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I. Undue Influence in a Modern Context

Our population is aging. Blended families are becoming more common, complex, and multi-generational.[1] Conservatorships have increased,[2] along with the incidence of elder and financial abuse claims.[3] While financial abuse is nothing new, modern sociocultural and familial dynamics have compelled renewed legislative attention[4] where profound decisional control is granted to proxies over the property of

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[1] This dynamic was perhaps best described by R. Hugh Magill in his Joseph Trachtman Lecture at the ACTEC 2018 Annual Meeting, summarized by Steve R. Akers in *ACTEC 2018 Annual Meeting Musings*, https://www.bessemertrust.com/sites/default/files/2018-07/ACTEC%202018%20Annual%20Meeting%20Musings_WEBSITE.pdf. *See also* R. Hugh Magill, *Estate Planning and Trust Management for a Brave New World: It's All in the Family. . .What's a Family?*, 44 ACTEC L.J. (forthcoming 2019); Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. Mich. J.L. Reform 787, 809 (2012).

[2] A 2017 report by Dr. Brenda K. Uekert, *Principal Court Research Consultant for the National Center for State Courts*, revealed "approximately 1.3 million active adult guardianship or conservatorship cases," with "at least $50 billion of assets under adult conservatorships nationally." *Written Testimony to the H.R. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, (statement of Dr. Brenda K. Uekert), https://ncsc.contentdm.oclc.org/digital/api/collection/famct/id/1211/page/0/inline/famct_1211_0 (last visited Dec. 27, 2018).

[3] Consider the increase in civil and criminal legislation affecting elder abuse. *See, e.g.*, Mahan v. Charles W. Chan Ins. Agency, Inc., 222 Cal. Rptr. 3d 360, 374-75 (Ct. App. 2017), *review denied* (Nov. 15, 2017) (recapping impetus for passage of Elder Abuse Act in its criminal and civil components); *In re* Estate of Haviland, 301 P.3d 31, 32 (Wash. 2013) (discussing amendment of slayer statute to include financial abusers of vulnerable adults).

[4] As Prof. John Langbein, who is a Reporter and principal drafter with the Uniform Laws Commission, has observed: "the challenges of the gerontological revolution are what have motivated the Custodial Trust Act, the Guardianship Act, and the Power of Attorney Act." John H. Langbein, *Major Reforms of the Property Restatement and the*

those they are supposed to protect.[5] Often, that trust is misplaced. As these data converge and interact, the growth curve in undue influence claims will continue to accelerate, along with attendant and altered estate planning strategies. The world is rapidly changing, and it appears that there is "no turning back."[6]

Into this context comes a timely piece exploring leading edge research over the effect that recent psychological and neuroscientific discoveries might hold for planning and litigation. In *Undue Influence: The Gap Between Current Law and Scientific Approaches to Decision-Making and Persuasion*,[7] Dominic Campisi, Evan Winet, and Jake Calvert reveal the under-appreciated role that the sub- or unconscious mind plays within complex decision making, and the presumably equally underdeveloped "psychology of persuasion" that influencers might wield in search of a desired outcome. As Campisi et al. make clear, an integrated understanding of both should feature prominently for those wishing to avoid, press, or defend an undue influence claim, particularly given the exacerbating effects of age and cognitive decline upon tendencies toward triggered decision making. It takes but a quick look at such undue influence factors as "susceptibility to influence" to see why.[8] How might the law respond?

II. Possible Changes to the Law in Response to the Science

With change and attention comes the promise of new developments and responses. For example, science may progress sufficiently to bolster the argument that undue influence should be abolished in favor of other or stronger disincentives against manipulation of the vulnerable.[9] But

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Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers, 38 ACTEC L.J. 1, 5 (2012).

[5] *See, e.g.*, Unif. Probate Code § 5-411(a)(7) (Unif. Law Comm'n 2010) (amended in 2010 to permit conservators to make wills for conservatees); Unif. Guardianship & Protected Proceedings Act § 411(a)(7) (Unif. Law Comm'n 1997) (permitting conservators to make wills for conservatees); Cal. Prob. Code §§ 2580(b)(13), 6100.5(c), 6110(c) (West 2018). Indirect but similarly broad rights exist within related estate planning arenas. *See, e.g.*, Susan T. Bart, *Summaries of State Decanting Statutes*, https://www.actec.org/assets/1/6/Bart-State-Decanting-Statutes.pdf. Unif. Power of Attorney Act §§ 201(a)(1)-(2); 211; 217 (2006) (conferring trust and gift-making license, with two introductions in 2018 alone). *See generally* Grayson M.P. McCouch, *Revocable Trusts and Fiduciary Accountability*, 26 Elder L.J. 1, 3-5, 15-16 (2018); Ralph C. Brashier, *Conservatorships, Capacity, and Crystal Balls*, 87 Temp. L. Rev. 1, 3-4 (2014).

[6] Langbein, *supra* note 4, at 17.

[7] 43 ACTEC L.J. 359 (2018).

[8] Restatement (Third) of Prop.: Wills and Other Donative Transfers § 8.3 cmt. f (Am. Law Inst. 2003).

[9] For example, Prof. Carla Spivack marshals historical, psychological, and doctrinal evidence to justify this result. Carla Spivack, *Why the Testamentary Doctrine of Undue*

less drastic measures exist that may prove more immediately palatable, at least in the short term. In her role as counselor, the estate planner is often the first line of defense against exploitation. It may thus be that planners simply need to be better educated regarding the "twin sides" of an undue influence claim – the "undue"-ness of the influence, and its causative connection to the ultimate decision made. Campisi et. al provide valuable information over the basic neurobiology and the persuasive tactics deployed so that planners can intelligently adjust their approach to counseling at-risk clients.

For example, exposure to Dr. Daniel Kahneman's theory of "ego depletion" might lead the conscientious planner to recalibrate the rhythm and flow of counseling sessions, spending "more time on the distributive provisions" so as to avoid facilitating clients' surrender or reflexive agreement to "dispositions which vary from the heart of their intentions."[10] As the authors well remind, clients care far more about "who gets what and why"[11] than even the most "intellectually intriguing"[12] planning technique.

Elsewhere they couple the power of authority, compliance, and scarcity with the realities of an aging mind. If the senior is "trapped into a sales pitch"[13] from the undue influencer, she may view the planner as a potential rescue agent. But the senior may place more trust in a mere "scrivener/planner" than is warranted, accepting proposed terms on their face rather than ventur[ing] out to obtain what may be a much-needed second opinion.[14]

III. Enhancing the Planner's Role by Addressing the Planner's Legal Duties and Standards of Care

If the estate planner is to be on the front line in preventing financial exploitation of vulnerable adults, then the planner's duties and standards of care may require enhancement, adjustment, or at least more particularized requirements in objectively worrisome situations. The planner certainly should be more than a mere scrivener. Some states and commentators recognize a duty owed by the estate planner to watch

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Influence Should be Abolished, 58 U. Kan. L. Rev. 245, 297 (2010). Professor Spivack proposes replacing undue influence with a more robust criminal law response, which while bearing its own potential demerits, offers the potential for heightened deterrent effect. Other deterrents include the enhanced use of no-contest clauses, arbitration agreements, and specialized courts.

10 Campisi et al., *supra* note 7, at 384.

11 *Id.* at 367.

12 *Id.* at 384.

13 *Id.*

14 *Id.*

for and recognize undue influence.[15] Some states provide that this duty is owed not only to the testator's estate, but also to the estate's beneficiaries.[16]

But lacking from these authorities is jurisdictional consistency. Indeed, some commentators offer internally inconsistent views over this "is" versus "ought" of the law. For example, in *Undue Influence and Professional Responsibility*,[17] William M. McGovern, Jr. urged both that lawyers "should not have to decide, at their own peril, whether a client is incapacitated or under undue influence," but also that a lawyer "who has reason to suspect this should not ignore the problem."[18] One might reasonably ask, "or what?"

IV. The Duty to be Watchful: Signs, Signposts, and Response

Authorities and commentators thus appear to support the view that the estate planner should be *watchful* for potential undue influence. But beyond some of the more obvious steps, they do not offer much detail on *how* the planner should become aware of influence, or what to do once and where it is suspected.

First, and as discussed, the scientific developments illuminated by Campisi et. al permit planners to seek for and neutralize the more subtle indicators that undue influence might be afoot. The duty to be watchful should require more of an estate planner than meeting with the testator alone, asking questions designed to reveal *testamentary capacity*,[19] and

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15 "An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard." Logotheti v. Gordon, 607 N.E.2d 1015, 1018 (Mass. 1993). "Lawyers who do sloppy work in guarding against claims of incapacity and undue influence can be liable for malpractice." William M. McGovern & Sheldon F. Kurtz, Wills, Trusts & Estates 314 (3d ed. 2004). An estate planning attorney "does not discharge [the] duty by simply taking down and giving legal expression to the words of the client, without being satisfied by all available means that [capacity] exists and is being freely and intelligently exercised." William M. McGovern, *Undue Influence and Professional Responsibility*, 28 Real Prop. Prob. & Tr. J. 643, 680 (1994) (citing Mark M. Orkin, Legal Ethics: A Study of Professional Conduct 103 (Cartwright & Sons Ltd., 1957)).

16 "[There is no] valid legal difference between a plaintiff who loses the right to one-half of an estate and a plaintiff who loses one-half of an estate in protecting her rights. If either was caused by an attorney's negligence in drafting that attorney should be liable." Rathblott v. Levin, 697 F. Supp. 817, 820 (D.N.J. 1988).

17 McGovern, *supra* note 15, at 681.

18 *Id.*

19 Testamentary capacity definitionally contemplates freedom from undue influence. But many estate planners focus their standard procedures on the more customary definition of testamentary capacity, which essentially seeks the testator's ability to connect what is being devised, to whom, and how.

then turning to the role of a scrivener. Campisi et. al demonstrate, if nothing else, that the possibility of influence cannot be revealed by simple questions from a standard will-execution checklist.[20]

A red-flag approach would take the common-law elements and factors for undue influence and instruct the estate planner to inquire and evaluate the existence of risk. Multiple resources exist for use in identifying potential red flags. For example, the California Elder Justice Coalition's research- and data-driven screening tool, designed for use by protective services staff, could be modified for use by estate planners assessing the potential for undue influence.[21]

This approach could be urged at various levels. The Model Rules of Professional Conduct, together with both official comments and ACTEC Commentaries, provide guidance consistent with this approach,[22] but these resources could be bolstered using the science[23] identified by Campisi et. al. And while the Model Rules are not rules of law for purposes of professional liability, the common law might follow developments in the Model Rules to further incentivize estate planners to address these issues.

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20 The obvious steps include ensuring that the planner provides counseling and advice without others (particularly beneficiaries) in the room, which presumably would reveal the testator's true intent. But as Campisi et al. demonstrate, an influencer does not necessarily need to be in the room to influence an estate plan; the skilled undue influencer is the most sneaky, insidious kind. *See* Campisi et al., *supra* note 7, at 371 ("[There are] six basic categories of persuasion tactics, each of which is governed by a fundamental psychological principle that directs human behavior and, in so doing, gives the tactics their power and an ability to produce a distinct kind of automatic, mindless compliance from people, this is, a willingness to say yes without thinking first.").

21 *See* Cal. Elder Justice Coal., *California Undue Influence Screening Tool*, https://www.elderjusticecal.org/uploads/1/0/1/7/101741090/final_cuist_5-27-2016_10.29.18.pdf (May 16, 2016); Cal. Elder Justice Coal., *Instructions for Completing California Undue Influence Screening Tool*, https://www.elderjusticecal.org/uploads/1/0/1/7/101741090/final_cuist_instructions_may_27_2016.pdf. *See also* Mary J. Quinn et al., *Developing an Undue Influence Screening Tool for Adult Protective Services*, 29 J. ELDER ABUSE & NEGLECT 157 (2017); Mary J. Quinn et al., *Undue Influence: Definitions and Applications, Final Report*, http://www.courts.ca.gov/documents/UndueInfluence.pdf (Mar. 2010).

22 Like many authorities, the ACTEC Commentaries on Rule 1.14 stops short of addressing undue influence and the duty to be watchful. The Commentaries advise that the lawyer should decline to prepare an estate plan if the lawyer reasonably believes that the testator lacks requisite capacity, but suggest assisting clients in borderline cases while preserving evidence regarding the client's testamentary capacity. With the recognition that undue influence forms a part of the capacity determination, and armed by the science highlighted by Campisi et al., these comments could be updated to provide for a stronger set of obligations through which to make that determination and respond. ACTEC, *Commentaries on the Model Rules of Professional Conduct*, https://www.actec.org/assets/1/6/ACTEC_Commentaries_5th.pdf, at 160-63 (5th ed. Aug. 2016) [hereinafter ACTEC *Commentaries*].

23 Campisi et al., *supra* note 7, at 361-62.

None of that discussion, however, answers how an attorney who discerns possible danger should proceed. The court in *Logotheti* suggested the unsatisfying response of simply declining to complete the estate plan.[24] But sending the client away could lead to drastic results, with the influencer assisting the elder in finding a planner who will "play ball." Rule 1.14(b) of the Model Rules suggests that the lawyer in this situation "*may* take reasonably necessary protective action . . . ."[25] This protective action could take the form of a more robust interview and investigation to determine the extent of possible undue influence, and a determination by the lawyer regarding how best to protect the elder from further exploitation. The lawyer might, as the client's agent, fend off the influencer's actions, prepare a *more protective* estate plan, and provide the client with the ability to deflect further inroads by pointing to the attorney-client relationship.[26]

In *Influence: Science and Practice*,[27] Robert B. Cialdini describes pluralistic ignorance, in which others' failure to take action in the face of an emergency leads each group member to believe that no action is required. Cialdini describes how to secure help in a crowd when the crowd is ignoring the need for help as a result of pluralistic ignorance: look one other person in the eye and tell that person that you need help.[28] This can break the pluralistic cycle and cause the one person, or others nearby, to realize that the emergency is real. By analogy, a particular elder may have stopped asking for help because of isolation, such that by the time she meets with an estate planner, the "cry for help" may be implicit or even absent. The careful estate planner can become the elder's protector, asking probing questions to reveal the need for help, and providing the help needed – through careful counseling, drafting, and follow up – to protect that elder from exploitation.

The fact is, the planner's elder client may truly need the protection that can only be provided by a conscientious estate planner. And as frightening as the possibility may be, perhaps it is time to ask more of estate planners than the tepid admonition that they remain "aware,"

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24 Logotheti v. Gordon, 607 N.E. 2d 1015, 1018 (Mass. 1993). *See also* ACTEC *Commentaries*, *supra* note 22, at 160-63.

25 MODEL RULES OF PROF'L CONDUCT r. 1.14(b) (AM. BAR ASS'N 2016) (emphasis added). The ACTEC Commentaries note point out the duties imposed in many states to report suspected exploitation or abuse to proper authorities. *See* ACTEC *Commentaries*, *supra* note 22, at 161.

26 As an interesting example, in John Grisham's *The Rainmaker*, attorney Rudy Baylor tells Miss Birdie's son that he can no longer ask his mother about her estate plan because the information would be protected by attorney-client privilege.

27 ROBERT B. CIALDINI, INFLUENCE: SCIENCE AND PRACTICE (4th ed. 2001).

28 ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION 105 (Pearson Educ. 2013, 5th ed. 1984).

and to begin exploring the possibility of legal accountability for those planners who fail reasonably to inquire, or who blithely draft in the face of objective indicators of concern.