PROBATE & ESTATE PLANNING SECTION

Supplemental Attachments for

Friday, September 8, 2023

Meeting of Committee on Special Projects (CSP)

at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Or *via* Zoom

Probate & Estate Planning Section of the
State Bar of Michigan

You are invited to the September meetings of the Committee on Special Projects (CSP),
the Annual Meeting of the Members of the Section and
the Council of the Probate & Estate Planning Section:

Friday, September 8, beginning at 9 AM
at the University Club of Michigan State University
3435 Forest Rd, Lansing, MI 48910

Remote participation by Zoom will be available. So, you are also invited . . .

to a Zoom meeting.
When: Sep 8, 2023, 09:00 AM Eastern Time (US and Canada)

Register in advance for this meeting:
https://us02web.zoom.us/meeting/register/tZwvdOutpjsrHtVU3CQ2uVmw29TkIi4zthQh

After registering, you will receive a confirmation email containing information about joining the meeting.
If you are calling in by phone, email your name and phone number to Angela Hentkowski
ahentkowski@stewardsheridan.com*, we will put your name in a zoom user list that*
will identify you by name when you call in.

Please note that the Zoom feature of these meetings entails that they will be recorded.

This will be a regular in person and remote meetings of the Council of the Probate & Estate Planning Section. The Council meeting will be preceded by a meeting of the Council's Committee on Special Projects (CSP), which will begin at 9:00 AM. The CSP meeting will end at about 10:15 AM, and the Council meeting will begin shortly thereafter. The agenda and meeting materials will be posted on the Probate & Estate Planning Section page of the SBM website. Once those things are posted, you should be able to download them from: http://connect.michbar.org/probate/events/schedule.

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M E M O R A N D U M

To: Council of the Probate and Estate Planning Section of the State Bar of Michigan
Ad Hoc Committee on Undue Influence

From: James P. Spica

Re: Draft Proposed MCL §§ 700.2724, 700.2725

Date: January 4, 2021 corrected September 5, 2023

I. Vagueness and Extravagance

Let me grant (1) that a nonnegligible number of judges and other lawyers mistake a particular string of words in the official report of the decision in *Kar v. Hogan*[1] for a legal "definition" of the concept of undue influence[2] and (2) that *as* such a "definition," that particular string of words is too confining. I, for my part, would not deduce from the conjunction of these premises that (3) we should therefore prompt the legislature to enact a less confining definition of the concept; for I believe (4) that the concept of undue influence (like much of the common law) is ineliminably vague and, therefore, unsuited to codification.

I do not propose to *argue* here for proposition (4).[3] Those who see or at least suspect the truth of proposition (4) will see or suspect that proposition (3) is likely to involve us in a mistake of our own. But even someone who thinks that proposition (4) is nonsense will recognize that proposition (3) is a jurisprudentially extravagant response to the conjunction of premises (1) and (2); for to the extent the conjunction of premises (1) and (2) describes the problem to be solved, we may look for a solution that does not occlude common law development by changing the mode of elaboration from analogy and distinction (the method of common law argument and justification)[4] to that of interpretation (the method of statutory construction):

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[1] Kar v. Hogan, 399 Mich. 529, 251 N.W.2d 77 (1976).

[2] I.e., not as a "general theoretical proposition[] of the common law" that "explains and justifies" past judicial decisions (A.W.B. Simpson, *The Common Law and Legal Theory*, *in* Oxford Essays in Jurisprudence 77, 92, 94 (A.W.B. Simpson ed., 2d series 1973)), but as a description, in an "authentic form of words" (*id.* at 88 (quoting F. Pollock, *A First Book of Jurisprudence* 249 (3d ed. 1911)), the failure to come within which *means*, as a matter of law, that a given case does not involve undue influence.

[3] As a hint to those who do not suspect the truth of proposition (4), I will point out that *not one* of the eight individuated "factors" that "may be considered" "[i]n determining whether a [given dispositive] result was produced by undue influence" according to the Committee on Undue Influence's (Committee's) proposed section 2524 [2724] is supposed by the proposal to be either necessary or sufficient for a finding of undue influence. *See* Committee's proposed (Comm. Prop.) § 700.2524(A) [700.2724(A)] (copy attached).

[4] *See, e.g.*, Carleton Kemp Allen, *Law in the Making* 298–300 (4th ed. 1946); Rupert Cross, *Precedent in English Law* 24–26, 182–88 (3d ed. 1977); A.G. Guest, *Logic in the Law*, *in* Oxford Essays in Jurisprudence 176, 190–91 (A.G. Guest ed., 1st series 1968). As to the antiquity of this characteristic of common law reasoning and its independence of the relatively recent doctrine of precedent, see, e.g., H.F. Jolowicz, *Lectures on Jurisprudence* 226–30 (J.A. Jolowicz ed., 1963).

> Now with statute any difficulties about the use of a rule are treated as problems of interpretation . . . [whereas] problems of applicability which arise in the courts about Common Law rules cannot be solved by interpretation—that is by a process of reasoning which attaches particular importance to linguistic considerations—for there is no text to interpret.[5]

To the extent the conjunction of premises (1) and (2) describes a problem in search of a *legislative* solution, the legislature need only remind the bench and bar that "the prerogative of judges is not to confer binding force upon a rule by formulating it and submitting the formulated rule to some procedure, but rather to decide cases by acting upon rules, without settling for the future the verbal form of the rule."[6]

Thus, expressed as a formula, the least obtrusive legislative response to the conjunction of premises (1) and (2) is a statute that contradicts the proposition tagged by the string of words referred to in premise (1) (Relevant String of Words), or displaces whatever it is about their implication that is too confining, without overruling *Kar v. Hogan*. I cannot illustrate this approach without first attempting to identify, if only for purposes of illustration, the Relevant String of Words. I shall assume, therefore, *for example*, that the Relevant String of Words is, "To establish undue influence, it must be shown that the grantor was subject to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the grantor to act against his inclination and free will."[7]

In that case, the formula might yield:

> To the extent supported by analogies to, and distinctions from cases constituting binding or persuasive precedent decided before or after the date of [this enactment], undue influence may be established on the facts of a given case even if it is not shown that the testator, grantor, settlor, or transferor was subject to threats, misrepresentation, undue flattery, fraud, or physical or moral coercion sufficient to overpower volition, destroy free agency and impel the testator, grantor, settlor, or transferor to act against his or her inclination and free will.

If we assume (again, *for example*) that while we have correctly identified the Relevant String of Words, those who hold premise (2) to be true do not object to the particular means of persuasion

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[5] A.W.B. Simpson, *The Ratio Decidendi of a Case and the Doctrine of Binding Precedent, in* Oxford Essays in Jurisprudence 148, 157–58 (A.G. Guest ed., 1st series 1968).

[6] *Id.* at 162.

> Remembering, as we always must, that the authority of a decided case lies not in the mere words and phrases which compose it, but in the principle which is to be extracted from it, every precedent is, in a sense, only "evidence" of the law, and not (like a statute) "the law itself."

Allen, *supra* note 4, at 251.

[7] Kar v. Hogan, 399 Mich. at 537.

("threats, misrepresentation, undue flattery" and so on) listed in that String,[8] then we might simplify:

> To the extent supported by analogies to, and distinctions from cases constituting binding or persuasive precedent decided before or after the date of [this enactment], undue influence may be established on the facts of a given case even if it is not shown that the testator, grantor, settlor, or transferor was subject to persuasion sufficient to overpower volition, destroy free agency and impel the testator, grantor, settlor, or transferor to act against his or her inclination and free will.

Such a statute could even include a positive description of undue influence, provided the description is so *weak* as to be uncontroversial:

> To the extent supported by analogies to, and distinctions from cases constituting binding or persuasive precedent decided before or after the date of [this enactment], undue influence may be established on the facts of a given case in which the free will of the testator, grantor, settlor, or transferor is overcome by persuasion even if it is not shown that the persuasion used was sufficient to overpower volition, destroy free agency and impel the testator, grantor, settlor, or transferor to act against his or her inclination.

A statute in any of these forms would address the mistake described in premise (1)—assuming for the sake of the example that we have correctly identified the Relevant String of Words—without limiting judicial development of the concept of undue influence to interpretations of a supplanting string of words. And the modesty of such a statute would be supported by the canon of statutory construction according to which "[t]he presumption is for a minimum change to be effected by legislation in a common law area."[9]

II. Cheating by Definition

Because I hold proposition (4) to be true, I am altogether opposed to the Committee's proposed "definition." But I regard most of proposed section 2524's [2724's] provisions as merely

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[8] *See* Comm. Prop. § 700.2524(A)(3)(b) [700.2724(A)(3)(b)].

[9] Rupert Cross, *Statutory Interpretation* 44 (John Bell & George Engle eds., 3d ed. 2005); *see also* Kent Greenawalt, *Statutory and Common Law Interpretation* 119 (2013) ("statutes that alter the common law should be strictly construed"). This is a canon which the Michigan Supreme Court has articulated instructively:

> [T]he legislature is deemed to act with an understanding of common law in existence before the legislation was enacted. Moreover, statutes in derogation of the common law must be strictly construed, and will not be extended by implication to abrogate established rules of common law. In other words, where there is doubt regarding the meaning of such a statute, it is to be given the effect which makes *the least* rather than the most change in the common law.

Nation v. W.D.E. Elec. Co., 454 Mich. 489, 494–95 (1997) (emphasis added) (citations omitted); *accord* Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 304–05 (1959).

unhelpful.[10] Subsection (A)(4) of that section, however, is worse than unhelpful. The invitation to the trier of fact to consider "[t]he equity of the result" "[i]n determining whether a [given dispositive] result was produced by undue influence" is contrary to analogy; for within broad limits set by "public policy" for structured gifts,[11] the equity of a given testamentary or other donative intention has *nothing whatever* to do with the legal validity of an associated donative act:

> No man is bound to make a will in such a manner as to deserve approbation from the prudent, the wise, or the good. A testator is permitted to be capricious and improvident, and moreover is at liberty to conceal the circumstances and the motives by which he has been actuated in this dispositions.[12]

On the other hand, there are many legally irrelevant aspects of actual cases that we may suppose do, in fact, regularly feature (consciously or unconsciously) in the decisions of triers of fact.[13] Why should we not mention more of them by way of invitations for judges and jurors "to do justice"? Why should we stop with the proposal's (none too timid) beginning in this line? Why should we not consider the following continuation of the Committee's proposed section 2524(A) [2724(A)]?

> (4) The equity of the result. Evidence of the equity of the result may include~~, but is not limited to~~ . . . . However, evidence of an inequitable result, without more, is not sufficient to prove undue influence.
>
> (5) The relative attractiveness of one of the parties. Evidence of the relative attractiveness of one of the parties may include, but is not limited to, a relative advantage of height or slenderness, extraordinary comeliness, grace of movement, elegance of dress . . . . However, evidence of the relative attractiveness of one of the parties, without more, is not sufficient to prove or disprove undue influence.

I trust that no one would find that continuation of the proposal acceptable. I suggest that the equity of a given dispositive arrangement should have as little to do with the arrangement's legal validity as does the "relative attractiveness" of anyone affected by it.

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[10] Which is not to say that I see no problem with section 2524 [2724] as legislative drafting. I do not understand, for example, how the question ~~of~~ "whether the alleged influencer knew or should have known of the donor's vulnerability" can constitute "[e]vidence of vulnerability" within the meaning of subsection (A)(1). *See* Comm. Prop. § 700.2524(A) [700.2724(A)]. And there is a split infinitive in subsection (A)(2)! *See* ~~Comm. Prop. § 700.2524(A) [700.2724(A)]~~*id.*

[11] *See, e.g.*, Unif. Tr. Code §§ 105(b)(3), 404 (Unif. ~~Law~~ L. Comm'n amended 2018) (requiring terms of trust to be, among other things, congenial to public policy); Restatement (Third) of Trusts § 29 (Am. L. Inst. 2003) (same).

[12] Harold Greville Hanbury & Ronald Harling Maudsley, *Modern Equity* 105 (Jill E. Martin ed., 13th ed. 1989) (quoting Wigram, V.C., Bird v. Luckie, [1850] 8 Hare 301 (Eng.)).

[13] For an example of active prejudice (in this case, homophobia) in the wild, see *In re* Kaufmann's Will, 247 N.Y.S.2d 664 (App. Div. 1964) aff'd, 205 N.E.2d 864 (N.Y. 1965).

III. Capitulation to Confusion

The Michigan Court of Appeals' decision in *In re Mortimore*[14] could not be binding—let alone persuasive—as precedent even if the Court's opinion in that case were published;[15] for the decision is logically inconsistent with a duly enacted statute of the State of Michigan[16]: that a preponderance of evidence should be required to rebut the presumption of undue influence on the facts of *Mortimore* is patently inconsistent with section 3407 of the Estates and Protected Individuals Code (EPIC), according to which "[a] contestant of a will [who alleges undue influence] has the burden of establishing . . . undue influence . . . [and] [a] party has the ultimate burden of persuasion as to a matter with respect to which the party has the initial burden of proof."[17] The Court of Appeals has no authority to countermand a duly enacted statute.[18]

What is more important for the Committee to notice, however, is that the principle of EPIC section 3407 is the palladium of the estate planning profession! Estate planning attorneys have a professional responsibility to uphold the principle that when a competently drawn estate planning instrument is challenged, the risk of nonpersuasion is cast upon, *and remains with* the contestant; for the estate planning attorney's adherence to professional ethics entails (1) that the estate planning instruments she prepares for clients are competently drawn and (2) that she prepares such instruments only for clients she reasonably believes (a) have the requisite capacity and intent and (b) are not laboring under undue influence, fraud, duress, or mistake.[19] To the extent an estate planning attorney involves herself in the promotion of legislation, she therefore has an ethico-philosophical disposition to protect the proponent's advantage under section 3407—not merely because it is an *advantage* to her clients, but because her own professionalism entails that her clients are *entitled* to that advantage.

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[14] *In re* Mortimore, No. 297280 (Mich. Ct. App. May 17, 2011), *appeal denied*, 491 Mich. 925, 813 N.W.2d 288 (2012).

[15] "An unpublished opinion is not precedentially binding under the rule of stare decisis." Mich. Ct. R. 7.215(C)(1) (1985).

[16] "For all practical purposes, a precedent which ignores or misconceives a clear and positive rule of law is not precedent." Allen, *supra* note 4, at 251. "Precedent is discarded either because it is not applicable to the case in hand, or because it proceeds on a misunderstanding of the law: because it is *not law*, never was the law, and therefore never was a precedent properly so called." *Id.* at 350.

[17] Mich. Comp. Laws § 700.3407(1)(c)–(d) (2000). The same principle contributed to the *ratio decidendi* of *Kar v. Hogan*, apropos of which, the Michigan Supreme Court said:

> The ultimate burden of proof in undue influence cases does not shift; it remains with the plaintiff throughout the entire trial. . . . A plaintiff has the burden of proof (risk of nonpersuasion) for all elements necessary to establish the case. This burden never shifts during trial. Therefore, plaintiffs, who alleged the existence of undue influence, bore the ultimate burden of persuading the trier of fact that undue influence was used to procure the deed.

Kar v. Hogan, 399 Mich. at 538–39.

[18] *See, e.g.*, Cross, *supra* note 4, at 1, 5, 165; J.W. Harris, *Law and Legal Science: An Inquiry into the Concepts of Legal Rule and Legal System* 72 (1979).

[19] *See e.g.*, *In re* Hughes Revocable Trust, No. 255928 (Mich. Ct. App. Sept. 22, 2005), *appeal denied*, 474 Mich. 1092, 711 N.W.2d 56 (2006) (attorney required to make reasonable inquiry into client's ability to understand nature and effect of document she was signing). *See generally* Am. College of Tr. & Est. Counsel, *Comm. on Model Rules of Pro. Conduct* r. 1.14 at 161 (5th ed. 2016).

The Committee's proposed section 2521 [2725] exchanges the proponent's advantage under section 3407 for "the advantage of clarity"[20]—for the hope, that is, that by making the Michigan Court of Appeals' confusion in *Mortimore* into *law*, we can avoid confusion. (What a hope!) Clarity and the avoidance of confusion are, of course, worthy aims, but from the point of view of estate planning attorneys, the price the Committee would have us pay in pursuit of those aims is too high: under the Committee's proposed section 2521 [2725], the devoted wife, *W*, of a lately deceased, uxorious husband, *H*, may be invited, thanks to the disappointment of a friend, *F*, who had hoped for a legacy, to prove by a preponderance of evidence, that she (*W*) did not unduly influence *H* in making his will *because* in addition to being married to *W*, *H* "relie[d] on [*W*] to conduct banking or other financial transactions"[21] or was, in his last illness, "reliant upon [*W*] for care."[22]

F, anticipating the trier of fact's hostility to her claim on these facts, may forbear to bring suit, but if so, that will be a credit to *F*'s common sense, not to the Committee's drafting~~!~~. No estate planning attorney whose clients are capable of forming normal human relations can accept the results yielded by the Committee's proposed section 2521 [2725] on facts like those hypothesized above. Part of the problem is that the Committee has failed to heed the *Restatement (Third) of Trust*'s insistence on the importance of (what the *Restatement* terms) "suspicious circumstances" in assaying the presumption.[23] But refinements on the conditions for raising the presumption would have to go *very* far before estate planning attorneys could cheerfully countenance a shifting of the burden of nonpersuasion to the proponent of a competently drawn instrument.

I am inclined to think that it would be both easier and more beneficial to leave the principle of EPIC section 3407 intact, codify the *Restatement (Third)*'s analysis of the facts that give rise to the presumption (Operative Facts),[24] and, in the draft statute that does that, declare (1) that there is no presumption of undue influence in the sense of a mandatory inference *under any circumstances* and (2) that if the trier of fact determines that Operative Facts ~~(that would give rise to the presumption under the *Restatement*'s analysis)~~ have been proved (*by the contestant, by a preponderance of evidence*), the trier of fact must be allowed to determine the ultimate question of whether undue influence has been proved (*by the contestant, by a preponderance of evidence*). That would serve the presumption's protective purpose[25] without making the contestant equity's "darling."[26]

JPS

[20] Memorandum from Ad Hoc Comm. on Undue Influence to Comm. on Special Projects 4 (Nov. 13, 2020).

[21] Comm. Prop. § 700.2521(d)(2)(A) [700.2725(d)(2)(A)] (copy attached).

[22] *Id.* § 700.2521(d)(2)(D) [700.2725(d)(2)(D)].

[23] *See* Restatement (Third) of Prop.: Wills & Other Donative Transfers § 8.3 cmt. f at 146, h (Am. L. Inst. 2003).

[24] *See id.* § 8.3 cmt.~~'s~~ f–h.

[25] "In the case of a contested will, the presumption establishes a prima facie challenge to the will—thereby protecting the challenge from dismissal." *In re* Mortimore, 491 Mich. 925, 927–28, 813 N.W.2d 288, 290–91 (2012) (Young, C.J., dissenting).

[26] To borrow Maitland's characterization of the *cestui que trust*. *See* Frederic William Maitland, *Trust and Corporation*, *in* Selected Essays 141, 173 (H.D. Hazeltine et al. eds., 1936).

Spica Memorandum re Ad Hoc Committee on Undue Influence's
Draft Proposed MCL §§ 700.2724, 700.2725

Exhibit
Draft Proposed Sections

MCL 700.2524 Definition of Undue Influence:

(A) "Undue influence" means persuasion that causes a donor to act or refrain from acting by overcoming the donor's free will. The amount of persuasion necessary to overcome a donor's free will may be less when a donor has vulnerabilities that could impair the donor's ability to withstand another's influence. In determining whether a result was produced by undue influence, the following factors are among those that may be considered:

(1) The vulnerability of the donor. Evidence of vulnerability may include, but is not limited to: incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, dependency, recent loss of a spouse, estrangement from children, fear of change in living situation, or whether the alleged influencer knew or should have known of the donor's vulnerability.

(2) The alleged influencer's apparent authority. Evidence of the alleged influencer's apparent authority may include, but is not limited to, status as a fiduciary, confidante, close family member, care provider, health care-professional, legal professional, spiritual adviser, or the donor's perception of the alleged influencer's expertise.

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

(a) Controlling necessaries of life, medication, the donor's interactions with others, access to information, or sleep.

(b) Use of force, threat, undue flattery, intimidation, coercion, fraud or misrepresentation.

(c) Initiation of changes in an estate plan or personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, or claims of expertise in effecting changes.

(d) Engages in efforts to negatively influence the donor's perception of family members, advisors or otherwise interfere with family, business or professional relationships.

(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 donor, any significant divergence from the donor'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. However, evidence of an inequitable result, without more, is not sufficient to prove undue influence.

(B) For purposes of this section and MCL 700.2725, as it relates to any written instrument, gift, or other transaction alleged to be the product of undue influence, the term "donor" shall mean a testator, grantor, settlor, or transferor.

MCL 700.2521 Burden Of Proof In Contests; Presumption Of Undue Influence.

(a) Absent a finding that a presumption of undue influence exists, duly executed instruments, gifts, or transactions are presumed to be valid. The contestant of an instrument, gift, or transaction has the burden of proving, by a preponderance of evidence, the grounds upon which an instrument, a gift, or a transaction is opposed or revocation is sought.

(b) A presumption of undue influence, whether as to a written instrument, gift or transaction, is established when all of the following elements are proven to exist by a preponderance of evidence:

(1) A confidential relationship exists between the donor and the alleged influencer;

(2) The alleged influencer, or an interest represented by an alleged influencer, benefits from a transaction; and,

(3) The alleged influencer had an opportunity to influence the donor's decision in the transaction.

(c) A presumption of undue influence, once established, is rebuttable. If a presumption of undue influence is found to exist, the proponent of an instrument, recipient of a gift, or other party to a transaction, has the burden of proving, by a preponderance of evidence, that the instrument, gift, or transaction is not the product of undue influence.

(d) "Confidential relationship," for purposes of this section, means a fiduciary, reliant, or dominant-subservient relationship.

(1) A fiduciary relationship is one in which the relationship arises from a legally recognized fiduciary obligation. Examples of legally recognized fiduciary relationships include, but are not limited to the following: lawyer/client,

stockbroker/investor, principal/agent, guardian/ward, trustee/beneficiary, physician/patient, accountant/client, and financial advisor/client.

(2) A reliant relationship is one where there is a relationship between the donor and alleged influencer based on special trust and confidence, and may include circumstances where the donor was guided by the judgment or advice of the alleged influencer or placed confidence in the belief that the alleged influencer would act in the interest of the donor. Examples of reliant relationships include, but are not limited to, the following:

(A) The donor relies on the alleged influencer to conduct banking or other financial transactions;

(B) Where trust is placed by the donor in the alleged influencer who, as a result, gains superiority or influence over the donor;

(C) When the alleged influencer assumes control over, and responsibility for, the donor, or is placed in an express or implied position of authority to represent or act on behalf of the donor;

(D) When the donor is reliant upon the alleged influencer for care; or,

(E) When a clergy/penitent relationship exists between the donor and the alleged influencer.

(3) A dominant-subservient relationship is one where the donor is prepared to unquestioningly comply with the direction of the alleged influencer. Examples of dominant-subservient relationships include, but are not limited to, relationships between a hired caregiver and client, or relative and an ill or feeble donor, when

the donor is dependent upon the alleged influencer for activities of daily living or instrumental activities of daily living.

(e) Being the donor's spouse or child, without more, is not sufficient to establish a presumption of undue influence.

(f) The definition of "donor" set forth in MCL 700.2724, shall also apply to this section.