



THE MARYLAND HOUSE OF DELEGATES
ANNAPOLIS, MARYLAND 21401

Testimony in Support of HB347 - Criminal Law - Exploitation of Vulnerable Adult or Elderly Individual - Undue Influence

Chairman Clippinger, Vice-Chair Atterbeary and Members of the Judiciary Committee, thank you for the opportunity to testify today in support of HB347. This bill is identical to a bill that this committee and the House passed unanimously during the 2020 session. It did not get considered in the Senate due to the shortened session.

As you may recall, undue influence is a doctrine that dates back to a Common law case in 1617, and although our understanding of undue influence has evolved, our laws across the country and here in Maryland have not kept up. These cases are incredibly difficult to prove, in part because they often occur behind closed doors without witnesses, there is a lack of clear definition for what ‘undue influence’ is under the law, and it is often complicated by the assumption that mental capacity and undue influence are linked, which is not always necessary. For example, one could be of sound mind and still fall prey to undue influence due to other factors, such as the relationship between the influencer and victim.

This bill will strengthen our criminal code as it pertains to the definition of ‘undue influence’ of a vulnerable adult, specifically as it relates to the transfer of property. The idea for HB347 came by way of my constituent, Claudia, whose late uncle was defrauded by their financial advisor, who was able to convince her uncle to place the advisor into the uncle’s will prior to his passing. Claudia’s story, in her own words, is attached to the end of my testimony. It is important to note that while there was a civil suit that was settled, a criminal case was not pursued, in part because the standard in Maryland is so difficult to prove that cases like these are rarely successful.

HB347 adopts language that was first enacted in California in 2014 after a multi-year study on how to protect seniors from financial exploitation via undue influence. HB347 provides a clear definition for undue influence and bases it on detailed recommendations by psychologists, sociologists, criminologists, victimologists, legal experts and courts that have focused on the following:

1. Victim characteristics that contribute to vulnerability;
2. The power dynamic between the influencer and the victim;
3. Improper actions or tactics taken by the influencer; and
4. Unfair, improper, ‘unnatural’ or unethical transactions or outcomes

Each of these components are addressed in HB347. The bill defines ‘undue influence’ as “excessive persuasion that causes a vulnerable adult or an individual at least 68 years old to act or refrain from acting by overcoming that person’s free will and that results in inequity.” It then defines in section (G) what the court shall consider when determining whether undue influence was used to obtain property. It

defines characteristics that would cause the victim to be vulnerable, whether the defendant knew or should have known of the alleged victim's vulnerability, the defendant's apparent authority, various tactics that could be used to engage in undue influence, and the inequity that results from the action.

It is imperative that we examine and improve this section of our code, as the number of potentially impacted individuals are growing at a rapid rate. Between 2000- 2010, Marylanders over the age of 68 grew approximately 6,862 per year, while between 2010-2018 that number skyrocketed to 21,815 per year. These numbers are only increasing as a result of the pandemic with more and more seniors falling victim to financial crimes.

I respectfully request a favorable report. Thank you.

Elements of Undue Influence Described In Professional Literature

Category I	Category II	Category III	Category IV
<p>Victim characteristics contributing to vulnerability</p> <p>Incapacity resulting from:</p> <ul style="list-style-type: none"> • Dementia • Mental illness • Physical/functional decline • Accident, injury <p>Alert, oriented, physically capable but has vulnerabilities that have been induced or are personality based.</p> <p>Deficits in judgment or insight</p> <p>Altered state of mind (may be induced):</p> <ul style="list-style-type: none"> • Under effect of medications • Sleep deprivation • Under the influence of alcohol • Pseudo dementia 	<p>Influencers' characteristics, sources of power, and opportunities</p> <p>Persons in positions of trust and confidence. May be:</p> <ul style="list-style-type: none"> • Formal (e.g., fiduciary) • Informal (e.g., family member) <p>Professional authority resulting from job, profession, experience, training:</p> <ul style="list-style-type: none"> • Care provider • Health care professional • Therapist • Clergy or spiritual advisor <p>Superior strength</p> <p>Personality traits:</p> <ul style="list-style-type: none"> • Charismatic • Persuasive 	<p>Actions or tactics, including emotional, psychological, and legal manipulation</p> <p>Controls weaker party's social interactions:</p> <ul style="list-style-type: none"> • Imposes isolation • Insulates relationship from outside supervision and advisors • Suppresses loyalties • Induces sense of obligation and indebtedness • Plays on loyalties (family, cultural ties, etc.) • "Poisons" relationships with others • Creates "siege mentality" (all others intend harm) <p>Controls weaker party's behavior:</p> <ul style="list-style-type: none"> • Imposes rules, rewards, punishments • Suppresses old behaviors 	<p>Unfair, improper, "unnatural," or unethical transactions or outcomes</p> <p>Victim loses assets or property</p> <ul style="list-style-type: none"> • Victim loses control of assets or property • Victim loses housing or care • Victim's care is inadequate or not commensurate with elder's assets <p>Transactions (including changes to wills, trusts, purchases, etc.) that:</p> <ul style="list-style-type: none"> • Unfairly benefit influencers (purchases property below market value) • Involve gifts are that not commensurate with length and quality of relationship • Are abrupt

From constituent Claudia Vess:

My uncle, Howard Vess, was a widower with no children. He had told his brother, nieces and nephew that various charities were the beneficiaries of his estate. The will was on file in the Prince Georges' courthouse and included accommodation for either spouse predeceasing the other. His financial advisor was named as personal representative.

Upon my uncle's death in 2011, his financial advisor produced from his office filing cabinet, a 'new' will, in which he was the PR and the sole beneficiary of my uncle's substantial estate. We discovered that he had urged my uncle to make a new will, 6 months after the death of his wife while he was still deeply depressed by her loss.

As his niece, I established standing to challenge this 'new' will in court. I was encouraged by the support of Howard's neighbors who also knew his intentions and his vulnerability following the death of his wife.

I was informed by my Counsel that under Maryland law, a lawyer who made himself the beneficiary of a client would be disbarred, however, there is no such prohibition for financial advisors. And, that there is little definition of the term 'undue influence' or case law clarifying such circumstances.

After over six years in court, finally a settlement that included donations to my Uncle's charities was reached. Sadly, by this time the percentage of the original funds available for the charities was small; much of the estate was spent for counsel defending the financial advisor, even after he was replaced as the Personal Representative by the court.

After settlement, I brought the matter to the attention of my state representatives. In this process, I discovered the work of the Borchard Foundation, which studied this issue in all states and developed a model legislative approach to define undue influence, which has now been enacted into law in California. That is the basis for the drafting of HB 347.