settlor and a charity she initially choose to benefit raised no question of fact as to whether or not it was a natural object of her bounty. "Frances's close friends testified that Frances still referred to Stanton as her "son-in-law" even after his divorce and that Frances promised Joanne that she would "take care" of Stanton. . . .Trail's End admits it never met with Frances or had any other connection with her. [The attorney] also stated that, when he drafted the 1996 Trust Agreement, he suggested a list of tax-exempt organizations, including Trail's End, from which Frances could choose. The District Court correctly concluded that the disposition was natural and that this factor raised no questions of fact regarding the presence of undue influence." *Id.* In *Estate of Hood*, 955 So. 2d 943 (Miss. App. 2007), the court held that Hood's conveyance of real property to non-relative neighbors and resultant disinheritance of his daughter, whom he understood to be his only heir and beneficiary under his prior will, was not unnatural. Hood had given his daughter an ultimatum that she must agree to live in the house or else he would give it to someone else. In *Estate of Harms*, 149 P.3d 557, 563 (Mont. 2006), the court stated that "'the fact that a parent might leave the majority of his or her assets to only one child, while excluding others, is not in and of itself unnatural.' (citation omitted) . . . Testimony from trial indicated that Charlie had obviously deeply cared for [an effectively disinherited child] and respected his work on the ranch. Nevertheless, given Charlie's articulated rationale for keeping the ranch intact as testified by Johnson at trial, the District Court determined that the results of the 2001 Will were not unnatural."

b) Change in victim's relations with others (poisoning mind). In *David v. Hermann,* 129 Cal. App. 4th 672, 686 (1st Dist. 2005), the court affirmed the trial court's finding that "'There is no rational explanation for this sudden shift in attitude by Jane toward and break

with Susan in September 1990 other than Wendy's falsely poisoning Jane's mind against Susan because of her (Wendy's) anger over the perceived slight in the August 1990 gifts. In other words, there is compelling circumstantial evidence that Wendy made continuing misrepresentations about Susan to their mother for the purpose of alienating Susan from her mother and effecting Susan's and her family's disinheritance. Proof that a testator/settlor is induced by misrepresentations into making dispositions that would not have been made absent those misrepresentations constitutes fraud.'" As the Court stated in the *Matter of Burke,* 441 N.Y.S.2d 542, 549 (1981), "The jury could have found, in addition, that [beneficiary] conveyed to [decedent] false accusations as to [former beneficiary]'s integrity and mismanagement of the family enterprises. If the accusations were intended to and did cause [testator] to disinherit members of his family in whole or in part, [beneficiary] exercised undue influence.*** If it were believed by the jury, they could have concluded that the alleged slander was uttered in order to alienate the testator from his counsel and advisor."

The susceptibility of the testator or settlor to undue influence is often found in a relationship in which the party benefitted had a superior position, whether physical or mental, or where the testator or settlor suffered from illness or mental impairments which made her unable to recognize and resist undue influence or fraud. In *Lintz v. Lintz* (Ct. App. 2014) 222 Cal. App. 4th 1346, the Court upheld a finding of undue influence by a spouse based on a statutory presumption of undue influence which arises when one spouse obtains an advantage in a transaction with the other, and the spouse benefitted fails to rebut the presumption by demonstrating that "' the disadvantaged spouse acted freely and voluntarily, with ' " 'full knowledge of all the facts, and with a complete understanding of the effect of the" transaction." ' (*In re Marriage of Fossum, supra,* 192 Cal.App.4th at p. 344, 121 Cal.Rptr.3d 195.)" *Lintz* 222 Cal app 4th at 1353. The issue was the standard of competence which applied to the transaction in question, whether it was the testamentary standard or a contractual standard which varied with the complexity of the transaction. California had adopted a statute dealing expressly with psychological and neurological factors to be used in evaluating the capacity to make contractual decisions. Hence in *Lintz,* the question is whether the advantaged spouse had met the burden of

proving that the disadvantaged spouse had a complete understanding of the effects of the transaction based on a contractual standard of competence which varied based on the complexity of the transaction.

The Lintz Court looked to the statutory and decisional law dealing with capacity to engage in contracts, rather than testamentary decisions. It held "In *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 730, 126 Cal.Rptr.3d 736 (*Andersen*) the court addressed 'the measure by which a court should evaluate a decedent's capacity to make an after-death transfer by trust.' *Andersen* ruled that Probate Code section 6100.5 applied to the mental competency to make a will, not to a testamentary transfer in general. It thus rejected the notion that the decedent's competency was determined under Probate Code section 6100.5. The court explained that Probate Code sections 810 through 812 do not impose a single standard of contractual capacity. Because each section provides that capacity be evaluated in light of the complexity of the decision or act in question, capacity to execute a trust 'must be evaluated by a person's ability to appreciate the consequences *of the particular act he or she wishes to take.'* (*Andersen, supra,* at p. 730, 126 Cal.Rptr.3d 736.) Indeed, '[m]ore complicated decisions and transactions thus would appear to require greater mental function; less complicated decisions and transactions would appear to require less mental function.' (*Ibid.*)" 222 Cal. App. 4th at 1352. The Court held that the trial court had properly found that the presumption had not been rebutted, using the contractual standard.

The undue influence must relate directly to the creation of all or a part of a particular will or trust. "In order to set aside a will on grounds of undue influence,'[e]vidence must be produced that pressure was brought to bear directly on the testamentary act...Mere general influence...is not enough; it must be influenced used directly to procure the will and must amount to *coercion* destroying free agency on the part of the testator.'...There must be proof of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.'" *Estate of Mann, supra,* 184 Cal.App.3d at 606.

Proof of undue influence generally must be made by use of circumstantial evidence since there seldom will be a confession on the stand: "Caveator must rely on inferences from the

surrounding facts and circumstances that arise on the evidence in his effort to prove that undue influence existed at the time testator executed his last will and testament thereby causing him to execute a will that he otherwise would not have executed. The more adroit and cunning the person exercising the influence, the more difficult it is to detect the badges of undue influence and to prove that it existed." *Will of Coley, supra*, 280 S.E.2d at 773-774. Some courts have looked only to mild persuasion as a basis for undue influence:

> "It need only be noted that the issue is whether the will or testamentary document was made by the testator exercising her own free will or whether there was undue influence by another such that the document was more that of the other than [testator]. If kindness and affection result in overcoming the testator's free agency and leave the will that of the beneficiary rather than the testator, then such constitutes undue influence."

Kelley v. First State Bank of Princeton, supra, 401 N.E.2d at 256. The test is whether the free will of the transferor was overcome. The Court in *Matter of Langmeier, supra*, 466 A.2d at 403 ruled that:

> "It is immaterial how this is done, whether by solicitation, importunity, flattery, putting in fear or some other manner. Whatever the means employed, however, the undue influence must have been in operation upon the mind of the testator at the time of the execution of the will. The essentials of undue influence are a susceptible testator, the opportunity to exert undue influence, a disposition to do so for an improper purpose, the actual exertion of such influence, and a result demonstrating its effect.

Susceptibility or weakness or mind or body are often cited as elements of undue influence. However there may be circumstances where a person with little susceptibility to suggestions will succumb to plausible misrepresentations by a trusted person or relent in the face of subtle duress. Some Courts have required a higher degree of proof where there is no showing of vulnerability:

> "'The true test of undue influence is that it overcomes the will without convincing the judgment.' This can happen but rarely in persons of normal strength of mind in the full possession of their faculties unimpaired by infirmity. The evidence which would justify

the conclusion that it had occurred in any particular case of that character would have to be strong indeed."

Estate of Anderson, 185 Cal. 700, 707 (1921).

Most judicial opinions on undue influence reflect a concept of influence which leans towards coercion and duress. Hence key evidence of a lack of undue influence is often the absence of the favored beneficiary from the conference with the scrivener or the testator's ability to describe their wishes. However the spectrum of undue influence is enormous, ranging from physical coercion to subtle blandishments disparaging other heirs and playing on the susceptibility of the victim to guilt. The Court in *In re Burke*, 441 NYS2d 542 (App. Div. 1981) discussed the full panoply of such misconduct:

> "Undue influence is seldom practiced openly, but it is, rather, the product of persistent and subtle suggestion imposed upon a weaker mind and calculated, by the exploitation of a relationship of trust and confidence, to overwhelm the victim's will to the point where it becomes the willing tool to be manipulated for the benefit of another.
>
> In *Matter of Walther*, 6 N.Y.2d 49, 53-54, 188 N.Y.S. 2d 168, 159 N.E.2d 665 the

Court held:

> "It must be shown that the influence exercised amounted to a moral coercion, which restrained independent action and destroyed free agency, or which, by importunity which could not be resisted, constrained he testator to do that which was against his free will and desire, but which he was unable to refuse or too weak to resist. It must not be the promptings of affection; the desire of gratifying the wishes of another; the ties of attachment arising from consanguinity, or the memory of kind acts and friendly offices, but a coercion produced by importunity, or by a silent resistless power which the strong will often exercises over the weak and infirm, and which could not be resisted, so that the motive was tantamount to force or fear ***lawful influences which arise from the claims of kindred and family or other intimate personal relations are proper subjects for consideration in the disposition of estates, and if allowed to influence a testator in his law will, cannot be regarded as illegitimate or as furnishing cause for legal condemnation."

In *Matter of Kaufmann*, 247 N.Y.S.2d 464, affd, 15 N.Y. 2d 825, 257 N.Y.S.2d 941, the court described the types of undue influence:

> "One may make testamentary disposition of his worldly goods as he pleases. The motives and vagaries or morality of the testator are not determinative provided the will is the free and voluntary disposition of the testator and is not the product of deceit. There are two principal categories of undue influence in the law of wills, the forms of which are circumscribed only by the ingenuity and resourcefulness of man. One class is the gross, obvious and palpable type of undue influence which does not destroy the intent or will of the testator but prevents it from being exercised by force and threats or harm to the testator or those close to him. The other class is the insidious, subtle and impalpable kind which subverts the intent or will of the testator, internalizes within the mind of the testator the desire to do that which is not his intent but the intent and end of another."

In an age when the nuclear family has exploded, the elderly often are left in the care of nurses, LPN's, neighbors or the nearest in-law who has ample opportunity to malign the missing and reiterate their affection and self-sacrifice to levels which cannot be ignored by the often frail and always lonely survivor. As the Court stated in *Burke, supra*, 441 N.Y.S.2d at 549,

> With the general increase in the longevity of men and women, the elderly population in this nation has increased and will continue to do so, and, with more demographic change, more and more of the elderly will find themselves in the care of nursing home proprietors. It is inevitable that the aged and infirm, under such circumstances, will become very dependent upon those who tend their wants, and a high degree of confidentiality will develop under which the aged will reveal to them their closest thoughts and the state of their financial affairs. Although the vast majority of those who so care for the aged are honest and dedicated professionals, the relationship is one from which the greedy and the corrupt may find considerable gain.

The method of insinuating oneself into the will in *Burke, supra*, was highlighted by the trial court:

> "The emotional base reflected in the letter of June 13, 1951 is gratitude utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy. The jury could have found, in addition, that [beneficiary] conveyed to [decedent] false accusations as to [former beneficiary]'s integrity and mismanagement of the family enterprises. If the accusations were intended to and did cause [testator] to disinherit members of his family

> in whole or in part, [beneficiary] exercised undue influence.*** If it were believed by the jury, they could have concluded that the alleged slander was uttered in order to alienate the testator from his counsel and advisor."

Most physicians don't understand complex wills or trusts or financial transactions any more than Alzheimer patients. Most transactions depend on trust that the professional involved has considered all the appropriate issues, has drafted or carefully selected the alternative suggested, and can be followed without any real understanding of the issues involved, whether it is surgery versus chemotherapy, the terms of a lease, the merits of a universal life/annuity policy, the terms of a complex trust or will, the prudence of investing in a closed-end mutual fund employing inverse floaters to minimize volatility, or the decision to employ an agent to manage one's money or real property. A large portion of the population shrinks from the critical analysis of such complex or technical decisions because of the difficulty involved, the fear that they are inadequate to understand the intricacies, embarrassment at their inability to follow the explanations or the details, the need to avoid taking responsibility for an important decision, a gambler's desire to risk losing everything, a surrender to the victimization one confronts in the auto repair shop, or a sweet and trusting nature.

"The standard for determining whether a person is mentally incapable is whether or not that person can fairly and reasonably understand the matter he is considering....A person is competent if he has the capacity or ability to understand <u>to a reasonable extent</u> the nature and effect of what he is doing." (emphasis added) *Krueger v. Zoch*, 173 N.W. 2d 18, 20 (Minn. 1969). Hence it is difficult in many cases to separate undue influence from perfectly normal fecklessness and fatalism. Trust that is betrayed is crucial here.

Depending on one's psychological, philosophical or religious orientation, "free will" can have great or minimal significance in the ordinary case, and hence make a decision about the overcoming of will a difficult question:

(1) Philosophical restrictions: treat all children equally, even the bad seed; protect children vs Warren Buffet; American philanthropic policy--Andrew Carnegie; tithe to the end to your church; spare the rod and spoil the child; The desire to be Jung again.

(2) personality issues: never get in disputes; always follow directions of pre-deceased spouse/parents; inability to withstand pressure; a refusal to accept responsibility; the desire to feel victimized. Ego strength depleted by age, disease or pharmacology--the suggestible testator. Freud: my mother made me do it.

(3) Desire to redress past grievances which testator was too timid to confront during his or her life. I'm 80 and I don't give a damn what people think anymore.

(4) The desire to induce attention or assistance by relatives and caregivers. Versus "sign the paper or I will abandon you in your residential hotel now that your legs have been amputated." She then rolls him to the savings and loan in a wagon to make her a joint tenant on his accounts.

(5) Will of the week. Wills empower the aged who have lost most other means of asserting themselves.

> "Some immensely rich old gentleman or lady, surrounded by needy relatives, makes, upon a low average, a will a week. The old gentleman or lady, never very remarkable in the best of time for good temper, is full of aches and pains from head to foot, full of fancies and caprices; full of spleen, distrust, suspicion and dislike. To cancel old wills, and invent new ones, is at last the sole business of such a testator's existence; and relations and friends (some of whom have been bred up distinctly to inherit a large share of the property, and have been, from their cradles, specially disqualified from devoting themselves to any useful pursuit, on that account) are so often and so unexpectedly and summarily cut off, and reinstated, and cut off again, that the whole family, down to the remotest cousin, is kept in a perpetual fever. At length it becomes plain that the old lady or gentleman has not long to live; and the plainer this becomes, the more clearly the old lady or gentleman perceives that everybody is in a conspiracy against their poor old dying relatives; wherefore the old lady or gentleman makes another last will--positively the last this time--conceals the same in a china teapot, and expires next day. Then it turns out, that the whole of the real and personal estate is divided between half a dozen charities; and that the dead and gone testator has in pure spite helped to do a great deal of good, at the cost of an immense amount of evil passion and misery."

Charles Dickens, *American Notes: A Journey* (originally published 1842 (Fromm International, 1985 at 27).

II. Presumption of Undue Influence

Although a few states hold that undue influence can never be presumed and must instead be shown by the evidence, most states recognize a presumption of undue influence arising from only some of the elements of undue influence. (Will Contests § 7:11 footnotes 97-98 lists these jurisdictions and respective cases). Most states raise a presumption of undue influence in the case where a confidential or fiduciary relation exists and where the fiduciary benefits himself, his family, or another:

> "In certain instances the law will raise a rebuttable presumption that the will was executed as a result of undue influence. This presumption arises where a fiduciary relationship exists between the testator and the devisee who receives a substantial benefit from the will, where the testator is the dependent and the devisee the dominant party, where the testator reposes trust and confidence in the devisee, and where the will is written or its preparation procured by the devisee."

Estate of Veronico, 396 N.E.2d 1095, 1100 (Ill.App. 1979). "When a confidential relationship exists between the decedent and the beneficiary, and the beneficiary both actively participates in procuring the execution of the will and unduly profits by it, a presumption of undue influence arises and places on the beneficiary the burden to show that the will was freely made." *Estate of Mann*, *supra*, 184 Cal.App.3d at 606.

To raise the presumption of undue influence, some States require that there must be "active participation by such person in the actual preparation or execution of the will." *Estate of Sarabia*, *supra*, 221 Cal.App.3d at 605. This is a rather flexible concept, with courts finding active participation in minor involvement by unsympathetic players and insufficient participation where a favored heir plays a role. Consider the case of *Estate of Shay*, 196 Cal. 355 (1925), cited by the Supreme Court in *Estate of Fritschi*, *supra*, 60 Cal.2d at 374. In *Shay* the beneficiary,

> "George mentioned the subject of a will to his father. Thereupon the father requested George to get a pencil and paper and take notes of the manner in which he desired to

> leave his property and then to take those notes to the testator's intimate friend, John McDonald, and request the latter to have a will prepared in accordance therewith. This was done and Mr McDonald turned the notes over to counsel...for the drafting of a will. When this had been done George called at Mr. McDonald's office and procured a copy of the proposed will, which he read to his father paragraph by paragraph, and the latter expressed himself as satisfied therewith.

Estate of Shay, *supra*, 196 Cal. at 362. The Supreme Court concluded: "The things done by George in this connection as above related, when measured by the decisions, do not constitute such activity in procuring the execution of the will as to bring this rule into operation." *Estate of Shay*, *supra*, 196 Cal. at 364. The factors considered in finding active participation include procuring the drafting attorney, taking the testator to the attorneys office, presence during discussions or execution which preclude private conversations with counsel, payment for the drafting attorney, suggestion of terms and the like. Taking the testator to the beneficiary's own attorney is generally held not to be sufficient, standing alone, to constitute active participation sufficient to trigger a presumption. *Mann*, *supra*, at 608. The cases are so result oriented that it is difficult to draw any bright lines about the sufficiency of conduct which present "the element of noxious activity which is necessary to the tridental presumption." *Estate of Ninquette*, 264 Cal.App.2d 976, 984 (1968).

Pennsylvania follows a different set of criteria for raising a presumption of undue influence:

> "When the proponent of a will proves that the formalities of execution have been followed, a contestant who claims that there has been undue influence has the burden of proof. The burden may be shifted so as to require the proponent to disprove undue influence. To do so, the contestant must prove by clear and convincing evidence that there was a confidential relationship, that the person enjoying such relationship received the bulk of the estate, and that the decedent's intellect was weakened."

Estate of Younger, 461 A.2d 259, 262 (Pa.Super. 1983).

Such a presumption continues until the person initially responsible for the undue influence is no longer in a position to do so. *Robertson v. Campbell*, 674 P.2d 1226, 1232 (Utah 1983).

Although most states will require that the contestant prove the elements necessary to raise the presumption by a preponderance of the evidence, some states will require clear and convincing evidence. In *Friendly Ice Cream Corp. v. Beckner*, 268 Va. 23, 31 (2004), the court described this requirement by stating, "if the party seeking rescission of the deed or contract produces clear and convincing evidence of great weakness of mind and grossly inadequate consideration or suspicious circumstances, he has established a *prima facie* case of undue influence and, absent sufficient rebuttal evidence, is entitled to rescission of the document."

Once the presumption has been raised, the burden shifts to the proponent. The courts however are split on whether it is merely the burden of going forward which shifts to the proponent or the burden of persuasion. In *Howard v. Nasser*, 364 S.C. 279, 285 (2005), the court refers to the South Carolina Code § 62-3-407 which provides: "Proponents of a will have the burden of establishing prima facie proof of due execution in all cases and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." In *In re Last Will and Testament of Melson*, 711 A.2d 783, 788 (Del. Supr. 1998), the court describes the burden as "where the challenger is able to demonstrate the same three elements that preclude the presumption of testamentary capacity, the burden shifts to the proponent of the will to prove affirmatively the absence of undue influence. Once the burden has shifted, the proponent must prove that he or she exerted no influence adverse to the interests of the testator or testatrix and that the disposition in dispute was consistent with the latter's intentions."

Again the courts are split on the quantum of proof necessary for the proponent to rebut a successfully raised presumption of undue influence.

Minimal proof or merely a reasonable explanation: Only a small minority of states follow this approach. In *In re Henke*, 203 Ill. App. 3d 975, 979-80 (5th Dist. 1990), the

court states “Illinois follows Thayer's “bursting-bubble” theory of presumptions. A presumption may be regarded as a bubble. Each fact necessary to the establishment of a presumption expands the bubble as each fact is produced. Once all facts necessary to the establishment of a presumption have been “blown in,” the presumption is fully established. The burden of production of evidence then is shifted to the opponent. If the opponent produces no evidence, then the presumption will carry the day, and the beneficiary of the presumption will be entitled to a directed finding or a directed verdict or judgment, as the case may be. If, however, evidence is introduced that is strong enough to contradict any of the facts which “blow up” the bubble, *i.e.,* the facts upon which the presumption rests, the bubble bursts. The presumption vanishes.”

Preponderance of the evidence: Another minority of states follow this approach. In *In re Estate of Roche*, 736 A.2d 777, 779 (Vt. 1999), the court stated “absent an element of fraud, the burden is on the proponent of the will to prove absence of undue influence by a preponderance of the evidence.”

Clear and convincing: Of those states which have defined the quantum of proof necessary for the proponent to rebut a presumption of undue influence, the majority follow this approach. In *Pittman v. Pittman*, 2007 WL 1217270 *9 (Tenn. Ct. App.), the court stated “Once the party proves these elements, a presumption arises that the deed was procured by undue influence. The burden then shifts to the grantee to prove, by clear and convincing evidence, that the transaction was fair and was not the result of undue influence. If the grantee fails to carry this burden, the transaction is presumed void."

Beyond a reasonable doubt: Arkansas requires that the presumption be rebutted by evidence beyond a reasonable doubt. In *Pyle v. Sayers*, 344 Ark 354, 359 (2001), the court states “The law in Arkansas is clear that when a will is valid on its face an opponent of the will must prove by a preponderance of the evidence that the testator either lacked the mental capacity to execute a will or did so under undue influence. However, if the proponent of the will procured the will and benefits from the will then the burden of proving the will is on the proponent. The burden of proof is under those circumstances beyond a reasonable doubt.”

The courts are also split as to whether the elements necessary to raise a presumption for testamentary transfers should also apply to inter vivos transfers. In *Upman v. Clarke,* 753

A.2d 4, 9 (Md. 2000) the court held that "[i]n the case of an *inter vivos* gift, the existence of a confidential relationship shifts the burden to the donee to show the fairness and reasonableness of the transaction." In contrast, the approach that the presumption should arise upon the same standard for inter vivos transfers is followed in *Ramsey v. Taylor*, 999 P.2d 1178 (Or. Ct. App. 2000), and favored by Restatement Third of Property over the *Upman* approach.

III. The Kindness Exception

The litmus tests for undue influence look to actions taken to subvert the free will of the testator or settlor, inducing them wrongfully to change their donative scheme. However, public policy should support actions taken to enrich the lives of testator even if a secondary effect is gratitude. Indeed, many elderly (and not so elderly) consciously use the prospect of an inheritance to induce attention and care from neighbors and relatives. Medieval moralists debated the issue whether one could be saintly where goodness was induced by the desire to avoid hell and enjoy the delights of heaven rather than a selfless thirsting for goodness. The court faces the same dilemma where even the most loving child recognizes that solicitude will not only be its own reward but may lead to a devise. If this is condemned as a device of undue influence, few heirs will be safe from such an inquisition. Hence, kindness is generally viewed as an acceptable form of currying favor, unless some improper conduct is involved.

The Court of Appeals in *Estate of Mann*, *supra*, cited *Estate of Bould*, 135 Cal.App.2d 260 (1955) for the proposition that """Influence gained by kindness and affection will not be regarded as "undue" if no imposition or fraud be practiced....."""[1]

[1] This is not a typographical error: this is a quote of a court quoting a court quoting a court quoting a court. *Mann* quotes *Bould* quoting *Kelly v. McCarthy*, 6 Cal.2d 347, 364 (1936), quoting *Mackall v. Mackall*, 135 U.S. 167 (1890), quoting *Matter of Gleespin's Will*, 26 N.J.Eq. 523. On sheer volume of precedents this proposition must be true.

Bould dealt with the situation of a childless testator who desired to leave her estate to the woman who cared for her. The testatrix discussed with attorney Johnson her desire to adopt the caretaker and to leave her assets to her in a will. The attorney advised the testatrix that a will offered more flexibility than an adoption, since it could easily be changed. The Court noted that "Mrs. Bould was a clean, fresh, a very alert little old lady and seemed happy." *Bould*, *supra* at 268. The beneficiary was not present during the execution of the will. The Court noted that "The foregoing resume leaves contestants without any direct evidence of undue influence and relegates them to a circumstantial showing, which is the ground upon which they really stand." *Bould*, *supra* at 269. The Court held, as cited above, that circumstantial evidence must not only be consistent with the application of undue influence, but "before a will can be overthrown, the circumstances proved must be inconsistent with voluntary action on the part of the testator." *Bould*, *supra* at 270. The rule was followed by the Court in *Mann*: "proof of circumstances consistent with undue influence is insufficient -- the proof must be of circumstances inconsistent with voluntary action." *Mann*, *supra* at 607.

The Court in *Bould* then analyzed the impact of influence gained by kindness and affection from the viewpoint solely of the testatrix, presaging the rule promulgated in *Sarabia*:

> "'It was for [her], not for the court, to be satisfied with the reasons upon which [she] acted and to determine whether the terms of the will were just and fair.' (*Estate of Hilker*, 85 Cal. App.2d 680, 685....) Moreover, "'Influence gained by kindness and affection will not be regarded as 'undue' if no imposition or fraud be practiced, even though it induce the testator to make...an unjust disposition of his property in favor of those who have contributed to his comfort and ministered to his wants, if such disposition is voluntarily made.' *Matter of Gleespin's Will*, 26 N.J. Eq. 523. (*Mackall v. Mackall*, 135 U.S. 167...)' (*Kelly v. McCarthy*, 6 Cal.2d 347, 364...)"

Bould, *supra* at 272. The Court of Appeals rejected any undue influence despite an ulterior motive on the part of the beneficiary for her kindness:

> "It is a reasonable deduction from the evidence that appellant had both motive and desire to obtain Mrs. Bould's property when she was gone. And she had ample opportunity to impose her will upon the elderly woman. But 'It is the settled rule that: "Mere proof of opportunity to influence a testator's mind, even when coupled with an interest or motive

> to do so, will not sustain a finding of undue influence, in the absence of testimony showing that there was pressure operating directly on the testamentary act...."'

The Court of Appeals overturned the trial court's decision, finding that though there was proof of an unnatural will, there was not proof of activity in the preparation and execution of the will. *Bould*, *supra* at 275.

The Supreme Court in *Kelly*, cited by *Bould*, dealt with a situation of a challenge to a deed. The Court noted that kindness used to induce a deed did not constitute undue influence:

> "The influence which will avoid a deed cannot proceed alone from sympathy or affection for the grantee but must be such as to dominate the grantor's will and coerce it to serve the will of another in the act of conveying, and a grantee who by his kindness and attention, won the affection of a relative, who executed a deed to him as he anticipated, did not thereby obtain the deed by undue influence....
>
> "Undue influence comprehends overpersuasion, coercion or force that destroys or hampers free agency and will power of the testator, and mere affection or attachment or a desire to gratify the wishes of one beloved, respected and trusted may not of itself amount to undue influence affecting testamentary capacity." (emphasis added)

Kelly v. McCarthy, *supra*, 6 Cal.2d at 364. The Court then cited that language from *Mackall v. Mackall*, *supra*, 135 U.S. 167 cited in *Bould* cited in part by *Mann*. The Court, as in *Bould*, assumed that the actions of the transferee were disingenuous and that the kindness was anticipated to result in the gift. This did not rise to the "imposition or fraud" exception to the cited language.

The United States Supreme Court in *Mackall* dealt with a deed executed before death to one of several children of the deceased. The challengers pointed to "the long intimacy between father and son, the alleged usurpation by the latter of absolute control over the life, habits, and property of the former, efforts to prevent others during the last sickness of the father from seeing him, and the subjection of the will of the father to that of the son, manifest in times of health, naturally stronger in hours of sickness." *Mackall*, *supra*, 135 U.S. at 707. Although the Court found there to be a confidential relationship, it rejected any holding of undue influence citing the

notes from *Small v. Small*, 4 Greenland 220, which in turn cited *In re Gleespin's Will, supra*, 26 N.J.Eq. 523 as the basis for the principle involved. The Supreme Court noted that:

> "It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary dispositions, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them."

Mackall, supra, 135 U.S. at 707. The Supreme Court required fraud and imposition relating to the actual transfer in question, rather than a disingenuous or ulterior motive on the part of the alleged influencer:

> "Right or wrong, it is to be expected that a parent will favor the child who stands by him, and give to him, rather than the others, his property. To defeat a conveyance under those circumstances, something more than the natural influence springing from such relationship must be shown; imposition, fraud, importunity, duress, or something of that nature must appear; otherwise that disposition of property which accords with **the natural inclinations of the human heart must be sustained**." (emphasis added.)

Mackall, supra, 135 U.S. at 707. Thus both *Mackall* and *Kelly* upheld transfers of property by deed to persons in a confidential relationship, requiring actual misconduct in the transfer itself. The rule in these cases thus is that "Good feeling thus won does not invalidate the will, although the services may be rendered to induce testamentary favor." *Estate of Doty*, 89 Cal.App.2d 747, 755 (1949).

The source of the language wending its way to *Mann* came in a will contest in New Jersey, where the favored son-in-law had moved into the home of the testator, obtained a copy of his prior will, obtained the attorney to draft the will, obtained the witnesses, and allegedly isolated the testator. The testator was "sick of an organic disease with which he had been for a considerable time afflicted..." *In re Gleespin's Will*, *supra*, 26 N.J.Eq. at 525-526. The beneficiary 'was accidentally drowned while the testimony was being taken in the Orphans Court, and was not sworn as a witness." *In re Gleespin's Will*, *supra*, 26 N.J.Eq. at 529.[2] Absent affirmative evidence of undue influence in the execution of the will, the Court held the will valid. "There is no proof of any influence on his part, except what is deduced from those facts, and they are, at most, suspicious circumstances." *In re Gleespin's Will*, *supra*, 26 N.J.Eq. at 529.

Disingenuous kindness is difficult to ferret out absent misconduct of the sort described by the United States Supreme Court in *Mackall*.

IV. Benefit to a Third Person

The goal of the law is to assure that the will is the voluntary act of the testator, not of some other person who may wish to benefit himself, a family member or friend, a client, or a favorite charity. As the Court held in *Estate of Clegg*, 87 Cal.App.3d 594, 602 (1978) the influence must result in "an undue benefit to such person *or another person* under the will thus procured."

The same rule was followed in *Estate of Gelonese*, 36 Cal.App.3d 854 (1974). There the will benefitted three of five children disproportionately. The attorney who prepared the will visited the testatrix "accompanied by a Catholic priest and a doctor, both of whom had been summoned at Lonergan's suggestion. Peterson, in the presence of the priest, the doctor, [and two of the children], interrogated decedent and determined that she did not possess testamentary capacity at that time." Changes were then made in the will and the decedent visited her doctor,

[2] It would have been interesting testimony if he had been sworn and perhaps could have resolved the medieval debate discussed above.

who "prepared a certificate of competency." *Gelonese*, *supra* 36 Cal.App.3d at 859. Accompanied by two of the favored three children, the testatrix visited her attorney where the will was executed.

The Court of Appeals found that a fiduciary or confidential relationship "is presumed to exist between parent and child." *Gelonese*, *supra* 36 Cal.App.3d at 863. The Court on appeal found ample evidence that "decedent discussed her business affairs, including the dispositions to be made under her will," with two of the three favored children. *Gelonese, supra*, 36 Cal. App.3d at 865.[3]

The Court in *Gelonese* found the influence of only two of the three children to be sufficient to invalidate the entire will:

> We note, in conclusion, that contestant asserted undue influence only on the part of Lena and Robert, and not on the part of Peter, who, as a residuary legatee and devisee, also stood to receive substantially more than Charles and Rosie. The jury in its special verdict found that the execution of the purported will was obtained through the undue influence of Lena and Robert and upon this verdict a judgment was made and entered that said will be denied probate. The theory upon which the case was tried and upon which the verdict was rendered and judgment entered was that the whole will was the result of the presence of the undue influence of Lena and Robert. Accordingly, upon the finding of undue influence the will was totally invalidated. (*Estate of Molera* 23 Cal.App.3d 993, 1001 [100 Cal.Rptr. 696]; *Estate of Beckley*, 233 Cal.App.2d 341, 348 [43 Cal.Rptr.649]; *Estate of Webster* 43 Cal.App.2d 6, 15 [110 P.2d 81, 111 P.2d 355].)

Gelonese, *supra*, 36 Cal.App.3d at 867.

These modern cases rest on the California Supreme Court's decision in *Estate of Bixler*, 194 Cal. 585, 595 (1924). In that case the Supreme Court reversed a judgment on the pleadings holding that it was not necessary to allege that the person who exerted the undue influence profited by the will or even that he was named therein as a legatee, because whether or not one exercising undue influence on a testator profited, or will profit, by a will is "wholly immaterial."

> "If in fact the will represents the desire and purpose of Hamilton instead of the desire and purpose of the testatrix, and was procured by him by dominating and controlling her mind and will, it is wholly immaterial whether or not he profited or will profit therefrom."

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[3] Some decisions hold that the mere existence of a parent/child relationship does not raise the presumption unless the "relationship would have to be shown as more intimate and influential than the other children enjoy." *Hendricks v. Hendricks*, 158 S.E.2d 496, 502 (N.C. 1968); *see also Olson v. Harshman* 668 P.2d 147, 151-152 (Kan. 1983).

Bixler, *supra*, 194 Cal. at 595.

In *Van Cleave v. Fairchild*, 950 So. 2d 1047, 1051-52 (Miss. App. 2007), the court held that a transfer to a third party, which was procured by a person in a confidential or dominant relationship with the grantor, is invalid where the dominant party is the actual beneficiary. "Although Van Cleave's name appears on the deed, there was substantial credible evidence that Marie was the actual beneficiary, if not a co-beneficiary. . . . Van Cleave testified that it was Marie who suggested to both he and Grace that he buy the Lost Gap property. He also testified that Marie was the one who negotiated the deal. After Perry found out about the transfer, it was Marie who offered to sell him the property for $1,000 an acre. Therefore, contrary to Van Cleave's assertion, the issue of Marie's undue influence was relevant to his deed.

The Common Law discloses a long history of undue influence and elder abuse, now augmented by modern financial stress, increased longevity, and the isolation of elderly or disabled persons from their family and friends. The legislature in California has instituted and refined elder abuse statutes as well as adopting tests of capacity which reflect Twentieth Century psychological testing criteria. In 2008, California modified its Elder Abuse statute to add "donative transfers" and "testamentary bequests" to the transactions subject to the statutory protections and remedies. This reflects a major change from the *inter vivos* transactions in which elders suffered financial and physical abuse currently, to add transactions which involve lower standards of capacity.

A transaction such as a purchase of objects or services or transfers of authority to a third party require the victim to assess both the providence of the transfer for their current and future personal financial needs or to assess the reliability and competence of the person who will now control necessities of his or her life. Such decisions require a high level of capacity. Historically, transactions which only affected events after death, such as wills or trusts, were held to involve a lower level of capacity since they did not impact the necessities required for the wellbeing and comfort of the testator, settlor or donor. Indeed, some courts hold that the standard for testamentary transfers is lower than any benchmark, except the decision to marry,

which obviously is often entirely an emotional act. The standard is “exceptionally low,” but higher than marital capacity.[4]

V. Common Factual Scenarios

Presumption Where Drafting Attorney is Benefitted.

Where the attorney who drafts the document is benefitted, a presumption of undue influence is created and the burden of proof shifts: "an instrument drafted by an attorney in his own favor is looked upon with suspicion....Also when an attorney creates an account with his client in which he retains the right of survivorship, he has the burden of showing that he did not unduly influence his client." *Estate of Barnhart*, *supra*, 339 N.W. 2d at 31.

"From very ancient times, bequests to the draughtsman of a will have been reprehended by the law. By the Roman law, they were invalid.” Page on Wills, Lifetime Ed., section 829: Justinian, Digest, Book XLCIII, Tit. 10, 15." *In re Lobb's Will*, 160 P.2d 295, 305 (Or. 1945). "Suetonius mentions a law promulgated by the Emperor Nero that 'no one who writes a will for another shall write in a legacy for himself.'" William McGovern, Jr., "Undue Influence and professional Responsibility," 28 Real Property Probate and Trust Journal 643, 647 (1994). Other authorities attribute this to an ordinance by Nero's successor, Claudius, "that the writer of another's will should not mark down a legacy for himself." *In re Blake's Will* (N.J. 1956) 120 A2d 745, 753. While California caselaw once fiddled around on this issue, *Magee v. State Bar*, 58 Cal. 2d 423 (1962), it has now joined the majority of the States in prohibiting such bequests, except to specified relatives fortunate enough to be attorneys. Cal. Prob. C. §21350.

In *Estate of Simmons*, 156 Minn. 144, 149 (1923) the court stated “Where the beneficiary sustains confidential relations and drafts the will, or controls its drafting, it is variously stated, the phraseology and perhaps the precise thought changing from case to case, with some attendant confusion of expression and meaning, that a presumption of undue influence arises, or that an

[4] *Marriage of Greenway* (2013) 217 Cal.App.4th 628. Where there is a disparity of wealth between the bride and groom, of course, the decision to marry a person of means may be as calculating and rational as any MBA could perform in purely financial transactions. Similarly, the decision of a rich octogenarian to obtain arm candy or sex (and avoid GST taxes for gifts to his or her playmate) via a marriage can be equally calculating. With a prenuptial agreement, such decisions may qualify as purely rational.

inference to that effect may be drawn as a fact, or that the facts stated make a prima facie case, or that the case is one for scrutiny."

In *Haynes v. First National State Bank of New Jersey*, *supra*, 432 A.2d 890 (N.J. 1981) the court found that the will had been drafted by the attorney for the principal beneficiary, testatrix's daughter, and ruled that a presumption of undue influence arose on such a prima facie case. It held that "Hence, the presumption of undue influence created by a professional conflict of interest on the part of an attorney, coupled with confidential relationships between a testator and the beneficiary as well as the attorney, must be rebutted by clear and convincing evidence." *Haynes*, 432 A.2d at 901.

Spouse or unmarried partner is the predominant beneficiary.

Courts are split on whether or not spousal relations raise a presumption. *In re Estate of Karmey*, 658 N.W.2d 796, 799 (Mich. 2003) states that "it can be said that marriage is not a relationship that has traditionally been recognized as involving fiduciary duties. It is a unique relationship based on mutual trust and commitment. We do not believe the presumption of undue influence is applicable to such a relationship." In contrast, *Cook v. Huff*, 552 S.E.2d 83, 85-86 (Ga. 2001) states the proposition that influences which might be considered spousal in nature can still be sufficient to raise a presumption of undue influence.

Courts are likewise split on whether or not the fact that a benefitting spouse holds power of attorney may raise a presumption. *Hamilton v. Hamilton*, 858 N.E.2d 1032, 1037 (Ind. Ct. App. 2006) states "[t]he disputed transaction is one between spouses, *i.e.*, the Decedent's designation of Lois, his wife, as the sole beneficiary under his Will. As such, we conclude that it would go against the thrust of *Womack* to coat such a transaction with a veil of undue influence. Consequently, we believe Lois' position as the Decedent's power of attorney is secondary to her position as the Decedent's spouse. To hold otherwise would discourage spouses from choosing one another as power of attorney, when often times a spouse is in the most genuine position of trust to make financial decisions for an incapacitated spouse. Therefore, we hold that the trial court did not err in instructing the jury that the burden was Michael's to prove that Lois unduly influenced the Decedent in executing his Will. In contrast, *Howard v. Nasser*, 364 S.C. 279, 290 (2005), states that "In addition to the confidential relationship by way of marriage, Respondent admitted at oral argument

that the power of attorney that Nasser gave to Respondent created a fiduciary relationship. . . Appellants did not rely solely on the existence of a confidential/fiduciary relationship, but additionally offered the following evidence in support of their claim of undue influence . . . this evidence was sufficient to require Respondent to present evidence rebutting the presumption of invalidity."

Child is the predominant beneficiary.

Generally, additional evidence will be required to raise a presumption of undue influence from a parent-child relationship. *Matlock v. Simpson,* 902 S.W.2d 384, 385-86 (Tenn. 1995). In *Van Cleave v. Fairchild*, 950 So. 2d 1047, 1052 (Miss. App. 2007), the court stated that "[a] deed from a parent to a child alone of itself raises no presumption of undue influence since, in the absence of evidence to the contrary, the parent is presumably the dominant party." (citing *Thomas v. Jolly*, 251 Miss. 448). In *Bailey v. Turnbow*, 639 S.E. 2d 291, 293-94 (Va. 2007), the court stated "in Virginia we have adhered to the view that a close family relationship, even the relationship of parent and child, will not, alone, give rise to a confidential relationship creating a presumption of undue influence. (citation omitted) Instead, for the presumption to arise, the party asserting it must establish, by clear and convincing evidence, an agency relationship in which one party is bound to act for the benefit of another and can take no advantage to himself, or between family members when one member bears also an attorney-client relationship to another member, or 'when one family member provides *financial advice* or *handles the finances* of another family member.'"

However, in *Estate of Gelonese*, 36 Cal. App. 3d 854, 863 (1974) the court stated that a fiduciary or confidential relationship "is presumed to exist between parent and child."

VI. Same Rules Generally Applicable to Trusts

Undue influence can be used to invalidate a trust just as in the case of a will. In *Levy v. Crocker-Citizens Nat. Bank, supra,* 14 Cal.App.3d at 104-105, the Court noted that: "'Upon the question whether the settlor has been induced to create the trust by undue influence, the following factors may be of importance: (1) whether and to what extent a fiduciary or confidential relationship existed at the time of the creation of the trust between the settlor and the person persuading him to create the trust; (2) whether it was the trustee, the beneficiaries or a

third person who persuaded the settlor to create the trust; (3) the improvidence of the settlor in creating the trust; (4) whether the settlor when he created the trust had independent legal advice; (5) the age, health, business competence, intelligence of the settlor; (6) whether the trust is of such a character that it would be natural for a person in the position of the settlor to create it when not unduly influenced by others.' (Rest.2d Trusts § 333, com. c.)"

Likewise, the same rules and presumptions will apply as do for wills. *Ryan v. Colombo*, 712 P.2d 139, 143 (Or. App. 1985) states "[w]hatever the test, it is the same for both wills and deeds...although some factors, such as the absence of independent advice and counsel, may weigh more heavily in the case of a deed than in the case of a will. . . . Generally, when a confidential relationship exists between the grantor and the one receiving an advantage, with a resulting superiority and influence over the grantor...., it is said that only slight evidence is sufficient to establish undue influence."

VII. Susceptibility to Undue Influence

We will now focus on undue influence and elder abuse with respect to testamentary transactions, but will utilize the common law and statutory requirements developed in both *inter vivos* transactions and testamentary transfers in such analysis. It will also look into the issue of how decisions are made: what is normal persuasion, and what is improper persuasion which can trigger remedies for undue influence and elder abuse. It will explore the insights of recent neurobiological investigations on how people make decisions—which expose major differences from the classical philosophical and psychological models used both in legal decisions and popular perceptions of how free will functions in financial and personal decisions. The article will also examine recent studies in cognitive aging, with emphasis on the changes such cognitive impairments inflict on the ability of elderly persons to recognize and resist improper influence in their financial decisions. We will be examining key lay and technical books and articles on decision making and susceptibility to influence, which hopefully can assist in assessing potential claims for financial elder abuse and undue influence, and preparing legal and psychological witnesses to render opinions or prepare for direct or cross examination at trial.

Developments in the last decade call into question many of the premises of lay and legal analyses of how "rational" or "free will" decisions are made. For example, the role of our

unconscious mind in making decisions has been highlighted by detailed investigations of how various decisions are actually made, both in the processes involved and in the areas of our brains utilized. While most people assume that most decisions are consciously made on rational grounds, in point of fact humans have developed heuristics and mental tools to deal with complex issues which are largely supported by unconscious modes of processing. "This and many other studies suggest that an unconsciously perceived stimulus may suffice to cause someone to actually pursue a goal without any awareness of how it originated—no conscious deliberation or free will required." J. Bargh, "Our Unconscious Mind" (2014) 310 *Scientific American* 30, 37 ("Unconscious"). This article provides an easy primer to understanding how much of our decision-making is triggered by unconscious assessment of the current situation by measuring it against patterns retained in our memory. "[A]n unconscious gesture or a casual word for which a strong association has previously been formed –'priming' to a social psychologist—can change a person's behavior….subliminal motivations make use of the same mental processes—working memory and executive function—as used in conscious acts of self-control and that people often misunderstand the actual underlying reasons for their behavior when influenced by unconscious impulses." Unconscious, at 34. We have a "natural tendency to mimic and imitate the physical behavior of others," which is a basic learning skill from infancy to death, referred to as the "chameleon effect" or "behavioral synchrony," which can be used to influence others by pointing out that others are making the same decision." Unconscious, at 35. If Lebron James drives a Kia luxury car, we should too. For the compromised elder, a suggestion that the friend, family member or others have made the same decision (e.g. to make a large donation to the predator's "charity") can lead to an imprudent and excessive donative transfer.

The process of making decisions in seconds, rather than long pondering of factors, has been illuminated over the past several decades, summarized by Nobelist Daniel Kahneman in in his 2011 book, *Thinking, Fast and Slow*. We will examine a variety of recent or recently revised books and technical articles dealing with such developments.

Much recent effort has gone into the investigation of elder abuse and undue influence, with the National Academy of Sciences publishing a comprehensive study of the decline of mental ability in 2016, *Cognitive Aging: Progress in Understanding and Opportunities for*

Action ("Cognitive Aging"). Cognitive Aging builds on recent studies of the neurobiology of decision-making and studies of the vulnerabilities of older individuals. The impetus for such studies is the increasing predation of elders and disabled by relatives, strangers and trusted employees. Cognitive Aging notes that "In 2010 alone, victims of financial elder abuse lost an estimated $2.9 billion, included loss of money and goods to legitimate businesses, scams, and family and friends, and indirect losses through medical insurance fraud (MetLife Mature Market Institute et al., 2011) Age-related changes in cognitive abilities may put older adults at risk for financial fraud or exploitation INAPSA, 2014)." Cognitive Aging, at 277.

Analyses of reported elder abuse victims points to a variety of risk factors leading to elder abuse, both personal and financial. Sommerfield, D, Henderson L, Aarons G, "Multidimensional Measurement Within Adult Protective Services," (2014) 26 *Journal of Elder Abuse & Neglect* 495. These risk factors include: confusion/cognitive impairment, underweight/frail, unclean/unsafe environment, alcohol by caregiver, marital/family conflict, self-blame, poor judgment/poor decisions, evidence of psychological or physical/sexual abuse. *See also* M. Quinn, **"**Developing an Undue Influence Screening Tool for Adult Protective Services", February 21, 2016 (Final Report to the Borchard Foundation).

Much of the case law on undue influence arose prior to the development of modern psychology, psychiatry, and neurology and long before the advent of brain imaging technology and scientific analysis of decision-making. With the advent of functional magnetic resonance imaging devices (fMRI) and arterial spin labeling and diffusion MRIs, it is now possible to identify the specific parts of the brain which are utilized in mental processes, including the assessment and making of decisions.

In 1996, the California legislature passed the Due Process in Competence Determinations ACT ("DPCDA") in order to provide a more rigorous set of standards for evaluating the competence of persons to perform various acts. This neuropsychological paradigm for evaluating capacity was a unique update to the common law tests for capacity. Probate Code Section 811 provides:

§ **811**. Deficits in mental functions

"(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to * * * execute wills * * *, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b),), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:
(A) Level of arousal or consciousness.
(B) Orientation to time, place, person, and situation.
(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:
(A) Short- and long-term memory, including immediate recall.
(B) Ability to understand or communicate with others, either verbally or otherwise.
(C) Recognition of familiar objects and familiar persons.
(D) Ability to understand and appreciate quantities.
(E) Ability to reason using abstract concepts.
(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.
(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:
(A) Severely disorganized thinking.
(B) Hallucinations.
(C) Delusions.
(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference that is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.
(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

> (d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act."

This statutory structure follows the insights developed in recent decades, using multiple tests to assess specific cognitive skills affecting competence. There are approximately 8,000 psychological tests available, dealing with general assessments such as the MiniMental States Exam used by many physicians to give a quick assessment of cognitive abilities but also enormously detailed exams probing specific areas of cognitive ability. The American Bar Association and American Psychological Association has developed Handbooks for Lawyers, Psychologists and Court professionals, which are accessible to lawyers and bankers who face the need to assess and report cognitive problems and potential elder abuse.

The practical problem for estate planners and others dealing with potential cognitive problems and elder abuse is that most people suffering problems have not had psychological tests taken, and hence the nuances of the California Code provisions are not easily assessed. However, this detailed statute provides the courts and practitioners with a set of issues which are not easily detected in court decisions, which rely on general evidence presented by general practitioners, relatives and friends. The statute allows practitioners to focus on specific issues of short term memory, working memory, problems with comprehension, attention, to assist in determining capacity.

In recent years, many estate planners have turned to expert testing or evaluation in order to bullet proof their estate plans where the testator or settlor or potential donor may suffer some cognitive impairments. In some of these cases, particularly with malleable experts looking for a good fee for a few hours with an elderly client or experts who have not been informed of problems or conflicts involved in the estate plan, test results can be used very effectively either to defend or attack competence. For example, in a recent case the settlor had been administered a Repeatable Battery for the Assessment of Neuropsychological Skills (RBANS). The expert administering the test had not been given any information on the transactions involved, and assumed that there were no conflict issues and simple competence to execute a will was all that was involved. The test had found severe impairment of Visual Spatial capacity, intermediate memory and delayed memory. The ABA/APA Handbook for Psychologists, Assessment of Older Adults with Diminished Capacity at 119 includes a sample of testing with RBANDS, and

test results which mirrored those of the settlor. The Handbook concluded that such results "placed her performance in the impaired range or requiring supervision in the area of money management."

Hence, sometimes existing testing to prove capacity or susceptibility to undue influence provide proof positive of a lack of capacity or severe susceptibility to fraud or undue influence. There are also many circumstances where the testator has had recordings made with him or her and the scrivener or with third parties seeking recordings for a family history or Hallmark autobiography report. Such video's or recordings can provide valuable evidence for neurologists or psychologist/psychiatrists in evaluating the abilities and susceptibilities of the person.

On whole, the California Due Process in Competence Determinations Act can be a useful addition to other States who face large numbers of court decisions which offer conflicting and vague guidelines for judges, juries, and bankers and lawyers seeking to assess the abilities and vulnerabilities of elderly or impaired adults.

Susceptibility to Financial Elder Abuse

When the issue is not capacity, but rather the susceptibility of the person to undue influence, the statutory framework is less helpful. The capacity to do an act varies with the complexity of the issue in question, *Anderson v. Hunt* (2011) 196 Cal. App.4th 722; *Estate of Ivey* (1928) 94 Cal. App. 2d 576, 585. Hence gifts or testamentary plans could be impacted by reduced cognitive abilities under the framework of Section 811—but capacity tests may not resolve the question whether free will was overcome. People with general capacity to do business or deal with complex situations are taken advantage of with great frequency, as will be seen below. *See, e.g.,* G. Akerlof and R. Shiller, *Phishing for Phools: The Economics of Manipulation and Deception* (2015). Alternatively, an impaired person may still be able to comprehend and approve of an estate plan that takes place only after death, when he or she presumably is no longer impacted by the dispositions made.

With respect to undue influence, the California statutory framework relies on classical indicia of vulnerability. Welfare & Institutions Code §15610(a) provides the general outline of issues:

"(1) The vulnerability of the victim. 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.

(2) The influencer's apparent authority. 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.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessaries 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.

(4) The equity of the result. 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 value of any services or consideration received, or 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."

Most instances of financial elder abuse involving *inter vivos* impact on the victims do not require much analysis, either because of the obvious lack of capacity of the victim or the fraudulent or inequitable conduct of the predator. For examples of the tactics of abuse, see T. Lewis, "Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota" (2001) 28 *William Mitchell L. Rev.* 911.

In other cases involving gifts and testamentary transfers, however, the issue of the intent and desires of the transferor are much more opaque. Many people have conflicting views about how children or other relatives should be treated in general terms such as equal treatment of children or nieces and nephews, treating those who helped you in your declining years at the expense of indifferent or absent members of the class, favoring the less successful or impaired members to erase the unfairness of limited genetic abilities or the catastrophes of modern life,

letting them all fight after a lifetime of feigned love and affection, or giving it to charity or the church to ease your way into the afterlife.

Dickens, a former clerk of the Chancery Court, understood many of these foibles, including the people who used the prospect of inheritance to control those around them, enjoying their frantic attentions and efforts to skewer other potential beneficiaries while professing their love of the elder's person, not their assets. Dickens traveled to America commenting on our restaurants, politics, insane asylums, schools for the blind, and estate planning practices:

> "Some immensely rich old gentleman or lady, surrounded by needy relatives, makes, upon a low average, a will a week. The old gentleman or lady, never very remarkable in the best of time for good temper, is full of aches and pains from head to foot, full of fancies and caprices; full of spleen, distrust, suspicion and dislike. To cancel old wills, and invent new ones, is at last the sole business of such a testator's existence; and relations and friends (some of whom have been bred up distinctly to inherit a large share of the property, and have been, from their cradles, specially disqualified from devoting themselves to any useful pursuit, on that account) are so often and so unexpectedly and summarily cut off, and reinstated, and cut off again, that the whole family, down to the remotest cousin, is kept in a perpetual fever. At length it becomes plain that the old lady or gentleman has not long to live; and the plainer this becomes, the more clearly the old lady or gentleman perceives that everybody is in a conspiracy against their poor old dying relatives; wherefore the old lady or gentleman makes another last will--positively the last this time--conceals the same in a china teapot, and expires next day. Then it turns out, that the whole of the real and personal estate is divided between half a dozen charities; and that the dead and gone testator has in pure spite helped to do a great deal of good, at the cost of an immense amount of evil passion and misery."

Charles Dickens, *American Notes: A Journey* (originally published 1842 (Fromm International, 1985) at 27.

VIII. The Contemporary Science of Decision-Making

The trier of fact and the attorneys, seeking to divine what went on in the donative act and in the mind of the donor, might have to be a mindreader to determine what the "free will" of the donor was and whether "undue persuasion" was the motivating force in the disposition. Fortunately, a professional mindreader has written a text, Nick Kolenda, *Methods of Persuasion: How to Use Psychology to Influence Human Behavior* (2013). This is an entertaining approach, which explains in general psychological terms how one can persuade people to act in a variety of context, and also how to prime members of an audience into selecting a number or a fact which the author then announces he has discovered with his mind reading skills. The book relies on a

number of scholarly studies which are less digestible and entertaining, but such studies may be of more help to the attorney or expert asked to opine on undue persuasion or susceptibility to undue influence or elder abuse.

The seminal psychological study on the subject is that of Robert Cialdini, *Influence: The Psychology of Persuasion* (3d Ed. 2007). A psychologist, Cialdini investigated how persuasion was exercised by "compliance professionals—sales operator, fund-raisers, recruiters, advertisers, and others." Xiii. He reviewed sales manuals, signed up to be trained to sell encyclopedias, vacuum-cleaners, and to become a portrait photographer, dance instructor, and to work in advertising agencies, public-relations, and fund rising agencies—all fertile sources to determine the techniques which got their customers/victims to "Yes." Cialdini assessed such techniques and the vulnerabilities of their targets in psychological terms. He derived six basic principles used in persuasion: consistency, reciprocation, social proof, authority, liking and scarcity. He used these principles in explaining the aspects of decision making which could be exploited to make the sale or victimize both the average or impaired victim. We will discuss Cialdini's principles below after explaining the neurobiology of decision making and the psychological nature of influence and persuasion.

Other experts in recent years examined the biological and psychological bases of decision making, moving from the model of the rational charioteer harnessing and controlling his own unruly animal spirits to a model which focused on how the structure of our brains evolved to deal with risks and rewards in the world and to make decisions. Daniel Kahneman and Amos Tversky teamed up to apply scientific testing to the psychological analysis of decision making starting in 1969. They applied their studies of behavior to all types of decisions, including investment decisions, creating the field of behavioral finance. They published their first paper reflecting their discoveries about how humans make decisions in 1974, "A Judgment under Uncertainty: Heuristics and Biases," (1974) 185 *Science Magazine* 1124. Kahneman received the Nobel prize in economics in 2002 for his work in behavioral finance.

Such studies raised the question of how humans make decisions involving uncertain information. Kahneman used the analyses developed by L. Savage in *Foundations of Statistics* (1954) and by psychologists Keith Stanovice and Richard West to describe the process by which we make decisions, identifying two distinct methods of making decisions. "*System 1* operates automatically and quickly, with little or no effort and no sense of voluntary control. *System 2*

allocates attention to the effortful mental activities that demand it, including complex computations. The operations of System 2 are often associated with the subjective experience of agency, choice, and concentration." D. Kahneman *Thinking, Fast and Slow* (2011), at 20-21. (Some of the factors utilized in formulating such Systems are the experiences of many expert professionals who made split second decisions based on what appeared to be intuition, but are now known as "tacit knowledge." G. Klein, *Streetlights and Shadows: Searching for the Keys to Adaptive Decision Making* (2009) 34-35.

Klein spent his career evaluating and assisting fire fighters, pilots, military officer and others to make appropriate decisions under great pressure and time constraints: planes running low on fuel, deploying firefighters in burning buildings, combat situations in the fog of war. He distinguishes Explicit Knowledge from Tacit Knowledge, evoking the same types of systems described by Kahneman. Explicit knowledge includes Declarative Information and Routines and Procedures, while tacit knowledge involves Perceptual Skills, Workarounds, Pattern Matching, Judging Typicality and Mental Modes.

Klein describes a situation in which a fire captain took his crew into the ground floor of a building after reports and evidence of smoke and fire. Once he got in the room, "the commander heard himself shout, 'let's get out of here!' without realizing why. The floor collapsed almost immediately after the firefighters escaped. Only after the fact did the commander realize that the fire had been unusually quiet and that his ears had been unusually hot. Together, these impressions prompted what he called a sixth sense of danger.' He had no idea what was wrong, but he knew something was wrong. It turned out that the heart of the fire had not been in the kitchen but in the basement beneath where the men had stood." Kahneman, *op. cit*., at 11. There was no reasoning involved in the decision. The fire captain did not write out a list of factors and run down them to assess what was present at the fire scene. There were no checklists, only his experience in other fire situations and the sense that something was very wrong.

Humans evolved to survive in a world where they lacked the size, claws, fangs, horns, or strength to catch prey or fight off predators, and where they had to recognize the signs that a predator was in their area, so that they could turn to flight rather than fight. Those who survived registered the signs observed in prior experience in their memories, and used a portion of their brain known as the anterior cingulate cortex (ACC) to match the sensory data arising from the

current situation to patterns and actions taken in the past. This is one of the processes by which humans learned from past experiences how to deal quickly with similar situations in the future.

The decision to run when confronted with sensory data similar to that in past experiences involving dangerous predators or life threatening situations had to be triggered by strong emotional signals to initiation action, or the observer would end up being lunch or watching their spouse and relatives die. Hence these pattern recognition and matching mechanisms had to be quicker than the time it took predators to reach their prey. The fire chief only sensed that the circumstances he and his men faced were somehow wrong for entering a burning building, and dangerously so. What people commonly call a sixth sense, in in fact a highly developed structure involving the interaction of sensory information which evokes working memories of patterns seen before, which the ACC matches to the current situation, and then triggers a decision to take action.

Jonah Lehrer in his *How We Decide* (2009) (Lehrer) provides an entertaining and comprehensible analysis of the insights of Kahneman, Klein and other scientists and the functioning of the brain in dealing with decisions. His succinct discussion of the anatomy of the brain's decision making elements is a useful summary: "Scientists explained the anatomy of the human in this manner: At its bottom was the brain stem, which governed the most basic bodily functions. It controlled heartbeat, breathing, and bodily temperature. Above that was the diencephalon, which regulated hunger pangs and sleep cycles. Then came the limbic region, which generated animal emotions. It was the source of lust, violence, and impulsive behavior. (Human beings shared these three brain areas with every other mammal.) Finally, there was the magnificent frontal cortex—the masterpiece of evolution—which was responsible for reason, intelligence, and morality. "Lehrer at 17. *See also* M. Botvinick et al, "Conflict monitoring versus selection-for-action in anterior cingulate cortex," (11 November 1999) 402 *Nature* 179; S. Sheth, et al, "Human dorsal anterior cingulate cortex neurons mediate ongoing behavioral adaptation," (August 2012) 408 *Nature* 218.

This basic anatomical system would imply the dichotomy used by Plato and Aristotle, that the rational side of the mind controls our behavior. The fundamental problem is the rational side of the mind deals of certainties—if you follow the directions of the income tax forms, and correctly add up the items of income and expenses, you can slowly but surely reach a correct solution. This is your prefrontal cortex carefully using known rules and known amounts to work

out the details of your Form 1041. This process takes time and conscious use of memory (and good financial records) to get to a defensible tax return. It also takes a great deal of energy, since the brain uses glucose to keep those neurons humming. (the use of glucose in the brain provides the medium which is observed in an fMRI to show what portions of the brain are being used in making different types of decisions).

Hence, as will be discussed later, the effort to maintain attention and consciously deal with tasks involving the prefrontal cortex uses up the available energy, leading to "ego depletion," Kahneman, at 42. Once you have labored on conscious reasoning, your supply of glucose may be so depleted that you likely will start making less than rational choices-- dictated by your limbic system rather than reasoning produced in your depleted prefrontal cortex. In general decision making, the ego depleted person will start making poor decisions based on System 1, seeking gratification rather than maximization of your utility.

In the estate planning process, after the client attempts to understand the perfect wording of a bypass trust formulation, the tests for a GST exempt trust or other masterful, dense and unintelligible lengthy paragraphs, the client does not praise your skillful wordsmithing. Instead they surrender to exhaustion and say "yes" to multiple other issues which are much more significant personally to them—who gets what and why. Where the predator is attempting to influence the elderly person, focusing on enormously complex issues first leaves the elder desperate to respond to ego depletion by agreeing on other issues suggested by the predator.

The elderly person is also more vulnerable than the capable adult to the creation of false memories by repetitive efforts by the predator to reframe the elder's relationship with family members or favored institutions. Kahneman points out that people have internal "stories" about themselves, which define who they are and what their values are. However, Kahneman investigated painful or pleasurable experiences and found that such experiences are categorized in our memories based on the intensity as well as the resolution of the experience at the end. "But our memory , a function of System 1, has evolved to represent the most intense moment of an episode of pain or pleasure (the peak) and the feelings when the episode was at its end." Kahneman at 284.

"[H]uman memory does not function like a video recorder that can be rewound and replayed; rather, our memories are malleable." Laney and Loftus, "Emotional Content of True and False Memories," 16 Memory 500,at 138 (2008). Predators can induce false memories by

repetition of false statements about past experiences or attitudes, seeking to change the person's perception and evaluation of persons they had dealt with. Asking **Leading Questions** to elicit agreement with propositions which may not be true. Assertion of **familial information false narrative** procedures, where the victim is plied by false information supposedly provided by trusted relatives and deceased family members.

A variety of studies show that repetition of new information regarding settled experiences or attitudes can create new memories, which the person has difficulty in placing in time sequence, with the most recent statements becoming more vivid than actual memories. *see* J. Dunsmoor etal, "Emotional learning selectively and retroactively strengthens memories for related events," Nature, January 2015; S. Du Brow, "Temporal Memory is Shaped by Encoding Stability and Intervening Item Reactivation," The Journal of Neuroscience (October 2014).

The surrender to animal instincts utilizes the mechanisms of System 1, which was designed to process information which is uncertain in nature and consequences which are hard to predict or quantify, and to do so quickly. That system uses memory to retrieve not specific granular facts, but rather patterns of sensory input which led to successful or unsuccessful decisions in the past. Assessing these past experiences and information flows can be deliberate as when you recall making an election in a prior tax return which either worked or resulted in an audit, System 2, or they can be automatic, where you decide to run out of the burning building, or remember the pleasure of buying that car with the hemi-head V-8 and roaring exhaust (ignoring the fact that the pleasurable experience was in a time when gasoline cost 25 cents per gallon and you did not care about five star crash ratings, repair records, or global warming).

The anatomical element helping to retrieve and analyze patterns of past success and failure is the anterior cingulate cortex (ACC), which matches current sensory information about a potential decision to past patterns. Lehrer explains that the ACC "sits at the crucial intersection between these two different way of thinking. On the one hand, the ACC is closely connected to the thalamus, a brain area that helps direct conscious attention. This means that if the ACC is startled by some stimulus –like the bang of a gunshot it didn't expect – it can immediately focus on the relevant sensation. It forces the individual to notice the unexpected event.

"While the ACC is alerting the consciousness, it's also sending signals to the hypothalamus, which regulates crucial aspects of bodily functions. …Within seconds, heart rate

increases, and adrenaline pours into the bloodstream. These fleshy feelings compel us to respond to the situation *right away*." Lehrer, at 38.

The speed of this system in reacting to complex and uncertain input of senses and retrieved memories is what allowed our ancestors to survive in a physically dangerous world. This speed is what also allow the financial predator to take advantage of his victim, who may be slowed by physical disabilities, cognitive decline, loss of confidence, dependence on other to make difficult decisions, and hence much more reliant on the cues sent by the ACC to trigger a decision in a financially dangerous world. The ACC provides a heuristic system for making decisions involving complex or uncertain variables, rules, or ambiguous sensory input. The AAS study, Cognitive Aging, concluded:

> "Older adults may rely more on strategies that use biases or heuristics to help them make decisions than do younger adults (Carpenter and Yoon, 2011). This poses obvious risks for financial decisions in which analysis of large amount of complicated information may be needed. …However, others have concluded that there is little evidence that additional disclosure and consumer education by themselves are sufficient to improve financial choices in the context of cognitive aging… As a result, older adults are more likely than middle-aged adults to make less-than-advantageous decisions across a range of scenarios involving financial decisions …." Cognitive Aging, at 277.

One striking set of studies demonstrates that elders tend to be more trusting than younger adults. E. Castle et al, "Neural and behavioral bases of age differences in perceptions of trust" (December 18, 2012) 109 *PNAS* 20848. The study examines psychological tests and fMRI scans and other studies of the activation on brain elements in making decisions dealing with the trustworthiness of strangers. The anterior insula, which is closely linked with the ACC, is the area which deals with evaluating the trustworthiness of people involved in financial decisions. In older adults, the signals from the anterior insula are either degraded by neurological losses or are viewed as less significant by elderly persons. In either case, the elderly victim should be expected to be more trusting of people presenting either financial or personal decisions including medical or caregiving issues. "Across a variety of experiences and perceptions, older adults show a positivity bias…: They report being happy and satisfied with life…they experience negative emotions after unpleasant interpersonal events les strongly than younger adults…they remember positive information better than negative information… and they recover faster from negative emotions…This general pattern of findings is consistent with socioemotional selectivity

theory…which posits a general pruning by older adults of negative experiences and people in way that may foster well-being.…Thus, a visceral early warning system that may alert younger adults to be cautious in the presence of cues regarding trust/distrust may not be present in the same degree in older adults." Castle, at 20851.

The disclosure of adverse information about conflicts of interest involved in financial advice (buy a mutual fund or annuity with high upfront charges or continuing high payments to the advisor (e.g. 12b1 fees) or actual specific information raising questions of trustworthiness with respect to a person or institution with which the elder has dealings, may actually and perversely lead the victim to disregard and defend the predator. D. Cain et al, "The Dirt on Coming Clease: Perverse Effects of Disclosing V. Renna) *The Neuroscience of Risky Decisionmaking* (2014); A. Hung et al, "Effective Disclosures in Financial Decisionmaking" (July 2015) Rand Corporation. The Rand report prepared for the Department of Labor concluded that "disclosures may in fact have the opposite effect: Consumers may feel a 'burden of disclosure" to follow the advice, and advisers may respond to the disclosure by providing even more biased advice, resulting in decreased welfare for consumers." Rand at 24.

One can understand this effect by looking other areas of psychological pathology, where people may be co-dependent on an abusive spouse or child because they lack self-esteem, feel guilty for their current impaired status, or are more fearful of the devil they do not know. An established relationship, however painful, may pose more less risk than the challenges of finding a new supporting person or entity. Accepting the serious shortcomings of the familiar situation is a frequent result. The elderly patient needs to rely on the expertise of their nurse or doctor since they lack the energy or skill to assess the medical decisions themselves. Warned of misconduct or conflicts of interest, they choose to defend the conflicted or predatory caregiver rather than leap into the void.

The legal or financial advisor who counsels the elderly person about changes in the financial or estate planning similarly may end up being viewed the lesser evil rather than deal with the advisor's personal conflicts or their proposals which benefit their other clients, rather than dealing solely with the interests of their elderly client.

These types of choices by the elderly or disabled person are among those dealt with by System 1, which can automatically prompt a response to ambiguous decisions despite badges or

clues to untrustworthiness or undue influence which a younger person would deal with in a more rational manner.

System 1 can be explained in part by looking at advances in Artificial Intelligence. IBM developed Deep Blue to challenge chess champions, creating a program which could evaluate all the potential moves which were possible given the current positions of the pieces on the board and the last move of the chess master. It lost at first using this system—the ultimate System 2. The chess master did not run through 12 million possible moves. He simply observed for the time allowed and acted. The chess master, like the fire chief, had participated in a huge number of prior games and had studied the games of prior grand masters. One has to have a huge and effective memory of the positions of pieces in prior games and use working memory to match the current situation with that faced by himself or masters he had studied.

IBM then adjusted its programing to input the moves (patterns) of prior games, and match the positions of the current game to segments of prior patterns. Mimicking the system of pattern recognition used by humans allowed the revised program to prevail, since it could more quickly and accurately match patterns than even a master of chess.

Google followed the same methods in developing GoogleGo, to seek to develop programs which would allow the computer to contend with the much more complicated strategies in the game of Go. Again, the computer did not reason from the current position and assess the benefit of alternative moves—it took the short-cut of finding patterns of sets of moves that it learned from historic Go matches, or those it generated in the course of autonomously playing itself.

Jonah Lehrer in *How We Decide* (2009) cites the example of Tom Brady taking 8 seconds to evaluate the defensive players and the positions of his potential receivers. "He needed to know that the linebacker wouldn't fall back into coverage and that there were no cornerbacks in the area waiting for an interception. After that, he had to calculate the ideal place to hit Brown with the ball so that Brown would have plenty of room to run after the catch. Then he needed to figure out how to make a throw without hitting the defensive lineman blocking his passing lane. If Brady were forced to consciously analyze this decision—if he treated it like question on the Wonderlic [intelligence] test—then every pass would require a lot of complicated trigonometry as he computed his passing angles on the plane of the football field. But how can you

contemplate the math when five angry linemen are running straight at you? The answer is simple. He can't." Lehrer, *op cit.* at 7-8.

Brady was not working with his frontal cortex to compute a math problem, as in System 2, instead he was utilizing System 1, which deals with tacit knowledge obtained over years of practice and observation, retrieved almost instantly and triggering an emotional impulse which started adrenaline flowing to activate muscles to take the immediate response to the sensory information offered by the images of linebackers, blitzers, blockers, receivers, and the sounds and scents of the melee of huge men around him: curl up and protect himself and the ball, run out of the pocket, pass to his third receiver, or pass and brace for impact of the hurtling linemen while in a vulnerable position.

The actual mechanism by which most decisions are made is centered in the portion of the brain known as the anterior cingulate cortex (ACC). This is an area of the left hemisphere of the brain, linked to memory resources to retrieve patterns or types of information from past experiences.

In recent decades, enormous advances have been made in the neurobiology of cognition and decision making, defining in great detail the process of exercising one's free will, at the same time as exposing the frailties of such processes both in "normal" adults as well as the geriatric or disabled population. In many cases, the enfeebled elder is easily deprived of their assets by theft, misrepresentation, consumer fraud, and other obvious acts of misconduct, providing an undue benefit to the predator. In many other circumstances, however, it is often difficult to determine whether "free will" has been trammeled, given the manner in which most important decisions have been made.

The borders between ordinary influence and undue influence are often difficult to determine in retrospect. The common law has struggled with this problem given the "social acceptability of lobbying or pressuring testators for bounty on the basis of appeals to affection, ties of kindred relationships or sentiments of gratitude or pity," Peisah, *op cit*. at 8, as well as the "kindness" exception to undue influence. The Court of Appeals in *Estate of Mann* (1986) 184 Cal.App.3d 593 at 606 cited *Estate of Bould* (1955) 135 Cal.App.2d 260 for the proposition that """"Influence gained by kindness and affection will not be regarded as "undue" if no imposition or fraud be practiced....."""

With the advent of the use of functional magnetic resonance imaging (fMRI) technology, researchers no long had to rely on philosophic speculation to explain how people make easy or difficult decisions, but instead now can image the brains of college volunteers or patients as they engage, or attempt to engage, in mental processes. Since the brain and spinal cord require nutrients in order to function, the fMRI can measure changes associated with blood flow to the areas actively involved in various mental processes, including the making of decisions.

The classical model of rational thought was refined in the publication of *Foundations of Statistics* in 1954, by Leonard Savage. Savage developed the concept of normative decision theory to answer the question how a rational agent *ought* to make decisions. "The answer to this question is usually taken to be that a rational agent ought to choose that act amongst all available acts which maximize their expected utility, where the expected utility of an act is calculated relative to the agent's utility valuations on the consequences of the act, and the agent's (personal) beliefs regarding the likelihood of these consequences."

"Savage's theory is designed to apply to *small worlds*, decision settings in which the agent's problem can be represented by using a decision matrix consisting of an exogenously given state space, a set of consequences, and a set of acts. Using a small world decision matrix, the agent then chooses that act in the set of acts which yields the highest subjective expected utility. A small world decision matrix is interpreted as containing all information which is relevant to the agent's decision problem." M. Drechler, "Rationality, Decisions and Large Worlds," (October 2012), thesis submitted to the Department of Philosophy, Logic and Scientific Method of the London School of Economics and Political Science at 12. Drechler points out that for such rational decision making to function, the agent must eliminate uncertainty in the variables, which is impossible in most complex decisions. Hence, it appears that the rational decision posited by Plato, who could observe the perfect form, could be utilized only when the actor can limit the options to a fair certainty. When uncertainty prevails in some or all of the alternatives, the process must deal with "Large World" methods, in order to assess and weigh alternatives. Enter the ACC and patterns of experience which are necessary to deal with decisions involving uncertainty in the acts involved, the states of the world, and the likely consequences of acts.

The rational decision maker is described in Bayesian decision theory, which is a primary paradigm of economics and probability theory. Drechler describes Bayesian decision theory as follows:

> "first, the idea that all uncertainty can be quantified in a single probability distribution satisfying the axioms of probability theory. Second, the stance that the agents should update their personal beliefs using Bayes' law. Finally, Bayesianism in decision theory holds that agents must maximize their expected utility relative to their subjective beliefs."

Drechler, at 20.

Large World Decisions are those which Kahneman described as dealt with by System 1. He reached his conclusions from psychological tests of persons confronting various kinds of decisions, concluding that most decisions involve uncertainties which require finding patterns of decisions in our personal history which fit the alternatives confronting the actor now.

Current neuroscientific research, using not only psychological tests of decision makers in process, but also neuroimaging of the brains of the actors as they reach decisions, refutes the Bayesian or Expected Utility (EU) models as a description of how people make most decisions: those which are fraught with uncertainties. "there is no compelling empirical evidence supporting the assumption that decision makers go through the stages of the expected value or utility model….Even in gambling situation, individuals seem to process information in a way that is incompatible with the EU framework, as revealed by imaging studies…., verbal protocol studies….,eye tracking studies…and information board studies. K. Volz and G. Gigerenzer, "The Brain is not 'as-if'—Taking stock of the Neuroscientific Approach on Decision Making" in *Advanced Brain Neuroimaging Topics in Health and Disease—Methods and Applications*, Chapter 22, at 573, 585-86. Neuroimaging studies involving decisions of uncertainty and risk, "further progress has been made in showing –for risky decisions—that in combining information from the three areas that are particularly responsive to changes in magnitude (striatum), objective risk coding (doral anterior cingulate cortex (dACC), and risk aversion (inferior frontal gyrus(IFG), 'these BOLD responses were informative enough to allow an ideal observer to detect the overt choice: a risky choice was more probably when striatal and cingulate activity was higher, whereas increased BOLD signals from IFCC correlated with increased probability of a safe choice.'" Volz, at 589.

These recent studies support the conclusions of the AAS study of Cognitive Aging that "Older adults may rely more on strategies that use biases or heuristics to help make decisions than do younger adults." Given problems of memory, attention, registration of new information, and difficulties in dealing with multi-tasking, as well as apathy and ego depletion, this result appears to be a necessary adaption to their cognitive and physical decline. However, it is an adaption which puts them at risk of manipulation by predators armed with psychological insights and experience in persuasion in financial and personal decisions.

IX. Persuasion: Tactics That Exploit Psychological Vulnerabilities—Unduly Or Otherwise

Cialdini, in *Influence,* listed categories of tactics resulting in the targets accepting the influence of "compliance professionals" who induced or triggered responses to their attempts at influencing customers, whether elderly, healthy, cognitively impaired on not. In all of these circumstances, "free will" may be an irrelevant concept, since such decisions may in many cases have nothing to do with rational thought/System 2. Hence the general susceptibility of the general population to influence may require a shift in analysis to determine whether a bright line between normal entreaty and undue influence can be elucidated. It may be necessary to utilize a flexible standard of legal analysis, finding undue influence where the defense mechanisms of the victim are compromised by general aging or specific insults to attention, short-term and working memory, or where the tactics or consequences are more extreme and inequitable. The predator should not be absolved because much of the population do not make good financial decisions. Cialdini organizes his book on "influence" around "six basic categories" of persuasion tactics, each of which "is governed by a fundamental psychological principle that directs human behavior and, in so doing, gives the tactics their power" (*Influence,* at xiii), and an "ability to produce a distinct kind of automatic, mindless compliance from people, that is, a willingness to say yes without thinking first." *Id.,* xiv:

- **Reciprocation.** This rule "enforces uninvited debts" by telling us that "we should try to repay, in kind, what another person has provided us." *Id.,* 17. We feel obliged to participate in a "web of indebtedness" or "network of obligation." *Id.,* 18. Persuaders exploit the rule through the "benefactor-before-beggar" strategy (e.g. Hare Krishnas who give a gift to solicit a donation, politicians who trade favors, "free samples") *Id.,* 25-27.

- **Commitment and Consistency.** We have "a nearly obsessive desire to be (and to appear) consistent with what we have already done. Once we have made a choice or taken a stand, we will encounter personal and interpersonal pressures to behave consistently with that commitment. Those pressures will cause us to respond in ways that justify our earlier decision." *Id.*, 57. Persuaders exploit the rule by making the initial commitment easy and attractive. "Once a stand is taken, there is a natural tendency to behave in ways that are stubbornly consistent with the stand." *Id.*, 67 (e.g. transcendental meditation seminar where presenters begin with attractive self-help offers and then promise increasingly dubious benefits.)

- **Social Proof.** "We view a behavior as more correct in a given situation to the degree that we see others performing it." *Id.*, 116. Persuaders exploit this rule by using indicators of wider social approbation to trigger our belief that the substance must be good or acceptable. *Id.* 116-117 (e.g. laugh tracks, "salting" tip jars with false donations, planting ringers in an audience.)

- **Liking.** "[W]e most prefer to say yes to the requests of someone we know and like." *Id.*, 167. Persuaders exploit this rule by creating situation in which the pressure is coming from a friend, relative or neighbor (e.g. Tupperware parties, 167-8), or by exploiting physical attractiveness (171-2), similarity to the victim (173-4), or compliments (174-5).

- **Authority.** We have "a deep-seated sense of duty to authority within all of us," (213) an "extreme willingness of adults to go to almost any lengths on the command of an authority" (215), a disinclination or even inability to defy the wishes of someone in charge. Persuaders exploit this rule when they "drape themselves with the titles, clothes and trappings of authority." *Id.*, 221. They make use of authoritative Titles (222-226), Clothes (226-228) and other Trappings (228-9).

- **Scarcity.** This rule here is that "opportunities seem more valuable to us when their availability is limited." *Id.*, 238. Something that, on its own merits, might hold little appeal becomes "decidedly more attractive merely because it would soon become unavailable." *Id.*, 238. Persuaders exploit this rule by conveying some kind of limited availability, e.g. the "deadline" tactic (some official time limit placed on opportunity to get the product). *Id.*, 242. The effectiveness of scarcity as a persuader relates to Jack Brehm's "reactance theory," which explains how "whenever free choice is limited or threatened, the need to retain our freedoms makes us desire them… significantly more than previously." *Id.*, 245. C/f, "loss aversion."

Any of these six tactics can cause compliant behavior in the victim by triggering "fixed action patterns" of compliant behavior, such as making a purchase or doing something else the persuader wants. Supporting these categories are other psychological factors which assist the compliance practitioner:

- **Fixed-Action Patterns.** These are sometimes intricate sequences of behavior, such as entire courtship or mating rituals, that occur in virtually the same fashion and in the same order every time, "as if the patterns were recorded on tapes." *Id.*, 3.

- **Trigger Feature.** What triggers the fixed-action pattern is some specific feature, one tiny aspect of the totality of a significant person, event or situation. *Id.*, 5. Trigger features are "shortcuts" or "stereotypes" or "rules of thumb to classify things according to a few key features and then to respond mindlessly when one or another of these trigger features is present." *Id.*, 7. Such "automatic behavior patterns" protect us from "brain strain," but also "make us terribly vulnerable to anyone who does know how they work." *Id.*, 8.

In his opening chapter, Cialdini describes the "contrast principle" in order to demonstrate the workings of triggers and fixed-action patterns:

- **Contrast Principle.** When two things are presented, one after another, and the second is fairly different from the first, we will tend to see it as more different than it actually is. (e.g., a heavier person will seem enormous; a less attractive woman will seem ugly) *Id.*, 12. Influencers use this by selling the costlier item first, so the less expensive alternative feels like a bargain. *Id.*, 13. Or a real-estate broker may show undesirable "setup" houses first to create more enthusiasm for the decent ones. *Id.*, 14.

The scarcity factor discussed by Cialdini finds ample support in observations about the use of time pressure to induce a decision. The FTC has issued rules imposing a cooling-off period for all door-to-door sales, including the provision of a written statement to the buyer that she has the right to rescind any purchase within three business days of the transaction. (16 C.F.R section 429 (Oct. 20, 1995)).

As the FTC explained: "The Cooling–Off Rule was not intended to be a federal 'satisfaction guarantee' requirement or 'buyers; remorse insurance program….The Rule instead has the limited purpose of correcting the specific problem of sales being obtained through high pressure and deceptive sales tactics used on consumers at times and places in which consumers typically may not expect to be solicited for sales and find it difficult to extricate themselves from the situation." 60 Fed. Reg. 54,184.

This is a common vulnerability of individuals young and old, and highlights the common law focus on personal confrontation and pressure on the donor or testator to obtain a transfer. The older adult, physically and mentally less able to deal with personal entreaties, is much more likely to agree to demands to end the presence and pressure of someone in their home or hospital room seeking their signature on documents. Evidence of imposed time pressures, or directions to

act quickly by potential beneficiaries or advisors should be treated as indicia of undue influence. Unfortunately, many estate planners lose patience with elderly clients and push them into decisions, failing to recognize that their slow consideration or reluctance to sign on the dotted line may be evidence that the client is wavering because of conflicting signals of risk when the advisors shifts into pressuring the client to make the proposed changes.

Nobelists George Akerlof (whose wife is Janet Yellen) and Robert Shiller cite Cialdini's writings in developing their book, *Phishing for Phools*, at 7, noting their intention to offer "a new, more general view (beyond Cialdini's list and beyond current behavioral economics) regarding what makes people manipulable. People largely think by situating themselves within a story. A leading strategy of manipulation is to lead phools to graft new stories (advantageous to the phishermen) onto the old ones. (we add, parenthetically that a major role of psychologists—literally from Freud to Kahneman—has been to elicit those stories that people are telling about themselves. The psychologists have technical terms for them: such as 'mental frames' or 'scripts.") *Phishing*, at 10.

Phools are people in the general population who do not make rational decisions to choose what is good for them, but instead choose immediate pleasure—to their detriment:

"We can think about our economy as if we all have monkeys on our shoulder when we go shopping or when we make economic decisions. These monkeys on are shoulders are in the form of the weaknesses that have been exploited by marketers for ages. Because of those weaknesses, many of our choices differ from what we 'really want,' or, alternatively stated, they differ from what is good for us. We are not generally aware of that monkey on our shoulder. So, in the absence of some curbs on markets, we reach an economic equilibrium where the monkeys on the shoulder are substantially calling the shots." *Phishing* at 5.

Here we are back with Plato trying to control, not raging horses, but monkeys on our shoulders. This is a powerful image, derived from the Fifth Voyage of Sinbad in the Arabian Nights. In the Sir. Richard Francis Burton translation, Sinbad has been shipwrecked and swims to an island where he finds an old man who gestures for Sinbad to put him on Sinbad's shoulders and help him:

"So I took him on my back and carrying him to the place whereat he pointed, said to him, "Dismount at thy leisure." But he would not get off my back and wound his legs about my neck. I looked at them and seeing that they were like a buffalo's hide for blackness and roughness, was

affrighted and would have cast him off; but he clung to me and gripped my neck with his legs, till I was well-nigh choked, the world grew black in my sight and I fell senseless to the ground like one dead. But he still kept his seat and raising his legs drummed with his heels and beat harder than palm-rods my back and shoulders, till he forced me to rise for excess of pain. Then he signed to me with his hand to carry him hither and thither among the trees which bore the best fruits; and if ever I refused to do his bidding or loitered or took my leisure he beat me with his feet more grievously than if I had been beaten with whips. He ceased not to signal with his hand wherever he was minded to go; so I carried him about the island, like a captive slave." 557th Night of the Arabian nights.

Phishing is an insightful discussion of how the monkeys destabilize the market and impose unnecessary costs on us poor Phools, who are poorer for the experience. Clearly we should be buying cars based on Consumer Report analyses, instead of aping our neighbors in conspicuous consumption or satisfying our animal urges by buying big, noisy V-8 cars instead of cheap reliable and efficient ones. But it is an excellent study in economic terms of the exploitation of the vulnerabilities of our financial decision making process.

If you compare *Phishing* with the Kolenda book, *Methods of Persuasion*, you can recognize many of the same themes—how to manipulate the decisions by using the insights of Cialdini to distract the target from the details of the sale by tactics familiar to any amateur or professional magician—prestidigitation. Kolenda's list of vulnerabilities and tactics are:

a. mold perception anchoring/framing
b. congruent attitudes
c. trigger social pressure
d. habituate your message
e. optimize your message
f. drive their momentum
g. sustain their Compliance

This is an easy read and also explains how the author "reads" the minds of audience members who agree to come on the stage and follow his directions. However, Cialdini is a more comprehensive investigation of how compliance personnel persuade people to make decisions which they might not otherwise make.

X. Conclusion

In evaluating the susceptibility of people to undue influence and elder abuse tactics, it is important to focus on the actual processes by which most people make decisions involving less than perfect information and uncertainty. These are not Bayesian decisions which can be done with complete rationality, but rather decisions that involve searching one's experience to find patterns which seem to match the current situation and then acting in accord with the emotional signals triggered by System 1.

If most of us are Phools, then most decisions can be construed as undue persuasion. However most people find benefit, utility, from decisions which gratify our emotional needs rather than Consumer Reports neutral statements of utility. In the context of undue influence in donative or testamentary decisions, however, the patterns evoked by requests for gifts or bequests are much more complex. In inter vivos transactions, the injury to the elder or disabled person is much easier to evaluate—why would somebody pay more than market price or get less than promised? Given limited resources needed to sustain the elder in reasonable comfort for a long life expectancy, why would large transactions be reasonable, when they could only put the elder at risk of serious later financial distress?

Where the issue is a pay on death account, joint tenancy, or trust or will whose impact will not be currently suffered by the donor or testator, value judgments need to be made on what the elder would have wanted. Care must be given here since these valuations are not fixed, rational, Bayesian values, but rather the subjective values and goals of a person whose goals may change with age and experience or the recent conduct or needs of the donee or beneficiary.

In analyzing the available facts and witnesses on the issue of reduced capacity, vulnerability to undue influence or fraud, and other indicia of undue persuasion, it is important to understand the actual mechanisms involved in such donative or testamentary decisions.

Drafting a will or trust involves expert knowledge incomprehensible to most lay people, and to many professionals. The donor or testator or settlor must, of necessity, rely on the expert advice of a skilled estate planner. Taking the client through inclusion ratios for GST purposes or other impenetrable clauses often exhausts the client—ego depletion occurs. At that point, like the person trapped into a sale pitch in their home, there is a strong impulse to do anything to escape, even if it means signing documents which they do not understand. With normal cognitive aging, the senior is likely to solve the problem by accepting all the details, seeking to

trust the scrivener. As noted above, as aging progresses, older people often refuse to deal with suggestions of conflicts or incompetence on the part of the planner, since it would require them to start the whole process over again, only to be flummoxed by tax jargon and fatigue.

It is important in the planning process to spend more time on the distributive provisions and not the interesting tax benefit provisions, so that the client is not so ego depleted that they reflexively agree to dispositions which are the heart of the dispositions being proposed.

Dealing with medical witnesses and experts is much more complicated now than when the experts were trained—be sure you are able to elicit the details which can accurately be described as tactics of undue influence as discussed in the psychological and neuropsychiatric studies discussed above. Also read Dickens, since he was an acute observer of the foibles and frailties of humankind, including donors and testators.