Title

If the settlor of a trust had been coerced into creating it, is trust the product of duress or of undue influence?

Text

Assume a professor encourages his thesis advisee, a marginal PhD student, to establish a trust for the benefit of the professor's favorite cause. The student reluctantly acquiesces. Having received his PhD, the now former student seeks equitable voidance/rescission of trust on the grounds that the trust's inception had been the product of duress or undue influence. Well, which was it?

Duress requires a specific threat that leaves no reasonable alternative. At stake is either the victim's physical or economic well-being. Undue influence, on the other hand, suggests a more general dominance over someone in a weakened state and use of that dominance to psychologically manipulate the disadvantaged party into doing what he would not otherwise be inclined to do. In either case, voidance/recission is not foreclosed if someone other than wrongdoer benefits. The line between the two abuses is blurry, to be sure, except when acquiescence has been extracted at the point of an actual gun. Otherwise, there is considerable overlap, undue influence having been foraging about in coercion territory since time immemorial.

The case here for classic duress is that there was the implied specific threat that unless the trust was created the student could expect to be washed out of the PhD program with severe adverse economic consequences for the student.

The case for classic undue influence: The settlor being a marginal student, he was in a weakened state psychologically, and thus susceptible to the extracurricular self-serving encouragements of his academic mentor. The professor-student relationship being one of confidence and the circumstances surrounding the entrustment suspicious, a presumption of undue influence prevails.

Now comes the Rest. (Third) of Property (Wills & Don. Trans.) and subsumes much of duress into undue influence, at least this appears so at first glance: "When examined more closely, the term 'confidential relationship' embraces three sometimes distinct relationships—fiduciary, reliant, or [sic] dominant-subservient." *See* id. at § 8.3, cmt. *g*. The hired caregiver's relationship with the ill/enfeebled patient and the adult child's relationship with the ill/enfeebled parent are proffered as examples of dominant-subservient relationships. Id. Transferring from the duress pigeonhole to the undue-influence pigeonhole an express or implied threat to mess with the medical care/nutritional requirements of someone physically incapacitated might seem a serious doctrinal tweak. The Restatement, however, then goes on to assign to duress criminality and acts that the wrongdoer "had no right to do." *See* id, cmt. *i.* Not sure what non-criminal behaviors are contemplated here. Seems awfully open-ended. And isn't criminality something one has no "right" to engage in? In the donative-transfer space, suggest that we unambiguously fold whatever is left of duress into undue-influence so that we can finally move on. Since its

enunciation by Lord Hardwicke in 1737 in *Morris v. Burroughs*, 1 Atk. 398; West t. Hard 242, the undue-influence concept has been a work in progress. The notion that coerced donative transfers, particularly via will, belong in undue influence's bailiwick has been circulating for almost as long. See, e.g., the 1838 case of *Baker v. Batt*, 2 Moo. P.C. 317, 329.

As to whether our professor committed a wrong that is actionable at law, such as the tort of intentional interference with inheritance or gift, see §8.47 of *Loring and Rounds: A Trustee's Handbook* (2023). Section reproduced in appendix below. Handbook available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-trustees-hanbook-2023e/01t4R00000Ojr97QAB.

Appendix

§8.47 The Tort of Intentional Interference with Inheritance or Gift [from *Loring and Rounds: A Trustee's Handbook* (2023), available for purchase at https://law-store.wolterskluwer.com/s/product/loring-rounds-trustees-hanbook-2023e/01t4R00000Ojr97QAB.].

Deep In the bowels of the Restatement (Second) of Torts (1979), specifically §774B, is some law that is poorly coordinated with prevailing relevant equity doctrine. Here it is: "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift." The title of the section is *Intentional Interference with Inheritance or Gift*. The problem is that when it comes to wrongful interference in the making of a gift, whether outright or in trust, equity's venerable and comprehensive unjust enrichment jurisprudence is generally far better equipped to fashion and execute a workable remedy, absent special facts.[1] Assume a property owner is induced by someone's fraud, duress, undue influence, or mistake not to make a completed donative transfer of the property to a trustee for the benefit of Jack. The property owner dies. The property ostensibly passes to Jill, the property owner's only heir at law. If Jill had had something to do with the inducement, *even if she had not*, in equity she has been unjustly enriched. If she will not voluntarily transfer legal title over to the express trustee for the benefit of Jack, the equity court will secure Jack's equitable property rights by impressing a constructive trust on the property.[2] It will then order her, the constructive trustee, to personally make restitution by transferring the legal title to the property to the express trustee for the benefit of Jack. As a matter of substantive law, the enrichment is unjust in that it has no justifiable basis in law and equity. Donative intent, for example, is lacking. The procedural equitable remedies are the constructive trust and the *in personam* specific performance order.[3] The substantive equitable remedy is the restitution.[4]

Now back to the Restatement (Second)'s tort of intentional interference with inheritance or gift. The wrongful inducement is fraud, duress, or "other tortious means." This tort-within-a-tort circularity is unfortunate. But it gets worse. The accompanying commentary incorrectly assumes that equity's remedy of restitution is not as capacious as it actually is, that it is limited only to situations where it is the "wrongdoer" who is unjustly enriched.[5] Not so, as we noted above in Jill's case.[6] Moreover, equity's unjust

[1] *See generally* §8.15.78 of this handbook.
[2] *See generally* §7.2.3.1.6 of this handbook.
[3] *See generally* §7.2.3.4 of this handbook.
[4] *See generally* §7.2.3.3 of this handbook.
[5] *See* Restatement (Second) of Torts §774B, cmt. e (1979).
[6] *See generally* Sacks v. Dissinger, 178 N.E.3d 388, 397–399 (Mass. 2021)

enrichment doctrine captures not only the fruits of culpability but also the fruits of innocent mistake.[7] Think the UPS package that has been mistakenly delivered to the wrong address.

All this having been said, at the margins the tort of intentional interference with inheritance or gift may be helpful in filling in some minor gaps in equity's remedial regime. Think an action in tort *against the wrongdoer* for the costs of the unjust enrichment action. Or the situation where neither the one unjustly enriched nor the enrichment itself is anywhere to be found.[8] The victim's recourse then would be an action at law for damages *against the wrongdoer*, there being no adequate remedy in equity.[9] At best, however, damages can be only an "approximation" of a victim's loss.[10] None of this marginal utility is readily discernible from a reading of the text of §774B and its accompanying commentary. The Restatement's law-equity coordination leaves much to be desired. That is why one court at least has taken the bull by the horns and declined to go the tort route unless or until all equitable remedies have been exhausted, thus standing on its head the maxim "Equity follows the law."[11]

So, why all this wheel re-inventing and absence of serious law-equity coordination? Simply put: The law schools are no longer exposing their students to critical equity doctrine, doctrine that is of profound real-world utility.[12] Torts is one of the few "doctrinal" subjects that has not been "reformed" out of the required curriculum, or out of the curriculum altogether. And as for the bar exam, forget about it.[13] It is no wonder, then, that "when modern, Realist-trained lawyers see a setback connected to antisocial conduct, they instinctively reach for tort."[14]

---

[7]*See generally* Restatement of the Law of Restitution §59 (1937).

[8]*See generally* Sacks v. Dissinger, 178 N.E.3d 388, 397–399 (Mass. 2021).

[9]*See generally* Sacks v. Dissinger, 178 N.E.3d 388 (Mass. 2021).

[10]*See* Sacks v. Dissinger, 178 N.E.3d 388, 397–399 (Mass. 2021).

[11]*See* Kinsel v. Lindsey, 526 S.W.3d 411 (Tex. 2017). *See also In re* Certification of Question of Law, 931 N.W.2d 510 (S.D. 2019). While equity generally follows the law, it does so neither slavishly nor always. *See* Graf v. Hope Bldg. Corp., 254 N.Y. 1, 9 (1930) (Cardozo, C.J.). When it comes to the tortious interference with an inheritance or gift, however, in some quarters the law has been deferring to equity altogether. *Cf.* Nelson v. Nelson, 508 P.3d 301 (Idaho 2022) (the Supreme Court of Idaho declining to adopt a new tort for intentional interference with expected inheritance). California is somewhat of an exception. *See* Gomez v. Smith, 54 Cal. App. 5th 1016 (2020) (the court employing the constructive trust, a creature of equity, to remedy, however, an injury at law, namely the tortious interference with the execution of a trust instrument).

[12]*See generally* §8.25 of this handbook. *See also* §8.15.78 of this handbook.

[13]*See generally* §8.25 of this handbook.

[14]John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 Stan. L. Rev. 335, 397 (2013).