The Velvet Hammer: Undue Influence Based On Deceit, Fraud, and Relationship Poisoning and a Financial Institution's Duty To Report Financial Exploitation

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David has specialized in estate and trust disputes including: trust modification/clarification, trustee resignation/removal, breach of fiduciary duty and related claims, accountings, will contests, mental competency issues, and undue influence. David's recent trial experience includes:

Represented a trustee in federal class action suit where trust beneficiaries challenged whether it was the authorized trustee of over 220 trusts;

Represented trustees regarding claims of mismanagement of assets;

Represented a trustee who filed suit to modify three trusts to remove a charitable beneficiary that had substantially changed operations;

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Represented a trustee/bank regarding a negligence claim arising from investments from an IRA account;

Represented individuals in will contests arising from claims of undue influence and mental incompetence;

Represented estate representatives against claims raised by a beneficiary for breach of fiduciary duty;

Represented beneficiaries against estate representatives for breach of fiduciary duty and other related claims; and

Represented estate representatives, trustees, and beneficiaries regarding accountings and related claims.

David is one of twenty attorneys in the state (of the 84,000 licensed) that has the triple Board Certification in Civil Trial Law, Civil Appellate, and Personal Injury Trial Law by the Texas Board of Legal Specialization. Additionally, David was a member of the Civil Trial Law Commission of the Texas Board of Legal Specialization. This commission writes and grades the exam for new applicants for civil trial law certification. David is a graduate of Baylor University School of Law*, Magna Cum Laude*, and Baylor University*,* B.B.A. in Accounting.

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I. 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.

A. 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.

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)). Once evidence contradicting the presumption has been offered, the presumption is extinguished. *Id*. The case then proceeds as if no presumption ever existed. *Tex. Nat. Res. Conservation Comm'n v. McDill*, 914 S.W.2d 718, 724 (Tex. App.—Austin 1996, no writ). A rebuttable presumption does not shift the ultimate burden of proof. *Garza v. Mission*, 684 S.W.2d 148, 152 (Tex. App.—Corpus Christi 1984, writ dism'd w.o.j.); *see also Saenz*, 873 S.W.2d at 359.

B. 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.
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> ….
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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 *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 *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.

C. 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.

II. 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)?

III. CONCLUSION

Even where an actor does not point a gun to a person's head to obtain a new, favorable will or other document, 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.