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Psychology and Probate: Generating and Preserving Data as Evidence for Cases Involving Undue Influence

Jon Feldon, J.D.



This year, the oldest of the “Baby Boomer” generation turns 80 years old, reflecting the aging of the United States population.¹ Accompanying this shift in demographics are steady increases in trust and estate litigation, particularly regarding capacity issues and undue influence, subjects that fall squarely within a neuropsychologist’s realm of expertise.

Psychologists are uniquely positioned to maintain records and provide testimony that go to the heart of such cases, whether they are providing expert opinions or serving as percipient witnesses. In particular, undue influence cases depend

¹<https://www.census.gov/newsroom/press-releases/2025/older-adults-outnumber-children.html>

on a variety of contextual factors that can vary widely from case to case, and sometimes a treating psychologist’s notes can be instrumental in helping courts determine whether a testamentary document is valid.

To start, the roles of a clinical psychologist and a forensic neuropsychologist differ. Clinical psychologists, often gerontologists, who specialize in people from aging populations, will work with individuals as their therapist. The clinical psychologist has no duty to gather any particular type of data during therapy, although they are required to maintain adequate records. Forensic neuropsychologists are specially hired as “experts” to do an investigation, gather data, and report to the Court what they have found regarding an older individual’s capabilities and capacities. Forensic neuropsychologists receive instructions on the legal standards from their hiring attorney, will usually review the therapy records from the individual’s treating clinical psychologist, and may also be given leave to do their own neuropsychological testing. Although the therapist’s clinical records may serve as a “snapshot in time” for the expert and ultimately the Court to rely upon, other times, these records do not provide any special insight into the patients’ wishes for their estate.

The goal of this article is to inform therapists of the types of data that are used by the Court in Probate actions so that therapist can, although they are not required to, put that kind of information into their therapy notes.

What is Undue Influence Under the California Probate Code?

Cases in Probate Court involving undue influence usually involve changes to an older person’s estate planning documents (wills, trusts, powers of attorney, etc.) that disinherit or disempower previously named beneficiaries or designated agents in favor of someone who wouldn’t have benefitted or been so empowered without the improper use of the influence of their relationship or the power of authority or control granted to them. Sometimes, an older person’s child will step in to assist their parent more than their siblings do and use that role to influence the parent’s estate plan to favor them or exclude the others. Sometimes a friend, fellow congregant, or neighbor provides the older person with rides to appointments and the supermarket and gradually takes on an increasingly prominent role—becoming an agent under power of attorney, then a trustee, named executor, or primary beneficiary of the estate plan. Such situations aren’t necessarily the result of undue influence, but they could be. Often, independent, in-the-

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moment sources of information to inform a court's decisions can be hard to come by. Therapists and their notes can, if prepared with these issues in mind, fill the gaps.

Under the California *Probate Code* (*Cal. Prob. Code* section 86, specifically), the definition of “undue influence” comes from California *Welfare and Institutions Code* section 15610.70(a): “...[E]xcessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.” A certain amount of persuasion is permissible, but not “excessive” persuasion. Likewise, inequitable results are also permissible (a person is free to disinherit their child if they want, even if doing so would be seen as objectively “unfair”), as long as the subject individual was not improperly pushed into making the inequitable decision by someone looking to benefit themselves. If this sounds “gray,” “squishy,” or otherwise subjective to you, you're right. One of the reasons this area of law is so complicated is that every case is decided by a court that must exercise its discretion to weigh the evidence in each unique set of circumstances. Who has the authority to make medical decisions for an older person, or who inherits their entire estate after their death, can be affected by a collection of sometimes seemingly minor details, as presented by the attorneys to the court. Therapists trained to observe how a person's neurological circumstances are affecting their behavior are in a perfect position to provide a broader picture.

Factors Courts Look at in Determining Undue Influence

Knowing the factors courts consider can help therapists determine whether something they observe makes sense to keep as a note. *Welfare and Institutions Code* section 15610.70(a)(1-4) outlines the required factors for courts to consider in determining whether or not particular outcomes were due to undue influence:

1. **The vulnerability of the victim**, specifically including (but not limited to) incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer should have known of the alleged victim's vulnerability. Notably, just because a person may lack capacity does not mean they have been unduly influenced. Capacity is just a factor. Therapists can make note of these factors to provide a roadmap for a potential future court.
2. **The influencer's apparent authority**. Again, the statute lists specific factors: status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification. Making note of who is bringing a patient in for treatment and whether that person is allowing the patient to speak for themselves can be helpful observations. There is no need or obligation to reach a conclusion. As long as information about the ongoing circumstances is preserved, its meaning can be analyzed with more context later by the Court.
3. **The actions and tactics used by the alleged influencer**, including:
 - A. Control of the necessities of life, medication, the alleged victim's interactions with others, access to information, or sleep. If information comes out during an appointment that someone is controlling your patient's sleep or medication, or if your patient tells you that they get all of their information from a particular person, it may be noteworthy. Sometimes an elderly individual needs help with virtually everything. Still, if someone is picking and choosing medications for them or controlling their access to sleep in a way that seems unusual, that would be helpful for future attorneys and the court to know.
 - 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. If you observe suspicious behavior, noting it could be useful.
4. **The equity of the result**. If a therapist becomes aware of a sudden divergence in a patient's plan that seems out of line with their previous stated intentions, making note of it provides a record of when and how the change occurred. Noting if the patient is unexpectedly disadvantaged by such a decision is similarly helpful. Note that, although inequity isn't always the result of undue influence, the context of the inequity may provide evidence that undue influence was involved. A neighbor begins helping your patient with their bills and doctor's appointments, and is now the sole beneficiary of the patient's estate? Not definitive, but suspicious and noteworthy, if it comes to light during an appointment. Likewise, therapists should always be aware of potential elder abuse issues that could be reportable.

Application

Clinicians are in-the-field preservers of information. Taking an extra moment to note an unusual circumstance related to the factors listed above could be crucial for future legal determinations and protection of patients. ▲

Attorney Jon Feldon's primary focus is trust and estate litigation, elder abuse and undue influence claims, probate, and conservatorships. Feldon graduated from Brown University and American University, Washington College of Law, then worked for 11 years as a Deputy Public Defender in Orange County, California, including two years in that office's Probate and Mental Health department. He has been in private practice since 2019 and is a member of the Los Angeles and Orange County Bar Associations and the California Lawyers' Association. He also volunteers with TEXCOM's Incapacity Subcommittee.

References are available on the LACPA Website www.lacpa.org.