From the Desk of the President

It has been a privilege to serve as president of the National College of Probate Judges (NCPJ) this past year. On behalf of the Executive Board, we thank you for your continued support of this wonderful organization. It is our goal to fulfill our mission, “to promote efficient, fair, and just judicial administration and provide continuing judicial education for probate judges and related personnel.” NCPJ was established thirty years ago. We celebrate and honor its existence and dedication to improving probate law and courts.

During this past year, I have had the opportunity to speak to many national leaders and representatives from numerous organizations that work alongside the NCPJ in promoting the effective administration of probate courts in the areas of estates, guardianships, and conservatorships.

Some organizations may possess vastly different goals and opinions on how courts are run, the interpretation of laws, or needed relief; yet, we still engage in order to learn from one another. We come together to collaborate and to share our struggles and our successes. In the end, whether we receive opposition or praise, we must foster a system that is equitable, fair, and informative. We must hold true to our mission.

NCPJ will collaborate with other organizations that recognize the importance of the work of probate courts, staffs, and judges. We will work in our courts to protect vulnerable adults who may be abused, exploited, or neglected. Specifically, we will seek solutions for mentally ill persons who are cycling through our hospitals and meet the challenge posed by the opioid epidemic.

With growing dockets, additional responsibilities, and less funding, we will continue to find innovative methods to provide effective representation for our citizens. Finally, NCPJ members will continue our history of leadership and we will fulfill our obligation of service in the areas of estates, guardianship, trusts and mental health law as we engage diverse challenges.

Unpacking Undue Influence

By Mary Joy Quinn

When I went to work for the San Francisco Superior Court in the Probate Department, I had much to learn. My previous work as an operating room nurse instructor, public health nurse and gerontologist had not prepared me for immersion in the judicial system. And yet, the work of a conservatorship investigator was decidedly related because the work involved interviewing elders wherever they were living and contacting their families and friends and the professionals with whom they were involved: attorneys, physicians, adult protective services staff, accountants, clergy, bank personnel, and others. Working as a conservatorship investigator required adherence to law and writing reports for the probate judge to review and to base decisions upon.

The probate law provided structure and direction. However, there was one term that remained most mysterious and murky—undue influence. There was no definition of it in the Probate

Hon. Tamara C. Curry, President of NCPJ

Fall Journal 2018

Special Points of Interest:
- Register for the NCPJ Fall Conference in Hilton Head, South Carolina, Nov. 15th through the 18th.
- Not a member of NCPJ? You can join!

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- From the Desk of the President
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- The Harris County Court Complex—A Year After Harvey
- Rockdale County, Georgia Addresses Elder Abuse

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Undue Influence (continued from page 1)

Code and yet it was mentioned more than 25 times in various contexts: marriage, gifts, conservatorship of estate, powers of attorney, trusts, and wills. Some observers have stated, “Undue influence is like pornography. I know it when I see it.”

2010 Exploratory Study

Once I became director of the San Francisco Probate Department, I was in a position to begin unpacking undue influence using grant assistance. The first grant, funded by the Bor-
chard Foundation Center on Law and Aging in 2009, supported exploratory research.

The research team was composed of consultants Lisa Nerenberg and Eileen Goldman, as well as Deanna Piazza, Research Analyst from the California Administrative Offices of the Courts. I served as project director. The work consisted of an extensive literature review of coercion and persuasion which focused on the process of undue influencing in cults, domestic violence, totalitarian regimes, hostages and prisoners of war among other situations. We also reviewed statutes and case law on undue influence in California and probate statutes in other states.

In addition, we held focus groups composed of experienced probate attorneys, public guardians, and Adult Protective Services staff. We reviewed 25 newly established conservatorships in which the petition or other reports mentioned undue influence. We found that 88% of the people lacked judgment and insight. Influencers were family, friends, and neighbors in the bulk of cases. In 13% of cases, romantic partners were the influencers while telemarketers or lottery scammers were influencers in 20% of the cases. The most common type of abuse was financial abuse that could not be remedied without a conservatorship. Main tactics included playing on weakness of the victim, lying and deception, and repeated solicitations.

During the course of this study, we also learned that the long-standing statute defining undue influence was contained in California Civil Code §1575 which had been enacted in 1872. The language of that statute is:

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

This is the statute, along with California case law, that guided attorneys and judges in determinations of undue influence for 148 years in California civil actions including those in the probate courts.

To a remarkable degree, all the sources and the various disciplines in this 2010 exploratory study agreed on a four-element framework of undue influence: a victim who may or may not have cognitive impairments, an influencer who had formal or informal authority, specific tactics, and an outcome that benefitted the influencer and harmed the victim. The report outlined new and existing avenues for crafting legislation regarding undue influence including the framework we had devised which detailed specifics in each of the four elements (see http://www.courts.ca.gov/documents/UndueInfluence.pdf). Since most undue influence cases are brought in probate courts, it seemed logical that the definition should be modernized and at least referenced in the Probate Code.

New California Law

In fact, the four-element framework was contained in new California law which took effect in 2014. California Probate Code §86 and California Welfare and Institution Code §15610.78

(to be continued page 7)
Visitation, communication, and interaction under guardianship is an important and complex issue for courts, guardians, and disability and elder rights advocates. This issue recently gained media attention when the adult children of incapacitated celebrities such as Casey Kasem and Peter Falk petitioned the courts for the right to visit their parents over a guardian’s objections, and then advocated for legislative change. These high-profile visitation cases highlight an unknown but anecdotally frequent number of instances nationally. As the public becomes more aware of the potential risks of guardianship—including isolation from friends, family, and community—more states are debating hotly contested visitation bills.

This article, based on Guardianship and the Right to Visitation, Communication, and Interaction: A Legislative Fact Sheet (2018), examines the role of visitation for a person subject to guardianship, from the point of view of the person, the guardian, and the court, and summarizes recent, relevant state legislation. For a complete list of state laws and statutory citations, the aforementioned Legislative Fact Sheet, made possible by the generous support of the Borchard Foundation Center on Law and Aging, is available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitaton-legislative-factsheet.authcheckdam.pdf. For more information on visitation, communication, and interaction in guardianship, contact dari.pogach@americanbar.org.

Preserving a person’s ability to visit, communicate, and interact is essential to their quality of life. Unfortunately, estrangement from family, friends, and acquaintances can be a precursor and a consequence of guardianship. The factors that led to the appointment of a guardian—mental illness, dementia, poverty, abuse, and exploitation—may have also led to unwanted isolation. Family, friends, and professionals should all be aware of the potentially devastating effects of isolation on the person—loss of ties to friends, family, and social networks can have a negative effect on anyone’s physical and mental health. Isolation leads to an increased risk for depression, cognitive decline and dementia, and even premature death. See Julianne Holt-Lunstad, The Potential Public Health Relevance of Social Isolation and Loneliness: Prevalence, Epidemiology, and Risk Factors, Public Policy & Aging Report, The Gerontological Society of America, Vol. 27 No. 4 at 128 (2017).

Recognizing the importance of protecting a person’s right to visitation whenever possible, the National College of Probate Judges National Probate Court Standards advise, when not otherwise limited by state statute, that courts may limit the guardian’s ability to make decisions about visitation without prior court approval. See Standard 3.3.13, Commentary.

Balancing the Right to Visitation with the Duty to Prevent Harm and Exploitation

The right to visit, communicate, and interact with others invokes the larger debate over guardianship: how can a guardian preserve as much of an individual’s autonomy as possible while ensuring protection from harm and exploitation? Historically, guardianships transferred most or all of an individual’s rights to a guardian, including the right to choose and maintain relationships and connections. National Probate Court Standards, National Guardianship Association (NGA) Standards of Practice, several state statutes, and the 2017 Uni-
Presentation of the Isabella Award

By Hon. Tamara C. Curry

We all often go through life doing our busy work and sometimes we become aware of someone who has done tremendous work in their community that we had no knowledge of. I became aware of such a person when the Isabella Guardianship Award Committee was tasked with choosing the Isabella Horton Grant Award Recipient. Dr. Pamela Teaster was nominated by Erica Wood, Assistant Director for the American Bar Association Commission on Law and Aging. After a review of her letters of Support, it was apparent that Dr. Teaster was more than qualified to receive such an honor.

Dr. Teaster is the current Director for Research at the Center for Gerontology at Virginia Tech, and is a renowned scholar who has conducted quantitative and qualitative studies with an emphasis on how society responds to the needs of vulnerable populations, our elderly, persons with mental illness, chronic diseases and intellectual disabilities. Dr. Teaster is one of a few persons who conducts academic empirical research on adult guardianship issues and is both a national and international leader in this area. A large percentage of her research addresses how the government responds to the challenges between the governmental responsibilities of public guardians and elder mistreatment.

Dr. Teaster is an innovative, world class professor, with an extraordinary depth of commitment to the guardianship field. This extremely busy, thought provoking Professor has been working tirelessly in this area since the early 2000’s having served as the principal investigator of grants from The Retirement Research Foundation, to conducting the first national study of public guardianship in 25 years. The final report entitled “Public Guardianship After 25 Years: In the Best Interest of Incapacitated People” has been distributed nationally.

Dr. Teaster has co-authored, contributed or written a number of articles too numerous to mention. However, I will mention a few of her most notable works. In 2007, she collaborated with Erica Wood, Susan Lawrence, and Winsor Schmitt to provide the first national overview of public guardianships—Wards of the State: A National Study of Public Guardianship. Dr. Teaster went on to co-author Public Guardianship After 25 Years: In the Best Interest of Incapacitated People? (Prager, 2010). She is currently partnering with the National Center for State Courts and the American Bar Association to study conservator fraud.


This academician has gone above and beyond her career responsibilities and has worked for decades to bring the issues of guardianship to light. The National College of Probate Judges was honored to make her the 2018 Isabella Horton Grant Award Recipient.

NGA Standards of Practice support the guardian’s role in promoting visitation:

- Identify and advocate for the person’s goals, needs, and preferences. (Standard 7).
- Ask the person what he or she wants. (Standard 7).
- Encourage the person to participate, to the maximum extent of the person’s abilities, in all decisions that affect him or her. (Standard 9).
- Acknowledge the person’s right to interpersonal relationships. (Standard 10).
- Consider the proximity of those people and activities that are important to the person when choosing a residential setting. (Standard 12).

(to be continued page 6)
In May, many of you attended our spring conference in sunny San Diego, California and enjoyed an informative and intriguing program. The upcoming National College of Probate Judges Fall Conference will be held in beautiful Hilton Head, South Carolina, from Wednesday, November 14, through Saturday, November 17, 2018. The beachfront resort hotel, Westin Hilton Head, will host the conference. The hotel is located at Two Grasslawn Ave., Hilton Head Island, SC 29928.

Program: Executive Board Members Amy McCulloch and Rita Cobb have developed an inspiring and thought-provoking program. Topics will include: Mental Health Evaluations, Crisis Intervention Training, Mediation in Probate and Heirs Property and Preservation. Also, Chief Justice Donald W. Beatty of the South Carolina Supreme Court will present motivating opening remarks. Please do not miss this opportunity to catch up on current trends in probate, guardianship, and elder law, visit with experts in varying disciplines, and fellowship with other judges and professionals.

Accommodations: The Westin Hilton Head is a year-round sporting paradise. Active travelers can choose from seaside golf, tennis, swimming, and cycling, while a luxurious spa, picturesque beaches and delightful dining options appeal to those in search of relaxation.

Cost of Hotel: The NCPJ has negotiated a guaranteed rate of $169.00 per night single or double (plus the sales and hotel occupancy taxes), plus a reduced resort charge of $12.00 per night. Resort charges include shuttle to the golf course, tennis courts and the Shelter Cove Mall & Marina, 24-hour access to the fitness center, overnight self-parking and unsecured wireless internet in lobby and guest rooms. Please call the Central Reservations Office to make reservations at (866) 238-4218 and mention the NCPJ Conference. You may also click here to access the hotel’s online registration form. Reservations for the hotel must be made no later than October 13, 2018.

Registration: The conference registration fee is $400.00 for members if received before September 14, 2018, and $450.00 thereafter. The fee for retired judges is $200.00. The registration fee includes all conference materials, and access to the reception and banquet. The fee for spouses and guests will be $80.00, which includes the cost of the reception and banquet. As a courtesy to non-NCPJ member probate judges in the host state of South Carolina, NCPJ offers a complimentary one year NCPJ membership with registration, provided that the respective judge has not been a prior NCPJ member.

Transportation: The hotel, Westin Hilton Head, is located approximately 45 miles northeast of Savannah Hilton Head International Airport. Located in Savannah, Georgia, this airport is about one hour from Hilton Head Island. Rental cars are available at the airport. Information on transportation to and from the hotel is located on the Savannah Hilton Head International Airport website.

Activities: On a pristine stretch of sugar-white sand along the Atlantic Ocean lies The Westin Hilton Head Island Resort & Spa. Nourish your soul with a walk or bike ride on our hard-packed sand beaches, explore the island via paddle board or kayak, treat yourself to our full-service spa, or tee it up at one of our nearby golf courses. No matter the time of year, Hilton Head Island provides a temperate climate for an escape to a beachside destination that provides a small-town feel. Hilton Head Island, sometimes referred to as simply Hilton Head, is a Lowcountry resort town and barrier island in Beaufort County, South Carolina. It is 20 miles northeast of Savannah, Georgia, and 95 miles southwest of Charleston. The island is named after Captain William Hilton, who in 1663 identified a headland near the entrance to Port Royal Sound, which mapmakers named “Hilton’s Headland.” The island features 12 miles of beachfront on the Atlantic Ocean and is a popular vacation destination. Hilton Head Island offers an unusual number of cultural opportunities for a community its size, including plays at the Arts Center of Coastal Carolina, the 120-member full chorus of the Hilton Head Choral Society, the Hilton Head Symphony Orchestra, an annual outdoor, tented wine tasting event on the east coast, and several other annual community festivals. It also hosts the Heritage Golf Classic, a PGA Tour tournament played on the Harbour Town Golf Links in Sea Pines Resort. The dress code for the conference is casual and the dress code for the reception and banquet is business casual.

We hope you can join us for what is sure to be an informative and enjoyable gathering of probate judges and professionals from across the country. Join us for a delightful mix of business and fun with Probate Judges, Probate Court Executives, and professionals in related disciplines from across the United States!
Guardianship and Visitation (continued from page 4)

State Guardianship Legislation Addressing Visitation

States are increasingly passing laws that address visitation. From 2015 to 2018, several states addressed the right to visitation and communication in legislation, including Arizona, California, Florida, Hawaii, Indiana, Illinois, Iowa, Louisiana, Maine, Maryland, Nebraska, Nevada, New Mexico, New York, Ohio, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, and West Virginia. State laws differ widely in approach. Several states expressly grant the right to visitation to people subject to guardianship. Others do not use the language of “rights” at all, instead focusing on the need to maintain connections.

For example, a recent California amendment specifies that “every adult in this state has the right to visit with and receive mail and telephone or electronic communication;” while Arizona’s statutory language provides that “a guardian shall encourage and allow contact between the person with a guardian and other individuals.” State laws address many facets of the right to visitation, interaction, and communication in guardianship, including: the right to visitation, evidence of prior relationships, and the rights of families and other interested parties.

Bills of Rights that Include the Right to Visitation

Some states have passed broad-based bills of rights for people subject to guardianship that include the right to visitation, interaction, and communication. These rights are not absolute—there are always exceptions when a guardian or court may prohibit visitation if it would cause harm to the person. For example, in Florida a person retains the right to visits and communications, but the court may remove the right to make decisions about “social environment” and delegate decision-making authority to the guardian. Nevada’s “Wards’ Bill of Rights” guarantees the right to telephone calls, personal mail, and visitors, unless the guardian and court determine that correspondence with a particular visitor would cause harm.

Evidence of Prior Relationships May be Sufficient to Presume Consent

Even if the person subject to guardianship cannot consent to visits or express interest in visits, a guardian can still encourage positive relationships. Several state statutes specify that evidence of prior relationships is a sufficient basis to presume consent or refusal to consent to visits. For instance, in South Dakota consent, or refusal to consent to visits, can be presumed based upon the nature of the prior relationship with an individual.

The Rights of Family and Other Interested Parties

Some states grant family members or other interested parties the right to petition for visitation in court if visitation has been denied by the guardian. In Texas, an adult child of an individual subject to guardianship has the right to file an application for visitation in court and have a hearing. Utah’s statutory language prohibits the guardian from associating with a relative or “qualified acquaintance,” and relatives or qualified acquaintances may petition the court to rescind or modify a visitation order.

Even if the guardian must seek the court’s consent to restrict visitation, a guardian could still isolate an individual by withholding, from family and friends, information about a permanent change of residence, admission to acute or long-term care, or significant changes in health condition. Several state laws and UGCPAOP guarantee a right to information for relatives and loved ones about significant changes in the condition or circumstances of the individual. For instance, in West Virginia, relatives who have been granted access by court order to the person subject to guardianship are entitled to notice of death and funeral arrangements, admission to medical facility, and change of location.

The Role of Courts

Traditionally, state statutes gave guardians unfettered authority to restrict visits and communication to protect individuals under their care. However, some jurisdictions now assign not to guardians but rather to courts the authority to set the terms of visitation. As discussed in the introduction to this article, National Probate Court Standards recognize a court may require the guardian to seek the court’s permission before limiting visitation. In South Dakota, Rhode Island, and Tennessee, the guardian must seek a court order to restrict visitation, with limited exceptions. Rhode Island’s statute specifies that a guardian may move the court to restrict communication/visitation for good cause, including: existence of a protective order; whether abuse, neglect, or exploitation of the individual by the person seeking access has occurred or is likely; and any documented wishes of the individual to reject the communication/visitation. And in Tennessee, only the court—not the guardian—may remove the individual’s right to communication, visitation, or interaction.

In several states, the court may sanction, and even remove, a guardian for preventing a person from visiting, communicating, and interacting with others. For instance, in Louisiana, failure of the curator (guardian) to allow visitation can result in removal of the curator. In Rhode Island, sanctions may include an order to pay court costs and reasonable attorneys’ fees of the other party or parties. These sanctions shall not be paid out of the estate of the person subject to guardianship.

Some state statutes also include procedural protections for individuals seeking visitation, including the right to a hearing, time limits, notice, standard of proof, and attorneys’ fees. For example, in Nebraska, a family member who is denied visitation may petition (to be continued on page 10)
Undue Influence (continued from page 2)

echo and amplify the framework and contain specific objective guidance for evaluating the presence of undue influence. Because the language is contemporary, it can be useful to anyone concerned about undue influence. Judicial discretion is preserved: judges are required only to consider the law when making determinations as to the presence of undue influence. Not all four elements are required by law for a judicial determination of “undue influence” and no one element is weighted more heavily than the other three.

Developing a Screening Tool

The next portion of unpacking undue influence was a second research study, also funded by the Borchard Foundation Center on Law and Aging. This time the research team was composed of Lisa Nerenberg as well as Adria Navarro and Kate Wilbur at University of Southern California. Again, I served as project director. Our goal was to develop a screening tool for undue influence based on the new law and the 2010 exploratory study. We viewed Adult Protective Services as the main user of a screening tool since they are the first responders to elder abuse and neglect in community settings. We conducted focus groups composed of APS staff and supervisors in two California counties who then piloted a draft tool that reflected the focus groups. We collated the responses of the focus groups. Once again, a literature review was conducted, this time using existing undue influence screening tools and models. We also received comments on the draft tool from a panel of experts and two APS administrators. The findings and the California Undue Influence Screening Tool (CUIST) can be found at https://www.elderjusticeca.org/undue-influence.html

The result of all these efforts culminated in the California Undue Influence Screening Tool which lays out the four-element framework devised in the 2010 exploratory study and used in 2014 California statutes. It divides the four elements of undue influence: victim, influencer, tactics, and unfair results. Each element lists specific behaviors, actions or situations. It is intended to guide, mobilize and organize the user’s findings in a given case where undue influence may be a factor. It is not intended for use as an assessment or diagnostic tool. The determination of undue influence is left to the judge. Rather, the tool provides objective evidence based information as to the possible existence of undue influence. The screening tool is set out herein on pages 8-9.

Implementation of the Screening Tool

Although based on California law and Adult Protective Services personnel, CUIST is being implemented in other states and with other professionals. For instance, Adult Protective Services in the District of Columbia employs psychologists who are using CUIST in conjunction with other screening and assessment tools to provide evidence in petitions for conservatorship.

In California, it is gradually being implemented. For instance, it has been incorporated into the judicial bench book of one California county. Some neuropsychologists seem particularly interested and are using CUIST with their clinical cases and when they give testimony in court. California conservatorship investigators are incorporating the tool into their reports for judges. Probate attorneys have expressed interest in using the tool to assist in preparing petitions for conservatorship and in estate planning. A criminal prosecutor in one large county has indicated he will provide CUIST to detectives to aid them in working with undue influence. Training on CUIST and undue influence for APS is currently being held in several California counties.

The unpacking of undue influence continues as APS practitioners, other professionals in California and other states, and perhaps even the public use CUIST to help them think about undue influence with greater objectivity. We hope it will fuel evidence based practice. It has been a joy to do this unpacking and to find that the results are proving useful and helpful.

Mary Joy Quinn is the Director (ret.) California Superior Court, County of San Francisco, Probate Department. She served as the project director for two academic research studies on undue influence, both funded by the Borchard Foundation Center on Law and Aging. Ms. Quinn served as President of NCPJ 2010-2011. She was the recipient of the NCPJ Treat Award in 2014.
The development of the Undue Influence Screening Tool set out below and discussed in Mary Joy’s Quinn’s article, “Unpacking Undue Influence,” was developed by Mary Joy Quinn, Lisa Nerenberg, Adria Navarro, and Kate Wilbur at the University of Southern California and was funded with a grant from the Borchard Foundation Center on Law and Aging. The Screening Tool may be accessed at: https://www.elderjusticecal.org/undue-influence.html.

California Undue Influence Screening Tool (CUIST)

Client’s Name: ___________________________ Date: ______________

The purpose of CUIST is to aid Adult Protective Service personnel screen for suspected undue influence. Undue influence means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.

<table>
<thead>
<tr>
<th>Client’s Vulnerability</th>
<th>Examples/Comments</th>
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<tbody>
<tr>
<td>□ Poor or declining health or physical disability</td>
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<tr>
<td>□ Depends on others for help or care</td>
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<tr>
<td>□ Problems with hearing, vision, or speaking</td>
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<td>□ Problems with memory</td>
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<td>□ Problems communicating and understanding</td>
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<td>□ Does not understand consequences of decisions</td>
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<td>□ Developmental disability</td>
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<td>□ Dependent or passive behavior</td>
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<td>□ Emotional distress (e.g., grief, anxiety, fear, depression)</td>
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<td>□ Language/literacy barriers</td>
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<td>□ Isolated from others</td>
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<tr>
<td>□ Lives in chaotic or dysfunctional environment</td>
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<tr>
<td>□ Influencer knew or should have known of person’s vulnerability</td>
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<tr>
<td>□ Other (please specify)</td>
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</tr>
<tr>
<td>□ No apparent vulnerability</td>
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<tr>
<th>Influencer Authority/Position of Power</th>
<th>Examples/Comments</th>
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</thead>
<tbody>
<tr>
<td>□ Stands in a position of trust, authority, or confidence resulting from:</td>
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<tr>
<td>□ Intimate/family relationship</td>
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<td>□ Caregiver</td>
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<tr>
<td>□ Professional standing (e.g., legal professional, spiritual adviser, health care professional, real estate agent, banker, accountant)</td>
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<tr>
<td>□ Legal authority (e.g., power of attorney, conservatorship, trust, representative payee)</td>
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<tr>
<td>□ Controls elder’s finances</td>
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<td>□ Immigration sponsor</td>
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<td>□ Landlord or long term care facility operator</td>
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<td>□ Predatory salesperson (e.g., telemarketer, annuity company, lottery)</td>
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<tr>
<td>□ Has access to client’s home/possessions, finances, documents, or private information (e.g., legal/immigration status, sexual orientation/identity)</td>
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<td>□ Other (please specify)</td>
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<td>□ No apparent authority, power, or access to assets and information</td>
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<tr>
<td>Action or Tactics</td>
<td>Examples/Comments</td>
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<tr>
<td>☐ Manipulates or controls the client’s access to food, sleep, medication or personal care</td>
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<td>☐ Makes promises to help the client get rich</td>
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<tr>
<td>☐ Makes false claims or promises, or misrepresents self (e.g., claims to be an expert)</td>
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<tr>
<td>☐ Professionals or paid caregivers involve clients in their personal lives or ask for gifts/loans</td>
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<tr>
<td>☐ Controls access to information</td>
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<tr>
<td>☐ Isolates from visitors, telephone/computer, or mail</td>
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<td>☐ Instills distrust and fear (e.g., nursing home placement, abandonment, threats of violence, “poisons relationships”)</td>
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<td>☐ Moves into client’s residence or changes their residence</td>
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<td>☐ Changes client’s usual providers (e.g. physicians, lawyers, bankers, accountants)</td>
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<tr>
<td>☐ Makes frequent/repeated requests that benefit the influencer</td>
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<td>☐ Pressures during periods of distress, illness, transition</td>
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<td>☐ Uses affection, sex, intimidation or coercion</td>
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<tr>
<td>☐ Rushes client to make decisions secretly and at inappropriate times and places</td>
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<tr>
<td>☐ Solicits or encourages gifts, loans, bequests, or cash</td>
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<td>☐ Other (Please specify)</td>
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<tr>
<td>☐ No apparent use of actions or tactics described above</td>
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**Unfair or Improper Outcomes**

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<thead>
<tr>
<th>Unfair or Improper Outcomes</th>
<th>Examples/Comments</th>
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<tbody>
<tr>
<td>☐ Economic losses (e.g. money, property, investments)</td>
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<tr>
<td>☐ Changes in prior intent, conduct, or practices (e.g., new beneficiaries on wills; new signatories on bank accounts, changes in property ownership, changes to estate plans or charitable contributions)</td>
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<tr>
<td>☐ Excessive gifts, payments, or donations in light of length and nature of relationship</td>
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<tr>
<td>☐ Loss of home or residence, or eviction</td>
<td></td>
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<td>☐ Deterioration of home and environment</td>
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<tr>
<td>☐ Loss of control of credit cards, bank accounts, or property</td>
<td></td>
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<tr>
<td>☐ Identity theft</td>
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<tr>
<td>☐ Unexplained physical decline or injury including weight loss, physical function</td>
<td></td>
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<tr>
<td>☐ Negative mental or emotional changes including depression, loss of will to live, suicidal thoughts</td>
<td></td>
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<tr>
<td>☐ Violation of rights (e.g., to live where one wants, to marry or divorce, agree to or refuse treatment)</td>
<td></td>
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<tr>
<td>☐ Other (please specify)</td>
<td></td>
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<tr>
<td>☐ No apparent unfair or improper outcomes, or cash</td>
<td></td>
</tr>
<tr>
<td>☐ Other (Please specify)</td>
<td></td>
</tr>
<tr>
<td>☐ No apparent use of actions or tactics described above</td>
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</tbody>
</table>

**Summary**

Check the following boxes that you believe apply to this client:

☐ Victim appears to be vulnerable.
☐ Suspected influencer appears to have power or authority over the client.
☐ Suspected influencer has taken steps suggestive of undue influence.
☐ Influencer’s actions appear to have resulted in unfair, improper, or suspicious outcome.

Further steps may include but are not limited to: referral for conservatorship, neuropsychological evaluation, multidisciplinary team review, capacity assessment, or medical evaluation; interviews with friends, family, neighbors or professionals; maintain form in agency file for future reference; contact law enforcement to discuss case or client’s bank to request information or monitoring. Specific action will depend on supervisor input and agency policy.
Guardianship and Visitation (continued from page 6)

The court. If the individual has a guardian, the petition is to be filed in the county court with jurisdiction over the guardianship case. If the individual’s health is in decline, the court shall hold an emergency hearing.

*The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPPA) and the Right to Visitation, Communication, and Interaction*

UGCOPPA, passed by the Uniform Law Commission in 2017, prioritizes visitation as important to the well-being of people subject to guardianship. The Act’s Prefatory Note states:

“[R]ecognizing that individuals subject to guardianship and conservatorship benefit from visitation and communication with third parties, the Act sets forth specific rights to such interactions. In recent years, some family members of individuals subject to guardianship have raised concerns that guardians have unreasonably restricted the ability of individuals subject to guardianship to receive visitors and communicate with others, and family advocates have encouraged legislative responses to address this concern. The Act includes a variety of provisions addressing this concern.” Prefatory Note, p. 3.

The Act’s strong provisions on visitation, communication, and interaction include §§ 311, 314, 315, 316, 502, 503. Of note, the Act:

- Sets out the right of the individual to receive notice of the right to communicate, visit or interact with others, including in-person visits, phone calls, personal mail, electronic communications, and social media. § 311(b)(6).
- Prohibits the guardian from restricting visitation, unless: (A) the restriction is authorized by court; (B) there is a protective order or protective arrangement that limits contact; or (C) the guardian “has good cause to believe the restriction is necessary because interaction with a specified person poses a risk of significant physical, psychological or financial harm,” and the restriction is for no more than seven business days if the person with whom contact is restricted has a family or pre-existing social relationship or for 60 days if a family or social relationship does not exist. §§311(b)(6); 315(c).
- Requires the guardian to file a mandatory plan for the care of the individual (within 60 days of appointment and when there is a significant change in circumstances or the guardian seeks to deviate significantly from the plan). The plan must include information about persons with whom the individual has a close personal relationship or a relationship involving regular visitation, and how the guardian will facilitate visits. §316(a)(3).
- Allows the court to order a “protective arrangement” instead of a guardianship. Under this Article, the court may direct the guardian to prioritize the least restrictive living arrangement that will allow the adult subject to guardianship to interact with people who are important to the adult. §314(e)(2).
- Includes requirements that family members and others receive key information about important changes in the person’s condition or circumstances. The Act “establishes a default that the adult children and spouse of an adult subject to guardianship or conservatorship are entitled to notice of key events, including a change in the adult’s primary residence, the adult’s death, or a significant change in the adult’s condition.” Prefatory Note, p. 3. See §§310(e); 411(e).

The Right to Visitation in Nursing Homes

Federal nursing home regulations specify that the resident has the right to visitation, and the facility must provide immediate access to any resident by immediate family members or other relatives, subject to the resident’s right to deny or withdraw consent at any time. The resident also has a right to communicate with a long-term care ombudsman, as well as a representative of a protection and advocacy agency. The law does not specify whether the appointment of a guardian transfers these rights to the guardian. Regardless, the nursing facility cannot prohibit visitation. 42 C.F.R. §483.10.

The Role of Mediation

A mediator may be able to resolve visitation disputes without going to court. If a dispute cannot be addressed through mediation, a new dispute resolution process called Eldercaring Coordination may be useful in resolving the increasingly common high conflict “family feud” situations. According to the Association for Conflict Resolution, Eldercaring Coordination is “a dispute resolution option specifically for high-conflict cases involving the care, needs and safety of elders.” See the Association for Conflict Resolution (ACR) Guidelines for Eldercaring Coordination, which includes ethical principles for Eldercaring Coordinators, training protocols, and a court pilot project template (https://www.eldercaringcoordinationfl.org/association-for-conflict-resolution.html). See also Bronson and Fieldstone, From Friction to Fireworks to Focus: Eldercaring Coordination Sheds Light in High-Conflict Cases, Experience, Senior Lawyers Division of American Bar Association, Vol. 24, Number 3, at 29 (2015).

Conclusion

Improving and preserving the access of people with guardians to visitation, communication, and interaction can benefit their quality of life and protect their basic rights. Professional standards, the Uniform Law, and many state legislatures recognize the tremendous importance of visitation, communication, and interaction, and charge courts and guardians with supporting it whenever possible.

Dani Pagach is a staff attorney at the American Bar Association Commission on Law and Aging. She works on guardianship reform and other issues relevant to the Commission’s mission to strengthen and secure the legal rights, autonomy, dignity, quality of life and quality of care of aging persons. For more information, a legislative fact sheet is available online at https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.pdf.
In August 2017, Hurricane Harvey hit the Gulf Coast, the resulting catastrophic flooding left tens of thousands of families in Houston without homes and countless businesses destroyed. Claiming sixty-eight lives and with rainfalls reaching up to fifty inches in some areas of Houston, Harvey was the most disastrous and costly storm the country has seen in over a decade. Harvey’s impact on local government and the court system will likely be felt for many years.

**Damage to the Courthouse Complex**

Hurricane Harvey upended the criminal justice system in Harris County when water flooded the Criminal Courthouse. Over a year later, the twenty-three criminal district courts and sixteen criminal county courts-at-law, formerly housed in the twenty-one story Harris County Criminal Justice Center, are displaced and sharing space with the Civil Courts primarily in the Civil Courts Building and being hosted in other locations throughout Harris County’s Courthouse Complex.

Not only did the first floor of the Criminal Justice Center flood, but due to complications with water pressure monitors, bursting pipes throughout the building damaged every floor of the courthouse, displacing all thirty-nine criminal courts and all the offices in that building including the District Attorney’s Office and the Office of Court Administration.

The Jury Assembly Building, situated primarily underground, also flooded along with the underground tunnels which connect the Assembly Building to each of the five courthouses and the Harris County Administration Building. As a result, Harris County saw a sharp decrease in the number of jurors available to hear cases. It took eight weeks after the storm before any jury was empaneled. Though the jury assembly has been relocated, a shortage in jurors remains due to lack of space and the backlog of cases resulting from flood delays working through the courts. At this point, there is no date certain as to when the Criminal Justice Center will reopen for business. Even as this article is being written, disputes between Harris County and insurance companies over the cause of the damage hinder recovery and delay renovation of the Criminal Justice Center.

**Making the Best of It**

To enable Harris County to keep peace and avoid the improper retention of defendants, the criminal courts had to reactivate as quickly as possible after Hurricane Harvey. So, most of the criminal courts were relocated to the Civil Courts Building where each criminal court shared a courtroom and offices with a civil court. To adjust to the increased demand for courtrooms, many judges explored and instituted creative solutions including: 1) holding trials in the courtrooms of local law schools; 2) re-furnishing spacious judicial chambers to function as courtrooms for bench trials; 3) scheduling alternating dockets to enable the judges on the civil and criminal benches to most efficiently use the shared courtroom. Most of the judges and court staff adapted well, but a few disagreements arose. The most notorious dustup resulted shortly after the relocation of the criminal courts and when one judge threatened to have another judge arrested because he would not leave the bench after a case ran over the agreed upon time.

Despite the best efforts of judges, commissioners, and other officials, desperate need for trial space will remain until the re-opening of the Criminal Justice Center. A backlog in no-bond criminal cases is developing due to the shortage of courtroom space. The civil courthouse is not equipped to hold criminal cases, as there is only one holding cell in the Civil Courts Building and the defendants must use the public bathroom. So, due to safety concerns and the possibility of escape, the Harris County Sheriff allows only four inmates into the Civil Courthouse at any one time for hearings.

**Texas Supreme Court Extends Deadlines**

Chris Daniel, the District Clerk in Harris County recalls that “within two weeks after Harvey, the Supreme Court of Texas issued emergency extensions to all kinds of civil cases, but the criminal courts have constitutional deadlines which are inflexible and impact upon the basic rights of the accused.” So, in the months
following the hurricane and even as this article is being published, the civil judges recognize the priority of criminal matters and cede courtroom space for criminal trials, slowing the progress of some civil matters.

Preserving Rights of Criminal Defendants

Lack of courtroom and office space were not the only issues. Judge David Farr, the judge of the 312th District Court in Harris County, explains that, “the criminal issue was huge because you immediately have back-up effects in the jails. Not only did the county jails flood, but people were in jail longer because the criminal courts were not able to convene due to lack of space.” To avoid overcrowding the jail space remaining intact, many inmates accused of low-level, non-violent crimes opted for “Harvey Deals” which enabled quick release with minimal punishment, making space for inmates with more serious charges leveled against them. Judge Farr recalls signing up to 30 release orders in the early days after the hurricane, directing the release of child support offenders to avoid their transfer out of county.

Preventing for the Future

In the aftermath of Hurricane Harvey, officials in Harris County are examining how best to prepare the county for a similar disaster in the future. Both Judge Farr and Chris Daniel offered suggestions.

First, both Judge Farr and Chris Daniel stress the necessity of an updated, flexible, and easily understood disaster plan. Importantly, like fire drills, the disaster plan must be practiced so that problems, gaps, and misunderstandings can be spotted and addressed in advance. Rehearsing a disaster plan enables people to know their role and prepare in the event that they are called to help.

Second, if an area is prone to flooding, do not build underground. Though Harris County has a courthouse complex tunnel system able to withstand heavy floods, as the entrances and exits are protected with flood doors installed after Tropical Storm Allison flooded the city in June of 2001, certain protocols were not followed and the tunnels flooded when Harvey hit. The Jury Assembly Building, built primarily underground, remains out of commission indefinitely, as county officials consider how to rebuild.

Third, to more efficiently use county office space, officials recommend designing and outfitting county offices with flexibility in mind and maintaining some vacant office space “on the shelf” in the event disaster strikes. Officials in Harris County have tended to avoid keeping unused office space on-hand so as to make good use of county resources, which led to limited options and curtailed services in the aftermath of Hurricane Harvey.

Lastly, and perhaps most importantly, a chain of authority with respect to commissioners, judges, other county officials, law enforcement, and facilities and property management must be established before disaster strikes. In the aftermath of the hurricane, the authority required to efficiently and effectively reshuffle the placements of courts within the remaining functional court space appeared unclear. Had the authority to reorganize the courts within the courthouse complex been established in advance, perhaps sharing the civil courthouse spaces could have been more relaxed and less troublesome for the judges, the clerks, and the public.

As of now, the completion of the Criminal Justice Center is expected to be in the Fall of 2020, three years after Hurricane Harvey.

Abigail Butts is a Senior at Texas A&M University and studying business administration. She volunteered with the Harris County Probate Courts as an intern in the summer of 2018. She plans to attend law school in the fall of 2019. She is the daughter of Judge Christine Butts, a member of NCPJ’s Executive Board.
By Clarence Cuthpert, Jr.

June was Elder Abuse Awareness Month, and June 15, 2018 has been labeled World Elder Abuse Awareness Day. Elder abuse is an intentional act, or failure to act, by a caregiver or another person in a relationship involving an expectation of trust that causes or creates a risk of harm to someone 65 years of age or older. Forms of elder abuse include: physical, sexual, emotional or psychological, neglect, financial, and exploitation.

A May 7, 2018 news report by Paul Singer, Investigative Editor for WGBH News in Boston, MA, titled, “New Data Shows ‘Crisis’ of Elder Abuse,” reported that the Federal Administration for Community Living estimated that in 2016, 1.5 million cases of abuse were reported to adult protective agencies around the country, and about half of those reports were deemed worthy of further investigation. Singer’s report further stated that research indicates only 1 out of 24 cases of elder abuse or neglect is ever reported to authorities, so if 1.5 million cases were reported, the total number of abuse cases could be more like 20 or 30 million. Massachusetts Secretary of Elder Affairs, Alice Bonner, was quoted as saying “It turns out that somewhere between 50 and 60 percent of perpetrators are actually family members, particularly in the context of financial exploitation.”

According to a May 3, 2018 article in the Bloomberg News, by Nick Leiber, titled, “How Criminals Steal $37 Billion a Year from America’s Elderly,” reported that “some 5 million older Americans are financially exploited each year, as scammers and even family members target the most vulnerable.” The scammers also include, but are not limited to, business professionals, caregivers, and court appointed guardians and/or conservators.

The 65 years of age and older population in Rockdale County has grown significantly since 2010. From 2013 to 2017, there were approximately 488 elder abuse cases investigated by Adult Protective Services in Rockdale County. Our District Attorney’s Office has reported an increase in investigations of elder abuse cases as well. Therefore, District Attorney Alisha Johnson, Sheriff Eric J. Levett, and I, through a collaborative effort, along with the tireless efforts of Investigator Dawn Murrain of the Rockdale County Sheriff’s Office, recently formed the Protecting our Elderly and At Risk with Resources for better Living (“P.E.A.R.L.”) program in Rockdale County.

P.E.A.R.L. is a multi-disciplinary team whose mission is to: 1) elevate awareness; 2) respond in a timely manner; 3) effectively investigate; and 4) preserve the protective processes of any reported abuse toward elderly and/or at risk individuals in Rockdale County. We will collaborate with state and local agencies, as well as various service providers to ensure the safety and well-being of the elderly (65 and older) and at-risk (18 to 64 with a disability) in our community. Our goal is to provide assistance to our citizens who are alleged victims of abuse, neglect, exploitation, or self-neglect. With prompt reporting of alleged abuse, these individuals can be rescued from their abusers, and the perpetrators will be held accountable criminally and/or civilly when their actions warrant the same. Additionally, P.E.A.R.L. will focus on unlicensed personal care homes as well.

For additional information regarding P.E.A.R.L., you may contact Investigator Murrain at (770) 278-8159, or email us at contact@rockdalepearl.org. Please remember, the life you save could be one of your own.

Judge Clarence Cuthpert, Jr. is the Probate Judge of Rockdale County. In March, 2018, Judge Cuthpert was appointed to the Judicial Council’s Standing Committee on Access to Justice.