

Consent, Decision-Making Capacity, and Undue Influence

The legal concepts of consent, decision-making capacity, or undue influence—or some combination of them—are a critical issue in many cases of elder abuse. As a result, these concepts are mentioned in every section of the guide and require a stand-alone explanation.

Lack of consent is an element of many crimes, such as sexual assault or theft. Adults may be unable to give valid consent because they do not have decision-making capacity or because they are victims of undue influence.

Consent: Key Definitions and Facts

- Consent, as used in the law, basically means a decision to do something or to allow something to happen. Examples of how the term is used include consenting to engage in sexual activity and giving informed consent to have a medical procedure.
- Consent may be given in writing, verbally, or through behavioral indicators such as nodding. The nature of the decision determines what method of demonstrating consent is necessary. For example, contracts or *deeds* must be in writing to be legally enforceable.
- Generally, consent has three elements (a state law may have a different number or articulate the elements differently). To give legally valid consent, a person must:
 - Have decision-making capacity,
 - Have knowledge of the true nature of an act, and
 - Act freely and voluntarily.
- Civil courts may undo legal transactions that were made by a person who could not provide consent. Reasons for the inability to provide consent may include lack of decision-making capacity or fraud and misrepresentations about the real circumstances of a transaction. The civil justice system does not use the term consent as often as the criminal justice system does—one example is informed consent for medical treatment—but the underlying concept is the same.
- In the criminal justice system, the failure to obtain legally valid consent may be an element of a crime (e.g., sexual assault, theft).

Decision-Making Capacity: Key Definitions and Facts

- Decision-making capacity means the cognitive ability to make a decision. **This guide often will use the term capacity as shorthand for decision-making capacity.**
- Sometimes state law or practitioners use the term **competence** or **competency** to mean the same thing as capacity (this guide does not use those terms).
- Capacity is both a legal concept and a medical concept. Lawyers and clinicians (such as physicians, psychiatrists, or psychologists) generally define it differently.
- Capacity is usually not black or white, all or nothing. It may fluctuate over time and even over the course of a day. For example, Alzheimer's disease is progressive and a person who has it will gradually lose decision-making capacity over time. Persons with dementia (which includes Alzheimer's disease) often have more capacity earlier in the day and less capacity later in the day; this is known as **sundowning** or **sundown syndrome**.
- Just because a person is old or has an illness or condition that affects cognitive abilities does not mean the person lacks capacity. For example, a person in the early to middle stages of Alzheimer's disease or someone who has a developmental disability may have capacity to make some or all decisions.
- In addition to being affected by disease or disability, a person's decision-making capacity may be affected by alcohol, drugs (legal and illegal), and nutrition.
- "Capacity to do what?" is a critical question. Under the law, there are different standards of capacity for different types of decisions. For example, the law requires a lower standard of capacity to make a gift or a *will* than it does to sign a contract. Complex decisions usually require a higher standard of decision-making capacity. But for decisions on financial matters, at the very least a person must understand the nature of the decision being made and the effect or potential effect of that decision.
- The law presumes that adults have capacity, unless a court decides differently and appoints a *guardian* or *conservator* to make decisions for the adult.

Undue Influence: Key Definitions and Facts

- Undue influence is a psychological and legal concept.
- Historically, undue influence has been a legal theory used to challenge the validity of a *will* or a *deed*. The recognition that undue influence may occur in some elder abuse cases is a recent development.
- Undue influence is not usually included in laws on elder abuse, and if it is included it is not usually defined. For example, while some *adult protective services (APS)* laws do include undue influence in their definition of financial exploitation, they do not define what undue influence is or how it occurs.

- Psychologist Margaret Singer defined undue influence as “when people use their role and power to exploit the trust, dependency, and fear of others. They use this power to deceptively gain control over the decision-making of the second person.” Professor Singer compared undue influence to the psychological techniques used to control prisoners of war or members of cults.
- State court decisions do define what undue influence is and how it occurs. Those definitions vary from state to state, but there are some common factors that the courts consider in deciding whether a *will* or *deed* was made as a result of undue influence. The courts may label or express these factors in different ways, but in general they look at:
 - The relationship between the alleged influencer and alleged victim.
Were they family? Was the alleged influencer providing care to the older person? Was the alleged influencer a **fiduciary** (e.g., an accountant, clergy member, financial or business advisor, or lawyer) who owed a special duty to the older person?
 - The alleged victim’s vulnerability to undue influence.
Was the older person experiencing illness, dementia or other cognitive impairment, grief, or sleep deprivation? Was the older person affected by medications?
 - The alleged influencer’s opportunity to gain control.
Was the older person isolated, either before the alleged influencer became involved in the elder’s life or as a result of actions by the alleged influencer? Were family members or friends prevented from seeing or talking to the older person (e.g., by being told that she was sleeping or feeling unwell each time they called)? Was the older person prevented from seeing family members, friends, neighbors, or others? Did the older person believe things that the alleged influencer denies (e.g., that they were or soon would be married)?
 - Whether the alleged victim’s decisions were the outcome of the undue influence.
Were decisions allegedly made as a result of the influencer’s control inconsistent with the older person’s decisions? Did the older person who suddenly made or changed legal documents have independent legal advice or did the alleged influencer choose the lawyer and sit in on all the meetings with the lawyer?
- A person who has decision-making capacity can be unduly influenced, but it is easier to commit undue influence on someone who has diminished capacity.
- Generally, a victim of undue influence will not recognize what is happening and will side with the perpetrator.
- Undue influence undermines consent. Even if the victim has capacity, a decision made as a result of undue influence is neither knowing nor voluntary. **Undue influence is a process by which control over the victim is gained and financial exploitation is committed.**

Relevance to Elder Abuse

- The legal concepts of consent, decision-making capacity, and undue influence—or some combination of them—are critical issues in many cases of elder abuse. These concepts are relevant in one or both of the following ways.
 - Present decisions. For example, can the alleged victim assist in an investigation, agree to or refuse to accept help from APS, or testify at trial?
 - Past decisions. To illustrate, did the alleged victim have the capacity to *deed* his property to his “new sweetheart”? Was the new *will* signed knowingly and voluntarily, or was it really the result of undue influence?
- If an alleged victim lacks capacity to make present decisions, then APS or family members may need to ask a court to appoint a *guardian* or a *conservator* or take other steps to protect the person from harm. Law enforcement and prosecutors may need to obtain, analyze, and use other forms of evidence instead of or in addition to the alleged victim’s testimony.
- An alleged victim’s capacity to make past decisions will be the central issue in many elder abuse cases. It is possible for skilled clinicians to retroactively assess capacity. If a person clearly lacked capacity, his or her consent cannot be legally valid. But a person who had sufficient capacity to make a decision (remember that there are different standards for different decisions and that capacity may fluctuate) cannot have given valid consent if the decision was not knowing and voluntary due to coercion, fraud, or undue influence.

Actions to Consider

- Consider whether the alleged victim had capacity to make the decisions in question.
- Determine whether the victim has had a capacity assessment or whether one is necessary. Skilled clinicians can retroactively assess capacity.
- The Mini-Mental Status Exam (MMSE or mini-mental) that is widely used by APS **does not** assess decision-making capacity.
 - Ideally, a capacity assessment should be conducted by a medical or mental health professional who understands how to conduct assessments, knows the pros and cons of existing assessment instruments, and has experience conducting assessments.
 - Do not limit an investigation to the issue of capacity. Consider whether the alleged victim’s decisions may have resulted from coercion, fraud, intimidation, misrepresentation, threats, or undue influence.
- Make a report to APS.