Undue Influence, Detecting Elder Abuse, And The Duty To Report Financial Exploitation

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I. INTRODUCTION

Elder abuse and financial exploitation is an ever increasing problem in our society. For example, on March 7, 2019, the Department of Justice announced the largest coordinated sweep of elder fraud cases to date. Coordinated law enforcement actions in the past year, resulted in criminal cases against more than 260 defendants who victimized more than 2 million Americans, most of them elderly. In each case, the offenders allegedly engaged in financial schemes that targeted or largely affected seniors. Losses are estimated to have exceeded more than $750 million.

Moreover, a recent analysis by the Consumer Financial Protection Bureau (CFPB) of Suspicious Activity Reports (SARs) related to elder financial exploitation provides the most detailed look to date at the size and scope of this issue. The Report covers SARs filings between 2013 and 2017. The Bureau analyzed 180,000 elder financial exploitation SARs filed with the Financial Crimes Enforcement Network (FinCEN) from 2013 to 2017, involving more than $6 billion. In 2017, financial institutions filed 63,500 SARs reporting elder financial abuse. Yet these SARs likely represent only a tiny fraction of the actual 3.5 million incidents of elder financial exploitation estimated to have happened that year.

This paper discusses the concept of undue influence and mental capacity: two basic issues that often come up in elder abuse situations. The paper also discusses the new durable power of attorney statutory changes as financial institutions often see elder abuse in the context of power of attorney transactions. Finally, the paper discusses the statutory duties to report incidences of financial exploitation of elderly customers and SAR reporting requirements as well as several criminal statutes that may apply to financial exploitation. The Author hopes that this paper provides Texas-specific guidance on this very important topic that impacts so many in our society.

II. UNDUE INFLUENCE

A. Introduction

The normal view of undue influence involves an actor threatening an elderly or infirm person into signing a document that he or she otherwise would not sign. One imagines the actor having control over the person and threating to not provide care or maintenance unless the document is executed. The proverbial gun to the head is the first thing that comes to mind. But undue influence, just as often, arises out of seemingly kind individuals. These are the types of actors that ingratiate themselves to the person, inserting themselves between the person and relatives, and convincing the person that the historical beneficiaries of his or her estate do not deserve the person's bounty due to deceit, fraudulent representations, misstatements, and misrepresentations. Moreover, the actors attempt to separate the individual from his or her family so that the deceit cannot be corrected. Often the person thinks that the actor is a good friend and has warm feelings toward him or her.

For example, picture an elderly woman who has nieces and nephews with whom she has a historical relationship. She has a will that leaves everything to them in equal shares. She is introduced to a handy man that initially helps her make repairs to her house. That handy man ingratiates himself into her life such that he and his wife visit her every day, and soon assist her with: 1) obtaining groceries; 2) doctor visits; 3) visits with bankers and accountants; 4) attending church with her; and 5) organizing the accomplishment of her other needs. The woman has decreasing cognitive ability and starts to abuse alcohol with the assistance of her handy man. The nieces and nephews become concerned about the woman's relationship with the handy man and start to question her about it. The handy man feels threatened by the nieces and nephews. He is rude to the nieces and nephews, interferes with visits and communications between the woman and her nieces and nephews, begins telling the woman that the nieces and nephews are only trying to get her money, are bad people who have sued others for money, and makes other derogatory

remarks that are simply not true about the nieces and nephews. The handy man then has the elderly woman sign new signature cards for bank accounts, naming him as beneficiary, and hires an attorney to draft a new will and power of attorney documents that name him as the agent and that leave all of her assets to him and his wife. The evidence shows that the woman genuinely likes the handy man and thinks that he is looking out for her best interest.

Where the actor is not seemingly unkind, can this type of conduct justify a finding of undue influence in Texas such that all of the various documents naming the handy man and his wife as beneficiaries are ineffective? The answer is maybe. Further, does a financial institution have a duty to detect and report this behavior? The answer is also maybe.

B. General Undue Influence Standards

First, it is important to understand general undue influence law. "[U]ndue influence implies the existence of a testamentary capacity subjected to and controlled by a dominant influence or power." *Rothermel v. Duncan*, 369 S.W.2d 917, 922 (Tex. 1963). When undue influence is established, the will or other document is ineffective. *Id.* "*Rothermel v. Duncan*, 369 S.W.2d 917, 919 (Tex. 1963), [is] the seminal Texas will contest case" in which the Texas Supreme Court established a three-part test to determine whether undue influence exists. *Estate of Davis v. Cook*, 9 S.W.3d 288, 292 (Tex. App.—San Antonio 1999, no pet.).To prevail on an undue influence claim, the contestant has the burden to prove (1) the existence and exertion of an influence, (2) that subverted or overpowered the person's mind at the time he or she executed the instrument, (3) so that the person executed an instrument she would not otherwise have executed but for such influence. *Truitt v. Byars*, No. 07-11-00348-CV, 2013 Tex. App. LEXIS 6705 (Tex. App.—Amarillo May 30, 2013, pet. denied). There must be some tangible and satisfactory proof of the existence of each of the three elements. *Id.* The exertion of undue influence is usually a subtle thing, and by its very nature typically involves an extended course of dealings and circumstances. *Id.* Thus, its elements may be proven by circumstantial or direct evidence.

Not every influence exerted by a person on the will of another is undue. *Rothermel*, 369 S.W.2d at 922; *Estate of Davis*, 9 S.W.3d at 293. Influence is not undue unless the free agency of the testator was destroyed and a testament produced that expresses the will of the one exerting the influence. *Rothermel*, 369 S.W.2d at 922; *Estate of Davis*, 9 S.W.3d at 293. One may request or even entreat another to execute a favorable dispositive instrument, but unless the entreaties are shown to be so excessive as to subvert the will of the maker, they will not taint the validity of the instrument with undue influence. *Rothermel*, 369 S.W.2d at 922. "Influence that was or became undue may take the nature of, but is not limited to, force, intimidation, duress, excessive importunity[,] or deception used in an effort to overcome or subvert the will of the maker of the testament and induce the execution thereof contrary to his will." *Id.*

Circumstances relied on as establishing the elements of undue influence must be of a reasonably satisfactory and convincing character, and they must not be equally consistent with the absence of the exercise of such influence. *Estate of Davis*, 9 S.W.3d at 293. "This is so because a solemn testament executed under the formalities required by law by one mentally capable of executing it should not be set aside upon a bare suspicion of wrongdoing." *Rothermel*, 369 S.W.2d at 922-23.

Regarding the standards for reviewing evidence of undue influence, all of the circumstances shown or established by the evidence should be considered; and even though none of the circumstances standing alone would be sufficient to show the elements of undue influence, if when considered together they produce a reasonable belief that an influence was exerted that subverted or overpowered the mind of the testatrix and resulted in the execution of the testament in controversy, the evidence is sufficient to sustain such conclusion. *Rothermel*, 369 S.W.2d at 922. No two suits alleging undue influence are the same.

Rothermel, 369 S.W.2d at 921. The outcome of each case depends on its own unique facts. *Pearce v. Cross*, 414 S.W.2d 457, 462 (Tex. 1966); *Fillion v. Troy*, 656 S.W.2d 912, 915 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.). Undue influence is seldom provable by direct testimony. *Long*, 125 S.W.2d at 1036; *Green v. Green*, 679 S.W.2d 640, 644 (Tex. App.—Houston [1st Dist.] 1984, no writ). It may be proven by direct or circumstantial evidence. *Rothermel*, 369 S.W.2d at 922; *Fillion*, 656 S.W.2d at 915. Even if no one circumstance standing alone suffices to show undue influence, several may do so together. *Rothermel*, 369 S.W.2d at 922. Circumstantial evidence must do more than raise suspicion though. *Id.* at 923. The distinction between evidence that suffices to show undue influence and that which is merely suspicious defies articulation; it essentially is a matter of degree. *Boyer v. Pool*, 154 Tex. 586, 280 S.W.2d 564, 566 (Tex. 1955). But if the circumstances are equally consistent with undue influence and its absence, then undue influence is unproven. *Rothermel*, 369 S.W.2d at 922.

To satisfy the first element, the party contesting a document must show that an influence existed and was exerted. *Rothermel*, 369 S.W.2d at 922. The focus is on the opportunities for the exertion of the alleged influence, the circumstances of the drafting and execution of the will, the existence of a fraudulent motive, and whether the testator was habitually under the control of another. *Id.* at 923. The exertion of influence, however, cannot be inferred from opportunity alone, such as might result from taking care of the testator or seeing to her needs. *Id.* There must be proof showing both that the influence existed and that it was exerted. *Id.*

To satisfy the second element, the contesting party must show that the exertion of the influence subverted or overpowered the mind of the testator at the time she signed the will. *Id.* at 922. The focus of this element is on the testator's state of mind and evidence relating to her ability to resist or susceptibility to the influence of another, such as mental or physical infirmity. *Id.* at 923.

Where there is competent evidence of the existence and exercise of undue influence, the issue as to whether undue influence was effectually exercised necessarily turns the inquiry and directs it to the state of the testator's mind at the time of the execution of the testament, since the question as to whether free agency is overcome by its very nature comprehends such an investigation. *Id.* at 923. "Words and acts of the testator may bear upon his mental state." *Id.* "Likewise, weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in establishing this element of undue influence." *Id.* But evidence that a testator was susceptible to influence or incapable of resisting it does not prove that her free will was in fact overcome when the will was made. *Id.; see, e.g., Guthrie*, 934 S.W.2d at 832.

"[T]he establishment of the existence of an influence that was undue is based upon an inquiry as to the nature and type of relationship existing between the testator, the contestants[,] and the party accused of exerting [the] influence." *Rothermel*, 369 S.W.2d at 923. Similarly, establishment of the exertion of such influence is generally predicated upon an inquiry about the "opportunities existing for the exertion of the type of influence or deception possessed or employed, the circumstances surrounding the drafting and execution of the testament, the existence of a fraudulent motive, and whether there has been an habitual subjection of the testator to the control of another." *Id.* Close relations or the provision of care standing alone do not suffice to show undue influence. *See, e.g., Guthrie v. Suiter*, 934 S.W.2d 820, 832 (Tex. App.—Houston [1st Dist.] 1996, no writ); *Evans v. May*, 923 S.W.2d 712, 715 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

To meet the third element, the contesting party must show that the testator would not have made the challenged will but for the influence. *Rothermel*, 369 S.W.2d at 923. In general, this element focuses on whether the will is unnatural in its disposition of property. *Id.* at 923. A disposition may be unnatural, for example, if it excludes a testator's natural heirs or favors one

heir at the expense of others who ordinarily would receive equal treatment. *Long v. Long*, 133 Tex. 96, 125 S.W.2d 1034, 1036 (Tex. 1939). Whether a particular disposition is unnatural, however, usually is for the factfinder to decide based on the circumstances. *Craycroft v. Crawford*, 285 S.W. 275, 278-79 (Tex. 1926). The disinheritance of close relatives or loved ones is not necessarily an unnatural disposition. *See, e.g.*, *Guthrie*, 934 S.W.2d at 832 (exclusion of testator's only living son from will not unnatural given strained and distant relationship between him and his mother). But a testator's preference for one heir over others of an equal or similar degree of kinship may be unnatural if the record does not disclose a reasonable basis for the preference or contains proof that calls the preference into question or discredits it. *Curry v. Curry*, 153 Tex. 421, 270 S.W.2d 208, 213 (Tex. 1954); *Rothermel*, 369 S.W.2d at 923-24; *Craycroft*, 285 S.W. at 278-79.

The *Rothermel* Court noted that a factfinder may not rely solely on the fact that a testator prefers one close relative over others as evidence of undue influence unless there is no reasonable explanation for the preference. *Id.* at 923-24. But it does not follow from this conclusion that the existence of a reasonable explanation for the testator's disposition of property bars a jury from finding that the will's disposition of property was unnatural based on other circumstances. For any explanation proffered, the jury may pass upon its adequacy and attribute to the circumstance and its explanation such weight as may be thought proper, having in view all other relevant evidence. *In re Estate of Johnson*, 340 S.W.3d 769, 783-84 (Tex. App.—San Antonio 2011, pet. denied).

In particular, fact-finders should consider the following ten factors when determining the existence of undue influence: (1) the nature and type of relationship existing between the testator, the contestants, and the party accused of exerting such influence; (2) the opportunities existing for the exertion of the type or deception possessed or employed; (3) the circumstances surrounding the drafting and execution of the testament; (4) the existence of a fraudulent motive; (5) whether there had been a habitual subjection of the testator to the control of another; (6) the state of the testator's mind at the time of the execution of the testament; (7) the testator's mental or physical incapacity to resist or the susceptibility of the testator's mind to the type and extent of the influence exerted; (8) words and acts of the testator; (9) weakness of mind and body of the testator, whether produced by infirmities of age or by disease or otherwise; (10) whether the testament executed is unnatural in its terms of disposition of property. *In re Estate of Graham*, 69 S.W.3d 598, 609-10 (Tex. App.—Corpus Christi 2001, no pet.) (citing *Rothermel*, 369 S.W.2d at 923). The first five factors address the first element of undue influence (i.e., whether such influence existed and was exerted with respect to the testament at issue); the next four factors concern the second element (i.e., whether the testator's will was subverted or overpowered by such influence); and the tenth factor is relevant to the third element (i.e., whether the testament would have been executed but for such influence). *Rothermel*, 369 S.W.2d at 923.

C. Burden of Proof

Generally, the party asserting undue influence has the burden to establish that claim. However, where there is a formal or informal fiduciary relationship between the testator and the beneficiary, there may be a presumption of undue influence, which then shifts the burden onto the defendant to prove he or she did not engage in undue influence. *See, e.g.*, *In re Estate of Pilkilton*, No. 05-11-00246-CV, 2013 Tex. App. LEXIS 1080, at *3 (Tex. App.—Dallas Feb. 6, 2013, no pet.) (mem. op.) (citing *Spillman v. Spillman's Estate*, 587 S.W.2d 170, 172 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *Price v. Taliaferro*, 254 S.W.2d 157, 163 (Tex. Civ. App.—Fort Worth 1952, writ ref'd n.r.e.)); *Rounds v. Coleman*, 189 S.W. 1086, 1089 (Tex. Civ. App.—Amarillo 1916, no writ) ("Where an antecedent fiduciary relation exists, a court of equity will presume confidence placed and influence exerted."); *see also Quiroga v. Mannelli*, No. 01-09-00315-CV, 2011 Tex. App. LEXIS 1959, at *12 (Tex. App.—Houston [1st Dist.] Mar. 17, 2011, no pet.) (explaining that the person challenging the validity of the

instrument generally bears the burden of proving elements of undue influence, but noting that "[i]n some cases involving confidential or fiduciary relationships, . . . the burden shifts to the person receiving the benefit to prove the fairness of the transaction"). Such a rebuttable presumption shifts the burden of producing evidence to the party against which it operates. *Hot-Hed, Inc. v. Safehouse Habitats (Scotland), Ltd.*, 333 S.W.3d 719, 730 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Long v. Long*, 234 S.W.3d 34, 37 (Tex. App.—El Paso 2007, pet denied); *All Am. Builders, Inc. v. All Am. Siding, Inc.*, 991 S.W.2d 484, 489 (Tex. App.—Fort Worth 1999, no pet.) (citing *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 359 (Tex. 1993)).

There is authority that the presumption of unfairness is not a super presumption; but just a normal presumption. *Fielding v. Tullos*, No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136, 2018 WL 4138971 (Tex. App.—Beaumont Aug. 20, 2018, no pet.). The court held that the presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifted the ultimate burden of proof of unfairness:

> Fielding had the burden of establishing that a fiduciary relationship existed between Tullos and Charles. Once a contestant presents evidence of a fiduciary relationship, a presumption of undue influence may arise and the other party then bears the burden to come forward with evidence to rebut the presumption. Such a rebuttable presumption shifts the burden of producing evidence to the party against which it operates. Once evidence contradicting the presumption has been offered, the presumption is extinguished. *Id*. The case then proceeds as if no presumption ever existed. A rebuttable presumption does not shift the ultimate burden of proof. The Plaintiff acknowledges the Estate did not state a claim for breach of a fiduciary duty, however the Plaintiff argues that a fiduciary relationship existed between Charles and Tullos, the effect of which is to shift the burden of proof onto Tullos to disprove undue influence. Assuming without deciding that Tullos owed Charles a fiduciary duty, it would not shift the ultimate burden of proof in the case to Tullos, but it would invoke the application of a rebuttable presumption. Tullos could rebut the presumption by coming forward with evidence showing the fairness of the transaction. If Tullos's summary judgment evidence contradicted the presumption, the presumption was extinguished. Plaintiff retained the ultimate burden of proof on her claims.

Id. (internal citation omitted). *See also Cardona v. Cardona*, No. 09-19-00118-CV, 2020 Tex. App. LEXIS 3644 (Tex. App.—Beaumont December 2, 2019, no pet.); *Lee v. Kline*, No. 14-98-00268-CV,2000 Tex. App. LEXIS 290, 2000 WL 19227 (Tex. App.—Houston [14th Dist.] Jan. 13, 2000, pet. denied) (after defendant offered evidence of fairness, the presumption disappeared and the defendant had no duty to obtain a jury finding on fairness).

In *Estate of Grogan*, the court seemed to equate the presumption of unfairness with the presumption of undue influence:

> This Court has not expressly applied this presumption in the context of a will contest, though we have recognized that "Texas appellate courts have held that when a fiduciary transacts with the principle [sic] or accepts a gift or bequest from the principal, a burden is placed on the fiduciary to demonstrate the

> fairness of the transaction." Nevertheless, the presumption is rebuttable. "Once evidence contradicting the presumption has been offered, the presumption is extinguished," and "[t]he case then proceeds as if no presumption ever existed." In other words, the rebuttable presumption shifts only the burden of production and "does not shift the ultimate burden of proof."

595 S.W.3d 807 (Tex. App.—Texarkana 2019, no pet.) (internal citations omitted).

At least one court has disagreed with these opinions and held that the presumptions are the same and that it is super presumption. In *In re Estate of Klutts*, the court held:

> While the Beaumont court in *Fielding* did hold that the presumption is a rebuttable presumption that is extinguished with the offering of contrary evidence, not one that shifted the ultimate burden of proof of unfairness, none of the cases cited in Fielding regarding this burden-shifting proposition involved undue influence in a fiduciary self-dealing situation. Accordingly, we are unpersuaded by Michael's argument.
>
> To the contrary, *Danford* and case law from the supreme court and other courts of appeals reflect that in situations involving self-dealing in fiduciary or confidential relationships, a presumption of unfairness arises that shifts both the burden of production and the burden of persuasion to the fiduciary seeking to uphold the transaction. *See Moore*, 595 S.W.2d at 509; *see also Stephens Cty. Museum, Inc. v. Swenson*, 517 S.W.2d 257, 260 (Tex. 1974) (observing that when a fiduciary relationship existed between sisters and their brother, who was operating under their power of attorney and who was also a director of the museum to which the sisters had made a contribution that they later sought to set aside, "[u]nder such conditions, equity indulges the presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity and benefits of the transaction that it is fair and reasonable"); *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964) (noting that after respondent "established that the conveyance was executed and delivered during the existence of the attorney-client relationship, the burden was on petitioner to show that his acquisition of the interest conveyed by the deed was fair, honest[,] and equitable"); *Int'l Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 576 (Tex. 1963) ("Contracts between a corporation and its officers and directors are not void but are voidable for unfairness and fraud with the burden upon the fiduciary of proving fairness."); *McAuley v. Flentge*, No. 06-15-00051-CV, 2016 Tex. App. LEXIS 6039, 2016 WL 3182667, at *7 (Tex. App.—Texarkana June 8, 2016, pet. denied) (mem. op.) (citing *Swenson*, 517 S.W.2d at 260; Archer, 390 S.W.2d at 740); *Jordan v. Lyles*, 455 S.W.3d 785, 792 (Tex. App.—Tyler 2015, no pet.) (op. on reh'g) ("Even in the case of a gift between parties with a fiduciary relationship, equity indulges the

> presumption of unfairness and invalidity, and requires proof at the hand of the party claiming validity of the transaction that it is fair and reasonable."). Thus, we decline Michael's invitation to follow *Fielding*.

No. 02-18-00356-CV, 2019 Tex. App. LEXIS 11063 (Tex. App.—Fort Worth December 19, 2019, settled by agr.). So, Texas currently has authority that the presumption of unfairness is a super presumption and some authority that it is just a regular presumption.

D. Acceptance of the Benefits Defense

In *In the Estate of Johnson*, a child of the decedent accepted over $143,000 from the decedent's estate and then decided to challenge the will due to mental capacity and undue influence. No. 20-0424, 2021 Tex. LEXIS 426 (Tex. May 28, 2021). The trial court ruled that the child could not accept a benefit under the will and then challenge the will and dismissed the child's claim. The court of appeals reversed, holding that the child did not receive anything that the child would not also receive if there was no will, and therefore, she was not inconsistent and was not estopped from bringing her will contest. The court held that the executor "failed to satisfy her burden, as the Will's proponent, by failing to demonstrate that [MacNerland] accepted greater benefits than those to which she was entitled under the Will or intestacy laws." *Id.* The Texas Supreme Court accepted the will proponent's petition for review and reversed the court of appeals.

The Supreme Court held that the contestant first had the burden to prove that he or she had a sufficient interest in the estate. Once the contestant meets that burden, the burden shifts to the will's proponent to provide evidence of an affirmative defense to preclude the contestant from proceeding with his or her claim. An affirmative defense that the will's proponent can raise is the acceptance-of-benefits doctrine. The Court describes that defense as follows:

> The acceptance-of-benefits doctrine bars a party from contesting the validity of a will while enjoying its benefits. It arises out of equity's aversion to a claimant who seeks to exploit irreconcilable positions. Equity does not permit the beneficiary of a will to grasp benefits under the will with one hand while attempting to nullify it with the other. A contestant may rebut the doctrine's applicability by showing that she did not accept the benefit through the will. The law does not deprive a contestant of standing when she otherwise has a present legal right to the benefit. That is, if the contestant is otherwise presently entitled to the accepted benefit, then her acceptance of it is not inconsistent with suing to set aside the will. For example, a contestant who accepts a bank account payable to the contestant upon the decedent's death or as an assertion of her interest in a community estate does not act inconsistently with a will contest because she does so through means other than the will. In such a case, there is no inconsistent position justifying estoppel because the contestant does not seek to nullify the will while she simultaneously enjoys its benefits.

Id. The Court then rejected the theory that "a will contestant may presently accept benefits under the will based on a hypothetical claim to greater benefits should a court declare it invalid." *Id*. The Court stated:

> We rejected the idea more than sixty years ago in *Wright v. Wright*. As we explained in that case, the test for determining whether a contestant's

> acceptance of benefits estops her from bringing a will contest "does not depend upon the value of the benefits," "[n]or is it to be determined by comparing them with what the statutes of descent and distribution would afford the beneficiary in the absence of a will." Rather, the doctrine asks whether the contestant has an existing legal entitlement to these benefits other than under the will. If there is no existing entitlement save for the testator's bequest, then the contestant's acceptance of it is inconsistent with a claim that the will is invalid.

Id. The Court also stated that this bright-line test would not harm a beneficiary that accepts a benefit without sufficient knowledge of the facts:

> MacNerland argues that an opportunistic executor could offensively deny a would-be will contestant's claim by partially distributing the estate to an unwitting beneficiary to avoid a will contest. The doctrine sufficiently accounts for this concern, however, by requiring that a beneficiary voluntarily accept the benefit. If a beneficiary or devisee lacks knowledge of some material fact at the time of acceptance, she may take steps to reject the benefit. MacNerland did not attempt to return the mutual fund account to the estate or assert in this case that her acceptance of the account was involuntary.

Id. The Court, thus, reversed the court of appeals and affirmed the trial court's dismissal of the suit.

E. Recent Undue Influence Cases

In *Dillon v. King*, one sister contested their father's will and codicil and also asserted other claims against her sister. No. 05-20-00215-CV, 2022 Tex. App. LEXIS 2991 (Tex. App.—Dallas May 4, 2022, no pet. history). In 2010, the father executed a will leaving everything equally to his two daughters. Thereafter, he moved to Texas to be near the contestant. The contestant then accessed the father's bank account. The father told Texas Adult Protective Services that he allowed her to use the account but that she no longer had access to it. Later, the father signed a new codicil, leaving everything to the applicant. After a bench trial, the trial judge admitted the will and codicil to probate and ordered the contestant to take nothing on her other claims. On appeal, the appellate court discussed many different issues.

The court described the standards for mental capacity and undue influence as follows:

> The matters in question in this case are Culpepper's testamentary capacity and whether he executed the codicil because of undue influence by King. A testator has testamentary capacity when he has sufficient mental ability to understand he is making a will, the effect of making a will, and the general nature and extent of his property. In re Estate of Blakes, 104 S.W.3d 333, 336 (Tex. App.—Dallas 2003, no pet.). He must also know the natural objects of his bounty and the claims upon them, and he must have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to form a reasonable judgment about them. Id. In a will contest, the pivotal issue is whether the testator had testamentary capacity on the day the will was executed, but evidence of the

> testator's state of mind at other times can be used to prove his state of mind on the day the will was executed, provided that the evidence demonstrates that a condition affecting his testamentary capacity was persistent and likely present at the time the will was executed. *Id.*
>
> To set a will aside because of undue influence, a contestant must prove (1) the existence and exertion of an influence (2) that subverted or overpowered the testator's mind at the time he executed the instrument (3) so that the testator executed an instrument he would not otherwise have executed but for such influence.

Id.

The contestant challenged the introduction of expert evidence by the applicant on the basis that the expert was not qualified. The court of appeals affirmed:

> To testify as an expert, a witness must be qualified "by knowledge, skill, experience, training, or education," such that his or her testimony will assist the trier of fact. Tex. R. Evid. 702. This means that the expert must possess special knowledge as to the very matter on which the expert proposes to give an opinion…
>
> Dillon argues that Cassius was not qualified to testify about Culpepper's capacity for several reasons. Cassius did not attend medical school or take any courses in medical science. At the time of trial, he did not have his Ph.D., was not a forensic psychologist, and did not practice forensic psychiatry. He did not regularly treat people with dementia. He did not know the meaning of all of the terms in Culpepper's medical records, and he was unfamiliar with at least some of Culpepper's medications.
>
> The question before us is whether the trial judge acted unreasonably in concluding that Cassius possessed special knowledge on the subject on which he proposed to give an opinion—Culpepper's mental abilities when he executed his will and codicil. See Broders, 924 S.W.2d at 152-53. We conclude that she did not. Cassius testified that he had five years of post-graduate education in forensic psychology and that he would receive his Ph.D. in the field "any minute now." His Ph.D. thesis concerned testamentary-capacity proceedings. And he had previously done three forensic autopsies related to dementia. Given Cassius's training and experience, we conclude that the trial judge did not abuse her discretion by concluding that Cassius met the minimum qualifications to be permitted to testify about Culpepper's mental abilities when he executed the will and codicil.

Id. The court held that the expert's testimony on the mini mental status exam was admissible:

> First, Dillon argues that Cassius's opinion that Culpepper possessed sufficient capacity to sign the codicil is unreliable because it was based in part on Cassius's view of a Folstein Mini Mental Status Examination (MMSE)

> performed on Culpepper by his physician, Dr. Ahn. Cassius opined that an MMSE is lacking in some areas, such as "executive functioning," and he elaborated that "[t]here is poor content validity to make an interpretation based on somebody's executive functioning with the MMSE exam." Dillon argues that Cassius's view is unreliable because Dillon's expert witness, Dr. Lisa Clayton, opined that Culpepper's MMSE score, together with his MRI and EEG results, placed him in the moderate stage of dementia, during which he would have had "basically no executive functioning." We disagree with Dillon's argument. We see nothing in the record squarely contradicting Cassius's view of MMSE results, much less establishing that his view is unreliable. Clayton herself testified that an MMSE result, in and of itself, is not enough to support a conclusion that someone has dementia, and she called the MMSE "kind of a rudimentary test." As for Clayton's conclusion that a person with moderate dementia would have basically no executive functioning, her testimony may conflict with Cassius's, but conflicting expert testimony does not necessarily show that one expert's opinion is unreliable.

Id. The court also held that the expert had sufficient foundational data to support his opinions: "opinions about a deceased person's mental capacity can[] reliably be based on a combination of medical records and witness interviews…" *Id*.

The court also affirmed the admission of expert evidence regarding undue influence:

> In Cassius's expert report, which was admitted into evidence, Cassius said that the IDEAL model, developed by Dr. Bennett Blum, M.D., is one of the best-known models for assessing potential undue influence. The model recommends consideration of five factors in financial cases: (1) isolation from pertinent information, friends, relatives, or usual advisors; (2) dependence, whether physical, emotional, or informational; (3) emotional manipulation and/or exploitation of vulnerability; (4) acquiescence because of the first three factors; and (5) financial loss. Cassius considered the information he had about Culpepper in light of these factors in reaching his conclusion that it was unlikely that King had undue influence on Culpepper.
>
> On appeal, Dillon argues that King did not support the validity of the IDEAL model with evidence of peer review or publication, that the model appears to rely heavily on subjective interpretation, that there was no evidence about the technique's potential rate of error, and that there was less than a scintilla of evidence to show that the IDEAL model has been generally accepted as valid by relevant professionals. Moreover, Clayton testified that she was not familiar with the IDEAL model.
>
> Dillon's critique of the record support for the IDEAL model's reliability has some force.

> However, assuming without deciding that the trial judge abused her discretion by admitting Cassius's undue-influence opinion, we conclude that admission of this evidence did not probably cause the rendition of an improper judgment. *See* Tex. R. App. P. 44.1(a). A successful challenge to an evidentiary ruling usually requires the complaining party to show that the judgment turns on the particular evidence admitted or excluded. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753-54 (Tex. 1995). This determination requires review of the entire record. Id. at 754. Here, the IDEAL model, as described by Cassius, amounted to little more than common sense—people who are isolated, dependent, and subjected to manipulation or exploitation are more susceptible to improper influence. And Cassius's specific undue-influence conclusion in this case, which was based on witness descriptions of Culpepper, is unlikely to have swayed the trial judge more than the witness descriptions themselves did.

Id.

The court also affirmed the finding that the father had mental capacity to execute the codicil. The court relied on medical records, which mentioned dementia but stated that the father remained stable. The court reviewed the testimony of both parties' experts, who had differing views of the father's mental capacity. The court also reviewed law witness testimony, which showed that the father knew who he was and was able to communicate effectively with other and travel by himself around the time of the executed codicil. The court held that this evidence was sufficient to contradict the contestant's expert testimony and was sufficient to support the trial court's finding of capacity to execute the codicil.

The court also reviewed the father's ability to execute a power of attorney document, naming the applicant. The court stated that the contestant had the burden of proof to prove that the father was not mentally competent and also held:

> Documents executed by a person who lacks sufficient mental capacity may be avoided. *Anderton v. Green*, 555 S.W.3d 361, 371 (Tex. App.—Dallas 2018, no pet.). To have mental capacity, a person must have sufficient mind and memory to understand the nature and effect of his act at the time of the document's execution. Id. Capacity may be assessed by considering factors such as (1) the person's outward conduct, (2) preexisting external circumstances that tend to produce a special mental condition, and (3) the person's mental condition before and after the relevant point in time, from which his mental capacity or incapacity may be inferred. Id. Expert testimony of capacity to contract is not required because the requisite proof may reside within the common knowledge and experience of laypersons. *Id*.
>
> Dillon argues that there is no evidence or insufficient evidence that Culpepper had capacity to contract when he executed a power of attorney in February 2012 and a beneficiary-designation form in October 2012. Because Dillon bore the burden of proof on this capacity issue, she must show that she conclusively proved that Culpepper lacked capacity

on those occasions or that the trial judge's contrary finding was contrary to the great weight and preponderance of the evidence. *See PopCap Games, Inc.*, 350 S.W.3d at 710, 722.

Dillon argues that the evidence conclusively or overwhelmingly supported her incapacity-to-contract defense because (1) her expert, Clayton, specifically testified that Culpepper lacked capacity to contract and (2) lay-witness testimony could not controvert Clayton's opinion testimony. We disagree with Dillon's argument. Even uncontroverted expert opinion testimony is not conclusive unless the subject is one for experts or skilled witnesses alone. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986). Capacity to contract is not a subject for which expert testimony is required. See Anderton, 555 S.W.3d at 371. Thus, Clayton's testimony that Culpepper lacked capacity to contract was not conclusive evidence of that fact, and the trial judge was free to consider the entirety of the evidence and to reject Clayton's opinions. *See McGalliard*, 722 S.W.2d at 697 (factfinder is entitled to disbelieve witnesses and to accept lay testimony over that of experts). Moreover, the lay testimony from Rockwell, King, and Roderick Dillon about Culpepper's behavior during the relevant time frame is also relevant evidence the trial judge could consider and credit. For example, although Clayton opined that Culpepper most probably lacked capacity to buy his house in 2011, Roderick Dillon testified that Culpepper's decision to buy the house was "a logical, fine decision" and that no one brought up any capacity issues at that time. Additionally, there was evidence that in September 2012 Dillon told TAPS investigator Rockwell that Culpepper was not impaired even though he had dementia. In sum, we reject Dillon's legal-sufficiency challenge because the evidence does not establish as matter of law that Culpepper lacked capacity to contract at the relevant times.

Id.

In *Neal v. Neal*, the decedent died leaving three sons. No. 01-19-00427-CV, 2021 Tex. App. LEXIS 2051 (Tex. App.—Houston [1st Dist.] March 18, 2021, no pet.). She had several wills in the last five years of her life, but her final will left all of her estate to one son. The other sons alleged that the last will was invalid due to mental incompetence and due to undue influence. The trial court found against the contestants and admitted the will to probate, and the contestants appealed.

The court of appeals first reviewed the law regarding mental competence to execute a will:

> A testator has testamentary capacity when, at the time of the execution of the will, she possesses sufficient mental ability to (1) understand the business in which she was engaged, the effect of making the will, and the general nature and extent of her property; (2) know her next of kin and the natural objects of her bounty; and (3) have sufficient memory to assimilate the elements of executing a will, to hold those elements long enough to perceive their obvious relation to each other, and to form a reasonable judgment as to them.

> The key to this inquiry is whether the testator had testamentary capacity on the day the will was executed. This may be inferred from the testimony of lay and expert witnesses concerning their observations of the testator's conduct prior or subsequent to the execution of the will. Evidence that the testator was incompetent at other times can be used to establish a lack of testamentary capacity on the day the will was executed if the evidence "demonstrates that the condition persists and 'has some probability of being the same condition which obtained at the time of the will's making.'"

Id. The court reviewed the evidence and noted that the decedent had been diagnosed with dementia: "These records demonstrate that Florene had a stroke in July 2011, and she was subsequently diagnosed with cerebrovascular disease and dementia. The records, from both her primary care physician and a home healthcare agency, reflect that Florene had cognitive deficits, including hallucinations, confusion, and problems with her short-term memory." *Id.* However, the records also indicated that the decedent had some improvement: "The records also reflect that Florene's condition improved throughout August and September 2011, that she practiced journaling and used calendar aids to help with her short-term memory problems, and that, by September 2011, she was no longer considered 'homebound.' A notation on a record from September 23, 2011, states, 'vascular dementia stable at this time.'" *Id*. The new will was executed in January of 2012. Medical records from mid-2012 indicated that the decedent's condition worsened and that she was having hallucinations. Multiple witnesses testified that during this entire time period that the decedent did not have mental competence to understand the complexities of a will. However, the applicant son testified that she did have competence in January of 2012. He admitted that she had mental competence issues before that time, but that she had improved and was making her own decisions at the time of the will. The attorney that drafted the will also testified that the decedent had capacity. The court of appeals held that the evidence was sufficiently contradictory such that it could not overrule the trial court's decision to admit the will.

The court of appeals then discussed the undue influence ground. The court described the law thusly:

> The party contesting the execution of a will generally bears the burden of proving undue influence. "The contestant must prove the existence and exertion of an influence that subverted or overpowered the testator's mind at the time she executed the testament such that the testator executed a will that she otherwise would not have executed but for such influence." Not every influence exerted by a person onto the will of another is undue. An influence is not considered undue "unless the free agency of the testator is destroyed and a testament is produced that expresses the will of the one exerting the influence rather than the will of the testator."

Id. However, the court noted that a fiduciary relationship between the applicant and the decedent created a presumption of undue influence:

> A will contestant may raise a presumption of undue influence by introducing evidence that a fiduciary relationship existed between the testator and the will proponent. If the contestant's challenge to the will is based on a purported confidential or fiduciary relationship between

> the testator and the will proponent, the contestant bears the burden to establish such a relationship. "A power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law." Once the contestant presents evidence of a fiduciary relationship, a presumption of undue influence arises and the will proponent bears the burden to produce evidence showing an absence of undue influence. This presumption is rebuttable and shifts only the burden of production; it does not shift the ultimate burden of proof. Once evidence contradicting the presumption has been introduced, the presumption is extinguished, and the case proceeds as if no presumption ever existed.

Id.

The court noted that the decedent executed a power of attorney document at the same time as the new will. The court questioned whether this simultaneous execution would be sufficient to create a presumption of undue influence. In any event, the court held that the applicant had sufficient evidence of no undue influence so as to shift the burden on that issue back to the contestants:

> David presented both his testimony and Ferringer's testimony that Florene was the one who contacted Ferringer about revising her will in January 2012. Ferringer testified that Florene called her and discussed the changes that she wanted made to her will. She also testified that Florene told her that she did not "want any of her family to be involved with her decisions on what she was doing with her estate." The record contains no evidence that David requested that Florene change her will, or that he was otherwise involved in the drafting and preparation of the January 2012 will. Ferringer's testimony is evidence rebutting any presumption of undue influence. This evidence therefore extinguishes the presumption of undue influence arising out of any fiduciary relationship existing between Florene and David. We conclude that Randall, as the will contestant, retained the ultimate burden of proof to demonstrate undue influence.

Id. The court then concluded that the contestants did not meet their burden to prove that the decedent executed a will that she otherwise would not have executed but for the undue influence of the applicant. The court noted that evidence that the decedent was not in good physical or mental health and that she changed her will to cut out two of her three children was not sufficient to prove undue influence. The court held:

> At most, Randall presented evidence that due to Florene's mental and physical condition, David, as the person primarily responsible for Florene's care, had the opportunity to exercise undue influence over Florene. Mere opportunity to exercise undue influence is not enough; there must be evidence that that influence was actually exerted upon the testator with respect to the testamentary document in question. The record contains no evidence—beyond speculation on the part of Randall, Lorraine, and Louise—that David actually exercised undue influence over Florene in order to procure execution of the January 2012

> will. There is no evidence in the record that David ever requested that Florene change her will from the April 2011 will—which included specific bequests for David but did not leave any portion of the residuary estate to him due to his obtaining full ownership of the Pflugerville property—to the January 2012 will, which left the entirety of Florene's estate to David. Furthermore, there is no evidence that David played any role in Florene's decision to change her will or in preparation of the January 2012 will. As stated above, both David and Ferringer testified that Florene was the one who contacted Ferringer about changing her will. David was not present at the time or at the time of the new will's execution. Considering all the evidence in a neutral light, we conclude that the probate court's implied finding that no undue influence occurred in connection with execution of the January 2012 will was not against the great weight and preponderance of the evidence.

Id. The court of appeals affirmed the trial court's judgment admitting the contested will to probate.

In *In re Estate of Klutts*, a son held his mother's power of attorney when he assisted in securing a new 2008 will, which enhanced his share of the estate. No. 02-18-00356-CV, 2019 Tex. App. LEXIS 11063 (Tex. App.—Fort Worth December 19, 2019, no pet.). Siblings attempted to probate an earlier will and alleged that the new will was the product of undue influence. The son filed a traditional and no-evidence motion for summary judgment on the undue influence claim, which the trial court granted. The siblings appealed.

The court of appeals reversed the trial court's grant of a traditional summary judgment for the son. The court held that the son's proof did not fall within the category of conclusive proof that allowed only one logical inference:

> To discharge his summary judgment burden, Michael offered four witnesses—Donald Barley, Sandra Barley, Marti Luttrall, and Linda Solomon—who each attested to Wynell's capacity at the time the 2008 Will was executed. However, because a factfinder was not bound to believe Michael's four witnesses, his proof does not fall within the category of conclusive proof that allows only one logical inference. Nor does any admission as to Wynell's testamentary capacity appear in this record. Because Michael failed to present conclusive proof of Wynell's testamentary capacity, he fell short of the legal standard that would entitle him to a traditional summary judgment, and the burden never shifted to Jan, Donna, and Paula to produce any evidence at all. Accordingly, the trial court erred when it granted Michael's motion for traditional summary judgment, and we sustain Jan, Donna, and Paula's third issue.

Id.

In *In re Estate of Russey*, the decedent was going through a divorce and signed a will. No. 12-18-00079-CV, 2019 Tex. App. LEXIS 1536 (Tex. App.—Tyler February 28, 2019, no pet. history). She died before the divorce was finalized. Her children took their father's side on some issues. During this time, a sister of a friend of the decedent "swooped in," befriended the decedent, began taking her to her medical appointments and to the hospital, and assisted with the divorce proceedings. After the

decedent's phone texted her attorney that she wanted to draft a will and name her new friend as her sole beneficiary, the decedent executed the will. The decedent passed away shortly thereafter, and the will was offered to probate. The decedent's daughter challenged the will. Following a bench trial, the trial court entered its order denying the admission of the will to probate and granting the daughter's application for independent administration. The friend appealed.

> The court of appeals discussed the standards for undue influence. "To establish undue influence, a contestant must show the following: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence." Id. (citing Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963)).

The court first considered whether there was sufficient evidence that the friend had a fraudulent motive in having the decedent sign the will. The friend was subject to an order of deferred adjudication for theft of $55,471.20, and she was required to pay restitution in the amount of $38,721.96. At the time the decedent signed the will, her estate was worth more than the $28,000. "This monetary need on Watson's part amounts to some circumstantial evidence underlying her motive to seek to influence Russey to name her as her sole devisee of her will." Id. The court also looked at evidence that the friend poisoned the decedent's relationship with her daughter. The daughter testified that the friend "froze her out," thereby preventing her from being able to reestablish any type of relationship with the decedent. The court considered the circumstances surrounding the drafting and execution of the will. The friend and her husband were present when the decedent executed the will in her home. The court held that the evidence was legally and factually sufficient to support the trial court's findings that an influence existed and was exerted by the friend.

Regarding whether the influence overpowered the decedent's mind, the court first considered the decedent's mental and physical capacity to resist and her susceptibility to the type and extent of the influences exerted. The trial court found that, due to her health problems, the decedent was reliant on others for transportation, and that the friend befriended the decedent while she was suffering from these health problems and that the decedent became dependent on the friend during her last illness for much of her care and transportation. The decedent was lonely at a time when the friend "swooped in" to provide assistance and became deeply involved in divorce proceedings. The court concluded that this evidence was sufficient to establish that the decedent was incapable of resisting her susceptibility to the influence. The court stated:

> Further, in considering Russey's state of mind at the time she executed her will, we note that Watson and Beatty actively sought to continue Russey's estrangement from Stevens and her grandchildren. The record also reflects that Watson and her husband made certain they were present when Russey signed the will, in which Watson was designated as her sole devisee; no family members were present or were invited to attend the signing of the will.

Id. The court concluded:

> Considering the cumulative effect of the evidence related to (1) Russey's susceptibility and dependence on Watson at the end of her life, (2) the details surrounding the signing of the March 2, 2017, will, and (3)

> Watson's successfully keeping Stevens and her children away from Russey during this time, we conclude that a factfinder reasonably could determine that Watson exerted her influence and subverted and overpowered Russey's mind at the time she signed the will.

Id.

Lastly, the court consider whether the decedent would not have executed the instrument, but for the influence. "Satisfaction of this element usually is predicated on whether the disposition of property is unnatural." *Id*. The court stated:

> One of the main objects of the acquisition of property by the parent is to give it to his child; and that child in turn will give it to his, in this way the debt of gratitude we owe to our parent is paid to our children. Thereby, each generation pays what it owes to the preceding one by payment to the succeeding one. This seems to be the natural law for the transmission of property. Any departure from that course, though it may not be uncommon or unusual, is unnatural.

Id. The evidence showed that the decedent never made a will until the friend reentered her life during her last illness. Because the evidence supported that the friend unduly influenced the decedent when she never had before sought to create such a document, the court concluded that the trial court reasonably could have determined that the will was unnatural in that it passed all of her property to the friend with no apparent consideration given to her children or grandchildren. The court affirmed the trial court's finding of undue influence.

In *Fielding v. Tullos*, an administrator of a decedent's estate brought claims against the decedent's housekeeper for undue influence and other related claims arising from the execution of new account beneficiary designations for certain accounts holding around $1.7 million dollars. No. 09-17-00203-CV, 2018 Tex. App. LEXIS 7136 (Tex. App.—Beaumont August 30, 2018, no pet.). The defendant filed a motion for summary judgment, which the trial court granted. The plaintiff appealed. The court of appeals first discussed the general concept of undue influence:

> The party contesting a will or payable-on-death provision or beneficiary designation based on a claim of undue influence bears the burden of proving undue influence. Undue influence is a form of fraud, and the term describes the wrongful use of influence, such as through force, intimidation, duress, or deception, to cause the execution of a will that is contrary to the testator's desire for the distribution of his or her property after death. In an undue influence claim, the evidence must show not only the presence of the opportunity to influence, but also that improper influence was exerted on the decedent at the time the beneficiary designation or will was made. Simply because the beneficiary had a close relationship with the decedent or otherwise was present for the execution of an instrument, it does not establish proof of undue influence. A person may request or entreat another person to create a favorable dispositive instrument, but unless the entreaties are shown to be so excessive as to subvert the maker's will, they do not constitute undue influence that invalidates the will. The contestant must prove the existence and exertion of an influence that subverted or overpowered the testator's mind

when the testator executed the document so that the testator executed the document in a manner that he otherwise would not have executed but for such influence.

….

In Texas, the rules guiding a determination of the existence of undue influence apply substantially alike to wills, deeds, and other instruments. To set aside an instrument based on undue influence, the party claiming undue influence must prove (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the property owner at the time the instrument was executed; and (3) the execution of an instrument that the property owner would not have executed but for such influence.

To satisfy the first element, the party contesting an instrument must show that an undue influence existed and was exerted. The contesting party focuses on facts showing the opportunities for the exertion of the alleged influence, the circumstances of the drafting and execution of the instrument, the existence of a fraudulent motive, and whether the person executing the instrument was habitually under the control of another. The exertion of influence, however, cannot be inferred from opportunity alone, such as might result from taking care of the property owner or seeing to his needs. There must be proof showing both that the influence existed and that it was exerted.

To satisfy the second element, the contesting party must show that the exertion of the influence subverted or overpowered the mind of the property owner at the time he signed the instrument. The focus of this element is on the property owner's state of mind and evidence relating to his ability to resist or susceptibility to the influence of another, such as mental or physical infirmity. But evidence that a property owner was susceptible to influence or incapable of resisting it does not prove that his free will was in fact overcome when the instrument or act of the owner was made. Likewise, a close relationship or the fact the other party was a caretaker would not be sufficient to show undue influence. Influence is "undue" when the property owner's volition is destroyed and the resulting instrument expresses the wishes of the one exerting the influence. Undue influence may include force, intimidation, duress, persistent requests or demands, or deceit.

To meet the third element, the contesting party must show that the property owner would not have executed the challenged instrument but for the undue influence. In general, this element focuses on whether the instrument makes an unnatural disposition of property. A disposition may be unnatural, for example, if it excludes a property owner's natural heirs or favors one heir at the expense of others who ordinarily would

> receive equal treatment. Even so, the disinheritance of close relatives or loved ones is not necessarily unnatural. A property owner's preference for one beneficiary over others may be unnatural if the record does not disclose a reasonable basis for the preference or contains proof that calls the preference into question or discredits it.

Id. The plaintiff contended that there was either a formal or informal fiduciary relationship between the decedent and the defendant such that there was a presumption of undue influence that shifted the burden of proof onto the defendant to prove she did not engage in undue influence. The court of appeals discussed the shifting burdens associated with this presumption:

> Fielding had the burden of establishing that a fiduciary relationship existed between Tullos and Charles. Once a contestant presents evidence of a fiduciary relationship, a presumption of undue influence may arise and the other party then bears the burden to come forward with evidence to rebut the presumption. Such a rebuttable presumption shifts the burden of producing evidence to the party against which it operates. Once evidence contradicting the presumption has been offered, the presumption is extinguished. The case then proceeds as if no presumption ever existed…. Assuming without deciding that Tullos owed Charles a fiduciary duty, it would not shift the ultimate burden of proof in the case to Tullos, but it would invoke the application of a rebuttable presumption. Tullos could rebut the presumption by coming forward with evidence showing the fairness of the transaction. If Tullos's summary judgment evidence contradicted the presumption, the presumption was extinguished. Plaintiff retained the ultimate burden of proof on her claims.

Id.

The court of appeals held that the evidence supported the trial court's granting of summary judgment for the defendant:

> Both Hargroder and Ridley testified that they observed Charles to be in control of his finances and accounts. By contrast, the heirs could not provide any personal knowledge of Tullos's alleged undue influence over Charles. Although an opportunity for influence may have existed because of the close relationship between Tullos and Charles and because of the degree of care provided by Tullos, opportunity alone is not sufficient to prove undue influence without evidence of exertion of influence. The record gives no indication of force, intimidation, duress, persistent requests or demands, or deceit by Tullos. Consequently, the trial court would not have erred in concluding that summary judgment evidence offered by Tullos rebutted any presumption of undue influence.
>
> There also was no evidence that Charles would not have designated Tullos as his beneficiary but for the alleged undue influence. Hargroder testified that Charles wished to designate Tullos as his beneficiary in recognition of the care she had provided, and

> Ridley testified that Charles assured him that he wished to designate Tullos as the beneficiary. The heirs testified that they had little contact with Charles and provided little care for him, including a lack of involvement with Charles during Hurricanes Rita and Ike. As a result, we cannot say that material issues of fact exist on Plaintiff's claims for undue influence. Even assuming without deciding that a fiduciary relationship existed between Charles and Tullos, and after considering the evidence in the light most favorable to the nonmovant, we conclude that Tullos was entitled to a summary judgment on the undue influence claim. Tullos established the fairness of the designations and rebutted any presumption of undue influence.

Id. The court of appeals affirmed the trial court's judgment for the defendant.

In *Cortes v. Wendl,* an elderly woman signed a deed conveying her mineral rights to two individuals. No. 06-17-00121-CV, 2018 Tex. App. LEXIS 4457 (Tex. App.—Texarkana June 20, 2018, no pet.). When the woman's nurse and friend learned of the transaction, she obtained a power of attorney and filed a lawsuit on the woman's behalf, claiming that the mineral deed was executed as a result of duress, coercion, and undue influence, and that no consideration was paid for the conveyance. The defendants alleged that the plaintiff had no capacity to sue. The court of appeals affirmed the trial court's implied finding that the plaintiff had capacity:

> "A power of attorney is a written instrument by which one person, the principal, appoints another person, the attorney-in-fact, as agent and confers on the attorney-in-fact the authority to perform certain specified acts on behalf of the principal." *Comerica Bank-Tex. v. Tex. Commerce Bank Nat'l Ass'n*, 2 S.W.3d 723, 725 (Tex. App.—Texarkana 1999, pet. denied); see Plummer v. Estate of Plummer, 51 S.W.3d 840, 842 (Tex. App.—Texarkana 2001, pet. denied). An agent has express authority to take all actions designated by the principal. *Reliant Energy Servs., Inc. v. Cotton Valley Compression, L.L.C.*, 336 S.W.3d 764, 783 (Tex. App.—Houston [1st Dist.] 2011, no pet.). An agent has implied authority "to do whatever is necessary and proper to carry out the agent's express powers." *Id.* Wendl introduced the durable power of attorney executed by Hardy as an exhibit, without objection. The power of attorney explicitly granted Wendl: "[a]uthority to initiate a claim and litigation, if necessary; negotiate; make decisions; and pursue the legal claim [Hardy] may have against Johnny Coutts, Charles [Randy] Hardy, and/or Isabel Cortes, or anyone else involved, and to pursue those claims or litigation as she sees fit for [Hardy] and/or [Hardy's] estate. [Wendl] is further given specific authority to negotiate and make all decisions on [Hardy's] behalf including accepting or rejecting offers of settlement, contracting for and payment of attorney's fees, and costs." The record supports the trial court's implied finding that Wendl, in her capacity as agent and attorney-in-fact for Hardy, had the capacity to bring the lawsuit on Hardy's behalf

Id.

The court then analyzed whether there was sufficient evidence to establish that the deed was procured by undue influence. "In deciding whether there was undue influence in executing a deed, the court considers three factors: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the grantors' minds when they executed the deed; and (3) whether the grantors would not have executed the deed but for the influence." The court stated:

> [A]lthough undue influence implies the existence of sufficient mental capacity to execute a deed if not hindered by another's overriding influence, "weakness of mind and body, whether produced by infirmities of age or by disease or otherwise, may be considered as a material circumstance in determining whether or not a person was in the condition to be susceptible to undue influence." Further, a beneficiary's voluntary participation in the preparation or signing of a deed can be one of the considerations used to determine if there was undue influence, as can an unnatural disposition of property by the grantor, Long.
>
> Cortes and Fernandes visited Hardy monthly to deliver the note payment on the property previously owned by Hardy. During these visits, they continually complained to Hardy that the property was no good without the minerals and that they wanted to purchase the minerals. These continual complaints and entreaties caused the elderly Hardy to feel pressured, frightened, and nervous. They were making her a "nervous wreck." They often met with Hardy one-on-one in her room at the assisted living facility and made these complaints to her privately. This frightened Hardy, and she began to lock the door to her room during the day, as she thought Cortes and Fernandes might hurt her. Hardy testified to these things and further testified that, when she failed to relent, Cortes and Fernandes told her that the IRS was going to come after her if she did not sell the minerals. Hardy was told that she needed to sign over her mineral rights to Cortes so that she would not be in trouble. Hardy testified that she felt that she had to do something because the IRS was coming after her. Threats about the IRS caused Hardy to become so nervous that she was shaking, and she thought she was going to have seizures, as she did after her husband passed away. The evidence further suggests that Hardy was essentially tricked into going alone with Cortes to the title company in Longview to sign the mineral deed. Hardy testified that she was not paid anything for her mineral rights, and she was not aware that the deed provided that Cortes was entitled to all past royalties not yet cashed out—to include the royalty payment from Sabine Oil & Gas Corporation. Hardy's testimony alone is evidence of the existence and exertion of Cortes' and Fernandes' influence.
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> ….
>
> Jimmy Don Reedy, who executed the 2010 agreement with Hardy and Randy to excavate topsoil from the property, testified that he

> removed less than ten fourteen-yard loads of topsoil from the property. According to Reedy, the removal of that quantity of topsoil is not enough to cause any kind of damage to the land. The topsoil was not removed over a five-year period. Instead, Reedy testified that it was removed fairly near the time of the agreement. In 2010, Fernandes asked Reedy to leave the property, and he did so. According to Reedy, if Cortes told Hardy that the land was no good because the topsoil had been removed, that would be false.

Id. The court of appeals affirmed the trial court's rescinding the mineral deed after finding that the evidence was legally and factually sufficient to support the trial court's implied findings.

In *Estate of Luce*, the court of appeals affirmed a trial court's admitting a will to probate where the decedent did not personally sign it and only communicating his desires by blinking. No. 02-17-00097-CV, 2018 Tex. App. LEXIS 9341 (Tex. App.—Fort Worth November 15, 2018, no pet.). The testator was in a serious accident that left him a quadriplegic. A week after he was admitted to the hospital, he was intubated, which rendered him unable to speak. Paralyzed from the chest down and unable to speak, the testator was able to communicate by blinking his eyes to indicate "yes" and "no." Using this blinking system, his attorney was able to draft a will based on the testator's blinked responses to a series of leading questions, and through this system, he directed a notary to sign the will for him. After he died, his estranged wife filed an application to probate an earlier will. The testator's sister filed an application to probate the most recent 2015 will. After a jury trial, the trial court admitted the 2015 will to probate and appointed the sister as independent executor but awarded the wife nearly $200,000 in attorney's fees and expenses. Both parties appealed.

The court of appeals first discussed the various burdens. Because the 2015 will had not been admitted to probate, the sister, as the proponent, bore the burden to prove that it was properly executed and that the testator had testamentary capacity at the time of execution. She made out a prima facie case on these issues by introducing the 2015 will, which was self-proving into evidence. The burden of producing evidence then shifted to the wife, as the will's opponent, to overcome the prima facie case, but the burden of persuasion remained with the sister. The wife argued that the sister failed to carry her burden because there was no evidence that the 2015 will was duly executed or that the testator had testamentary capacity.

Regarding execution, Texas Estates Code Section 251.051(2) requires that a will be signed by the testator or by another person on the testator's behalf in the testator's presence and under the testator's direction. Here the attorney testified that when he arrived at the hospital, a nurse told him that the testator was able to communicate by blinking, so they established a "signal system" by blinking. The attorney testified that he was able to communicate with the testator based on the testator's blinked responses to a series of leading questions. Through these questions and blinked responses, they established an attorney-client relationship and the attorney determined that the testator wanted to make a new will that revoked any earlier ones. Further, Texas Government Code Section 406.0165 provides: "A notary may sign the name of an individual who is physically unable to sign or make a mark on a document presented for notarization if directed to do so by that individual, in the presence of a witness who has no legal or equitable interest in any real or personal property that is the subject of, or is affected by, the document being signed." Id. (citing Tex. Gov't Code Ann. § 406.0165(a)). Based on this .provision, the attorney determined that a notary could sign the will for the testator. When the attorney returned to the hospital with the drafted will, he met with the testator privately to explain the execution process and that the law allowed a notary to sign the will for him. Through the blinking system, the testator confirmed to the attorney that he

understood the execution process, that the notary was signing the will for him, and that he was requesting the notary to sign for him. Other witnesses to the execution also testified to the soundness of the system and the testator's intent. The court of appeals found that this was sufficient evidence to support the finding that the will had been properly executed.

The wife also challenged the evidence that supported the finding that the testator had mental capacity. Testamentary capacity requires that the testator, at the time the will is executed, have sufficient mental ability to understand he is making a will, the effect of making the will, and the general nature and extent of his property. He must also know his next of kin and the natural objects of his bounty, the claims upon them, and have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to perceive their obvious relation to each other and form a reasonable judgment about them.

The evidence showed that testator did not have a brain injury from the accident. The medical records indicated that he was lucid. The attorney met with the testator alone and determined that they could communicate using the blinking system. The testator communicated that he wanted to make a new will disposing of his assets and property, who he wanted to inherit under the new will, and that he intended to revoke any prior wills. The attorney further testified that the testator understood the nature and extent of his assets and knew who his family members were. The testator, who was in a divorce proceeding with his wife, made clear that he did not want his wife to take under the new will. According to the attorney, the testator was of sound mind, and the attorney had no concerns about the testator's capacity.

Two days after the will's execution, a doctor examined the testator who was still unable to speak because he was intubated, but they communicated by the testator nodding his head "yes" and "no" or by him casting his gaze at index cards labeled "yes" and "no." As a result of the examination, the doctor determined that the testator was fully competent and able to make his own decisions, including financial and medical decisions. Based on all of the evidence, the court of appeals determined that the jury's finding of mental competence should be affirmed.

The wife also challenged the finding that sister did not unduly influence the testator. The court held that exertion of undue influence cannot be inferred by opportunity alone and there must be some evidence that the influence was not only present but was in fact exerted in connection with the making of the will. The court held:

> Although weakness of mind and body caused by infirmities of disease, age, or otherwise may be considered as material in establishing the testator's physical incapacity to resist or the susceptibility of his mind to an influence exerted, such weakness does not establish that his mind was in fact overpowered or subverted at the time the will was executed. But not every influence exerted by one person on another's will is undue. Influence is not undue unless it destroys the testator's free agency and the testament produced expresses the will of the person exerting the influence. Even if one requests, entreats, or importunes another to execute an instrument that makes a favorable disposition, the entreaties and importunities will not render the instrument invalid based on undue influence unless they were so excessive that they subverted the will of the maker. Undue influence may be exerted-among other ways-through force, duress, intimidation, excessive importunity, or deception used to try to subvert or overcome the testator's will and induce the testator to

> execute the instrument contrary to his will.

Id.

The wife alleged that the will was the result of sister's undue influence because at the time the will was executed, the testator was in physical and mental distress; the sister isolated him from the wife and the testator's sons; he was entirely dependent on the sister; the sister was directly involved in the planning, preparation, and execution of the will; and the will's property disposition was inconsistent with the 1998 will and was unnatural because it disinherited his wife and sons. The court of appeals disagreed:

> Michael was indisputably in a state of severe physical distress at the time the 2015 will was executed. Unable to move or speak, he was confined to a hospital room and was totally reliant on others. But there is no evidence that Michael was experiencing the type of "mental distress" that made him susceptible to undue influence. Michael had not suffered a head or brain injury, and as we detailed above, he was alert and lucid when he executed the will.
>
> It is also undisputed that Michael was isolated from his wife and adopted sons. Tina admitted that she never informed GayeLynne, Kevin, or Jeremy about the accident. GayeLynne did not find out that Michael was in the hospital until a friend told her on November 18, over a month after the accident. Before then, GayeLynne had unsuccessfully tried to contact Michael by calling friends, family members, hospitals, and the police. According to GayeLynne, during this time, Tina left her a telephone message "saying that Michael was perfectly fine."
>
> After GayeLynne learned about Michael's accident, Tina told her that she was not allowed at the hospital and threatened to have her arrested if she came there. When Kevin and Jeremy went to visit Michael in the hospital sometime after November 18, Tina and Melissa told them that GayeLynne was not allowed to come to the hospital. GayeLynne never went to the hospital and had no contact with Michael before he died on November 26.
>
> But Michael's isolation from GayeLynne and his sons and his leaving them out of the 2015 will is not altogether surprising. At the time of the accident, he and GayeLynne (his adopted sons' biological mother) were separated, and they were in the middle of a contested divorce. Despite GayeLynne's testimony that at the time of the accident she and Michael were considering reconciling, there was evidence that the divorce was contentious. And when Michael was admitted to the hospital, he made clear to hospital staff that he did not want GayeLynne making medical decisions for him, explicitly telling staff that he wanted his daughters or his sister to do so.
>
> Contrary to GayeLynne's assertions on appeal, Tina was not "directly involved in the planning, preparation[,] and execution of the 2015 will." Tina contacted Ferrier and provided information about Michael's family to Ferrier, but

> she was not involved in the will's preparation and execution. As explained above, Ferrier met with Michael privately to discuss the will, and Michael made clear to Ferrier that he did not want GayeLynne, Kevin, and Jeremy to inherit. Indeed, his will states that he is "specifically not making any provisions for [GayeLynne] in this Will because [they] are in the process of divorcing." Tina was not present when Ferrier drafted the will, when he walked through it with Michael, or when the will was executed. Viewing the evidence under the applicable standards of review, we hold that there is some evidence to support the jury's no-undue-influence finding and that the jury's failure to find undue influence is not against the great weight and preponderance of the evidence.

Id.

Finally, the court of appeals sustained the sister's appeal of the trial court's award of attorney's fees to the wife. The trial court had entered judgment notwithstanding the verdict after the jury found that the wife was not in good faith in attempting to probate an earlier will. The court of appeals held that there was sufficient evidence to support the jury's finding and that the trial court erred in disregarding that finding:

> But as we have explained in detail, at the time of the 2015 will's execution, GayeLynne and Michael were in the process of divorcing. Michael's medical records-all of which GayeLynne stated that she had read before trial-reflected that, when Michael was admitted to the hospital a week before the will's execution, he told hospital staff that because of the divorce, he did not want GayeLynne to make decisions for him and wanted his daughters to do so. His medical records also reflected that he had not suffered any brain or head injury because of the accident and that when the will was executed, Michael was alert and oriented as to person, place, and time and had not had any pain medication for several hours. The jury also heard videotaped deposition testimony from four witnesses regarding the drafting and execution of the 2015 will and Michael's testamentary capacity. This evidence (of which GayeLynne was aware before trial) is some evidence to support the jury's finding that GayeLynne did not act in good faith in trying to have the 1998 will admitted to probate, and we certainly cannot say that GayeLynne conclusively proved the opposite. Accordingly, the trial court erred by disregarding the jury's good-faith-and-with-just-cause finding against GayeLynne and by implicitly finding that she acted in good faith and with just cause to be entitled to an award of attorney's fees and expenses for probating the 1998 will. We thus sustain this part of Dowdy's second issue, which is dispositive of his appeal.

Id. The court of appeals affirmed the trial court's judgment admitting the 2015 will to probate and reversed the trial court's award of attorney's fees to the wife.

In *Estate of Frye*, parties filed an application to set aside an order probating a will due to an allegation of undue influence. No. 07-16-00398-CV, 2017 Tex. App. LEXIS 6992 (Tex. App.—Amarillo July 26, 2017, no pet.). The decedent

left bequests to her daughters, Judy and Patsy, in her will, but left nothing to her grandchildren, Jackson and Frye, despite her purported comments that she would do so. The grandchildren alleged that this omission was due to the efforts of Judy and Patsy to induce the decedent to change her will when her husband died. The aunts filed a no-evidence motion for summary judgment, which the trial court granted, and the grandchildren appealed.

The court of appeals held that a claim of undue influence contains several elements: 1) the existence and exertion of an influence upon the testator, 2) that subverted or overpowered his mind at the time the will was executed, and 3) so that the testator executed an instrument he would not otherwise have executed but for such influence. The court noted that influence is not "undue" unless it destroys the testator's free agency resulting in the testament reflecting not the desires of the decedent but rather those of the person exerting the influence. "In other words, requesting or entreating another to execute a favorable dispositive instrument fails to evince undue influence; rather, the entreaties must be so excessive as to subvert the will of the maker." Id. The court held that a will contestant must not only provide evidence that an undue influence existed, they must also offer evidence of the testatrix's state of mind at the time the will was executed that would tend to show her free agency was overcome by such influence. The court affirmed the no-evidence summary judgment, holding that there was no evidence to support a finding of undue influence:

> It is the legal truism that a person of sound mind has the right to dispose of his property as he wishes. One may be old, may be suffering from maladies, may be susceptible to influence, and may select an unordinary way to dispose of his property, but the disposition may still be emanating from her own will or choice. Simply put, the evidence of record fails to create a genuine issue of fact establishing the exertion of any influence on the part of Judy or Patsy with regard to the identity of those who were to be beneficiaries of Margaret's estate. There is evidence that Judy and Patsy may have informed their mother of her need to change the will. So too is there evidence that Judy and or Patsy may have taken their mother to a lawyer's office within three weeks of Eugene's death. Frye stated in his deposition that Judy and Patsy informed Margaret that this was needed because the person designated as executor of her will (her son Gerald) had died and that they wanted to be co-executors. Yet, we are cited to nothing indicating what transpired in the lawyer's office. Nor were we cited to evidence indicating that either Judy or Patsy was present when Margaret spoke with the lawyer or what the lawyer and Margaret discussed. It is clear that neither Judy nor Patsy were present when Margaret executed the new will.… It may be that Patsy informed Jackson, years after the will's execution, that "we cut ya'll out"... Yet, "we cut ya'll out" indicates a result. It illustrates neither the presence of any communications on the matter between Judy, Patsy, and Margaret or their tenor. And though the result may have been agreeable to Judy and Patsy, there is no evidence that they asked, told, or demanded that from Margaret. At most, the evidence indicates opportunity to influence. Opportunity alone, though, is not enough to establish undue influence. Nor is it enough to create genuine issues of material fact on the matter.

Id.

The court then held that the grandchildren's claim for tortious interference with inheritance rights failed because there was no such claim in Texas: "this court does not recognize the cause of action for tortious interference with inheritance rights… Until either the Supreme Court or the legislature recognizes it, we will not for the reasons expressed in our Kinsel opinion. Thus, the trial court did not err in granting summary judgment against them on that claim." *Id*.

In *In re Estate of Kam*, an elderly man executed a new will to omit any gift to one son after the man discovered that his life insurance had been altered to name his son as the sole beneficiary. No. 08-14-00016-CV, 2016 Tex. App. LEXIS 2070 (Tex. App.—El Paso February 29, 2016, pet. denied). The son was also the executor of the man's wife's estate, and there were claims that he did not act appropriately in that position. After the man died, one of his daughters filed the new will for probate. The son challenged the will, claiming that it was not properly executed and that it was the product of undue influence by the daughter. After a bench trial, the trial court denied the application to probate the will and also found that the daughter did not act in good faith and rejected her request for attorney's fees.

The court of appeals first reviewed whether the new will was properly executed. The daughter, as the party offering the will for probate, had the burden to establish that the will was: (1) in writing; (2) signed by: (A) the testator in person; or (B) another person on behalf of the testator: (i) in the testator's presence; and (ii) under the testator's direction; and (3) attested by two or more credible witnesses who are at least 14 years of age and who subscribe their names to the will in their own handwriting in the testator's presence. The will was not self-proved, so there had to be at least one witness to swear to these facts in open court. The court reviewed the testimony of the notary public and the two signing witnesses. The court held that the witnesses did not have to know the will's contents, and that they only had to know facts to prove proper execution. The court held: "So long as at least two non-inheriting witnesses attest to the signature, and so long as at least one testifies, the non-self-proving will meets the statutory formalities." Moreover, the court held that "The statute does not require the attesting witnesses to see the testator sign the will, so long as 'they can attest, from direct or circumstantial facts, that the testator in fact executed the document that they are signing.'" The court reversed the trial court's decision to the extent that it rested on the formalities of the will because the "uncontradicted testimony of two witnesses—one of whom who was totally and completely disconnected from the family conflict—conclusively establishes only one reasonable inference: that the formalities and solemnities necessary to execute the will were fulfilled."

The court then turned to the undue influence holding. The court held that the son had the burden to establish that the new will was the product of undue influence by the daughter. The court held that to establish undue influence, a contestant must show: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time of the execution of the testament; and (3) the execution of a testament which the maker thereof would not have executed but for such influence. The court discussed the factors that courts consider in reviewing these three elements. The court held that there was some evidence to support the fact that the daughter exerted some influence over the man's decision-making process and that but for her efforts the new will would likely not have come into existence. But the court held that there was no evidence of the second element. The court held that evidence that the man was in a weakened mental state was not any evidence that influence existed. Further, the will itself was not evidence of any undue influence. The court held that the fact that a testator chose to distribute his estate among a number of children or relatives making one bequest larger than another, or the fact that he chose to exclude certain children from a will while providing for others was not in and of itself evidence of undue influence. Further, a person of sound mind has the right to dispose of

his or her property in the manner he or she wishes. The court noted that this "principle holds regardless of whether a testator of sound mind's perceptions about the disinherited heir's actions or motivations at the time the testator signs the disinheriting instrument are true or not."

Accordingly, the court held that there was no evidence to support the trial court's finding of undue influence and rendered that the new will should have been admitted to probate. The court finally held that as the daughter prevailed in admitting the will that she acted in good faith and deserved an award of attorney's fees.

F. Deceit, Fraud, and Relationship Poisoning As An Undue Influence Tool

1. General Rules On Undue Influence Due To Fraud And Deceit

Courts hold that deception is a ground that sustains a finding of undue influence. "Influence that was or became undue may take the nature of, but is not limited to force, intimidation, duress, excessive importunity *or deception* used in an effort to overcome or subvert the will of the maker of the testament and induce the execution thereof contrary to his will." *Rothermel*, 369 S.W.2d at 923. "Undue influence may be exercised through fear, threats, deception or some other means of persuasion over the person being so influenced." *Grohn v. Marquardt*, 657 S.W.2d 851, 855 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). "[U]ndue influence is a form of legal fraud. It may exist without resort to false representations, but by a more subtle form of deceit or cunning, particularly where there has been an unconscionable advantage taken of a confidential relationship." *Pace v. McEwen*, 574 S.W.2d 792, 800 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.). Texas courts hold that fraud in the inducement and undue influence are the same, "it being said that 'undue influence is itself a species of legal fraud.'" *Rothermel*, 369 S.W.2d at 922; *Curry v. Curry*, 153 Tex. 421, 270 S.W.2d 208, 214 (1954). The definition of undue influence submitted to the jury should include fraud in cases where the contestant alleges fraud. *Curry v. Curry*, 270 S.W.2d at 214. Where a beneficiary lies to a person to obtain a new will or other document, undue influence may exist.

2. Fraud In The Factum

One aspect of deception is fraud regarding what the will or other document provides. "Fraud in the factum is present when the testator is misled as to the nature or content of the instrument executed." *Guthrie v. Suiter*, 934 S.W.2d at 832-33 (citing *Sockwell v. Sockwell*, 166 S.W. 1188, 1188 (Tex. Civ. App.—Texarkana 1914, writ ref'd)). So, a beneficiary cannot tell a person that the will or other document has one effect when it has another. More commonly, deception involves fraud or deceit about other facts and circumstances. *Wetz v. Schneider*, 34 Tex. Civ. App. 201, 78 S.W. 394 (1904); *Smith v. Mann*, 296 S.W. 613 (Tex. Civ. App.—San Antonio 1927, writ ref'd). Fraud in the inducement can include a promissory misrepresentation as well as a misrepresentation of an existing fact.

3. Fraud In The Inducement

A will may be invalidated on the ground that it was induced by a fraudulent promise if it is proved that the promise was false and that the will was executed in reliance on the false promise. *Montgomery v. Willbanks*, 202 S.W.2d 851, 856 (Tex. Crim. App.—Fort Worth 1947, writ ref'd n.r.e.). For example, in *Holcomb v. Holcomb*, the court affirmed a finding of undue influence where the beneficiary lied about the nature of real property that was being devised and that he would later equalize the distribution with another beneficiary when he never had the intent to do so:

> Long holds undue influence can compel a testator to act against his will because of his desire for peace. *See also Furr v. Furr*, 403 S.W.2d 866, 871 (Tex. Civ. App.—Fort Worth 1986, no writ). Undue influence need not be accomplished forcibly and directly, as at the point of a gun.

> It is more often exercised by subtle and devious, but no less effective, means, such as deceit and fraud. *In re Olsson's Estate*, 344 S.W.2d 171, 173-74 (Tex. Civ. App.—El Paso 1961, writ ref'd n.r.e.). Although undue influence may be exercised consistently and successfully over a long period of time, such influence or deception need only be exercised immediately prior to the execution of the will in question. *Grohn v. Marquardt*, 657 S.W.2d 851, 855 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). Undue influence and fraud in the inducement of a dispositive instrument are sometimes viewed as separate and distinct grounds for invalidating a will. The courts of this state, however, treat the two as one, viewing undue influence as a species of legal fraud. *Curry v. Curry*, 153 Tex. 421, 270 S.W.2d 208, 214 (Tex. 1954). The evidence adduced at trial showed that Mr. Holcomb's desire was for both his children to be equally provided for. His December 1st will accomplished this goal by offsetting the property conveyed to the son by the mother by providing that all his property would go to his daughter. There was testimony that after the execution of this will, Sid told his father that the property conveyed to him by his mother was less valuable than Mr. Holcomb believed, and that Sid made an agreement with his father to equalize both estates if the father would devise his estate equally between his two children. Sid testified he made no such agreement. The jury heard sufficient evidence to conclude that the agreement was made, and that Sid had no present intention to perform the agreement. *Stanfield v. O'Boyle,* 462 S.W.2d 270, 272 (Tex. 1971) (denial of promise with other evidence, sufficient to support verdict). This intent not to fulfill his promise is part and parcel of the undue influence, fraud in the inducement, which led to the execution of a will which Mr. Holcomb would not have exercised but for this influence.

803 S.W.2d 411, 415 (Tex. App.—Dallas 1991, writ denied). *See also Goodloe v. Goodloe*, 105 S.W. 533, 534-35 (Tex. Civ. App.—1907, writ denied) (court affirmed finding of undue influence on many facts, including that beneficiary promised to equalize gift of property to siblings).

Aside from false promises, undue influence can be based on false statements about other facts and circumstances. Recently, one court affirmed the rescission of a mineral deed based on fraud and undue influence based on misrepresentations about the value of the property and other factors. In *Cortes v. Wendl*, an elderly woman signed a deed conveying her mineral rights to property to two individuals. No. 06-17-00121-CV, 2018 Tex. App. LEXIS 4457 (Tex. App.—Texarkana June 20, 2018, no pet.). When the woman's nurse and friend learned of the transaction, she obtained a power of attorney and filed a lawsuit on the woman's behalf, claiming that the mineral deed was executed as a result of duress, coercion, and undue influence, and that no consideration was paid for the conveyance; and that it was not executed by the woman "of her own free will or volition." *Id*. The trial court rescinded the deed after hearing from several witnesses. The court of appeals analyzed whether there was sufficient evidence to establish that the deed was procured by fraud and undue influence. The court stated:

> Cortes and Fernandes visited Hardy monthly to deliver the note payment on the property

previously owned by Hardy. During these visits, they continually complained to Hardy that the property was no good without the minerals and that they wanted to purchase the minerals. These continual complaints and entreaties caused the elderly Hardy to feel pressured, frightened, and nervous. They were making her a "nervous wreck." They often met with Hardy one-on-one in her room at the assisted living facility and made these complaints to her privately. This frightened Hardy, and she began to lock the door to her room during the day, as she thought Cortes and Fernandes might hurt her. Hardy testified to these things and further testified that, when she failed to relent, Cortes and Fernandes told her that the IRS was going to come after her if she did not sell the minerals. Hardy was told that she needed to sign over her mineral rights to Cortes so that she would not be in trouble. Hardy testified that she felt that she had to do something because the IRS was coming after her. Threats about the IRS caused Hardy to become so nervous that she was shaking, and she thought she was going to have seizures, as she did after her husband passed away. The evidence further suggests that Hardy was essentially tricked into going alone with Cortes to the title company in Longview to sign the mineral deed. Hardy testified that she was not paid anything for her mineral rights, and she was not aware that the deed provided that Cortes was entitled to all past royalties not yet cashed out—to include the royalty payment from Sabine Oil & Gas Corporation. Hardy's testimony alone is evidence of the existence and exertion of Cortes' and Fernandes' influence.

….

Jimmy Don Reedy, who executed the 2010 agreement with Hardy and Randy to excavate topsoil from the property, testified that he removed less than ten fourteen-yard loads of topsoil from the property. According to Reedy, the removal of that quantity of topsoil is not enough to cause any kind of damage to the land. The topsoil was not removed over a five-year period. Instead, Reedy testified that it was removed fairly near the time of the agreement. In 2010, Fernandes asked Reedy to leave the property, and he did so. According to Reedy, if Cortes told Hardy that the land was no good because the topsoil had been removed, that would be false.

Id. The court of appeals affirmed the trial court's rescinding the mineral deed after finding that the evidence was legally and factually sufficient to support the trial court's implied findings.

In *Wetz v. Schneider*, the court held that the evidence did not support a finding of undue influence where the decedent had ill feelings towards one daughter. 34 Tex. Civ. App. 201, 78 S.W. 394 (1904). The court in dicta stated that if other siblings had made false representations about the daughter to the decedent, that would be sufficient to support a claim of undue influence:

> The mere fact that Mrs. Stolte may have had an unjust and unreasonable prejudice against Mrs. Schneider, or may have

> had a wrong impression as to her connection with the insulting valentine sent to her, is no indication in itself that she was prevented from providing for Mrs. Schneider in the will by fraud or undue influence. If, however, her prejudice against her daughter was engendered and fostered by beneficiaries under the will a different case would be presented. In other words, if the beneficiaries under the will had stated to Mrs. Stolte that Mrs. Schneider had sent the valentine, knowing that she had not done so, and thereby created such a prejudice against Mrs. Schneider as to cause her to be disinherited, the will would be invalid. The false statements must have been made to the testatrix by the beneficiaries under the will, or through their procurement or agency. They cannot be held responsible for the unauthorized statement of anyone, no matter how closely connected by ties of blood or marriage.

Id.

To sustain a finding of undue influence due to fraud, there must be evidence that the defendant made false representations. For example, in *Curry v. Curry*, a plaintiff attempted to void a deed based on undue influence due to a defendant stating that his brothers were stealing the decedent's cattle. 153 Tex. 421, 270 S.W.2d 208, 214 (1954). The Texas Supreme Court reversed the jury's finding of undue influence where there was no evidence that any such statement was false:

> The defendant was heard to tell the grantor, while he was in the hospital, that certain of his other sons were stealing his cattle and that "if he didn't sign the papers they were going to steal him blind." The grantor inquired of a friend if he knew anything about some of the boys stealing his cattle, and the defendant told a witness that the boys were stealing the cattle and he, the defendant, was therefore selling them. The defendant was seen loading cattle on a truck. Respecting this testimony the substance of plaintiffs' contention is that the defendant was stealing the cattle but was falsely accusing other sons of the grantor of stealing them. This contention appears to raise the issue that the execution of the deed was induced by fraud.
>
> …
>
> There is no direct testimony in the record establishing fraud and none from which an inference of fraud can arise. For representations to form a basis of fraud, they must be false. The record is devoid of any proof of the falsity of defendant's statements to the grantor that the other boys were stealing his cattle. We cannot presume they were false. It must be remembered that the burden was on the plaintiffs to prove they were false and not on the defendant to prove they were true. The same thing may be said with reference to the testimony that the defendant was selling the cattle. Plaintiffs' theory is that defendant was stealing the cattle and falsely charging plaintiffs with the theft. But that is a theory only. There is testimony that defendant was selling some of the cattle, but there is absolutely no evidence that he was not authorized to sell them or that he was stealing them. If

> plaintiffs expected to prevail on the theory mentioned, it was incumbent on them to offer evidence to support it. In the absence of such evidence there was no support for the jury finding of undue influence based on fraud in the inducement of the deed.
>
> On oral argument counsel for plaintiffs was asked if the testimony with respect to the stealing of the cattle did not actually pose a question of fraud rather than the usual question of undue influence and he suggested that false statements made by one natural beneficiary against the others would be evidence of undue influence even though they did not constitute fraud. The suggestion has support in good authority. *See Atkinson on Wills*, p. 212, where it is said: "Likewise creation of resentment toward a natural object of testator's bounty by false statements, though not amounting to fraud, may invalidate the will." But this rule presupposes that the statements are false. In Page on Wills, supra, Vol. 1, § 187, p. 377, it is said: "Derogatory or malicious statements made to testator concerning the natural objects of his bounty do not, of themselves, amount to undue influence, especially if such statements are true." The influence of truthful statements could hardly be said to be undue. Here, again, we are faced with a record which throws no light on the truth or falsity of the defendant's statements to the grantor that the other boys were stealing his cattle, and the plaintiffs must be held to have failed to meet their burden of proving that the statements were false and were therefore evidence of undue influence.

Id.; In re Estate of Graham, 69 S.W.3d 598, 609-10 (Tex. App.—Corpus Christi 2001, no pet.) (no evidence of fraud where no evidence of false statements); *Collins v. Smith*, 53 S.W.3d 832 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (In an action to set aside a deed claiming fraudulent inducement, the trial court properly ruled that there was no fraudulent inducement where all elements of fraud were not met).

4. Relationship Poisoning

The "bad person" often joins misrepresentations with an attempt to poison a person's relationships with other family members. "[R]elationship poisoning can be a tool to unduly influence a person, including making negative remarks about a person's children and re-interpreting historical events in a negative manner." *In re Estate of Johnson*, 340 S.W.3d 769, 782-83 (Tex. App.—San Antonio 2011, pet. dism.). In *In re Estate of Johnson*, the court affirmed a finding of undue influence and noted that there was evidence of relationship poisoning:

> One expert testified that relationship poisoning can be a tool to unduly influence a person, including making negative remarks about a person's children and re-interpreting historical events in a negative manner. Although several people were interviewed for the book about B's life, Ceci, Sarah, and Hager were not interviewed. Instead, Laura was extensively interviewed about events that occurred before she met B. The book contained a suggestion that Kley had committed suicide based on Booth's interview of Laura; however, Laura had no proof that Kley committed suicide,

and other evidence established that he was killed in a car accident, likely driving while intoxicated. In the early 1990's, before B met Laura, B was having financial trouble; B and Laura's interviews for the book conflict as to whether Ceci and Sarah knew of the extent of the financial trouble. Laura said they did; B said they did not. B sold the Chaparrosa ranch to alleviate the financial trouble. The childrens' trusts, which also owned an interest in the ranch, sued B because the sales agreement had money going to J.P. Morgan before the trusts, and the trustees did not believe the trusts were receiving the amount they were entitled to receive from the sale. Laura stated in an interview that Ceci and Sarah filed the lawsuit to bury B financially; however, B had stated Ceci and Sarah did not know the extent of his financial trouble. The jury could consider Laura's reinterpretation of these historical events in a negative manner as evidence of relationship poisoning.

The jury also heard evidence that Laura made negative remarks about Ceci and Sarah. Laura's friend, Reverend Zbinden, was interviewed by Booth and stated Laura had told him that Ceci and Sarah were greedy and ungrateful. During his deposition, Reverend Zbinden testified it was not unusual for Laura to speak negatively of Ceci and Sarah. Laura told Copley in a telephone conversation that Sarah was vile, not smart, and had the attention span of a gnat. Based on the evidence presented, the jury could infer that Laura also spoke negatively of Ceci and Sarah to B. Having reviewed the record, we conclude the evidence is legally and factually sufficient to support a finding that undue influence existed and was exerted.

Id. at *30-31.

In *In re Estate of Russey*, the decedent was going through a divorce and signed a will. No. 12-18-00079-CV, 2019 Tex. App. LEXIS 1536 (Tex. App.—Tyler February 28, 2019, no pet. history). She died before the divorce was finalized. Her children took their father's side on some asset issues. During this time, a sister of a friend of the decedent "swooped in," befriended the decedent, began taking her to her medical appointments and to the hospital, and assisted with the divorce proceedings. After the decedent's phone texted her attorney that she wanted to draft a will and name her new friend as her sole beneficiary, the decedent executed the will. The decedent passed away shortly thereafter, and the will was offered to probate. The decedent's daughter challenged the will. Following a bench trial, the trial court entered its order denying the admission of the will to probate and granting the daughter's application for independent administration. The friend appealed.

The court first consider whether there is sufficient evidence that the friend had a fraudulent motive in having the decedent sign the will. The court looked at evidence that the friend poisoned the decedent's relationship with her daughter. The daughter testified that the friend "froze her out," thereby preventing her from being able to reestablish any type of relationship with the decedent. The court considered the circumstances surrounding the drafting and execution of the will. The friend and her husband were present when the decedent executed the will in her home. The court held that the evidence was legally and factually sufficient to support the trial court's findings that

an influence existed and was exerted by the friend.

Regarding whether the influence overpowered the decedent's mind, the court first considered the decedent's mental and physical capacity to resist and her susceptibility to the type and extent of the influences exerted. The trial court found that, due to her health problems, the decedent was reliant on others for transportation, and that the friend befriended the decedent while she was suffering from these health problems and that the decedent became dependent on the friend during her last illness for much of her care and transportation. The decedent was lonely at a time when the friend "swooped in" to provide assistance and became deeply involved in divorce proceedings. The court concluded that this evidence was sufficient to establish that the decedent was incapable of resisting her susceptibility to the influence.

"Further, in considering Russey's state of mind at the time she executed her will, we note that Watson and Beatty actively sought to continue Russey's estrangement from Stevens and her grandchildren. The record also reflects that Watson and her husband made certain they were present when Russey signed the will, in which Watson was designated as her sole devisee; no family members were present or were invited to attend the signing of the will."

Id. The court concluded:

> Considering the cumulative effect of the evidence related to (1) Russey's susceptibility and dependence on Watson at the end of her life, (2) the details surrounding the signing of the March 2, 2017, will, and (3) Watson's successfully keeping Stevens and her children away from Russey during this time, we conclude that a factfinder reasonably could determine that Watson exerted her influence and subverted and overpowered Russey's mind at the time she signed the will.

Id.

Lastly, the court consider whether the decedent would not have executed the instrument, but for the influence. "Satisfaction of this element usually is predicated on whether the disposition of property is unnatural." *Id*. The court stated:

> One of the main objects of the acquisition of property by the parent is to give it to his child; and that child in turn will give it to his, in this way the debt of gratitude we owe to our parent is paid to our children. Thereby, each generation pays what it owes to the preceding one by payment to the succeeding one. This seems to be the natural law for the transmission of property. Any departure from that course, though it may not be uncommon or unusual, is unnatural.

Id. The evidence showed that the decedent never made a will until the friend reentered her life during her last illness. Because the evidence supported that the friend unduly influenced the decedent when she never had before sought to create such a document, the court concluded that the trial court reasonably could have determined that the will was unnatural in that it passed all of her property to the friend with no apparent consideration given to her children or grandchildren. The court affirmed the trial court's finding of undue influence.

In *Peralez v. Peralez*, the court of appeals affirmed a finding of undue influence that primarily relied on a poisoning theory. No. 13-09-00259-CV, 2010 Tex. App. LEXIS 4781 (Tex. App.—Corpus Christi June 24, 2010, pet. denied). The court stated:

> There was evidence that Carlos was in a weakened condition and in pain at the end of his life. He was on medication and was relying on Rene to assist him with his basic needs. There was evidence that Rene had the

> opportunity to unduly influence Carlos as he was acting as his care giver during the final days of Carlos's life. There was also more than a scintilla of evidence of motive. Rene had given up his job, either to retire or for some other reason. He was dipping into his 401k account to live. There was evidence that his wife was also not employed. And, there was evidence that someone was telling Carlos that the brothers were snooping around and looking into his affairs. The brothers denied snooping and Rene emphatically denied telling his father that his brothers were looking into Carlos's property. But the jury believed the brothers' testimony over Rene's. The jury could have inferred deceit and an attempt on Rene's part to influence Carlos. There was also some testimony that Rene kept the brothers from seeing their father at the end of his life and that Rene would "shadow" them when they visited. The jury could have inferred from this testimony that Rene was attempting to unduly influence his father to leave everything to Rene. There was also evidence that Carlos was going to divide his property equally when he passed away. In sum, the jury could infer from this testimony, when combined with testimony that Carlos had always treated the four sons and their families equally, that there existed circumstances of undue influence. The jury determined that Rene had the motive, opportunity and, in fact, did unduly influence his father to leave Rene the bulk of his estate. The evidence presented was more than a scintilla of evidence suggesting undue influence. We will not substitute our judgment for that of the jury.

Id. (emphasis added).

In *Bounds v. Bounds*, the court affirmed a finding of undue influence where a son represented to his mother that her daughters had instituted a guardianship proceeding to get her money and put her in a nursing home. 382 S.W.2d 947, 950-51 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.). The evidence showed:

> [Defendant] ordered his sisters out of his home, "and never come back." Several witnesses testified to the strong language used by appellant in ordering his sisters to leave the premises. On the day Mrs. Bounds' daughters left appellant's home the power of attorney to her daughter was revoked by Mrs. Bounds. There is evidence that the revocation was initiated by appellant. Four days later, on August 29, the guardianship proceedings were filed by Mrs. Bounds' daughters. When she was served in connection with the guardianship proceedings, Betty Mead testified, "Charles [appellant] brought in a paper and carried it into his mother, and he told her that they were trying to prove that her—her daughters were trying to prove that she was crazy. And he told her that the daughters didn't love her and they were just trying to get her money, and trying to put her in this old folks home where they could get her property." By deposition, Mrs. Bounds corroborated this testimony. She testified she had confidence in her son and believed him when he told her her daughters had abandoned

> her, and that they sought to get her property. She further testified in connection with the deed, "I would not have signed it if I had but—if I had known that he was the cause of them not coming back to see me."
>
> ….
>
> Under this record, when considered in the proper light, we can reach no other conclusion than that the representations made by appellant created a belief in the mind of Mrs. Bounds that the deeding of the land to appellant was the only way she had to deprive her daughters of securing this land from her. We are of the opinion the elements of the exertion and the effective operation of undue influence by appellant over Emma Bounds so as to influence her to execute the deed are supported by competent evidence.

Id.

In another case, a court of appeals affirmed a finding of undue influence due to many different facts, and expressly mentioned that the defendant attempted to separate the decedent from her relatives:

> One of the witnesses, a nurse, testified that she was instructed by appellant "never to leave her (Mrs. Olsson) alone with the family, not one minute, not even to go to the kitchen to get a drink of water." Another nurse, testifying as a witness, said that appellant told her "not to ever let anybody be in there talking to her without him being there too." The testatrix told her grandson, James Webb, that she wanted to come to see the family more often, but that Mr. Olsson wouldn't bring her. When Mr. Webb (appellee's husband) offered to come and get her whenever she wanted to visit the family, "she said no, that would make Rudy (Mr. Olsson) mad."

In re Olsson's Estate, 344 S.W.2d 171, 173–174 (Civ. App.—El Paso 1961, ref. n.r.e.).

Another older example of relationship poisoning by undue influence is *Walker v. Irby*, where the court stated:

> In the case at bar we find a man executing a will excluding several of his children from its benefits, and devising the whole of his property to two of them, Lee Walker, and Mrs. Briley. The jury found, under the evidence, that the undue influence of Lee Walker had secured the execution of part of the will, Proponent, Mrs. Briley, contends that, as she was not a party to Lee Walker's conduct, and was free from any charge of misconduct in that regard, that clause of the will devising one-half of the estate to her should stand, and the will to that extent should be probated. We cannot concede this, for we think that, under the findings of fact, and under the evidence, that it is disclosed that the undue influence of Lee Walker was the controlling cause of the execution of the whole will, and hold, as a matter of law, that the undue influence extended to the execution of every part of the will. Analyzing the findings in this case, it appears that the undue influence exerted by Lee Walker upon his father's mind was not done for the sole purpose of having his father

enlarge a bequest to him, but the undue influence extended to an absolute exclusion of contestant and the brothers from any participation in the estate. If contestant is correct, Lee Walker had created in his father's mind such a hatred for contestant and Mrs. Clark as to make him disinherit them from participating, not alone in that part of the estate willed to Lee Walker, but from participating in any part or all of it. By inheritance, if G. B. Walker had made no will the contestants and their nonparticipating brothers would have partaken of the estate share and share alike. If this will was not the will of G. B. Walker disposing of one-half of his property, then it was not his will in the disposition of the other half. That hatred which was sufficient to dictate the execution of a will excluding these parties excluded them from participating in the whole. Who can draw so fine a line as to indicate where hatred and malice cease and an affectionate regard begins? If he hated those nonparticipating children, who can say that he only hated them enough to exclude them from his will as to their share in that portion of his estate given to Lee Walker? We do not think it possible, without utterly destroying G. B. Walker's intent to distribute his entire estate, to attempt to say that it was his will to leave half the estate to Mrs. Briley and to make no disposition of the residue of his estate.

This is true even though the contestant and Mrs. Briley had agreed on a disposition of the estate regardless of the decision in the matter of the will of their father to share and share alike in whatever was obtained. This cannot influence any question in the decision of what was the will of G. B. Walker, and does not alter that question. If this undue influence poisoned the mind of the father it cannot be said that the ill will permeating his mind stopped at a desire to deprive them of participating in part of his property, but the reasonable and natural conclusion is that such condition of his mind brought about the execution of the will as a whole. We therefore hold that the trial court erred in rendering judgment probating such portion of the will of G. B. Walker as devised one-half of his property to Mrs. Briley, and holding null and void that part of the will leaving the other half to his son, Lee Walker, and that the Court of Civil Appeals erred in holding that the undue influence of Lee Walker did not extend to and affect all the provisions of the will.

238 S.W. 884, 887-88 (Tex. Com. App. 1922).

There are many different variants of deception, lies, broken promises, and relationship poisoning. All of these variants may be used as factors that can support a finding of undue influence. A fact finder should aware of two important aspects of real friendship: initial intensity and rate of change. The specter of undue influence exists if either is too high. If the display of friendliness and its speed is inappropriate or disproportionate, then undue influence may exist. One may call this "undue friendliness."
www.openmindsfoundation.org/deceit-undue-influence. This undue friendliness is usually coupled with attempts to separate a person from his or her relatives. *In re Estate of Vestre*, 799 N.W.2d 379 (N.D. S. Ct. 2011) (defendant had

controlled decedent's visitors and tried to keep family members at a distance by telling them not to visit and preventing them from talking to nursing home staff).

Besides evidence of misrepresentations, deceit, and relationship poisoning, evidence of "friendly" undue influence could be: sweeping, dramatic changes to an estate plan; multiple changes over a short period of time; gradual changes, starting with executing a power of attorney in favor of the perpetrator, and gradually escalating to amending an entire estate plan; disinheriting other children or close family members; using an attorney selected by the perpetrator; mental capacity issues by the decedent; physical impairments and illness issues by the decedent; drug or alcohol abuse by the decedent; decedent using new physicians selected by the perpetrator; decedent using new banking institutions or financial advisors suggested by the perpetrator; perpetrator moving in with the decedent and "caring" for the decedent; perpetrator providing transportation, meals, and medicine to the decedent; sudden inter vivos (during life) cash advances or transfers of assets to the perpetrator; and the perpetrator having a history of deceitful conduct, perjury, or fraud.

G. Conclusion

There are different types of undue influence. Though most people imagine a gun being pointed at a head, that is not usually the case. Most incidences of undue influence involve a perpetrator telling a person untruths about the natural objects of the person's bounty to create hostility and to attempt to separate the person from his or her relatives so that the hostility cannot be remedied by the truth. Where a fact-finder determines that this conduct rises to the level of undue influence, Texas courts have been willing to affirm such findings.

Even where an actor does not point a gun to a person's head to obtain a new, favorable will or other document, such as a bank account agreement, there may still be undue influence. People have the right to dispose of their property as they wish. But their wishes must exist independent of another party's deceitful, fraudulent, and coercive actions. So, a will, trust, deed, or bank document may be set aside by a court where there is evidence that the party executing same was lied to about the document, or about some other issue, such that if that person knew the truth, they would not have executed the document. Further, separating the person from his or historical friends and family in conjunction with lying about those who are the natural objects of the decedent's bounty is certainly evidence that supports a finding of undue influence. Financial institutions should take care to identify circumstances when financial exploitation is occurring and to report same.

III. MENTAL COMPETENCE

A. Introduction

In addition to undue influence, individuals often take advantage of elderly or infirm individuals who have compromised mental status. Individuals change their wills, trusts, bank accounts, and other estate documents. These changes often impact beneficiaries and others who expect to receive benefits under these documents.

B. Standards for Mental Competence To Execute Wills and Trusts

A testator has testamentary capacity when he has sufficient mental ability to understand that he is making a will, as well as the general nature and extent of his property. *Le v. Nguyen*, No. 14-11-00910-CV, 2012 Tex. App. LEXIS 8857 (Tex. App.—Houston [14th Dist.] October 25, 2012, no pet.). He also must know the natural objects of his bounty and the claims on them, and have sufficient memory to collect in his mind the elements of a business transaction and hold them long enough to form a reasonable judgment about them. *Id.* In a will contest, the pivotal issue is whether the testator has testamentary capacity on the date the will was executed. *Id.* However, evidence of the testator's state of mind at other times can be used to prove his state of mind on the day the will was executed provided the evidence demonstrates a condition

affecting his testamentary capacity was persistent and likely present at the time the will was executed. *Id*. The court stated that the capacity to make a will is a subtle thing and must be established to a great extent, at least so far as laymen are concerned, by circumstantial evidence. *Id*.

For example, in *Jackson Walker LLPO v*. *Kinsel*, Lesey and E.A. Kinsel owned a ranch, and when E.A. died, he divided his half between his children and Lesey. Jackson Walker, LLPO v. Kinsel, No. 07-13-00130-CV, 2015 Tex. App. LEXIS 3586 (Tex. App.—Amarillo April 10, 2015), *aff'd in part*, 2017 Tex. LEXIS 477 (Tex. May 26, 2017). Lesey owned sixty percent at that point. Lesey placed her interest into an intervivos trust, which provided that upon her death, her interests would pass to E.A.'s children. Lesey became frail and moved near a niece, Lindsey, and nephew, Oliver. Lindsey and Oliver referred Lesey to an attorney to assist in drafting a new will. The attorney informed E.A.'s children that Lesey needed to sell the ranch to pay for her care. At that time, Lesey had approximately $1.4 million in liquid assets and did not need to sell the ranch. Not knowing Lesey's condition, E.A.'s children agreed to sell, and the ranch was sold. Lesey's $3 million in cash went into her trust. Lindsey, as a residual beneficiary in the trust, would receive most of the money – not E.A.'s children. The attorney also effectuated amending the trust to grant Lindsey and Oliver greater rights, while advising them to withhold that information from E.A.'s children. E.A.'s children sued Lindsey, Oliver, and the attorney for tortious interference with inheritance rights and other tort claims. The jury returned a verdict for E.A.'s children.

The Texas Supreme Court granted the petition for review in *Jackson Walker, LLPO v*. *Kinsel*, No. 15-0403, 2017 Tex. LEXIS 477 (Tex. May 26, 2017). The Court first addressed whether Lesey had mental capacity to execute the documents:

> Documents executed by one who lacks sufficient legal or mental capacity may be avoided. Lesey had the mental capacity to execute the documents effectuating the ranch sale and the fourth and fifth amendments to her trust if she "appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting." The proper inquiry is whether Lesey had capacity on the days she executed the documents at issue. But courts may also look to state of mind at other times if it tends to show one's state of mind on the day a document was executed.

Id. The Court quoted from the court of appeals summary of her deterioration in the final years of her life:

> [Lesey] 1) grew more infirm, 2) experienced macular degeneration, 3) became legally blind, 4) had to have others give her the pills she had to take, 5) had to have others manage her doctors' care and her finances, 6) became extremely frail, 7) required assistance in walking, bathing, dressing, and eating, 8) became incontinent of urine or urinated on herself, 9) experienced continual confusion and forgetfulness, 10) experienced agitation, and 11) experienced depression. So too did she begin to experience congestive heart failure in 2007 and grow less responsive to the medications administered to ameliorate that condition. The condition resulted in her having renal insufficiency or a precursor to renal failure. Consequently, fluid was pooling in her body, and her heart was unable to "clear it out." That, according to a physician who testified, could affect a person's

> mental state "[w]hen it gets that significant."

Id. at *16. The Court held that not all of Lesey's afflictions suggested that she was mentally compromised, and noted that evidence of physical infirmities, without more, does not tend to prove mental incapacity. *Id*. at *16-19. "But evidence of physical problems that are consistent with or can contribute to mental incapacity is probative." *Id*. The Court noted that a board-certified forensic psychiatrist testified how Lesey's physical challenges contributed to her mental incapacity. She testified that by February 2007 Lesey had "mild to moderate dementia and cognitive impairment." *Id*. She added that in 2007 and 2008 Lesey was in the latter stages of congestive heart failure, which led to renal insufficiency. She testified a person's mental state can be affected by that condition. She testified that Lesey began having "confusion" about her medication in 2007 and that nurse and caregiver notes on Lesey indicated "she was confused, she was forgetful. And those began going up until she passed away." *Id*. The psychiatrist opined that by the end of February 2007, Lesey had neither "the executive functioning nor the overall mental capability" to transact business or sign legal documents. *Id*. As to Lesey's dementia, the testimony was that "as you're losing brain cells and if you keep losing so many, some days your brain cells that you have left function better than other days" but that "you'll still have a significant limitation." *Id*. The psychiatrist also noted the deterioration of Lesey's handwriting as evidence of her mental decline.

The Kinsels testified that well before Lesey executed a document in 2007, Lesey was consistently confused, forgetful, and unable to comprehend conversations and documents. She would ask for a car she no longer owned and could no longer understand jokes. *Id*. at *20-21. Due at least in part to her loss of vision, she could no longer read, work crossword puzzles, or play board games, all pursuits she once enjoyed. *Id*. One testified to a "dramatic change in her mental and physical health" beginning in 2006: "She was very forgetful. She was hard to talk to. Just a little disassociative with people." Carole testified that by Thanksgiving of 2006 Lesey was no longer lucid and would talk and respond only in short sentences or by nodding. *Id*. "She was not the Lesey that I had known my entire life," she testified. Another testified that in late 2006 Lesey was "clearly becoming more and more confused and forgetful, and she would forget things that she had recently done or did." *Id*. He visited Lesey four days after Lesey executed the document, and testified she was "very agitated and confused." *Id*. Lesey told him: "I think I've signed something and I don't know what I've signed." *Id*. He testified that by 2008, Lesey only sometimes remembered conversations from minutes earlier. *Id*. He added, "[O]ftentimes I found that she either had not heard what I said or understood it, or didn't understand it, because I'd have to repeat myself." *Id*.

The Court noted that although the defendant maintained at trial that Lesey never lost mental capacity, the jury considered evidence that contradicted this evidence. *Id*. The Court held:

> We agree with the court of appeals that there is sufficient evidence to support the jury's mental-incapacity finding. Keith's [the attorney's] testimony, and that of those who accompanied him on his visits with Lesey, tends to contradict the evidence that Lesey was mentally impaired. And the evidence shows that Keith took his responsibilities seriously and executed his duties carefully and ably. But it is not our place to weigh the testimony adduced at trial. That is the jury's province.

Id.

C. Standards for Mental Competence To Execute Bank Documents

When the issue of mental incapacity is raised, the burden of proof is on the party seeking to set aside the contract, or deed, to show that the

person executing the document did not understand the nature and consequences of his act at the time. *Mandell & Wright v. Thomas*, 441 S.W.2d 841, 845 (Tex.1969) (to have mental capacity to enter into a contract in Texas, a person must have "appreciated the effect of what she was doing and understood the nature and consequences of her acts and the business she was transacting"); *In re Estates of Gomez*, No. 04-05-00300-CV, 2005 Tex. App. LEXIS 9740, 2005 WL 3115871 (Tex. App.—San Antonio Nov. 23, 2005, no pet.); *Gonzalez v. Mendoza*, 739 S.W.2d 120, 121-22 (Tex. App.—San Antonio 1987, no writ). A lack of mental capacity may be shown by circumstantial evidence which includes: (1) the person's outward conduct, "manifesting an inward and causing condition;" (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred. *In re Estate of Robinson*, 140 S.W.3d 782, 793 (Tex. App.—Corpus Christi, 2004, pet. denied). In general, the question of whether a person knows or understands the nature and consequences of his act at the time of the contract is a question of fact for the jury. *Id*. at 793-94.

Courts have held that bank account agreements may be invalid where a party is not mentally competent to execute same. *See In re Estates of Gomez*, No. 04-05-00300-CV, 2005 Tex. App. LEXIS 9740, 2005 WL 3115871 (Tex. App.—San Antonio Nov. 23, 2005, no pet.); *James v. Gant*, 469 S.W.2d 927, 928 (Tex. Civ. App.—Waco 1971, no writ). An estate representative can assert that a decedent did not have the mental capacity to execute bank agreements creating survivorship effect or can allege that a third-party unduly influenced the decedent. *Dubree v. Blackwell*, 67 S.W.3d 286 (Tex. App.—Amarillo 2001, no pet.); *see also Tomlinson v. Jones*, 677 S.W.2d 490 (Tex. 1984) (change of beneficiary of life insurance policies was a nullity where insured lacked capacity); *Cobb v. Justice*, 954 S.W.2d 162, 168 (Tex. App.—Waco 1997, pet. denied) (holding that former beneficiary may bring suit to contest a change of beneficiary on the basis that the change was accomplished as a result of undue influence exerted against the insured).

Absent proof and determination of mental competence, a person who signs a document is presumed to have read and understood the document. *Dubree v. Blackwell*, 67 S.W.3d at 286. Similarly, the law presumes that a person executing a contract or instrument had sufficient mental capacity at the time of its execution to understand his legal rights; therefore, the burden of proof rests on the person seeking to have the instrument set aside to show lack of mental capacity at the time of execution. *Decker v. Decker*, 192 S.W.3d 648, 652 (Tex. App.—Fort Worth 2006, no pet.). Elderly persons are not presumptively incompetent. *Dubree v. Blackwell*, 67 S.W.3d at 286 (citing *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998)). A person may be incompetent at one time and competent at other times. *Id*.

For example, in *Dubree*, the court of appeals affirmed a jury's determination that a decedent had mental competence when she created a survivorship account. *Id*. The court noted that no one testified regarding the decedent's mental competence at the time that she signed the account agreement. Though experts testified that the decedent had diminished capacity in general, they admitted that persons in that condition could have periods of lucidity. *Id*. at 290. There was also conflicting lay testimony regarding the decedent's mental competence and ability to handle her financial affairs. The court held that this was sufficient to support the jury's finding of competence. *Id*.

The court also affirmed the jury's finding that the decedent was not unduly influenced. *Id*. at 291. The evidence showed that the bank agreement was presented to the decedent by third parties, and there was no evidence of the decedent's mental incompetence at the time the agreement was signed. *Id*.

For further example, in *Estates of Gomez*, the court of appeals affirmed a finding of lack of mental competence to sign an account agreement based on the following evidence:

> Lisa testified that after Edmundo died in March 2001 and continuing thereafter, Rose's mental capacity was a "2" on a scale of 1 to 10; physically, she was a "1." Rose had bad short term memory, started speaking Spanish even though her family could not understand her, stopped eating, stayed in her wheelchair and slept a lot, and developed odd mannerisms similar to those exhibited by Edmundo before he died. In the summer of 2001, Lisa stated Rose could make only simple decisions and was exhibiting a steady mental decline. Greg testified that Rose was very depressed, quiet and withdrawn after Edmundo passed away, and was in no condition to open a new investment account. Jeff testified that in March 2001, Rose was very depressed, stayed in her wheelchair, and never ate whole food again, instead surviving on liquid supplements the nurses tricked her into drinking. Jeff stated his opinion that Rose did not understand what she was doing, and that she would never have moved all of her money to be managed by a stranger for a fee when she could just have left the money in CD's at Compass Bank where they had been customers their whole life. Finally, Lina Alonso testified that she did not personally handle the transaction when Rose withdrew the annuity funds, but believed that she would have had to understand the forms and transaction or the bank would not have completed the transaction.
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> In his brief, Robert Gomez stresses the lack of evidence of the specific date that the Edward Jones account was opened. However, the record as a whole clearly reflects that the account was opened sometime during the period between the first meeting with Clay Leveritt in August 2000 and April 2001 when it was funded with approximately $ 100,000. We hold the record contains legally and factually sufficient evidence to support the jury's finding that Rose lacked the mental capacity to open and fund the Edward Jones account during that period of time.

In re Estates of Gomez, No. 04-05-00300-CV, 2005 Tex. App. LEXIS 9740 at *32-34.

It should be noted that whether a party has mental capacity to execute a bank agreement is an issue that a court decides and not an arbitrator. *In re Morgan Stanley & Co.*, 293 S.W.3d 182, 187 (Tex. 2009). If the trial court finds that a contract was executed by a mentally incompetent individual, then the arbitration clause is not enforceable. *Oak Crest Manor Nursing Home, LLC v. Barba*, No. 03-16-00514-CV, 2016 Tex. App. LEXIS 12710 (Tex. App.—Austin December 1, 2016). A party's mental incompetency made the agreement void: "the supreme court has held that when the issue of mental capacity to contract is raised, 'the very existence of a contract is at issue,' as with other contract-formation issues, and therefore the court's determination that a party lacked the capacity to contract would render that contract non-existent and void rather than merely voidable." *Id*.

D. Recent Cases On Mental Competence To Execute Bank Documents

In *In the Estate of Minton*, the court of appeals affirmed a jury's finding that the decedent did not have mental competence to execute a POD agreement with the bank naming a non-family

member as a beneficiary. No. 13-12-00026-CV, 2014 Tex. App. LEXIS 1061 (Tex. App.—Corpus Christi, January 30, 2014, pet. denied). On December 2, 2010, Minton passed away, intestate, leaving a checking account and four C.D.s totaling $430,000. On March 25, prior to his death, Minton entered into POD contracts where he designated Garza, a retired law enforcement officer who had been friends with Minton since February 2007, as the beneficiary. After his death, the administrator of his estate and his heirs sued Garza for a declaration that the POD contract was void due to undue influence and mental incompetence. The court dismissed the undue influence claim due to a lack of evidence, and the mental competence claim went to a jury. The jury found that the decedent was not mentally competent.

Garza challenged the sufficiency of the evidence to support the jury's finding of mental incompetence. The court of appeals held that the burden of proof rests with the party seeking to set aside a contract for lack of mental capacity. It also held that the legal standards for determining the existence of mental capacity for the purposes of executing a will or deed are substantially the same as the standards for mental capacity to execute a contract.

The court held that to possess "mental capacity" to contract, the decedent, at the time of contracting, must have "appreciated the effect of what he was doing and understood the nature and consequences of his acts and the business he was transacting." *Id*. It also stated that mental capacity, or lack thereof, may be shown by "circumstantial evidence, including: (1) a person's outward conduct, manifesting an inward and causing condition; (2) any pre-existing external circumstances tending to produce a special mental condition; and (3) the prior or subsequent existence of a mental condition from which a person's mental capacity (or incapacity) at the time in question may be inferred." *Id*.

The court first dealt with an argument by Garza that evidence before or after the date that the POD agreement was signed was irrelevant. He argued that because there was evidence that the decedent was mentally competent on the day that he signed the POD agreement, that evidence from other time periods was not relevant. The court disagreed:

> Garza cites no case precluding the jury from considering or giving weight to evidence under any circumstance, much less solely because the party seeking to uphold the contract presents its own testimony of competence. Accordingly, we hold that the jury was entitled to consider evidence of Minton's mental capacity prior and subsequent to the execution of the P.O.D. contracts if the trial court could have considered it probative and relevant to his mental state on March 25, 2010.

Id. at *19. Consistently, the court later held that the trial court did not err in admitting the evidence of competence from time periods before and after the execution of the POD agreement.

The court then held that sufficient evidence supported the jury's determination that a decedent lacked mental capacity on the day he executed the POD agreement because in the month of, and the months before and after, he signed the POD agreement, the decedent refused medical treatment even though he was bed-ridden and needed it, spoke to people who were not there, sat for hours in his own feces and urine, and medical providers indicated he was confused and senile. This evidence came from medical records, care givers, former friends of the decedent, and a retained expert. The court held that the jury was entitled to infer that evidence of the decedent's irrationality and dementia in the months preceding and following the signing of the contracts was probative of his capacity to contract on the date at issue. There was contradicting evidence that showed that the decedent was competent on the day that he signed the agreement, including evidence by the beneficiary, two bank representatives, a care giver, and a retained expert. The court held that

this evidence merely created a fact question that was resolved by the jury: "while Garza elicited testimony from witnesses who claimed Minton was competent on the date the contract was signed, it was the jury's responsibility to judge the credibility of the witnesses and determine the weight to be given their testimony." *Id*. at *21.

One interesting aspect of this case is the holding that the legal standards for determining the existence of mental capacity for the purposes of executing a will or deed are substantially the same as the standards for mental capacity to execute a contract. Historically, however, courts have held that less mental capacity is required to enable a testator to make a will than for him to make a contract. *See, e.g., Burk v. Mata*, 529 S.W.2d 591 (Tex. Civ. App.—San Antonio1975, writ ref'd n.r.e.); *Smith v. Welch*, 285 S.W.2d 823 (Tex. Civ. App.—Texarkana 1955, writ ref'd n.r.e.); *Rudersdorf v. Bowers*, 112 S.W.2d 784 (Tex. Civ. App.—Galveston 1938, writ dism'd). *But see Bach v. Hudson*, 596 S.W.2d 673 (Tex. Civ. App.—Corpus Christi 1980, no writ).

IV. NEW STATUTORY CHANGES TO THE DURABLE POWER OF ATTORNEY ACT

A. Introduction

Financial institutions often see elder abuse and financial exploitation in the context of transactions with individuals who hold a power of attorney for the elderly person. Historically, in Texas, financial institutions and others did not have to accept a power of attorney document. If an agent wanted to conduct a transaction, the financial institution could demand alternative power of attorney forms, that the principal conduct it, or simply refuse to do it.

The Texas Legislature has recently instituted broad changes to the Texas Estates Code's Texas Durable Power of Attorney Act regarding durable power of attorney provisions. The Real Estate, Probate, and Trust Law (REPTL) Section of the State Bar of Texas supported HB 1974 because that section wanted to plan around expensive guardianships by the use of durable power of attorney documents. Those planners were frustrated by financial institutions not accepting those documents. Accordingly, one aspect of the new statutory provisions is to make sure that financial institutions and others accept power of attorney documents. The provisions also potentially allow broad additional powers to designated agents; powers that would even allow the agents to benefit themselves from the principal's assets. The legislative history provides:

> The Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL) proposes H.B. 1974, which provides several changes to the Texas Durable Power of Attorney Act intended to ensure that validly-executed durable powers of attorney (DPOA) can be used more effectively in Texas, in furtherance of the legislative goal of reducing the need for guardianship proceedings, and to provide additional powers to the designated agents. DPOAs are vital for planning for the possibility of incapacity, and are specifically included as an alternative to guardianship under the Estates Code. But many Texas citizens have been unable to effectively use DPOAs due to their rejection for arbitrary or unexplained reasons. H.B. 1974 makes DPOAs more readily available.
>
> Overview: H.B. 1974 makes important changes to the statute by: providing for reasonable acceptance of DPOAs in a timely fashion so that guardianship can be avoided; eliminating risk to persons who accept DPOAs by allowing them to rely on an agent's certification that the DPOA is valid for the purpose it is being presented or an opinion of the

> agent's counsel who is hired at the principal's expense; giving the person who is asked to accept the DPOA numerous valid reasons to reject, some of which cannot be challenged by the principal or agent; and providing a mechanism to have a court decide any disputes. This bill does not require someone to automatically accept a DPOA and does not shift liability to those who do accept a DPOA. Rather, it provides new liability protection to those who accept a DPOA without knowledge that it was invalid and includes new procedures to properly reject a DPOA. Similar provisions have been enacted in 30 other states without issue.

B. Application of Statute

The new statutes apply to "(1) durable power of attorney, including a statutory durable power of attorney, created before, on or after the effective date of the Act [September 1, 2017]; (2) a judicial proceeding concerning a durable power of attorney pending on, or commenced after, the effective date of this Act." Section 16(a), H.B. 1974. Also, certain provisions [Section 751.024; Chapter 751, Subchapters A-2, B, C, and D; and Chapter 752] only apply to durable powers of attorney executed after the date of the Act. *Id*. at 16(b). Moreover, if a court finds that the application of a provision of the new statutes would substantially interfere with the effective conduct of a judicial proceeding or would prejudice the rights of a party, then the court can apply the former law for that purpose and in those circumstances. *Id*. at 16(d).

The new power of attorney statutes apply to durable powers of attorney as that term is defined in Texas Estates Code Section 751.021. Tex. Est. Code Ann. § 751.0015 ("This subtitle applies to all durable powers of attorney except: (1) a power of attorney to the extent it is coupled with an interest in the subject of the power, including a power of attorney given to or for the benefit of a creditor in connection with a credit transaction; (2) a medical power of attorney … (3) a proxy or other delegation to exercise voting rights or management rights with respect to an entity; or (4) a power of attorney created on a form prescribed by a government or governmental subdivision, agency, or instrumentality for a governmental purpose.").

If the document complies with the statutory definition of durable power of attorney, then a "person" is required to comply with the statute. The term "person" commonly means: "a human being regarded as an individual." NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010) ("person" means); WEBSTER'S THIRD NEW INT'L DICTIONARY (2002) ("person" is "an individual human being," "a human being as distinguished from an animal or thing"). However, the term may also include an artificial person, such as a government agency, partnership, association, corporation, trust, or other legal entity. *See, e.g.*, Tex. Gov't Code § 311.005 (unless a statute or context employing the word or phrase requires a different definition, "person," when used in a statute, "includes corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity"). *See also Colorado County v. Staff*, 510 S.W.3d 435, n.59 (Tex. 2017). Therefore, the term "person" should be construed very broadly.

C. Definition of Durable Power of Attorney

To be a durable power of attorney, the document must be in writing or other record that designates a person as an agent and grants authority to act in place of the principal, signed by the principal or another at the principal's direction, be acknowledged, and contain words that: 1) the power of attorney document is not affected by the subsequent disability or incapacity of the principal, 2) the power of attorney becomes effective on the disability or incapacity of the principal, or 3) other similar words that clearly indicate that the authority conferred on the agent shall be exercised notwithstanding the principal's subsequent

disability or incapacity. Tex. Est. Code Ann. § 751.021(a).

The power of attorney document must be signed by the principal or another person that the principal directs to sign for him or her. *Id*. Accordingly, a person that is not physically able to sign a power of attorney document may nonetheless be able to execute the same via another person. The Legislature has a form for a statutory durable power of attorney, and the new form is attached to this paper as Appendix A. A statutory durable power of attorney is legally sufficient under this subtitle if:(1) the wording of the form complies substantially with the wording of the form prescribed by Section 752.051; (2) the form is properly completed; and (3) the signature of the principal is acknowledged. Tex. Est. Code Ann. § 752.004.

A signature on the power of attorney is presumed to be genuine, and the durable power of attorney is presumed to be executed under the statute defining a durable power of attorney if the officer taking the acknowledgment has complied with Texas Civil Practice and Remedies Code Section 121.004(b). *Id*. § 751.0022. That statute provides: "An acknowledgment or proof of a written instrument may be taken outside this state, but inside the United States or its territories, by: (1) a clerk of a court of record having a seal; (2) a commissioner of deeds appointed under the laws of this state; or (3) a notary public." Tex. Civ. Prac. & Rem. Code Ann. § 121.004(b).

The principal can appoint co-agents, and unless the power of attorney document provides otherwise, each co-agent can exercise authority independently of the other. Tex. Est. Code Ann. § 751.021. The statutory durable power of attorney form expressly has a provision discussing co-agents and their authority to act. *Id*. at § 752.051.

D. Agent's Acceptance of Duties

An agent does not have to sign any document or make any other declaration regarding accepting the position of agency. Rather, a person accepts the appointment simply by exercising authority or performing duties as an agent or by any other assertion or conduct indicating acceptance of the appointment. Tex. Est. Code Ann. § 751.022.

A person who accepts appointment as an agent under a durable power of attorney as provided by Section 751.022 is a fiduciary as to the principal only when acting as an agent under the power of attorney and has a duty to inform and to account for actions taken under the power of attorney. Tex. Est. Code § 751.101.

E. Agent's Duties

An agent is a fiduciary when he or she acts under the power of attorney document. "A person who accepts appointment as an agent under a durable power of attorney as provided by Section 751.022 is a fiduciary as to the principal only when acting as an agent under the power of attorney and has a duty to inform and to account for actions taken under the power of attorney." *Id*. at § 751.101. An agent has a duty to timely inform the principal, maintain records, and perform an accounting when requested. *Id*. at § 751.102-104. The agent also has a duty to inform the principal of breaches of fiduciary duties by other agents. *Id*. at § 751.121.

Importantly, an agent has the duty to preserve a principal's estate plan. The Act provides:

> An agent shall preserve to the extent reasonably possible the principal's estate plan to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on all relevant factors, including: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (4) eligibility for a benefit, a program, or

assistance under a statute or regulation.

Id. at § 751.122.

Finally, a power of attorney agent is an agent and owes the fiduciary duties recognized by common law for agents generally. An agency relationship can be formed by oral agreement between the parties or simply by the parties' conduct. *Community Health Systems Professional Services Corporation v. Hansen*, 525 S.W.3d 671 (Tex. 2017). An agency relationship creates a fiduciary relationship as a matter of law. *Crim Truck & Tractor Co. v. Navistar Intern. Transp. Corp.*, 823 S.W.2d 591, 52 A.L.R.5th 919 (Tex. 1992). Factors which must be taken into consideration when determining the scope of an agent's fiduciary duty include not only the nature and purpose of the relationship, but also agreements between the agent and principal. *National Plan Adm'rs, Inc. v. National Health Ins. Co.*, 235 S.W.3d 695 (Tex. 2007); *Man Industries (India), Ltd. v. Midcontinent Exp. Pipeline, LLC*, 407 S.W.3d 342 (Tex. App.—Houston [14th Dist.] 2013, no pet.). The agreement to act on behalf of the principal causes the agent to be a fiduciary, that is, a person having a duty, created by the agent's undertaking, to act primarily for the benefit of another in matters connected with such undertaking. *Stoneeagle Services, Inc. v. Davis*, 2013 WL 12143946 (N.D. Tex. 2013). The nature of the fiduciary duty owed by an agent is a high duty of good faith, fair dealing, honest performance, and strict accountability. *Salas v. Total Air Services, LLC*, 550 S.W.3d 683 (Tex. App.—El Paso 2018, no pet.); *Daniel v. Falcon Interest Realty Corp.*, 190 S.W.3d 177 (Tex. App.—Houston [1st Dist.] 2005, no pet.). Under Texas law, an agent has a general duty to disclose material facts to such individual's principal. *Patton v. Archer*, 590 F.2d 1319 (5th Cir. 1979). Specifically, an agent has the duty to impart to its principal every material fact relating to transactions within the scope of the agency on becoming aware of those facts during the course of the transaction. *Allison v. Harrison*, 137 Tex. 582, 156 S.W.2d 137 (Comm'n App. 1941). Under the principles that relate to fraud and deceit generally, an agent's conduct that constitutes a fraud on its principal renders the agent liable in damages to the principal. *Tyler Building & Loan Ass'n v. Baird & Scales*, 106 Tex. 554, 171 S.W. 1122 (1914).

A fiduciary may be held accountable for breaching its duty by acting negligently. *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010). In determining an agent's liability for negligence, courts need not consider whether the agent acted in good faith; instead, courts are to inquire as to whether the agent complied with the legal standard of conduct required under the circumstances presented. *Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches*, 215 S.W.2d 904 (Tex. Civ. App.—Beaumont 1948, writ refused n.r.e.).

F. Agent's Right to Reimbursement and Compensation

The new statute now provides that unless a durable power of attorney document provides otherwise, that an agent is entitled to the reimbursement of any reasonable expenses incurred on the principal's behalf and compensation that is reasonable under the circumstances. Tex. Est. Code Ann. § 751.024. The new durable statutory power of attorney form has a provision dealing with an agent's right to reimbursement and compensation where the principal has the ability to revoke that right. Tex. Est. Code Ann. § 752.051.

G. Powers Of Attorneys From Other Jurisdictions

A power of attorney document that is executed in a different jurisdiction is valid in Texas if, when executed, the execution complied with: "(1) the law of the jurisdiction that determines the meaning and effect of the durable power of attorney as provided by Section 751.0024; or (2) the requirements for a military power of attorney as provided by 10 U.S.C. Section 1044b." Tex. Est. Code Ann. § 751.0023(b).

Section 751.0024 provides that the meaning and effect of a durable power of attorney is determined by the law of the jurisdiction

indicated in the document. *Id*. at § 751.0024. If the document does not designate the controlling law, then it is controlled by the law of the jurisdiction of the principal's domicile if the principal's domicile is indicated in the document. If the domicile is not indicated, then the document is controlled by law of the jurisdiction in which the principal executed the document. *Id*. It should be noted that the new statutory durable power of attorney form expressly states that it is controlled by Texas law. *Id*. at § 752.051.

Power of attorney documents prepared in other jurisdictions generally follow the law of that jurisdiction regarding whether it is a durable power of attorney. *Id*. § 751.021(b). "If the law of a jurisdiction other than this state determines the meaning and effect of a writing or other record that grants authority to an agent to act in the place of the principal, regardless of whether the term 'power of attorney' is used, and that law provides that the authority conferred on the agent is exercisable notwithstanding the principal's subsequent disability or incapacity, the writing or other record is considered a durable power of attorney under this subtitle." *Id*.

H. Conflict-Of-Law Issues

The durable power of attorney act does not supersede any other law applicable to financial institutions or other entities, and to an extent that there is a conflict, the other law applies. Tex. Est. Code Ann. § 751.007.

The remedies under the new power attorney statute are not exclusive and other rights and remedies under other laws still exist. Tex. Est. Code Ann. § 751.006.

Regarding the construction of powers of attorney and the statutes, courts should construe them to make them uniform "to the fullest extent possible" with the laws of other states with similar provisions. *Id*. at § 751.003. Accordingly, though not binding, persuasive authority from other states should be considered by courts in construing Texas powers of attorneys and the statutes.

I. Persons Now Generally Required To Accept Power Of Attorney Documents (With Limited Exceptions)

Historically, in Texas, persons were not required to accept power of attorney documents. They could reject them for any reason and did not have any obligation to explain why they were not accepting them. That has now changed. Section 751.201 of the Texas Estates Code provides:

> [A] person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall: (1) accept the power of attorney; or (2) before accepting the power of attorney: (A) request an agent's certification under Section 751.203 or an opinion of counsel under Section 751.204 not later than the 10th business day after the date the power of attorney is presented, except as provided by Subsection (c); or (B) if applicable, request an English translation under Section 751.205 not later than the fifth business day after the date the power of attorney is presented, except as provided by Subsection (c).

Tex. Est. Code Ann. § 751.201(a).

A person who requests: "(1) an agent's certification must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested certification; and (2) an opinion of counsel must accept the durable power of attorney not later than the seventh business day after the date the person receives the requested opinion." *Id*. at § 751.201(b).

The statute does provide that the parties can agree to extend the periods provided above. *Id*. at § 751.201(c). Therefore, the principal or agent

presenting a durable power of attorney for acceptance and the person may agree to extend a time period prescribed above. No format for the agreement or time period during which the agreement may be entered into is specified, but it is prudent that the agreement be in writing, dated, and signed by both parties before the end of the original ten business-day period. The Author has attached a proposed form agreement altering the statutory timing requirements as Appendix C.

Importantly, a person is not required to accept a power of attorney if the agent does not provide a requested certification, opinion of counsel, or English translation. *Id*. at § 751.201(e).

A durable power of attorney is considered accepted on the first day the person agrees to act at the agent's discretion under the power of attorney. Tex. Est. Code Ann. § 751.208. Therefore, persons should implement procedures that will avoid an unintentional acceptance of the power of attorney before a decision has been made to accept or reject it.

J. Timeline Considerations

The statute does not describe "business days." Under the Texas Government Code, in computing business days, a person should exclude the first day and include the last day, and if the last day is a Saturday, Sunday, or legal holiday, the person should extend the period to include the day that is not a Saturday, Sunday, or legal holiday. Tex. Gov. Code Ann. § 311.014.

K. When Does The Agent Present The Power Of Attorney To Start The Clock?

The event that triggers a person's time period to accept the power of attorney document is the presentment of the document and a request to accept it by an agent. Tex. Est. Code Ann. § 751.201(a). This should normally be a fairly easy assessment. For example, an agent may present a power of attorney document and want to write a check, wire money in or out, deposit money, obtain a loan, change an account agreement, request statements, etc. Each request will be focused on a particular transaction or request some action by the person. However, Section 751.201(a) does not use the term "transaction" or require the request to involve an action by the person; rather it uses a broader phase: "who is presented with and asked to accept a durable power of attorney by an agent…" *Id*. That could encompass an agent bringing in a power of attorney document before a particular transaction or request for action occurs. For example, an agent may bring such a document in before the principal is incapacitated because they live in another location and want to simply keep it "on file" in case it is needed in the future. When the agent delivers the power of attorney document without an immediate transaction or request of action in mind, does that start the clock for the person to reject the power of attorney document?

The safest answer at this time is to document the incident and clarify whether the agent is presenting it to the person and requesting that the person accept it. The Author has a proposed in Appendix B a form agreement that could be used to clarify whether the agent is "presenting" the power of attorney. If there is no associated transaction or requested action, the agent may agree that he or she is not seeking a determination on acceptance at this time, which would not start the clock. If he or she does request acceptance, even without a transaction in mind, the person should take the safest course and start the process for accepting or rejecting the document.

The author is of the opinion that Section 751.201(a) must mean that a power of attorney document is offered for acceptance when there is a request to consummate a particular transaction or to take some affirmative action. Granted, that section does not limit it to "transactions," but other provisions clearly contemplate a transaction or request for action being associated with the request. Section 751.206 provides the reasons that a person may reject a power of attorney document, and many of those reasons revolve around facts that actually use the term "transaction." Tex. Est. Code Ann. § 751.206(1), (2), and (3). The statutes discussing an agent's powers are primarily done in reference to "transactions." *Id*. at §§ 752.102-752.115.

For example, the provision discussing the power to conduct banking transactions states:

> The language conferring authority with respect to banking and other financial institution transactions in a statutory durable power of attorney empowers the attorney in fact or agent to:(1) continue, modify, or terminate an account or other banking arrangement made by or on behalf of the principal;
>
> (2) establish, modify, or terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, brokerage firm, or other financial institution selected by the attorney in fact or agent;
>
> (3) rent a safe deposit box or space in a vault;
>
> (4) contract to procure other services available from a financial institution as the attorney in fact or agent considers desirable;
>
> (5) withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution;
>
> (6) receive bank statements, vouchers, notices, or similar documents from a financial institution and act with respect to those documents;
>
> (7) enter a safe deposit box or vault and withdraw from or add to its contents;
>
> (8) borrow money at an interest rate agreeable to the attorney in fact or agent and pledge as security the principal's property as necessary to borrow, pay, renew, or extend the time of payment of a debt of the principal;
>
> (9) make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, bills of exchange, checks, drafts, or other negotiable or nonnegotiable paper of the principal, or payable to the principal or the principal's order to receive the cash or other proceeds of those transactions, to accept a draft drawn by a person on the principal, and to pay the principal when due;
>
> (10) receive for the principal and act on a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument;
>
> (11) apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution and give an indemnity or other agreement in connection with letters of credit; and
>
> (12) consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Id. at 752.106.

A statute should be construed as a whole rather than in its isolated provisions. *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). A court should not give one provision a meaning that is out of harmony or inconsistent with the other provisions, although it may be susceptible

to such a construction standing alone. *City of Waco v. Kelley*, 309 S.W.3d 536, 542 (Tex. 2010). Accordingly, a court should construe presentment of a power of attorney document to include an actual transaction or other request for action. Until that issue is decided, a person should be careful to clarify in writing any issues concerning presentment with an agent.

L. Person Cannot Request Alternative POA Form And Originals Are Not Required

Historically, many institutions have rejected power of attorney forms and required agents to have the particular institution's power of attorney form executed by the principal. This was very problematic when the principal was incapacitated and not able to execute a new form. Accordingly, the new statutory changes now state that a person who is asked to accept a durable power of attorney that meets the statutory requirements set forth above and includes the appropriate authority for the transaction cannot request "an additional or different form of the power of attorney." Tex. Est. Code Ann. § 751.202(1). Therefore, the person cannot request a power of attorney that is otherwise valid be revised to include additional language. *Id*.

Further, the person may not require that the agent file or record the power of attorney document "in the office of a county clerk unless the recording of the instrument is required by Section 751.151 or another law of this state." *Id*.

However, pursuant to Section 751.203 of the Texas Estates Code, a person may request that "the agent presenting the power of attorney provide to the person an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney." Tex. Est. Code Ann. § 751.203. Therefore, the Author believes that a person can require the agent to include a requested factual statement in the certificate. *Id*.

Further, unless otherwise required by statute or by the durable power of attorney document, a photocopy or electronically transmitted copy of an original durable power of attorney document has the same effect as the original instrument and may be relied on without liability by the person who is asked to accept it. *Id*. at 751.0023(c).

M. Agent's Certification

As stated above, the person to whom the power of attorney is presented may request that the agent provide an agent's certification, under penalty of perjury, of any factual matter concerning the principal, agent, or power of attorney. The statute provides a form for the certification for parties to use. *Id*. at § 751.203(b). A copy of this form is attached hereto as Appendix D (with one modification to add lines for additional factual matters).

Section 751.203(c) of the Texas Estates Code states: "[a] certification made in compliance with this section is conclusive proof of the factual matter that is the subject of the certification." *Id*. at § 751.203(c). Further, "[a] person may rely on, without further investigation or liability to another person, an agent's certification, opinion of counsel, or English translation that is provided to the person under this subchapter." *Id*. at § 751.210.

Accordingly, the author suggests that persons generally request agent's certifications for any transaction, including individual check transactions. Of course, a person may have a particular circumstance where it wants to omit the requirement for an additional certification, and that may be done where reasonable.

It may be convenient for a person to have a form certification on hand and to provide a notary service for agents wanting to make a transaction. With respect to employees notarizing a certification, there is no per se prohibition to an employee doing so. In fact, Texas Finance Code Section 59.003 provides: "[a] notary public is not disqualified from taking an acknowledgment or proof of a written instrument as provided by Section 406.016, Government Code, solely because of the person's ownership of stock or a participation interest in or employment by a financial institution that is an interested party to

the underlying transaction." Tex. Fin. Code Ann. § 59.003.

If a dispute ever arises, however, a person should be aware that the fact that the employee notarized the certification may be used as evidence. For that reason, the better practice would be for a non-interested third party to notarize the certification.

The Author has provided a proposed form for a request for an agent's certification as Exhibit F.

N. Physician's Written Statement

If the power of attorney becomes effective on the disability or incapacity of the principal, the person may also request that the certification include a written statement from a physician that states that the principal is presently disabled or incapacitated. *Id*. at § 751.203.

Unless otherwise defined in the power of attorney document, a person is considered disabled or incapacitated for the purposes of the durable power of attorney if a physician certifies in writing at a date later than the date of the power of attorney document that, based on the physician's medical examination of the person, the person is determined to be mentally incapable of managing the person's financial affairs. Tex. Est. Code Ann. § 751.00201.

For any springing durable power of attorney document (one that becomes effective upon the disability or incapacity of the principal), a person has the right to request a writing from a doctor stating that the principal is disabled or incapacitated. The author would recommend that a person request that physician's written statement for any springing power of attorney document that is presented. The Author has provided a proposed form for a physician's written statement as Exhibit E.

The request for medical information about a principal raises HIPAA privacy issues. 45 C.F.R. Section 164.502, which pertains to the general permissible uses and disclosures of protected health information, protects the disclosure of a person's medical information. The protected health care information is individually identifiable health information held or transmitted by a covered entity (which includes most health care providers) in any form or media, whether electronic, paper or oral and includes the patient's past, present, and future physical or mental health condition. 45 C.F.R. Section 164.508 pertains to the uses and disclosures of protected health information for which an authorization is required. A provider must obtain the principal's written authorization for any use or disclosure of protected health information that is not for treatment, payment or health care operations, or otherwise permitted or required by the privacy rule. All authorizations must be in plain language, and contain specific information regarding the information to be disclosed or used, the person(s) disclosing and receiving the information, expiration, right to revoke in writing, and other data and terms. A medical power of attorney holder may potentially sign a release for this type of information. Tex. Health & Safety Code Ann. § 166.157. A medical power of attorney or other written authorization should specifically state that medical care information can be shared with the agent who has been assigned power of attorney. That way, any health care provider reviewing the medical power of attorney can be assured that he or she will not be in breach of HIPAA privacy rules, and subject to related fines, if a principal's health care information needs to be shared with the named representative.

In the end, if the principal's physician will not provide any written information about the principal's ability to manage their financial affairs, then the person does not have to accept the durable power of attorney and may reject it. So, the burden is on the agent to obtain the medical opinion if they want the person to close the transaction.

O. Opinion Of Counsel

Before accepting a power of attorney, the person may request from the agent an opinion of counsel regarding any matter of law concerning the power of attorney so long as the person provides to the agent the reason for the request

in a writing or other record. *Id*. at § 751.204(a). If timely sought, this opinion will be prepared by the principal or agent, at the principal's expense. *Id*. at § 751.204(b). However, if the person requests the opinion later than the tenth business day after the date the agent presents the power of attorney and there has not otherwise been an agreed-upon extension, the principal or agent may, but is not required to, provide the opinion and it will be done at the requestor's expense. *Id.* at § 751.204(c).

The Author recommends that when the person is presented with a power of attorney document that is prepared in another state or that does not meet the statutory form, that the person timely requested an opinion of counsel on whether the power of attorney document is enforceable and valid. Further, if the person has any doubt regarding the propriety of the transaction, the person should request an attorney's opinion that the transaction is appropriate and not in breach of any duties that the agent owes the principal.

The Author has provided a proposed form for a request for an opinion of counsel as Exhibit F.

P. English Translation

The person may request from the agent presenting the power of attorney document that the agent provide an English translation of the power of attorney document if some or all of the power of attorney document is not written in English. *Id*. at § 751.205(a). If timely requested (within five days of getting the power of attorney document), the translation must be provided by the principal or agent at the principal's expense. *Id*. at § 751.205(b). However, if, without an extension, the person requests the translation later than the fifth business day after the date the power of attorney is presented, the principal or agent may, but is not required to, provide the translation at the requestor's expense. *Id*. If the person asks for an English translation, then the power of attorney is not considered presented until the date the person receives the translation. *Id*. at § 751.201(d). At that point the person can request a certification and/or attorney opinion.

A person should generally request an English translation when presented with a power of attorney document that is not in English. If nothing else, this will delay the time periods for compliance and/or requesting an agent's certificate or opinion of counsel. The durable power of attorney is not considered presented for acceptance until the date the person receives the translation. In this instance, the author advises not requesting an agent's certification, physician's written statement, or the opinion of counsel until after receipt of the English translation in order to extend the period allowed to accept or reject the power of attorney.

The Author has provided a proposed form for a request for an English translation as Exhibit F.

Q. Person Accepting Power Of Attorney Has Defenses

The statutes have many different protections for those who are asked to accept a power of attorney document.

The statutes protect a person who receives a copy of a power of attorney document: "a photocopy or electronically transmitted copy of an original durable power of attorney . . . may be relied on, without liability, by a person who is asked to accept the durable power of attorney to the same extent as the original." Tex. Est. Code Ann. § 751.0023(c).

A signature on a power of attorney that purports to be the signature of the principal is presumed to be genuine. *Id*. at § 751.022. A person who in good faith accepts a power of attorney without actual knowledge that the signature of the principal is not genuine may rely on a presumption that the signature is genuine and that the power of attorney was properly executed. *Id*. at § 751.209(a). Additionally, a person who in good faith accepts a power of attorney without actual knowledge that the power of attorney is void, invalid, or terminated, that the purported agent's authority is void, invalid, or terminated, or that the agent is exceeding or improperly exercising the agent's authority may rely on the power of attorney as if: (1) the power of attorney were genuine, valid,

and still in effect; (2) the agent's authority were genuine, valid, and still in effect; and (3) the agent had not exceeded and had properly exercised the authority. *Id*. at § 751.209(b).

These provisions provide limited protections to the person accepting the power of attorney document. The person is protected if it acts in good faith and without actual knowledge of a defect. That simply means that there may be a fact issue regarding "good faith" or "actual knowledge." The statute also does not state whose burden it is to prove "good faith" or "actual knowledge" or the lack thereof.

The statutes protect a person receiving a certification, opinion, or translation: "A person may rely on, without further investigation or liability to another person, an agent's certification, opinion of counsel, or English translation that is provided to the person under this subchapter." Tex. Est. Code Ann. § 751.210. So, if the certification has false statements, the person has no duty to investigate those facts and may rely on the certification without liability to a third party. For example, if the agent states that the principal has never revoked the power of attorney, but the principal really did so, then a financial institution that conducted a transaction with the agent has a defense if the executor of the principal's estate later sues based on the transaction.

It should be noted that the provision dealing with a certification, opinion, or translation does not expressly have a "good faith" or "actual knowledge" requirement. It appears that this defense is unqualified. But there is an argument that a person that knows that a certification, opinion, or translation is false did not "rely" on it and cannot take advantage of the liability protection.

A person is not considered to have actual knowledge of a fact relating to a power of attorney, principal, or agent if the employee conducting the transaction or activity involving the power of attorney does not have actual knowledge of the fact. *Id*. at § 751.211. A person is considered to have actual knowledge of a fact relating to a power of attorney, principal, or agent if the employee conducting the transaction or activity involving the power of attorney has actual knowledge of the fact. *Id*. at § 751.211. "Actual knowledge" means the knowledge of a person without that person making any due inquiry and without any imputed knowledge. *Id*. at § 751.002.

This is a very favorable definition of actual knowledge for financial institutions. A principal may have relationships in multiple parts of a financial institution: commercial (loans), retail (accounts), and fiduciary (trust administration, investment advisor). The fact that a person in the trust department may know something about the principal and agent will not be imputed to the teller that closes a transaction for the agent. The transaction will be judged solely by the teller's actual knowledge without the teller making any inquiry with other parts of the financial institution and without the teller being imputed the knowledge of the trust administrator.

R. Defenses and Protections for Person Accepting POA Could Be Broader

It is helpful to compare the protections in the power of attorney act with other statutory protections. Regarding joint accounts, a financial institution has a statutory protection from account holders' claims arising from the bank paying a party to the account. A multiple-party account may be paid, on request, to any one or more of the parties to that account. Tex. Est. Code Ann. §113.202.

Moreover, the Estates Code has specific provisions allowing a financial institution to pay account parties for joint accounts, P.O.D. accounts, and trust accounts. Tex. Est. Code Ann. §§ 113.203, 113.204, 113.205. Moreover, "[a] financial institution that pays an amount from a joint account to a surviving party to that account in accordance with a written agreement under Section 113.151 is not liable to an heir, devisee, or beneficiary of the deceased party's estate." Tex. Est. Code Ann. §113.207.

The Estates Code also expressly states that payment in accordance with these provisions

discharges a financial institution from liability. Section 113.209 states:

> (a) Payment made in accordance with Section 113.202, 113.203, 113.204, 113.205, or 113.207 discharges the financial institution from all claims for those amounts paid regardless of whether the payment is consistent with the beneficial ownership of the account between parties, P.O.D. payees, or beneficiaries, or their successors.
>
> (b) The protection provided by Subsection (a) does not extend to payments made after a financial institution receives, from any party able to request present payment, written notice to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving the notice, the successor of a deceased party must concur in a demand for withdrawal for the financial institution to be protected under Subsection (a).
>
> (c) No notice, other than the notice described by Subsection (b) or any other information shown to have been available to a financial institution affects the institution's right to the protection provided by Subsection (a).
>
> (d) The protection provided by Subsection (a) does not affect the rights of parties in disputes between the parties or the parties' successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

Tex. Est. Code Ann. §113.209. Therefore, a financial institution cannot be liable for paying funds in an account to a party on the account. For example, in *Nipp v. Broumley*, the court of appeals noted that the defendant, as a party to the account, had a right to withdraw all of the money in the CDs he held with his mother and that the bank could not be held liable for allowing him to do so even though the son did not have any beneficial ownership in those funds. 285 S.W.3d 552 (Tex. App.—Waco 2009, no pet.). The estate's only claims were against the defendant and not the bank. *See id. See also Bandy v. First State Bank*, 835 S.W.2d 609, 615-16 (Tex. 1992) (holding bank is not liable for paying funds to one of named holders of a joint account, even after executor of other named holder's estate demanded payment); *Clark v. Wells Fargo Bank, N.A.*, No. 01-08-00887–CV, 2010 Tex. App. LEXIS 4376, at *12-13 (Tex. App.—Houston [1st Dist.] June 10, 2010, no pet.); *MBank Corpus Christi, N.A. v. Shiner*, 840 S.W.2d 724, 727 (Tex. App.—Corpus Christi 1992, no writ) ("Thus, between competing interests in a joint account, the bank is fully discharged from liability when it pays the other party on the account, unless one of the parties gives written notice to the bank that no payment should be made.").

S. Grounds For Refusing Acceptance

A person is not required to accept a power of attorney if: the person would not otherwise be required to enter into a transaction with the principal; the transaction would violate another law or a request from law enforcement; the person filed a SAR regarding the principal or agent or the principal or agent has prior criminal activity; the person has a negative business history with the agent; the person knows that the principal has revoked the agent's authority; the agent refused to provide a certification, opinion, or translation; the person believes in good faith that a certification, opinion, or translation is incorrect or deficient; the person believes in good faith that the agent does not have authority to conduct the transaction; the person has knowledge that a judicial proceeding has been instigated regarding the power of attorney document or has been completed with negative

results for the document; the person receives conflicting instructions from co-agents; the person has knowledge that a complaint has been raised to the proper authorities that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent; or the law that would apply to the power of attorney document does not require the person to accept the document.

The statute provides:

> (1) the person would not otherwise be required to engage in a transaction with the principal under the same circumstances, including a circumstance in which the agent seeks to: (A) establish a customer relationship with the person under the power of attorney when the principal is not already a customer of the person or expand an existing customer relationship with the person under the power of attorney; or (B) acquire a product or service under the power of attorney that the person does not offer;
>
> (2) the person's engaging in the transaction with the agent or with the principal under the same circumstances would be inconsistent with: (A) another law of this state or a federal statute, rule, or regulation; (B) a request from a law enforcement agency; or (C) a policy adopted by the person in good faith that is necessary to comply with another law of this state or a federal statute, rule, regulation, regulatory directive, guidance, or executive order applicable to the person;
>
> (3) the person would not engage in a similar transaction with the agent because the person or an affiliate[1] of the person: (A) has filed a suspicious activity report as described by 31 U.S.C. Section 5318(g) with respect to the principal or agent; (B) believes in good faith that the principal or agent has a prior criminal history involving financial crimes; or (C) has had a previous, unsatisfactory business relationship with the agent due to or resulting in: (i) material loss to the person; (ii) financial mismanagement by the agent; (iii) litigation between the person and the agent alleging substantial damages; or (iv) multiple nuisance lawsuits filed by the agent;
>
> (4) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before an agent's exercise of authority under the power of attorney;
>
> (5) the agent refuses to comply with a request for a certification, opinion of counsel, or translation under Section 751.201 or, if the agent complies with one or more of those requests, the requestor in good faith is unable to determine the validity of the power of attorney or the agent's authority to act under the power of attorney because the certification, opinion, or translation is incorrect, incomplete, unclear, limited, qualified, or otherwise deficient in a manner that makes the

[1] "Affiliate" means "a business entity that directly or indirectly controls, is controlled by, or is under common control with another business entity." Tex. Est. Code § 751.002(2).

certification, opinion, or translation ineffective for its intended purpose, as determined in good faith by the requestor;

(6) regardless of whether an agent's certification, opinion of counsel, or translation has been requested or received by the person under this subchapter, the person believes in good faith that: (A) the power of attorney is not valid; (B) the agent does not have the authority to act as attempted; or (C) the performance of the requested act would violate the terms of: (i) a business entity's governing documents; or (ii) an agreement affecting a business entity, including how the entity's business is conducted;

(7) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding to construe the power of attorney or review the agent's conduct and that proceeding is pending;

(8) the person commenced, or has actual knowledge that another person commenced, a judicial proceeding for which a final determination was made that found: (A) the power of attorney invalid with respect to a purpose for which the power of attorney is being presented for acceptance; or (B) the agent lacked the authority to act in the same manner in which the agent is attempting to act under the power of attorney;

(9) the person makes, has made, or has actual knowledge that another person has made a report to a law enforcement agency or other federal or state agency, including the Department of Family and Protective Services, stating a good faith belief that the principal may be subject to physical or financial abuse, neglect, exploitation, or abandonment by the agent or a person acting with or on behalf of the agent;

(10) the person receives conflicting instructions or communications with regard to a matter from co-agents acting under the same power of attorney or from agents acting under different powers of attorney signed by the same principal or another adult acting for the principal as authorized by Section 751.0021, provided that the person may refuse to accept the power of attorney only with respect to that matter; or

(11) the person is not required to accept the durable power of attorney by the law of the jurisdiction that applies in determining the power of attorney's meaning and effect, or the powers conferred under the durable power of attorney that the agent is attempting to exercise are not included within the scope of activities to which the law of that jurisdiction applies.

Id. at § 751.206.

T. Party Refusing A Power Of Attorney Must Give A Timely Response.

Generally, if a person refuses to accept a power of attorney, then that person should provide the agent a written statement setting forth the reason or reasons for the refusal. *Id*. at § 751.207. However, if the person is refusing the power of

attorney due to a reason set forth in Section 751.206(2) or (3), then the person shall provide to the agent a written statement signed by the person under penalty of perjury stating that the reason for the refusal is a reason described by Section 751.206(2) or (3), and the person is not required to provide any additional explanation. *Id*. at § 751.207(b). This response must be provided to the agent on or before the date the person would otherwise be required to accept the power of attorney. *Id*. at § 751.207(c).

It is very important to note that Federal law requires a suspicious activity report be kept confidential and prohibits disclosure of a report of any information revealing its existence. 31 U.S.C. § 5318(g)(2)(A); 31 CFR § 103.18(e). Accordingly, making specific reference to 751.206(3)(A) would likely violate federal law. If a person has to file a SAR, and that is the basis for rejecting a power of attorney document, the author recommends that the person retain an attorney to provide a legal opinion on the person's duties under federal law. The durable power of attorney act expressly states that other laws that apply to financial institutions trump the act's provisions. Tex. Est. Code Ann. § 751.007. So, if there is a conflict, federal law would control.

U. New Vulnerable Persons Statute Impacts Use of Power of Attorney Documents

If the person is a financial institution, broker, or financial advisor, it should create policies regarding the exploitation of vulnerable persons. The Texas Legislature recently created new statutes that require employees to report suspected financial exploitation, a person to assess that conduct and to report to a governmental agency, persons to institute policies for this reporting, and for persons to potentially put a hold on transactions where suspected financial exploitation is occurring.

"Financial exploitation" means:

> (A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person's money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.

Tex. Fin. Code Ann. § 280.001(3).

This statute expressly references the use of power of attorney documents. *Id*. Further, the Texas Estates Code § 751.206(9) dealing with valid reasons to refuse to accept power of attorney documents expressly references reports of financial exploitation. Tex. Est. Code § 751.206(9).

So, persons should evaluate who is benefiting from the transaction, and if there is evidence that the agent is benefiting, there should be an evaluation of whether a report of financial exploitation should be made.

V. Cause Of Action For Wrongfully Refusing Power Of Attorney

The principal or agent may bring an action against a person who wrongfully refuses to accept a power of attorney. *Id*. at § 751.212(a). This suit may not be commenced until after the date the person is required to accept the power of attorney. *Id*. at § 751.212(b). The exclusive remedies are that the court shall order the person to accept the power of attorney and may award the plaintiff court costs and reasonable and necessary attorney's fees. *Id*. at § 751.212(c).

The court shall dismiss an action that was commenced after the date a written statement was provided to the agent. *Id*. at § 751.212(d). If the agent receives a written statement after the date a timely action is commenced, the court may not order the person to accept the power of attorney, but instead may award the plaintiff court costs and reasonable and necessary attorney's fees. *Id*. at § 751.212(e). To the contrary, a court may award costs and fees to the defendant if: (1) the court finds that the action was commenced after the date the written statement was timely provided to the agent; (2) the court expressly finds that the refusal was permitted; or (3) Section 751.212(e) does not apply and the court does not issue an order ordering the person to accept the power of attorney. *Id*. at § 751.213.

W. Person May Bring Suit To Construe Power Of Attorney

A person who is asked to accept a power of attorney may bring an action requesting a court to construe, or determine the validity or enforceability of, the power of attorney. *Id.* at § 751.251(b). This provision does not expressly allow a person to receive an award of attorney's fees or court costs from the agent or principal. The person may potentially also assert a request for a declaratory judgment regarding the effectiveness of the power of attorney document, and that statute allows a trial court to potentially award fees. Tex. Civ. Prac. & Rem. Code Ann. 37.009.

X. Agent Can Change Rights of Survivorship And Beneficiary Designations If Granted That Authority

If the principal provides for such power in the power of attorney document, the agent may create or change rights of survivorship or beneficiary designations.

1. Power To Create Or Modify Survivorship And Beneficiary Rights

Section 751.031 provides that if the principal grants the following authority in the power of attorney document, the agent may: "(1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; or (5) delegate authority granted under the power of attorney." Tex. Est. Code Ann. 751.031(b). The provision does limit this right: an agent who is not "an ancestor, spouse, or descendant of the principal may not exercise authority under the power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise." *Id*. at §751.031(c). However, that limitation is, itself, limited by the following clause: "[u]nless the durable power of attorney otherwise provides." *Id*. So, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary, the agent can do so. If the agent is the principal's ancestor, spouse, or descendant, then the agent can name himself or herself as a beneficiary.

Unless the power of attorney otherwise provides, and agent can:

> (1) create or change a beneficiary designation under an account, contract, or another arrangement that authorizes the principal to designate a beneficiary, including an insurance or annuity contract, a qualified or nonqualified retirement plan, including a retirement plan as defined by Section 752.113, an employment agreement, including a deferred compensation agreement, and a residency agreement;
>
> (2) enter into or change a P.O.D. account or trust account under Chapter 113; or
>
> (3) create or change a nontestamentary payment or transfer under Chapter 111.

Id. at § 751.033.

Under Section 752.108(b) and Sections 752.113(b) and (c), unless the principal has granted the authority to create or change a beneficiary designation expressly as required by Section 751.031(b)(4), an agent may be named a beneficiary of an insurance contract, an extension, renewal, or substitute for the contract, or a retirement plan only to the extent the agent was named as a beneficiary by the principal before executing the power of attorney. *Id*. at §§ 752.108(b), 752.113(b), (c). "If an agent is granted authority under Section 751.031(b)(4) and the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides, the authority of the agent to designate the agent as a beneficiary is not subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id*. at §751.033. "If an agent is not granted authority under Section 751.031(b)(4) but the durable power of attorney grants the authority to the agent described in Section 752.108 or 752.113, then, unless the power of attorney otherwise provides and notwithstanding Section 751.031, the agent's authority to designate the agent as a beneficiary is subject to the limitations prescribed by Sections 752.108(b) and 752.113(c)." *Id*. at § 751.033(c).

So, in other words, if the power of attorney document expressly allows the agent to name himself or herself as a beneficiary of a retirement or insurance contract, he or she can do so even if he or she was not previously named a beneficiary. If the power of attorney document does not expressly allow the agent to name himself or herself, but there is a general power to enter into retirement and insurance transactions, then the agent can name himself or herself as a beneficiary only if he or she was previously so named by the principal.

2. Agent's Gifting Powers

Unless the durable power of attorney otherwise provides, a general grant of authority to make a gift only authorizes the agent to:

> (1) make outright to, or for the benefit of, a person a gift of any of the principal's property, including by the exercise of a presently exercisable general power of appointment held by the principal, in an amount per donee not to exceed: (A) the annual dollar limits of the federal gift tax exclusion under Section 2503(b), Internal Revenue Code of 1986, regardless of whether the federal gift tax exclusion applies to the gift; or (B) if the principal's spouse agrees to consent to a split gift as provided by Section 2513, Internal Revenue Code of 1986, twice the annual federal gift tax exclusion limit; and
>
> (2) consent, as provided by Section 2513, Internal Revenue Code of 1986, to the splitting of a gift made by the principal's spouse in an amount per donee not to exceed the aggregate annual federal gift tax exclusions for both spouses.

Id. at §751.032.

The agent may make a gift only as the agent determines is consistent with the principal's objectives if the agent actually knows those objectives. *Id*. If the agent does not know the principal's objectives, the agent may make a gift of the principal's property "only as the agent determines is consistent with the principal's best interest based on all relevant factors, including the factors listed in Section 751.122 and the principal's personal history of making or joining in making gifts." *Id*.

3. Duty To Preserve Principal's Estate Plan

The statute provides that the agent should take into account the principal's estate plan in making decisions:

> An agent shall preserve to the extent reasonably possible the principal's estate plan to the extent the agent has actual knowledge of the plan if preserving the plan is consistent with the principal's best interest based on all relevant factors, including: (1) the value and nature of the principal's property; (2) the principal's foreseeable obligations and need for maintenance; (3) minimization of taxes, including income, estate, inheritance, generation-skipping transfer, and gift taxes; and (4) eligibility for a benefit, a program, or assistance under a statute or regulation.

Id. at 751.122.

4. Concern With New Provisions Broadening Agent's Authority

It is not uncommon for an agent to take advantage of the power that he or she has regarding the principal's assets. The agent may start taking assets for his or her own benefit, use the principal's assets as collateral for a loan to the agent, receive assets for the agent's own benefit that should be deposited into the principal's accounts, create new accounts or change account signature cards that create an ownership interest in the agent, etc.

The new provisions of the Estates Code allow a principal to allow an agent to name himself or herself as the beneficiary of accounts, insurance products, and retirement accounts. The author has grave concerns about the way that vulnerable persons sign power of attorney documents. Principals often have diminished capacity at the time that power of attorney documents are executed. Attorneys, who are often retained by the agent, may not adequately explain all of the provisions of the power of attorney document. An agent may not even retain an attorney and may simply create such a document (from the statutory form) and have the principal sign it without any explanation.

Principals routinely use beneficiary designations as a form of estate planning. So, the principal may execute a will and omit a person or decrease a devise to that person if the principal has otherwise already provided for that person via a beneficiary designation. If a power of attorney document is signed with broad powers that the principal does not really understand, the agent may completely change the principal's estate planning by changing beneficiary designation. If the power of attorney document allows the agent to name himself or herself, then the agent can take property that should go to someone else and give it to himself or herself. In any event, the agent can redirect assets from the person the principal originally intended to have those assets and give them to someone else. There is no need for these results. In the author's opinion, the ability of an agent to effectuate transactions for the principal's benefit should not include the ability to change beneficiary designations that only impact who gets the assets once the principal is deceased. Should an agent be able to execute a new will for the principal and name himself or herself as the beneficiary of the estate or name someone else? Of course not. Yet, that is essentially what the statute allows regarding non-probate assets.

Y. Recent Cases Dealing With Powers of Attorney Documents

In *Transamerica Life Ins. Co. v. Quarm*, Thomas Quarm obtained a life insurance policy and designated his mother as his beneficiary and his brother, Nicholas, as the alternate beneficiary. No. EP-16-CV-295-KC, 2017 U.S. Dist. LEXIS 192192 (W.D. Tex. November 13, 2017). Quarm later purchased an annuity product with the same beneficiaries. When the mother died, Nicholas became the primary beneficiary. Thomas then signed a durable power of attorney naming his son, Christian, as his agent with the authority to act on his behalf. Among the powers delegated to Christian was the power to perform any act Thomas could do regarding "[i]nsurance and annuity transactions," which included the power to

"modify . . . any [existing] annuity or [insurance] policy." *Id*. It also empowered Christian to "engage in any transaction he . . . deems in good faith to be in [the principal's] interest, no matter what the interest or benefit to [the] agent." Id. Christian sent the power of attorney and a beneficiary change form naming himself as the primary beneficiary and his sister, Sarah, the as the contingent beneficiary. The insurance company determined that this form changed the beneficiary designation for both the policy and the annuity. After Thomas died, Christian and Nicholas made competing claims to the benefits under the policy and the annuity. The insurance company filed an interpleader in federal court, and Christian and Nicholas filed competing claims for the proceeds and each filed motions for summary judgment.

The district court first analyzed whether Christian's action in naming himself was a self-interested transaction that was a breach of fiduciary duty. The court stated the law concerning self-interested transactions thusly:

> While an agent who benefits from a transaction carried out on behalf of his principal bears the burden of showing that the transaction was fair, he can meet that burden by showing that the transaction was authorized by the principal. The grant of a power of attorney creates an agency relationship, which is a fiduciary relationship as a matter of law. A fiduciary owes his principal a high duty of good faith, fair dealing, honest performance, and strict accountability. Multiple courts have noted that the fiduciary relationship does "no more than cast upon the profiting fiduciary the burden of showing the fairness of the transactions." The court in Vogt found it "worth repeating that fiduciary status does not prohibit the beneficiary from giving the fiduciary gifts or bequests; instead, it insures that the fiduciary will be prepared to prove the transaction was conducted with scrupulous fairness." One way to establish decisively that a transaction was fair to the principal is to show that the principal consented to it. Texas courts have recognized the significance of the principal's consent in determining whether a transaction by a profiting agent was fair or constituted self-dealing. "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency." Accordingly, "absent the principal's consent, an agent must refrain from using his position or the principal's property to gain a benefit for himself at the principal's expense."

Id. (internal citation omitted).

The court noted that the power-of-attorney document specifically authorized Christian to act for his own benefit: "My agent may buy any assets of mine or engage in any transaction he or she deems in good faith to be in my interest, no matter what the interest or benefit to my agent." *Id*. The court held that this language established that Christian was authorized to benefit from his use of the power of attorney and mentioned that Texas courts regularly look for such language in determining whether a profiting agent violated his fiduciary duty. The court held that Christian's beneficiary change did not breach his fiduciary duty or constitute self-dealing.

The court then analyzed whether Christian acted in good faith as required by the power-of-attorney document. The court held that Christian provided evidence establishing that he acted fairly and in good faith when he changed the beneficiary and Nicholas failed to present

contrary evidence. The court noted that because the proceeds only became available after Thomas's death, it is undisputed that Christian's change of beneficiary did not deprive Thomas of anything during his lifetime, reducing the potential for unfairness to Thomas. "Nevertheless, if Christian did not in good faith consider the change to be in the Decedent's interest, he acted unfairly and outside of the scope of the Power of Attorney, rendering the change invalid." *Id*. Christian provided evidence that he believed the change of beneficiary to be in Thomas's interest in that Thomas described his four-month stay to care for Thomas during his prolonged illness. Christian also stated that Thomas made it known that Thomas wished for Christian to be designated as the beneficiary. This was corroborated by Thomas's sister. The court stated: "This evidence, combined with the language in the Power of Attorney granting Christian the authority to benefit from transactions on Decedent's behalf, sufficiently establishes that Christian believed in good faith that it was in the Decedent's interest for Christian to be the designated beneficiary of the Policy and Annuity Contract." *Id*.

The court, however, held that even though it was not a breach of fiduciary duty, Christian could not be a beneficiary of the policy and annuity. The court held that Christian's use of the power of attorney was subject to the restrictions imposed by the Texas Estates Code. At the time that the power of attorney was executed, the Code provided that "The language conferring authority with respect to insurance and annuity transactions in a statutory durable power of attorney empowers the attorney in fact or agent to . . . change the beneficiary of an insurance contract or annuity." *Id*. (citing Tex. Est. Code Ann. § 752.108(a)(10)). The court noted that this power was strictly limited where the agent attempts to designate himself as beneficiary: "An attorney in fact or agent may be named a beneficiary of an insurance contract or an extension, renewal, or substitute for the contract only to the extent the attorney in fact or agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney." *Id*. (citing Tex. Est. Code Ann. § 752.108 (b)). Further, "Unless the principal has granted the authority to create or change a beneficiary designation expressly . . . an agent may be named a beneficiary of an insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." *Id*.

The court held that as Christian had not previously been named as beneficiary, he was not authorized to name himself beneficiary of the policy or annuity. However, the court noted that his designation of his sister Sarah as the contingent beneficiary was authorized by both the statute and the power of attorney: "Christian was therefore authorized to remove Nicholas as a beneficiary of the Policy and designate anyone but himself as a beneficiary in his place… Barker is the proper beneficiary of the Policy and is legally entitled to collect the remaining Policy funds." *Id*.

Finally, the court held that Nicholas's cross-claims for breaches of various fiduciary duties, conversion, trespass to chattels, violation of the Theft Liability Act, and tortious interference with inheritance failed because Nicholas did not have standing to assert them. The court held:

> To bring these claims, Nicholas must show that he has standing as the principal in a fiduciary relationship with Christian or demonstrate that he was deprived of a legitimate property interest. He can do neither. As the discussion above establishes, while Christian's designation of himself as beneficiary of the Policy was not authorized by statute, his actions did not constitute self-dealing or breach any duty he held as fiduciary. Furthermore, Christian was authorized by statute to designate Sarah as the contingent beneficiary of the Policy and the Annuity Contract. Accordingly, Christian acted lawfully in removing Nicholas as the beneficiary of the Policy and

> Annuity Contract, and Nicholas cannot recover against him for it.

Id. Therefore, the court held that neither Christian or Nicholas were entitled to the proceeds, Christian's sister was entitled to those funds.

Interesting Note: The court also held that "Texas courts apply the law that was in place at the time the power of attorney was executed rather than the current law." *Id*. (citing *Wise v. Mitchell*, 2016 WL 3398447, at *8 (Tex. App. 2016) (applying sections of Probate Code—now Estates Code—that were in place "at the time the Power of Attorney was executed"); *Cole v. McWillie*, 464 S.W.3d 896, 898 (Tex. App. 2015) (finding that power of attorney was not durable under the Probate Code that "was in effect at the time of the execution of the power of attorney"); *cf. Randall v. Kreiger*, 90 U.S. 137, 138-39, 23 L. Ed. 124 (1874) (holding that a power of attorney that was invalid at the time it was made was validated by a curative act only because the act was explicitly retroactive)). The court noted that in September 2017, the Texas Estates Code was amended to read, "Unless the principal has granted the authority to create or change a beneficiary designation expressly . . . an agent may be named a beneficiary of an insurance contract . . . only to the extent the agent was named as a beneficiary by the principal." Tex. Est. Code Ann. § 752.108(b). Accordingly, because the power of attorney was executed in October 2015, the court applied the 2015 statute and not the 2017 amendment.

In *Fletcher v. Whitaker*, a brother withdrew $25,000 from a joint bank account while the owner of the funds (decedent) was still alive. No. 02-17-00138-CV, 2018 Tex. App. LEXIS 8329 (Tex. App.—Fort Worth October 11, 2018, no pet. history). The parties to the joint account were the decedent and his sister in law. The brother was the decedent's agent under a power-of-attorney document and had the authority to do banking transactions. That relationship also meant that the brother owed fiduciary duties to the decedent. The decedent's sister in law sued the brother for conversion of the funds he withdrew from the account. The trial court determined in a bench trial that the brother wrongfully exercised dominion and control over the money to the exclusion of, or inconsistent with, the sister in law's rights. The brother appealed.

The court of appeals first discussed a conversion claim, which is the wrongful exercise of dominion and control over another's property in denial of or inconsistent with one's rights. The court mentioned that money is subject to conversion only when it can be identified as a specific chattel but not if it is an indebtedness that can be discharged by the payment of money. "To qualify as a specific chattel, the money must be (1) delivered for safekeeping, (2) intended to be kept segregated, (3) substantially in the form in which it is received or in an intact fund, and (4) not the subject of a title claim by its keeper." Id. The brother, however, apparently did not raise an issue about whether the sister in law could assert a conversion claim due to the fact that she was only seeking money.

Rather, the brother contended that the evidence was insufficient to show that he unlawfully and without authorization assumed or exercised control over the sister in law's property to the exclusion of, or inconsistent with, her rights as owner. He argued that the sister in law did not own the funds because the decedent was the sole source of them and the withdrawal was legal and authorized because the power of attorney allowed the brother to undertake banking transactions.

A bank employee testified that the sister in law was a joint owner and that each joint owner on the account had "full rights to access" the funds. The court concluded that this was some evidence that the sister in law had the right to possess the joint account's funds. Regarding whether the brother unlawfully and without authorization assumed and exercised control over the funds to the exclusion of, or inconsistent with, the sister in law's rights, the court noted that the brother admitted that when he withdrew the money, he knew (1) that the account was a joint account with right of survivorship, (2) that the sister in law had full access to the account, and (3) that

she would own the funds when the decedent died. The brother further admitted that he used the power of attorney to withdraw the money to ensure that the sister in law did not get the money and that he deposited the check into his own checking account. There was no evidence that the brother had used the funds for the decedent's care. The brother did not dispute that he breached a fiduciary duty by withdrawing the money and using it for his benefit. The court of appeals affirmed the trial court's judgment and held the trial court could have reasonably concluded that when the brother withdrew the money from the joint account, the brother was not acting in the decedent's interests but was using the power of attorney to wrongfully exercise dominion and control over the money to the exclusion of, or inconsistent with, the sister in law's rights.

In *Cortes v. Wendl*, an elderly woman signed a deed conveying her mineral rights to two individuals. No. 06-17-00121-CV, 2018 Tex. App. LEXIS 4457 (Tex. App.—Texarkana June 20, 2018, no pet.). When the woman's nurse and friend learned of the transaction, she obtained a power of attorney and filed a lawsuit on the woman's behalf, claiming that the mineral deed was executed as a result of duress, coercion, and undue influence, and that no consideration was paid for the conveyance. The defendants alleged that the plaintiff had no capacity to sue. The court of appeals affirmed the trial court's implied finding that the plaintiff had capacity:

> "A power of attorney is a written instrument by which one person, the principal, appoints another person, the attorney-in-fact, as agent and confers on the attorney-in-fact the authority to perform certain specified acts on behalf of the principal." An agent has express authority to take all actions designated by the principal. An agent has implied authority "to do whatever is necessary and proper to carry out the agent's express powers." Wendl introduced the durable power of attorney executed by Hardy as an exhibit, without objection. The power of attorney explicitly granted Wendl: "[a]uthority to initiate a claim and litigation, if necessary; negotiate; make decisions; and pursue the legal claim [Hardy] may have against Johnny Coutts, Charles [Randy] Hardy, and/or Isabel Cortes, or anyone else involved, and to pursue those claims or litigation as she sees fit for [Hardy] and/or [Hardy's] estate. [Wendl] is further given specific authority to negotiate and make all decisions on [Hardy's] behalf including accepting or rejecting offers of settlement, contracting for and payment of attorney's fees, and costs." The record supports the trial court's implied finding that Wendl, in her capacity as agent and attorney-in-fact for Hardy, had the capacity to bring the lawsuit on Hardy's behalf

Id. The court then analyzed whether there was sufficient evidence to establish that the deed was procured by undue influence, and found that there was sufficient evidence.

V. NEW EXPLOITATION OF VULNERABLE PERSONS STATUTE

A. Introduction

The Texas Legislature passed, and the Governor signed, an act that creates new protections for vulnerable individuals. HB 3921 creates a new chapter 280 of the Texas Finance Code and a new Article 581, Section 45, of the Texas Securities Act in the Texas Civil Statutes. The Texas Legislature now requires employees to report suspected incidences of financial exploitation to their employers, and for the financial institution, security dealers, or financial adviser to similarly make reports to the Texas Department of Family and Protective Services

(the "Department"). This legislation took effect September 1, 2017. Legislative history provides:

> Interested parties contend that certain vulnerable adults lose a significant amount of money each year to fraud and financial exploitation. H.B. 3921 seeks to protect the financial well-being of these individuals by authorizing financial institutions, securities dealers, and investment advisers to place a hold on suspicious transactions involving these vulnerable adults and by requiring the reporting of suspected financial exploitation.

B. Definitions Of Vulnerable Person And Financial Exploitation

A "vulnerable adult" means someone who is sixty-five (65) years or older or a person with a disability. Tex. Fin. Code Ann. § 280.001. The term "exploitation" means: "the act of forcing, compelling, or exerting undue influence over a person causing the person to act in a way that is inconsistent with the person's relevant past behavior or causing the person to perform services for the benefit of another person." *Id*. at § 280.001(2).

"Financial exploitation" means:

> (A) the wrongful or unauthorized taking, withholding, appropriation, or use of the money, assets, or other property or the identifying information of a person; or (B) an act or omission by a person, including through the use of a power of attorney on behalf of, or as the conservator or guardian of, another person, to: (i) obtain control, through deception, intimidation, fraud, or undue influence, over the other person's money, assets, or other property to deprive the other person of the ownership, use, benefit, or possession of the property; or (ii) convert the money, assets, or other property of the other person to deprive the other person of the ownership, use, benefit, or possession of the property.

Tex. Fin. Code Ann. § 280.001(3).

C. Financial Institutions

1. Employee Reporting Obligation

Section 280.002 provides that "if an employee of a financial institution has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the financial institution has occurred, is occurring, or has been attempted, the employee shall notify the financial institution of the suspected financial exploitation." Tex. Fin. Code Ann. § 280.002. "Financial Institution" means: "a state or national bank, state or federal savings and loan association, state or federal savings bank, or state or federal credit union doing business in this state." Tex. Fin. Code Ann. § 277.001.

From a practical perspective, this provision requires employers to educate and train employees about financial exploitation so that they know when to suspect that it is occurring.

2. Financial Institution Reporting Obligation

If an employee makes such a report or the financial institution otherwise has cause to believe a reportable event has occurred, then the financial institution shall assess the suspected financial exploitation and submit a report to the Department. *Id*. at § 280.002. The report shall include: (1) the name, age, and address of the elderly person or person with a disability; (2) the name and address of any person responsible for the care of the elderly person or person with a disability; (3) the nature and extent of the condition of the elderly person or person with a disability; (4) the basis of the reporter's knowledge; and (5) any other relevant

information. *Id.* (citing Tex. Hum. Res. Code § 48.051). The financial institution should submit the report not later than the earlier of: (1) the date it completes an assessment of the suspected financial exploitation; or (2) the fifth business day after the date the financial institution is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation has occurred, is occurring, or has been attempted. *Id*. Furthermore, a financial institution may at the time the financial institution submits the report also notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the financial institution suspects that the third party is guilty of financial exploitation of the vulnerable adult. *Id*. at § 280.003.

3. Who Are "Account Holders"?

The statute does not define "account" or "account holder." Texas Estate's Code section 113.001 provides that "account" means "a contract of deposit of funds between the depositor and a financial institution. The term includes a checking account, savings account, certificate of deposit, share account, *or other similar arrangement*." Tex. Est. Code § 113.001(1) (emphasis added). The vague term: "or other similar arrangement" does not provide a lot of limitation on what is meant by "account."

Section 113.004 describes multiple types of accounts, including convenience accounts, joint accounts, multi-party accounts, POD accounts, and trust accounts. Tex. Est. Code Ann. § 113.004.

"Convenience account" means an account that: "(A) is established at a financial institution by one or more parties in the names of the parties and one or more convenience signers; and (B) has terms that provide that the sums on deposit are paid or delivered to the parties or to the convenience signers "for the convenience" of the parties." *Id*. at § 113.004(1).

"Joint account" means "an account payable on request to one or more of two or more parties, regardless of whether there is a right of survivorship." *Id*. at § 113.004(2).

"Multiple-party account" means a "joint account, a convenience account, a P.O.D. account, or a trust account." *Id*. at § 113.004(3). The term does not include an account established for the deposit of funds of a partnership, joint venture, or other association for business purposes, or an account controlled by one or more persons as the authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or a regular fiduciary or trust account in which the relationship is established other than by deposit agreement. *Id*.

"P.O.D. account," including an account designated as a transfer on death or T.O.D. account, means "an account payable on request to: (A) one person during the person's lifetime and, on the person's death, to one or more P.O.D. payees; or (B) one or more persons during their lifetimes and, on the death of all of those persons, to one or more P.O.D. payees." *Id*. at § 113.004(4).

"Trust account" means "an account in the name of one or more parties as trustee for one or more beneficiaries in which the relationship is established by the form of the account and the deposit agreement with the financial institution and in which there is no subject of the trust other than the sums on deposit in the account." *Id*. at § 113.004(5). The deposit agreement is not required to address payment to the beneficiary. *Id*. The term does not include: (A) a regular trust account under a testamentary trust or a trust agreement that has significance apart from the account; or (B) a fiduciary account arising from a fiduciary relationship, such as the attorney-client relationship." *Id*.

There are also definitions for retirement accounts in Estate's Code Section 111.051.

4. Financial Institution's Ability To Place A Hold On Transactions

If a financial institution submits a report, it "(1) may place a hold on any transaction that: (A) involves an account of the vulnerable adult; and (B) the financial institution has cause to believe is related to the suspected financial exploitation; and (2) must place a hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Department or a law enforcement agency." *Id*. at § 280.004. This hold generally expires ten business days after the report was submitted. *Id*. The financial institution may extend a hold for an additional thirty business days "if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation." *Id*. The financial institution may also petition a court to extend a hold. *Id*.

5. Duty To Create Policies

The statute requires that a financial institution adopt internal policies, programs, plans, or procedures for: (1) the employees of the financial institution to make the notification; and (2) the financial institution to conduct the assessment and submit the report. *Id*. at § 280.002(d). These policies may authorize the financial institution to make a report to other appropriate agencies and entities. *Id*. at § 280.002(e). A financial institution shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction. *Id*. at § 280.004.

6. Immunity

An employee or financial institution that makes a report to the Department or to a third party is immune from any civil or criminal liability unless the employee or financial institution acted in bad faith or with a malicious purpose. *Id*. at § 280.005. Further, a financial institution that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from any civil or criminal liability or disciplinary action resulting from that action or failure to act. *Id*. at § 280.005.

7. Records

A financial institution shall provide access to or copies of records relevant to the suspected financial exploitation to the Department, law enforcement or a prosecuting attorney. The provisions in Texas Finance Code Section 59.006 relating to notice and reimbursement for customer records do not apply to these provisions.

D. Securities Dealers and Financial Advisers

1. Professionals' Duties To Report.

The new statute provides that if a securities professional has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted, the securities professional shall notify the dealer or investment adviser of the suspected financial exploitation. "Securities professionals" are agents, investment adviser representatives, or persons who serve in a supervisory or compliance capacity for a dealer or investment adviser.

2. Dealer's/Investment Adviser's Duty To Report

If a dealer or investment adviser is notified of suspected financial exploitation or otherwise has cause to believe that financial exploitation of a vulnerable adult who is an account holder with the dealer or investment adviser has occurred, is occurring, or has been attempted, the dealer or investment adviser shall assess the suspected financial exploitation and submit a report to the Securities Commissioner and the Department. The dealer or investment adviser shall submit the reports not later than the earlier of: (1) the date the dealer or investment adviser completes the dealer's or investment adviser's assessment of the suspected financial exploitation; or (2) the fifth business day after the date the dealer or investment adviser is notified of the suspected financial exploitation or otherwise has cause to believe that the suspected financial exploitation

has occurred, is occurring, or has been attempted. If a dealer or investment adviser submits reports, they may also notify a third party reasonably associated with the vulnerable adult of the suspected financial exploitation, unless the dealer or investment adviser suspects the third party of financial exploitation of the vulnerable adult.

3. Duty To Create Policies

Each dealer and investment adviser shall adopt internal policies, programs, plans, or procedures for the securities professionals or persons serving in a legal capacity for the dealer or investment adviser to make the notification and for the dealer or investment adviser to conduct the assessment and submit reports. The policies, programs, plans, or procedures may authorize the dealer or investment adviser to report the suspected financial exploitation to other appropriate agencies and entities in addition to the Securities Commissioner and the Department, including the attorney general, the Federal Trade Commission, and the appropriate law enforcement agency. Each dealer and investment adviser shall also adopt internal policies, programs, plans, or procedures for placing a hold on a transaction.

4. Ability To Place Hold On Transactions

If a dealer or investment adviser submits reports, they: (1) may place a hold on any transaction that involves an account of the vulnerable adult, and the dealer or investment adviser has cause to believe is related to the suspected financial exploitation; and (2) must place a hold on any transaction involving an account of the vulnerable adult if the hold is requested by the Securities Commissioner, the Department, or a law enforcement agency. The hold expires ten business days after the date the dealer or investment adviser submits the reports. This can be extended for up to thirty business days if requested by a state or federal agency or a law enforcement agency investigating the suspected financial exploitation. The dealer or investment adviser may also petition a court to extend a hold placed on any transaction.

5. Immunity

A securities professional, dealer, or investment adviser who makes a notification or report or who testifies or otherwise participates in a judicial proceeding is immune from any civil or criminal liability arising from the notification, report, testimony, or participation in the judicial proceeding, unless the securities professional, person serving in a legal capacity for the dealer or investment adviser, or dealer or investment adviser acted in bad faith or with a malicious purpose. A dealer or investment adviser that in good faith and with the exercise of reasonable care places or does not place a hold on any transaction is immune from civil or criminal liability or disciplinary action resulting from the action or failure to act.

6. Records

A dealer or investment adviser shall provide on request access to or copies of records relevant to the suspected financial exploitation to the Department, law enforcement or a prosecuting attorney.

E. Other Reporting Duties

The Texas Human Resources Code has a general provision that requires the reporting of the exploitation of elderly or disabled individuals. *Newspaper Holdings, Inc. v. Crazy Hotel Assisted Living, Ltd.*, 416 S.W.3d 71, 89 (Tex. App.—Houston [1st Dist.] 2013, pet. denied). Section 48.051 states: "a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation shall report the information required by Subsection (d) immediately to the department." Tex. Hum. Res. Code § 48.051. In the Texas Human Resources Code, the term "exploitation" means "the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person's social security number or

other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person." *Id.* at § 48.002. Importantly, the Texas Human Resources Code provides a criminal penalty for not reporting the exploitation: "[a] person commits an offense if the person has cause to believe that an elderly person or person with a disability has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter." *Id*. at § 48.052. Generally, this offense is a Class A misdemeanor. *Id*. The Texas Human Resources Code has similar immunity defenses for making reports. *Id*. § 48.054.

Courts have held that the qualified immunity defense is an affirmative defense and that the defendant has the burden of showing that a defendant was not acting "in bad faith or with a malicious purpose"—i.e., in good faith—when he made his report of elder abuse. *Scarbrough v*. *Purser*, No. 03-13-00025-CV, 2016 Tex. App. LEXIS 13863 (Tex. App.—Austin December 30, 2016, pet. denied).

Texas Family Code Section 261.106 also provides that: "[a] person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect is immune from civil or criminal liability that might otherwise be incurred or imposed." Tex. Fam. Code Ann. § 261.106(a). Courts have held that this qualified defense is an affirmative defense that a defendant has the duty to raise and prove. *Miranda v*. *Byles*, 390 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Howard v*. *White*, No. 05-01-01036-CV, 2002 Tex. App. LEXIS 4891, at *18-20 (Tex. App.—Dallas July 10, 2002, no pet.) (not designated for publication) (concluding that appellant was not entitled to statutory protection from defamation claims based on her report of child abuse because she failed to prove that her report was made in good faith).

Importantly, the new provisions provide that complying with those reporting obligations also satisfies the reporting obligations under the Texas Human Resources Code. So, there is no duty to make multiple reports.

F. Application of U.C.C. Section 3.307 To Notice Of Financial Exploitation

The statutory definition of "financial exploitation" seems very broad. Financial institutions, dealers, and financial advisers should be aware of another provision that dictates when a financial institution has notice of a breach of fiduciary duty. Texas Business and Commerce Code Section 3.307 sets forth the rules dictating when a taker of an instrument would lose its holder-in-due-course status and potentially make financial institutions vulnerable to other causes of action, such as conversion due to having notice of fiduciary breaches. Tex. Bus. & Com. Code Ann. § 3.307. Section 307 has been explained in this way:

> When a fiduciary holds an instrument in trust for or on behalf of the represented person, he is usually authorized to negotiate the instrument only for the benefit of the represented person. When the fiduciary negotiates the instrument for his own benefit rather than for the benefit of the represented person in breach of his trust, an equitable claim of ownership on the part of the represented person arises. The represented person may assert this claim against any person not having the rights of a holder in due course. A taker cannot be a holder in due course if he has notice of the claim of the represented person. Section 3-307 determines when the taker has notice of such a claim that prevents her from becoming a holder in due course.

6 WILLIAM D. HAWKLAND & LARRY LAWRENCE, UNIFORM COMMERCIAL CODE SERIES § 3-307:3 (Rev. Art. 3) (1999).

Section 3.307(b) of the Texas Business and Commerce Code states:

> If (i) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:
>
> (1) notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person;
>
> (2) in the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is:
>
> (A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;
>
> (B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or
>
> (C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person;
>
> (3) if an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty; and
>
> (4) if an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is:
>
> (A) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary;
>
> (B) taken in a transaction known by the taker to be for the personal benefit of the fiduciary; or
>
> (C) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

Tex. Bus. & Com. Code Ann. § 3.307.

Although the definition of financial exploitation is broader than the provisions of Section 3.307, Section 3.307 is a good place to start to determine whether there is notice that financial exploitation may be occurring.

G. New Provisions Application To Aiding And Abetting Breach Of Fiduciary Duty, Knowing Participation, Or Conspiracy

When an exploiter takes advantage of a vulnerable person, the exploiter often does not make wise investments with the wrongfully obtained assets. In other words, when someone attempts to retrieve those assets for the vulnerable person or his or her estate, the exploiter may be judgment proof. So, the plaintiff will often look to others who have deeper pockets and may be able to pay a judgment. There are several theories in Texas that allow a plaintiff to sue a third party for the exploiter's bad conduct.

When a third party knowingly participates in the breach of a fiduciary duty, the third party becomes a joint tortfeaser and is liable as such.

Kinzbach Tool Co. v. Corbett-Wallace Corp., 138 Tex. 565, 160 S.W.2d 509, 513-14 (Tex. 1942); *Kaster v. Jenkins & Gilchrist, P.C.*, 231 S.W.3d 571, 580 (Tex. App.—Dallas 2007, no pet.); *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 867 (Tex. App.—Houston [1st Dist.] 1999), *aff'd on other grounds*, 73 S.W.3d 193 (2002). The elements are: (1) a breach of fiduciary duty by a third party, (2) the aider's knowledge of the fiduciary relationship between the fiduciary and the third party, and (3) the aider's awareness of his participation in the third party's breach of its duty. *Darocy v. Abildtrup*, 345 S.W.3d 129, 137-38 (Tex. App.—Dallas 2011, no pet). There may also be an aiding-and-abetting-breach-of-fiduciary-duty claim in Texas. *See First United Pentecostal Church of Beaumont v. Parker,* 2017 Tex. LEXIS 295 (Tex. Mar. 17, 2017) (assumed that such a claim existed in Texas but held that it was not expressly so holding).

A civil conspiracy involves a combination of two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). An action for civil conspiracy has five elements: (1) a combination of two or more persons; (2) the persons seek to accomplish an object or course of action; (3) the persons reach a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts are taken in pursuance of the object or course of action; and (5) damages occur as a proximate result. *Id*.

The point is that a plaintiff may allege that the financial institution, dealer, or financial adviser knew of the exploiter's fiduciary relationship, knew that breaches were occurring, and still assisted in completing the transactions. The plaintiff may cite to these new broad statutes (and Section 3.307) as giving legal definition to when a financial institution, dealer, or financial adviser has notice of breach of fiduciary duty. If the financial institution, dealer, or financial adviser did not properly report financial exploitation as required by the statutes, then the plaintiff will certainly take advantage of that fact in proving liability and/or exemplary damages. Accordingly, these new statutes may have far-reaching ramifications for financial institutions, dealers, or financial advisers beyond the express words in those statutes.

H. Conclusion Regarding Financial Exploitation Statutes

Certainly, the author agrees that financial exploitation of vulnerable individuals is bad and should be punished. However, the new provisions seem to be very broad and have vague aspects that place new duties on financial institutions, dealers, financial advisers and their employees. These duties also seem to be placed at the expense of the financial institutions, dealers, and financial advisers. These new provisions raise many questions:

1) When should financial institutions, dealers, and financial advisers be imputed with knowledge that a client is a vulnerable person? Is it just actual knowledge or should there be a "should have known" component? Is the knowledge of one employee imputed to all other employees?

2) The burden to make a report involves vulnerable persons who have an account with financial institutions, dealers, and financial advisers. Does an employee or financial institution, dealer, or financial adviser have any duty to investigate or report under this statute any exploitation of vulnerable persons who are not account holders? What if they are borrowers or attempted borrowers? Presumably, the Texas Human Resources Code provisions will still apply even if the other newer provisions do not.

3) What evidence will be necessary to raise a "cause to believe" that employees or financial institutions, dealers, and financial advisers should make a report?

4) What will the assessment entail? Does the financial institution, dealer, or financial adviser have a duty to investigate "outside the walls"? If the

assessment leads to the belief that no exploitation has occurred, does there still have to be a report?

5) The definition of "financial exploitation" is very broad and would also seem to include even proper behavior, such as a power-or-attorney holder/ agent reasonably compensating himself or herself for their services. What duties will financial institutions, dealers, and financial advisers have to report proper behavior that seems to fit within the broad definition of "financial exploitation"?

6) If financial institutions, dealers, and financial advisers have to file suit to extend a hold, can they seek attorney's fees and costs from the vulnerable individual and/or the exploiter?

7) Do the new statutes create duties that a vulnerable individual can later use as a basis for a negligence suit? Would negligence per se apply? Can vulnerable individuals sue financial institutions, dealers, and financial advisers for not assessing or reporting financial exploitation or placing or extending a hold that then leads to damages to the vulnerable individuals?

8) When do financial institutions, dealers, and financial advisers have to adopt internal policies, programs, plans, or procedures regarding assessing and reporting financial exploitation and regarding holds? Do these have to be in writing or can they be oral? Does a defendant have to turn these over in litigation? Can these be used to set a standard of care, such that if financial institutions, dealers, and financial advisers have higher internal policies, programs, plans, or procedures than what is required by law, will the defendants have to meet their higher standards?

9) With regard to immunity, what are the legal standards for proving "bad faith or with a malicious purpose"? Who has the burden to prove that a report was made in "bad faith or with a malicious purpose"? Is the defendant presumed to act in good faith?

10) With regard to immunity for holds, what are the standards for "good faith and with the exercise of reasonable care"? Does reasonable care involve what a reasonably prudent financial institution, dealer, or financial adviser would do or simply what a normal person would do? Will the parties be required to have expert evidence on the standard of care? If financial institutions, dealers, and financial advisers are in good faith, but do not exercise reasonable care, are they able to claim immunity? If there is no immunity, what potential damages can a vulnerable individual claim (direct or consequential damages)?

VI. SUSPICIOUS ACTIVITY REPORTS[2]

The federal banking agencies have each issued regulations setting forth the circumstances under which a financial institution must file a suspicious activity report ("SAR"). The Office of the Comptroller of the Currency ("OCC"), Board of Governors of the Federal Reserve System ("FRB"), Federal Deposit Insurance Corporation ("FDIC") and the Financial Crimes Enforcement Network ("FinCEN") have each issued regulations which are codified at 12 C.F.R. § 21.11 (OCC); 12 C.F.R. § 208.62 (FRB); 12 C.F.R. pt. 353 (FDIC); and 12 C.F.R. § 1020.320 (FinCEN), respectively. SARs are filed electronically with FinCEN through the BSA E-Filing System. The regulations are intended to ensure that institutions file SARs when they detect a known or suspected violation of Federal law or a suspicious transaction related to money

[2] The Author would like to thank Mike O'Neal for his assistance in the drafting of this section of the paper. Mike works at Winstead and specializes in financial institution corporate and regulatory matters.

laundering activity or a violation of the Bank Secrecy Act.

A. Reporting Requirements.

The regulations set forth situations in which an institution must file a SAR. In general, the situations are as follows:

1) insider abuse involving any amount;

2) violations aggregating $5,000 or more where a suspect can be identified;

3) violations aggregating $25,000 or more regardless of potential suspects; and

4) transactions aggregating $5,000 or more that involve potential money laundering or violate the bank secrecy act.

12 C.F.R. § 21.11(c)(OCC); 12 C.F.R. § 208.62(c)(FRB); and 12 C.F.R. § 353.3(a)(FDIC).

B. Time for Reporting.

An institution must file the SAR no later than 30 calendar days after the date of initial detection of facts that may constitute a basis for filing a SAR.

12 C.F.R. § 21.11(d)(OCC); 12 C.F.R. § 208.62(d)(FRB); and 12 C.F.R. § 353.3(b)(FDIC).

C. Where to File.

SARs are filed electronically with the Treasury Department's Financial Crimes Enforcement Network (FinCEN), through the BSA E-Filing System.

12 C.F.R. § 21.11(e)(OCC); 12 C.F.R. § 208.62(c)(FRB); and 12 C.F.R. § 353.3(9)(FDIC).

D. Failure to File.

The failure to file reports can lead to supervisory action (e.g., civil money penalties). For example, the OCC regulation expressly provides that "failure to file a SAR in accordance with this section and the instructions may subject the national bank, its directors, officers, employees, agents, or other institution-affiliated parties to supervisory action."

12 C.F.R. § 21.11(i)(OCC); *see also* 12 C.F.R. § 208.62(i)(FRB).

E. Notification to the Bank's Board of Directors.

If a SAR is filed, management must promptly notify its board of directors of the SAR. The board must make a note of such report in its minutes. If an institution files a SAR and the suspect is a director or executive officer, the institution may not notify the suspect, but must notify all directors who are not suspects.

12 C.F.R. § 21.11(h)(OCC); 12 C.F.R. § 208.62(h)(FRB); and 12 C.F.R. § 353.3(f)(FDIC).

F. Confidentiality.

The regulations also deal with the issue of an institution being subpoenaed for a SAR. The regulations expressly state that SARs are confidential. For example, the OCC regulation states, in part, the following:

> A SAR, and any information that would reveal the existence of a SAR, are confidential and shall not be disclosed except as authorized in this paragraph (k).
>
> (1) No national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR. Any national bank,

> and any director, officer, employee, or agent of any national bank that is subpoenaed or otherwise requested to disclose a SAR, or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i), and shall notify the following of any such request and the response thereto:
>
> (A) Director, Litigation Division, Office of the Comptroller of the Currency; and
>
> (B) The Financial Crimes Enforcement Network (FinCEN).

12 C.F.R. § 21.11(k).

G. Liability for Disclosure of Information.

In the Annunzio-Wylie Anti-Money Laundering Act, Congress saw fit to explicitly provide immunity from civil liability for an institution's disclosure of information required by federal law. Pub.L. 102-550, 106 Stat. 4059 (1992) (codified at 31 U.S.C. § 5318). The statute creating this safe harbor provides in part:

> Any financial institution that makes a disclosure of any possible violation of law or regulation or a disclosure pursuant to this subsection or any other authority . . . shall not be liable to any person under any law or regulation of the United States or any constitution, law or regulation of any State or political subdivision thereof, for such disclosure or for any failure to notify the person involved in the transaction or any other person of such disclosure.

31 U.S.C. § 5318(g)(3). The safe harbor is also addressed in the regulations. For example, the OCC regulation states the following:

> A national bank and any director, officer, employee or agent of a national bank that makes a voluntary disclosure of any possible violation of law or regulation to a government agency or makes a disclosure pursuant to this section or any other authority, including a disclosure made jointly with another financial institution, shall be protected from liability to any person for any such disclosure, or for failure to provide notice of such disclosure to any person identified in the disclosure, or both, to the full extent provided by 31 U.S.C. 5318(g)(3).

12 C.F.R. § 21.11(l).

H. SARs and Financial Exploitation

On February 22, 2011, the Department of the Treasury Financial Crimes Enforcement Network issued an Advisory to Financial Institutions on Filing Suspicious Activity Reports Regarding Elder Financial Exploitation. This report described the interplay between SARs and financial exploitation. It provides:

> The Financial Crimes Enforcement Network

(FinCEN) is issuing this advisory to assist the financial industry in reporting instances of financial exploitation of the elderly, a form of elder abuse. Financial institutions can play a key role in addressing elder financial exploitation due to the nature of the client relationship. Often, financial institutions are quick to suspect elder financial exploitation based on bank personnel familiarity with their elderly customers. The valuable role financial institutions can play in alerting appropriate authorities to suspected elder financial exploitation has received increased attention at the state level; this focus is consistent with an upward trend at the federal level in Suspicious Activity Reports (SARs) describing instances of suspected elder financial exploitation. Analysis of SARs reporting elder financial exploitation can provide critical information about specific frauds and potential trends, and can highlight abuses perpetrated against the elderly.

….

Older Americans hold a high concentration of wealth as compared to the general population. In the instances where elderly individuals experience declining cognitive or physical abilities, they may find themselves more reliant on specific individuals for their physical well-being, financial management, and social interaction. While anyone can be a victim of a financial crime such as identity theft, embezzlement, and fraudulent schemes, certain elderly individuals may be particularly vulnerable.

….

SARs continue to be a valuable avenue for financial institutions to report elder financial exploitation. Consistent with the standard for reporting suspicious activity as provided for in 31 CFR Part 103 (future 31 CFR Chapter X), if a financial institution knows, suspects, or has reason to suspect that a transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the financial institution knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction, the financial institution should then file a Suspicious Activity Report.

Financial institutions shall file with FinCEN to the extent and in the manner required a report of any suspicious transaction relevant to a possible violation of law or regulation. A financial institution may also file with FinCEN a Suspicious Activity Report with respect to any suspicious transaction that it believes is relevant to the possible violation of any law or regulation but whose reporting is not required by FinCEN regulations. See, e.g., 31 CFR § 103.18(a) (future 31 CFR § 1020.320(a)).

In order to assist law enforcement in its effort to target instances of financial exploitation of the elderly, FinCEN requests that financial institutions select the appropriate characterization of suspicious activity in the Suspicious Activity Information section of the SAR form and include the term "elder financial exploitation" in the narrative portion of all relevant SARs filed. The narrative should also include an explanation of why the institution knows, suspects, or has reason to suspect that the activity is suspicious. It is important to note that the potential victim of elder financial exploitation should not be reported as the subject of the SAR. Rather, all available information on the victim should be included in the narrative portion of the SAR.

Elder abuse, including financial exploitation, is generally reported and investigated at the local level, with Adult Protective Services, District Attorney's offices, sheriff's offices, and police departments taking key roles. We emphasize that filers should continue to report all forms of elder abuse according to institutional policies and the requirements of state and local laws and regulations, where applicable. Financial institutions may wish to consider how their AML programs can complement their policies on reporting elder financial exploitation at the local and state level.

Financial institutions with questions or comments regarding this Advisory should contact FinCEN's Regulatory Helpline at 800-949-2732.

The alert also identified certain red flags to assist financial institutions on identifying financial exploitation and abuse:

> The following red flags could indicate the existence of elder financial exploitation. This list of red flags identifies only possible signs of illicit activity. Financial institutions should evaluate indicators of potential financial exploitation in combination with other red flags and expected transaction activity being conducted by or on behalf of the elder. Additional investigation and analysis may be necessary to determine if the activity is suspicious.
>
> Financial institutions may become aware of persons or entities perpetrating illicit activity against the elderly through monitoring transaction activity that is not consistent with expected behavior. In addition, financial institutions may become aware of such scams through their direct interactions with elderly customers who are being financially exploited. In many cases, branch personnel familiarity with specific victim customers may lead to identification of anomalous activity that could alert bank personnel to initiate a review of the customer activity.
>
> • Erratic or unusual banking transactions, or changes in banking patterns:
>
> * Frequent large withdrawals, including

daily maximum currency withdrawals from an ATM;

* Sudden Non-Sufficient Fund activity;

* Uncharacteristic nonpayment for services, which may indicate a loss of funds or access to funds;

* Debit transactions that are inconsistent for the elder;

* Uncharacteristic attempts to wire large sums of money;

* Closing of CDs or accounts without regard to penalties.

• Interactions with customers or caregivers:

* A caregiver or other individual shows excessive interest in the elder's finances or assets, does not allow the elder to speak for himself, or is reluctant to leave the elder's side during conversations;

* The elder shows an unusual degree of fear or submissiveness toward a caregiver, or expresses a fear of eviction or nursing home placement if money is not given to a caretaker;

* The financial institution is unable to speak directly with the elder, despite repeated attempts to contact him or her;

* A new caretaker, relative, or friend suddenly begins conducting financial transactions on behalf of the elder without proper documentation;

* The customer moves away from existing relationships and toward new associations with other "friends" or strangers;

* The elderly individual's financial management changes suddenly, such as through a change of power of attorney to a different family member or a new individual;

* The elderly customer lacks knowledge about his or her financial status, or shows a sudden reluctance to discuss financial matters.

VII. CRIMINAL STATUTES

There are several criminal statutes that implicate fiduciary activities in Texas that are not well-known: misappropriation of fiduciary property and financial exploitation of the elderly. Though these may be similar in some ways to a theft charge, they are different criminal charges. *Rhinehardt v. State*, No. 08-01-00335-CR, 2003 Tex. App. LEXIS 6223 (Tex. App.—El Paso July 17, 2003, no pet.).

A. Misapplication Of Fiduciary Property

Misapplication of fiduciary property or property of a financial institution is a charge that has been in existence in Texas for over forty years. Tex. Pen. Code Ann. § 32.45. A person commits the offense of misapplication of fiduciary property by intentionally, knowingly, or recklessly misapplying property he holds as a fiduciary in a manner that involves substantial risk of loss to the owner of the property. *Id*. at § 32.45(b). "Substantial risk of loss" means a real possibility of loss; the possibility need not rise to the level of a substantial certainty, but the risk of loss does have to be at least more likely than not. *Coleman v*. *State*, 131 S.W.3d 303 (Tex. App.—Corpus Christi 2004, pet. ref'd).

The statute defines "Fiduciary" to include: "(A) a trustee, guardian, administrator, executor, conservator, and receiver; (B) an attorney in fact or agent appointed under a durable power of attorney as provided by Chapter XII, Texas Probate Code; (C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 162.001, Tax Code; and (D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary." *Id*. at § 32.45(a)(1).

The phrase "acting in a fiduciary capacity" is not defined in the code, but the Texas Court of Criminal Appeals has construed the undefined phrase according to its plain meaning and normal usage to apply to anyone acting in a fiduciary capacity of trust. *Coplin v*. *State*, 585 S.W.2d 734, 735 (Tex. Crim. App. 1979). Based on the plain and ordinary meaning of the word "fiduciary" as "holding, held, or founded in trust or confidence," one court has held that a person acts in a fiduciary capacity within the context of section 32.45 "when the business which he transacts, or the money or property which he handles, is not his or for his own benefit, but for the benefit of another person as to whom he stands in a relation implying and necessitating great confidence and trust on the one part and a high degree of good faith on the other part." *Gonzalez v*. *State*, 954 S.W.2d 98, 103 (Tex. App.—San Antonio 1997, no pet.); *see also Konkel v*. *Otwell*, 65 S.W.3d 183 (Tex. App.—Eastland 2001, no pet.). Moreover, evidence that a defendant aided another person in misapplying trust property sufficed, under the law of parties as set forth in Texas Penal Code sections 7.01(a), 7.02(a)(2), to convict a defendant of misapplication of fiduciary property although the defendant did not personally handle the misapplied funds. *Head v*. *State*, 299 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

An offense under this statute ranges from a Class C misdemeanor if the property is less than $100 to a first degree felony if the property misapplied is over $300,000. Tex. Penal Code Ann. § 32.45(c). Moreover, the punishment is increased to the next higher category if it is shown that the offense was committed against an elderly individual. *Id*. at § 32.45(d). For example, a court affirmed a sentence of 23 years for a conviction of this crime, and held that such was no cruel and unusual punishment. *Holt v*. *State*, No. 12-12-00337-CR, 2013 Tex. App. LEXIS 8393 (Tex. App.—Tyler July 10 2013, no pet.).

This criminal charge arises in the context of trustees misapplying trust property. *Bowen v*. *State*, 374 S.W.3d 427 (Tex. Crim. App. 2012); *Kaufman v*. *State*, No. 13-06-00653-CR, 2008 Tex. App. LEXIS 3880 (Tex. App.—Corpus Christi May 29, 2008, pet. dism.). It also arises in joint bank accounts situations and the use of funds therein. *Bailey v*. *State*, No. 03-02-00622-CR, 2003 Tex. App. LEXIS 10140 (Tex. App.—Austin Dec. 4, 2003, pet. ref'd). It also arises when a power of attorney holder makes gifts to himself or herself. *Natho v*. *State*, No. 03-11-00498-CR, 2014 Tex. App. LEXIS 1427 (Tex. App.—Austin Feb. 6 2014, pet. ref'd); *Tyler v*. *State*, 137 S.W.3d 261, 2004 Tex. App. LEXIS 3446 (Tex. App.—Houston [1st Dist.] 2004, no pet.). This can also apply in business contexts, where a business partner improperly diverts funds for personal use. *Bender v*. *State*, No. 03-09-00652-CR, 2011 Tex. App. LEXIS 3096 (Tex. App.—Austin Apr. 19 2011, no pet.); *Martinez v*. *State*, No. 05-02-01839-CR, 2003

Tex. App. LEXIS 9963 (Tex. App.—Dallas Nov. 21, 2003, pet. ref'd). Attorneys can be charged for misapplying clients' funds. *Sabel v. State*, No. 04-00-00469-CR, 2001 Tex. App. LEXIS 6493 (Tex. App.—San Antonio Sept. 26, 2001, no pet.). It also arises where a defendant misapplies royalty owners' money contrary to a gas lease agreement. *Coleman v. State*, 131 S.W.3d 303, 2004 Tex. App. LEXIS 2093 (Tex. App.—Corpus Christi 2004, pet. ref'd). It also arises in the abuse of guardianship relationships. *Latham v. State*, No. 14-04-00248-CR, No. 14-04-00249-CR, No. 14-04-00250-CR, 2005 Tex. App. LEXIS 6560 (Tex. App.—Houston [14th Dist.] Aug. 18, 2005, no pet.). Of course, the charge can apply in many other instances as well.

B. Financial Exploitation Of The Elderly

Financial exploitation of the elderly is a criminal offense in Texas that has been in the statutes since 2011. Tex. Pen. Code Ann. § 32.53. "A person commits an offense if the person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual." *Id*. at § 32.53(b). "Exploitation" means the illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain. *Id*. at § 32.53(a)(2). A "child" means a person 14 years of age or younger, and an "elderly individual" means a person 65 years of age or older. *Id*. at § 22.04(c). A "disabled individual" means a person: (A) with one or more of the following: (i) autism spectrum disorder, as defined by Section 1355.001, Insurance Code; (ii) developmental disability, as defined by Section 112.042, Human Resources Code; (iii) intellectual disability, as defined by Section 591.003, Health and Safety Code; (iv) severe emotional disturbance, as defined by Section 261.001, Family Code; or (v) traumatic brain injury, as defined by Section 92.001, Health and Safety Code; or (B) who otherwise by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person's self from harm or to provide food, shelter, or medical care for the person's self. *Id*. This offense is a felony of the third degree. *Id*. at § 32.53(c).

C. Financial Abuse of Elderly Individual

Effective September 1, 2021, the Texas Legislature added a penal statute entitled "Financial Abuse of Elderly Individual." Tex. Pen. Code §32.55. It provides:

> (a) In this section:
>
> (1) "Elderly individual" has the meaning assigned by Section 22.04.
>
> (2) "Financial abuse" means the wrongful taking, appropriation, obtaining, retention, or use of, or assisting in the wrongful taking, appropriation, obtaining, retention, or use of, money or other property of another person by any means, including by exerting undue influence. The term includes financial exploitation.
>
> (3) "Financial exploitation" means the wrongful taking, appropriation, obtaining, retention, or use of money or other property of another person by a person who has a relationship of confidence or trust with the other person. Financial exploitation may involve coercion, manipulation, threats, intimidation, misrepresentation, or the exerting of undue influence. The term includes:
>
> (A) the breach of a fiduciary relationship, including the misuse of a durable power of attorney or the abuse of guardianship powers, that results in the unauthorized appropriation, sale, or transfer of another person's property;

(B) the unauthorized taking of personal assets;

(C) the misappropriation, misuse, or unauthorized transfer of another person's money from a personal or a joint account; and

(D) the knowing or intentional failure to effectively use another person's income and assets for the necessities required for the person's support and maintenance.

(b) For purposes of Subsection (a)(3), a person has a relationship of confidence or trust with another person if the person:

(1) is a parent, spouse, adult child, or other relative by blood or marriage of the other person;

(2) is a joint tenant or tenant in common with the other person;

(3) has a legal or fiduciary relationship with the other person;

(4) is a financial planner or investment professional who provides services to the other person; or

(5) is a paid or unpaid caregiver of the other person.

(c) A person commits an offense if the person knowingly engages in the financial abuse of an elderly individual.

(d) An offense under this section is:

(1) a Class B misdemeanor if the value of the property taken, appropriated, obtained, retained, or used is less than $100;

(2) a Class A misdemeanor if the value of the property taken, appropriated, obtained, retained, or used is $100 or more but less than $750;

(3) a state jail felony if the value of the property taken, appropriated, obtained, retained, or used is $750 or more but less than $2,500;

(4) a felony of the third degree if the value of the property taken, appropriated, obtained, retained, or used is $2,500 or more but less than $30,000;

(5) a felony of the second degree if the value of the property taken, appropriated, obtained, retained, or used is $30,000 or more but less than $150,000; and

(6) a felony of the first degree if the value of the property taken, appropriated, obtained, retained, or used is $150,000 or more.

(e) A person who is subject to prosecution under both this section and another section of this code may be prosecuted under either section or both sections.

Tex. Pen. Code §32.55. The Bill analysis provides that:

> Reports indicate that older Americans collectively lose nearly $37 billion each year to financial scams and abuse. Concerns have been raised regarding the vulnerability of elderly Texans to these scams, as Texas has one of the largest

and fastest growing populations of senior citizens in the country. The number and complexity of reports involving financial abuse of vulnerable and older adults has grown significantly over the past decade. Due to the complexities of elder financial exploitation, many of the victims are left without restitution or any other means of legal protection. The toll that these crimes places on elderly victims frequently results in financial ruin, loss of dignity, diminished health, and other negative effects. C.S.H.B. 1156 seeks to address this issue by creating an offense for the financial abuse of an elderly individual.

…

C.S.H.B. 1156 amends the Penal Code to create the offense of financial abuse of an elderly individual for a person who knowingly engages in the wrongful taking, appropriation, obtaining, retention, or use of money or other property of an elderly person or for a person who knowingly assists in such conduct, by any means, including by exerting undue influence and by financial exploitation. The bill establishes penalties for the offense ranging from a Class B misdemeanor to a first degree felony depending on the value of the property taken, appropriated, obtained, retained, or used. If the conduct constituting the offense also constitutes another Penal Code offense, the actor may be prosecuted for either offense or both offenses. The bill defines "financial exploitation," among other terms.

Acts 2021, 87th Leg., ch. 456 (H.B. 1156), § 1, Bill Analysis

D. Criminal Statutes Do Not Create Civil Liability

These criminal statutes do not create civil causes of action. "The Texas Penal Code does not create private causes of action," and as a result, criminal code "allegations fail to state a viable claim for relief." *Spurlock v. Johnson*, 94 S.W.3d 655, 658 (Tex. App.—San Antonio 2002, no pet.); *see also Macias v. Tex. Dep't of Crim. Justice Parole Div.*, No. 03-07-00033-CV, 2007 Tex. App. LEXIS 6798 (Tex. App.—Austin August 21, 2007, no et.). Other states have adopted express civil causes of action for the exploitation of the elderly or other vulnerable persons. *See, e.g.*, Ariz. Rev. Stat. § 46-456, et. seq.; CA Welf. & Inst. Code § 15610-1561-.65; Fla. Ann. Stat. § 415.102(8)(a)(1) and (2); (8)(b). In Texas, there are no such statutory or common law claims for exploitation of vulnerable persons. However, there is a common law claim for breach of fiduciary duty, and the same conduct that may justify a criminal charge may also support a valid breach of fiduciary duty claim. *Compare Natho v. State*, No. 03-11-00498-CR, 2014 Tex. App. LEXIS 1427 (Tex. App.—Austin Feb. 6 2014, pet. ref'd) (criminal charge affirmed) with *Natho v. Shelton*, No. 03-11-00661-CV, 2014 Tex. App. LEXIS 5842 (Tex. App.—Austin May 30, 2014, no pet.) (affirming civil judgment in part based on same acts of fiduciary breach). Moreover, there are civil claims for conversion, fraud, breach of contract, money had and received, undue influence, mental incompetence, constructive trust, etc. that may provide the appropriate relief.

E. Courts Can Award Restitution In A Criminal Case

Even if a party cannot assert a civil claim under a criminal statute, a criminal court has discretion to award a victim restitution as against the criminal defendant. *Jones v. State*, 2012 Tex. App. LEXIS 10549 (Tex. App.—Corpus Christi Dec. 20 2012, pet. ref'd). "Restitution was intended to 'adequately compensate the victim

of the offense' in the course of punishing the criminal offender." *Cabla v. State*, 6 S.W.3d 543, 545 (Tex. Crim. App. 1999) (quoting Tex. Code Crim. Proc. Ann. art. 42.12 § 9(a)). A sentencing court may order a defendant to make restitution to any victim of the offense. Tex. Code Crim. Proc. Ann. art. 42.037(a). "[T]he amount of a restitution order is limited to only the losses or expenses that the victim or victims proved they suffered as a result of the offense for which the defendant was convicted." *Cabla*, 6 S.W.3d at 546. "An abuse of discretion by the trial court in setting the amount of restitution will implicate due-process considerations." *Campbell v. State*, 5 S.W.3d 693, 696 (Tex. Crim. App. 1999). Due process places four limitations on the restitution a trial court may order. First, "[t]he amount of restitution must be just, and it must have a factual basis within the loss of the victim." Id. Second, "[a] trial court may not order restitution for an offense for which the defendant is not criminally responsible." *Id*. at 697. Third, "a trial court may not order restitution to any but the victim or victims of the offense with which the offender is charged." *Id*. Fourth, a trial court may not, "without the agreement of the defendant, order restitution to other victims unless their losses have been adjudicated." *Id*. The standard of proof for determining restitution is a preponderance of evidence. Tex. Code Crim. Proc. Ann. art. 42.037(k). The burden of proving the amount of loss sustained by the victim is on the prosecution. *Id*. The restitution ordered must be "just" and must be supported by sufficient factual evidence in the record.

VIII. CONCLUSION

As noted above, financial exploitation and elder abuse is on the rise. As the baby boomer generation ages and that generation's wealth begins to transfer to the next generation, individuals will take illegal and immoral actions to obtain that wealth. The government has placed the financial services industry in the position of a watch dog to alert authorities to financial exploitation. The author has attempted to provide guidance regarding the common elements of financial exploitation: undue influence and mental incapacity. The author has also attempted to describe the various statutes and other authorities that describe financial institutions' duties to report these incidences.