Rescuing 'Fiduciary' Undue Influence Law in Australia? *Wu v Wu* [2024] ACTCA 8 and *Wu v Wu [No 2]* [2024] ACTCA 29

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I Case Outline

Mr and Mrs Wu were married for 55 years until Mrs Wu passed away in 2018. They had two daughters, Karen and Angela, the latter being the 'favoured' of the two. The family home, owned jointly by Mr and Mrs Wu, was in O'Malley, a suburb of Canberra. In 2009, the home was gifted[1] to Angela, who was then living abroad. At the time of the disposition, Mr Wu was 85 years old; he had a poor command of English, was extremely deferential to Mrs Wu and dependent on her for financial decisions and the management of his assets, and had no significant assets apart from the O'Malley property; he also received no independent legal or financial advice in relation to the proposed transfer.

In 2020, Mr Wu commenced proceedings for equitable relief in relation to the 2009 transfer and registration.[2] Although the bases for relief were not clearly pleaded doctrinally by counsel for Mr Wu at trial, when the matter reached the Australian Capital Territory Court of Appeal[3] it was determined that Mr Wu was relying on two alternative vitiating grounds: (1) Angela became beneficial owner of the O'Malley property as a volunteer when there had been causative 'undue influence' by Mrs Wu over Mr Wu, and so she was vulnerable to losing the benefit of the transaction based on principles expounded in authorities such as *Bridgeman v Green*[4] and *Bank of New South Wales v Rogers*;[5] and/or (2) Angela had acquired the transfer as a result of her own 'unconscionable conduct' with respect to her

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1 Although the transfer was for a stated consideration of $1.225 million, which Angela never paid, at trial it was found that the transaction was a gift.

2 *Wu v Wu* [2022] ACTSC 360.

3 *Wu v Wu* [2024] ACTCA 8 ('*Wu [No 1]*').

4 (1757) 97 ER 22.

5 (1941) 65 CLR 42.

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father, in the sense articulated by the High Court in such authorities as *The Commercial Bank of Australia Ltd v Amadio*[6] and *Stubbings v Jams 2 Pty Ltd*.[7]

In the result,[8] the Court of Appeal (Mossop, Baker and McWilliam JJ) held that Mr Wu's first claim against Angela succeeded: (1) it was established that a fiduciary-style 'relationship of ascendancy/dominion', or a 'special relationship of influence', existed between Mr and Mrs Wu, resulting from Mr Wu's lack of English proficiency, inability to read or understand complicated documents in English, and his absolute dependence on and deference to Mrs Wu's intentions in relation to decisions governing his assets and financial affairs;[9] (2) the impugned transfer to Angela, being 'so substantial, or so improvident, as to not be reasonably accounted for on the ground of [the] relationship or ordinary motives', sufficed to 'perfect' the 'presumption of undue influence in respect of the O'Malley property';[10] and (3) the presumption had not been rebutted, Angela having led no substantive evidence as to her father's independence from her mother's governing will preceding and at the time of the impugned transfer.[11] Given that conclusion, it was unnecessary for the Court to examine the merits of Mr Wu's second claim.[12] Hence, in the absence of an available defence, Angela's beneficial interest in the O'Malley property was tainted by the equities in favour of her father, regardless of whether Angela knew of or was complicit in her mother's undue influence, as she (Angela) was a third-party volunteer.[13] The Court held that there was no defence — such as laches[14] — available to Angela, and discretionary relief was granted in a manner that reflected equity's preference for achieving '"practical restitution and justice"'[15] between the respective parties, taking the interests of all parties, including the late Mrs Wu, into account. A remedial constructive trust was imposed in favour of Mr Wu in respect of 50 per cent of the O'Malley property.

While much could be said about the reasoning leading to Mr Wu's successful petition for relief, this note focuses singularly on the Court's treatment of the law of equitable undue influence in Australia. Pleasingly (from my perspective), the Court proceeded as if the traditional 'classes' of undue influence, expounded so masterfully by Dixon J in *Johnson v Buttress* ('*Johnson*'),[16] had survived the

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6 (1983) 151 CLR 447 ('*Amadio*').

7 (2022) 276 CLR 1.

8 *Wu v Wu [No 2]* [2024] ACTCA 29 ('*Wu [No 2]*').

9 Ibid [25]–[27]. The relationship was a 'fiduciary-style' one because the Court held that the level of 'deference' that Mr Wu exhibited towards his wife 'was sufficient to bring about the duty upon Mrs Wu … to act in [Mr Wu's] interests in managing or disposing of his assets or property interests': at [27].

10 Ibid [29]–[36].

11 Ibid [37]–[41].

12 Ibid [54]–[59].

13 Ibid [44]–[45].

14 *Wu [No 1]* (n 3) [124]–[130]; *Wu [No 2]* (n 8) [46]–[53].

15 *Wu [No 2]* (n 8) [63], quoting *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102, 111 (The Court).

16 (1936) 56 CLR 113 ('*Johnson*').

majority's treatment of the law in *Thorne v Kennedy* ('*Thorne*')[17] in 2017. Although I have previously argued against that prospect,[18] the Court saw things otherwise, as captured by the following two paragraphs of its first judgment:

> Following the High Court's decision in *Thorne*, reservations among academic commentary have subsequently been expressed as to the ongoing relevance in Australia of the fiduciary characteristics underpinning the doctrine (articulated in *Johnson* above) insofar as it arises from a relationship of trust and confidence between the parties. It is important to recognise that the decision in *Thorne* dealt with a particular situation, being the circumstances of a pre-nuptial agreement, and was based on a finding of actual undue influence, the source of which was excessive pressure. The alternative case based on a presumption of undue influence (discussed below), which was argued to arise from the nature of the relationship of fiancé and fiancée, was rejected. In short, the facts of *Thorne* did not call for any discussion of fiduciary characteristics underpinning the doctrine or how the potential for abuse gives rise to the presumption.
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> The facts of the present case concern whether there was a proven relationship of influence. Appreciating that there may be broader implications to be drawn from *Thorne* and the language used, but confining our consideration of the case to the limited extent that it touched upon the substantive aspect of the doctrine, we respectfully do not understand the decision to be one that sought to depart from the above authority in *Johnson*, nor one that intended to depart from fiduciary characteristics applying to certain relationships. Indeed, the plurality in *Thorne* expressly cited Dixon J in *Johnson* in referring to 'a corresponding position of dependency or trust'. In circumstances where the focus in that case was actual undue influence arising from a specific identifiable source, we do not take the absence of any discussion in *Thorne* of the fiduciary nature (and its abuse) underpinning the presumption of undue influence as an implied rejection of the previously established law set out above. There [were] no considered *dicta* in that regard.[19]

I shall respond to those observations below, but before doing so it makes sense first to examine the extent to which the Court accurately expounded the pre-*Thorne* law on equitable undue influence based, *inter alia*, on *Johnson*.

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17 (2017) 263 CLR 85 ('*Thorne*'). The 'majority', regarding undue influence, was a plurality comprising Kiefel CJ, Bell, Gageler, Keane and Edelman JJ, and Gordon J in a separate judgment (dissenting in the result on the issue). The remaining member of the Court, Nettle J, said nothing about undue influence and would have preferred the case to be tested as a claim of (lawful-act) duress.

18 Rick Bigwood, 'The Undue Influence of "Non-Australian" Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*? Part I' (2018) 35(1–2) *Journal of Contract Law* 56; Rick Bigwood, 'The Undue Influence of "Non-Australian" Undue Influence Law on Australian Undue Influence Law: Farewell *Johnson v Buttress*? Part II' (2019) 35(3) *Journal of Contract Law* 187.

19 *Wu [No 1]* (n 3) [44]–[45] (citations omitted).

II On the Basis, Operation and 'Types' of Equitable Undue Influence

The Court in *Wu* accepted the position, espoused in England since *Allcard v Skinner*,[20] and enshrined in Dixon J's profound exposition of the subject in *Johnson*, that there are 'two different bases underpinning the [equitable] doctrine [of undue influence]', signifying that 'there are two ways in which the doctrine may operate'.[21] This basically means that there are, in equitable contemplation, two 'forms' or 'types' of undue influence, which the Court dubbed 'actual' and 'presumed' undue influence, respectively.[22] Reflected here is a time-honoured distinction: equitable intervention in the name of undue influence can occur 'either on the basis that no-one should be permitted to benefit from their own wrong, or as a matter of public policy arising from a relationship of influence'.[23] Each 'basis' then maps respectively onto each 'form' of undue influence in the sense that '[a]ctual undue influence requires proof that in the particular situation, or by the deliberate contrivance of the disponee, the transaction was the outcome of such an actual influence over the mind of the disponor that it cannot be considered to be his or her free act',[24] whereas the other form rests upon a principle of 'public policy', being directed not (like the first form) at proof of 'actual wrongdoing' *inter se*, but rather '"to preventing the *possible abuse* of relations of trust and confidence"'.[25] In other words, the second form of undue influence is a category falling within the framework of fiduciary-style, risk-management regulation, the 'presumption' within that form serving as a prophylactic procedural rule against the *possible* realisation of the regulated risk, rather than its actualisation.[26] Hence, the presumption here is not genuinely 'evidential', involving instead equity's application of what Story termed 'preventive justice', 'so as to shut out the inducements to perpetrate a wrong, rather than to rely on mere remedial justice, after a wrong has been committed. By disarming the parties of all legal sanction and protection for their acts, they

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20 (1887) 36 Ch D 145 ('*Allcard*').

21 *Wu [No 1]* (n 3) [35].

22 Ibid [35], [37]. Sometimes these were referred to as different 'classes' of undue influence — 'class 1' and 'class 2' undue influence, respectively: see, eg, *Bank of Credit & Commerce International SA v Aboody* [1990] 1 QB 923, 953 (Slade LJ), approved by the House of Lords in *Barclays Bank plc v O'Brien* [1994] 1 AC 180, 189 (Lord Browne-Wilkinson) — but those labels were not employed by the Court in *Wu*. They are, however, better labels than 'actual' and 'presumed'. In *Royal Bank of Scotland plc v Etridge [No 2]* [2002] 2 AC 773, for instance, Lord Clyde regarded the labels of 'actual' and 'presumed' undue influence as terminologically inapt (as not bearing their actual meaning) and 'illogical' (as appearing to 'confuse definition and proof'): at 816 [92].

23 *Wu [No 1]* (n 3) [33], citing *Allcard* (n 20) 171 (Cotton LJ).

24 *Wu [No 1]* (n 3) [35], citing *Johnson* (n 16) 134 (Dixon J).

25 *Wu [No 1]* (n 3) [42] (emphasis added), quoting *Johnson* (n 16) 123 (Latham CJ).

26 In the Court's own words, 'the presumption [of undue influence] arises, not on the ground that any wrongful act has in fact been committed, but to prevent the relationships which existed between the parties and the influence arising from being abused': *Wu [No 2]* (n 8) [13].

suppress the temptations and encouragements, which might otherwise be found too strong for their virtue'.[27]

Importantly, the Court in *Wu* said that the basis of both forms of undue influence is identical, namely, 'protect[ing] people from the abuse of a power imbalance',[28] or '"the prevention of an *unconscientious use* of any special capacity or opportunity that may exist or arise of *affecting the alienor's will or freedom of judgment* in reference to such a matter"'.[29] Their Honours further stated that equity intervenes for undue influence not simply because of the existence of influence *inter se*, but rather because it is '"established that the person in a position of domination *has used that position* to obtain unfair advantage for himself"':[30] 'Influence will be "undue" if the donee takes improper advantage or makes "unconscientious use" ... of the relationship or opportunity for influence.'[31] Within two paragraphs of those observations, though, the Court asserted that the 'focus of the doctrine [is] on the "quality of the consent or assent of the weaker party"',[32] which seems to gesture at a completely different rationale for relief than what was just stated. For why would the 'focus' of the doctrine be different from its 'basis'?

More perplexing, however, is the Court's apparent acceptance of the proposition that (unconscientious) *use* of a dominant position must be shown to demonstrate that the relevant influence is 'undue', as this runs directly counter to their Honours' prior endorsement of the 'public-policy' (ie, preventive-justice) manner in which the second form of undue influence was said to operate.[33] Indeed, it is hard to gauge just how committed the Court was to the fiduciary account of 'presumed undue influence' because, in the course of their Honours' reasoning towards the ultimate conclusion that 'undue influence ha[d] been established' in the case,[34] the Court also stated that, upon perfection of the presumption, 'the evidential onus shift[s] to [the answering party]'.[35] Yet, under the traditional 'public policy' approach for interfering with transactions on the ground of undue influence, it matters not whether undue influence is *established* at all — merely the *risk* thereof need be established — and once that risk is established, the answering party faces a *persuasive* burden on the *separate* issue of

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27 Joseph Story, *Commentaries on Equity Jurisprudence, as Administered in England and America* (4th ed, 1846) vol 1, 280 § 258. The public policy approach in this area is discussed in detail in Rick Bigwood, 'Undue Influence as Constructive Fraud' (2019) 13(2) *Journal of Equity* 144, 150–9.

28 *Wu [No 1]* (n 3) [33], citing *Allcard* (n 20) 171 (Cotton LJ).

29 *Wu [No 1]* (n 3) [38] (emphasis in original), quoting *Johnson* (n 16) 134 (Dixon J) (emphasis added).

30 *Wu [No 1]* (n 3) [48] (emphasis added), quoting *Watkins v Coombes* (1922) 30 CLR 180, 194 (Isaacs J), quoting *Poosathurai v Kannappa Chettiar* (1919) LR 47 IA 1, 2 (Lord Shaw).

31 *Wu [No 1]* (n 3) [50].

32 Ibid [52], quoting *Amadio* (n 6) 474 (Deane J). See also *Thorne* (n 17) 118 [86] (Gordon J).

33 So, too, does the Court's apparent acceptance (*Wu [No 1]* (n 3) [50]) of Lindley MR's remarks in *Barron v Wills* [1900] 2 Ch 121, 128, where his Lordship said: 'If [the solicitor] *did in fact disregard his duty*, the consequence must follow that the transaction which is impeached cannot stand' (emphasis added).

34 *Wu [No 2]* (n 8) [43].

35 Ibid [37].

the existence of informed and free consent, *ex ante* or *ex post*. Nothing 'shifts'.[36] And while it is true that the existence of undue influence can be proved *as a fact* even in the fiduciary class of cases (including by inferential reasoning) — *Wu* itself apparently being an example — Dixon J in *Johnson* specifically warned against treating cases involving 'the presence of circumstances which might be regarded as presumptive proof of express influence' as if they 'were not governed by the presumption but depended on an inference of fact'.[37] Thus, in *Johnson*, per the majority, the impugned conveyance was set aside even though use of ascendancy or influence, by Mrs Johnson over Mr Buttress, could *not* be shown, whether directly or indirectly (as a matter of inference).[38]

III Has 'Fiduciary' Undue Influence Law been Saved from the Implications in *Thorne*?

Turning away now from those concerns just raised about the Court's articulation in *Wu* of the fiduciary approach to equitable undue influence in the so-called 'presumptive' cases, was the Court nevertheless persuasive in its stance that that approach was left untouched by *Thorne*, in particular because '*Thorne* dealt with a particular situation … and was based on a finding of actual undue influence, … [the] alternative case based on a presumption of undue influence …, which was argued to arise from the nature of the relationship of fiancé and fiancée, [being] rejected'? In other words, because 'the facts of *Thorne* did not call for any discussion of fiduciary characteristics underpinning the doctrine or how the potential for abuse gives rise to the presumption', was the *Wu* Court correct in its implication that whatever the High Court did happen to say about 'presumed undue influence' in *Thorne*, it would have, strictly speaking, been in the nature of obiter dicta (and not obiter dicta of the kind that would bind a lower court)?[39]

I must confess that, upon reading the judgments in *Thorne* when they were first delivered, it never dawned on me for a second that what was said therein about 'presumed undue influence' was not considered or intended to be complete and definitive — a position I maintain having just re-read the case for the

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[36] See Robert Flannigan, 'Presumed Undue Influence: The False Partition from Fiduciary Accountability' (2015) 34(2) *University of Queensland Law Journal* 171, 208–9; Bigwood, 'Undue Influence as Constructive Fraud' (n 27) 157–9.

[37] *Johnson* (n 16) 135.

[38] Ibid 123 (Latham CJ): 'it has not been affirmatively proved against the defendant that she exercised undue influence'; at 133–4 (Dixon J, Evatt J agreeing at 139): 'it is not possible to find enough in the evidence to establish [undue influence] as [an] affirmative [conclusion] …. [I]f positive proof is required … [of undue influence], and the case cannot rest on presumption, then … that requirement is not satisfied'); at 143 (McTiernan J): '[i]t is not possible to *infer* that notwithstanding the presumption of undue influence arising from the relationship of the parties the gift was the result of the free exercise of the donor's will' (emphasis added).

[39] On the significance of 'seriously considered dicta', see *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 151 [134] (The Court).

purposes of preparing this note. That their Honours' views might have been mistaken or based on an incorrect interpretation of the prior law (as articulated by Dixon J in *Johnson*) does not alter that stance. Granted, the views I then formed were founded not any express rejection of the previously established law — the Court in *Wu* is right that there was no discussion in *Thorne* 'of the fiduciary nature (and its abuse) underpinning the presumption of undue influence' — but whereas the Court in *Wu* was not prepared to draw inferences as to the continued relevance of the fiduciary model and approach in the presumptive cases due to the *absence* of anything specifically said on the subject in *Thorne*, my focus instead was on what the Court in *Wu* referred to as 'the broader implications to be drawn by *Thorne* and the language used'. Indeed, the question of the authoritativeness of what was said in *Thorne* about 'presumed undue influence' — ie, whether it was genuinely 'obiter' or not, and, if so, of what kind — cannot, in my respectful view, be disentangled from those broader implications found in the express language of the *Thorne* judgments. Quite apart from the plurality's (somewhat ambiguous)[40] statement in *Thorne* that the 'label of "undue influence"' is 'better seen as distinct' from the concept of 'abuse of confidence'[41] — a concept sometimes treated synonymously with *fiduciary* undue influence regulation[42] — the Court's suggestion in *Wu* that *Thorne* was a case of 'actual' rather than 'presumed' undue influence flies in the face of the *Thorne* majority's unmistakable messaging that *all* successful undue influence claims are 'actual' in the sense that it they are *proven* by the claimant on the balance of probabilities in the individual case; the labels 'actual' and 'presumed' (undue influence) simply reference the *alternative* ways a claimant may meet her burden in relation to establishing *the same thing* (ie, 'undue influence', as generically conceived of by the majority in *Thorne*). This

40 'Ambiguous' because what is cited in support of the *Thorne* plurality's statement are remarks that Dixon J made in *Yerkey v Jones* (1939) 63 CLR 649, 675 ('*Yerkey*'), but there his Honour appeared to be using the phrase 'confidence abused' in association with those relations attracting a presumption of undue influence under 'the doctrine of *Huguenin v Baseley*' ((1807) 33 ER 526) so as to *not* be distinct from that doctrine (ie, the law of undue influence). However, later in their Honours' judgment (*Thorne* (n 17) 102 [35]) the plurality refer to 'the different doctrine [than undue influence] concerning the possibility of an abuse of confidence in any relationship of intimacy', citing *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395, but in *Garcia* the concept of 'confidence' (of a wife towards her husband), as used by the High Court in that case, clearly does not carry the same connotation it does in the sorts of cases to which Dixon J was apparently referring in *Yerkey* (n 40), in connection with 'the doctrine of *Huguenin v Baseley*'.

41 *Thorne* (n 17) 99 [30].

42 The High Court has previously noted that the expressions 'relation of influence', 'relation of confidence', and 'fiduciary relation' are often used interchangeably, while also reminding us that they are not necessarily coextensive in application: *Jenyns v Public Curator (Qld)* (1953) 90 CLR 113, 132 (Dixon CJ and McTiernan and Kitto JJ). Cf *CIBC Mortgages plc v Pitt* [1994] 1 AC 200, 209 (Lord Browne-Wilkinson).

mirrors, simply and merely, the distinction commonly drawn between evidence that is 'direct' and evidence that is 'indirect', respectively.[43]

To press this point, the plurality in *Thorne* expressly acknowledged that some of the members of the High Court in *Johnson* — the majority, in fact — 'relied upon a presumption of undue influence, which is considered below';[44] but when that presumption was in fact 'considered below' — in the very next paragraph of their Honours' judgment — the presumption is presented, unambiguously, as a garden-variety, 'common-experience' operation concerned solely with *proof*, rather than prophylaxis, and that characterisation extends to all of those 'relationships' involving 'ascendency or influence', and corresponding 'dependency or trust', whether recognised or proven ad hoc.[45] And while it its true what the Court in *Wu* said about Ms Thorne's 'alternative case based on a presumption of undue influence, which was argued to arise from the nature of the relationship of fiancé and fiancée, [being] rejected' in *Thorne*, if the High Court had not rejected it as a formerly 'recognised category' of presumptive influence, the *Wu* Court would have equally been caught by the *Thorne* plurality's remarks about the forensic nature of the presumption that flows from such cases, that is, that it is 'evidential'. Again, in contrast, the 'presumption' applied by a majority of the Court in *Johnson*, being founded on a public policy, was not genuinely 'evidential' at all. Thus, while it might be understandable that the Court in *Wu* did not apprehend the decision in *Thorne* 'to be one that sought to depart from the above authority in *Johnson*, nor one that intended to depart from fiduciary characteristics applying to certain relationship', this, in my respectful view, too lightly overlooks or ignores the natural and inevitable (if perhaps unintended) consequences of what *was* deliberately stated, in an apparently considered way, by the plurality in *Thorne*. That plurality, it must be acknowledged, drew explicitly upon the majority judges' *fiduciary*-imbued judgments in *Johnson* (which is why I previously argued that the High Court's departure from *Johnson* in *Thorne* was 'implied' and '*sub silentio*').

Finally, mention might briefly be made of an additional reason for regarding *Thorne* as an implied departure from *Johnson* — and it is again a reason that can only lie in what the *Wu* Court appreciated 'may be broader implications to be drawn from *Thorne* and the language used [therein]'. The judgments of the plurality (and of Gordon J) in *Thorne* present what might be characterised as a 'leaning toward [a] modern unjust enrichment analysis [of undue influence]'[46] — an extrapolation apparently reinforced by certain members of the High Court, including two from

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43 I am not the only commentator to read *Thorne* in this way. See Kit Barker and Anna Kretovicz, 'Unjust Enrichment in Australia' [2026] *Lloyd's Maritime and Commercial Law Quarterly* 117, 154: 'the High Court in *Thorne* clearly thought … that actual and presumed undue influence are one and the same thing (just proved in different ways — through direct evidence or presumption)'.

44 *Thorne* (n 17) 101 [33].

45 Ibid 101–2 [34]. See also at 118 [84] (Gordon J) (referring to the 'presumption' as a 'method of proof').

46 Barker and Kretovicz (n 43) 154.

the *Thorne* bench, subsequently referring to 'undue influence' as an example of an 'unjust factor' for the purposes of 'restitution within the category of unjust enrichment' in Australia (where it had not previously been listed as such).[47] And while a modern 'unjust enrichment analysis' does not alone preclude resort to nuanced equitable technique, such as that evident in the judgment of Dixon J in *Johnson*, leading scholars within the restitutionary school — including those cited favourably by the plurality and Gordon J in *Thorne* — have been quick to suggest that '[i]t is less useful, even dangerous, to create a close relationship between undue influence and breach of fiduciary duty', and that 'intrusion of a complex term such as "fiduciary" can only confuse' in the current field.[48] Still, that does not affect the actual state of the law as it was authoritatively presented and applied by a majority of the members of the Court in *Johnson*, and which subsequently ought to have influenced the *Thorne* Court's framing of the law of equitable undue influence in Australia (even though *Thorne* was not itself a 'fiduciary' class of case).

IV Conclusion

As will be clear from the foregoing, I am sceptical about the *Wu* Court's scepticism about whether *Thorne* altered the prior 'fiduciary' understanding of the relationship-based undue influence cases under Australian law. Indeed, I wonder why it mattered at all for their Honours to have even raised the issue; given the manner in which the 'presumption of undue influence' was ultimately applied to the facts of the case, the 'public policy' approach endorsed by the Court in *Wu* seemed to have made no material difference to the success of Mr Wu's claim against his daughter in the case. I could, in the end, discern no close adherence to a strict, preventive-justice approach at all. Undue influence, said the Court, was 'established'; intervention was not, as in *Johnson* (per the majority), based on a public policy whereby equitable relief may be granted *regardless of* whether undue influence could be established as an affirmative conclusion on the balance of probabilities. Even assuming that the Court was right in its view that nothing that was said about presumed undue influence in *Thorne* sought to challenge *Johnson* or depart from the 'fiduciary characteristics' applying to certain relationships of influence, as described in that case, it eludes me as to what the High Court would say if ever petitioned to decide a genuine 'dependency and trust' style of case under the doctrine of 'presumed undue influence'. For a majority of the members of that Court have already described the nature and operation of the 'presumption' in terms that are unambiguously inconsistent with how the majority conceived of it in *Johnson*, and their Honours also extended that

47 See *BMW Australia Ltd v Brewster* (2019) 269 CLR 574, 645 [192] (Edelman J); *Redland City Council v Kozik* (2024) 281 CLR 202, 259 [179] (Gordon, Edelman and Steward JJ).

48 See Peter Birks and Chin Nyuk Yin, 'On the Nature of Undue Influence' in Jack Beatson and Daniel Friedman (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) 57, 91.

description, again unambiguously, to the 'relationship' cases, whether recognised or proven, while also expressly implicating the majority of the *Johnson* Court in that description. Besides admitting a misinterpretation of the majority's language and approach in *Johnson*, what room now remains for the High Court to manoeuvre on the subject? With respect, none that I can presently discern.