Practical Issues Concerning Durable Power of Attorney Transactions

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David maintains an active trial and appellate practice for the financial services industry. David is the primary author of the Texas Fiduciary Litigator blog (txfiduciarylitigator.com), which reports on legal cases and issues impacting the fiduciary field in Texas. David's financial institution experience includes (but is not limited to): account litigation, breach of contract, foreclosure litigation, lender liability, receivership and injunction remedies upon default, non-recourse and other real estate lending, class action, RICO actions, usury, various tort causes of action, breach of fiduciary duty claims, and preference and other related claims raised by receivers.

David has specialized in trust and estate disputes including: trust modification/clarification/reformation, 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 regarding dispute over the failure to make distributions;

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.

David has published over twenty (20) law review articles on various litigation topics. David's articles have been cited as authority by: federal courts, the Texas Supreme Court (three times), the Texas courts of appeals (El Paso, Waco, Texarkana, Tyler, Beaumont, and Houston), McDonald and Carlson in their Texas Civil Practice treatise, William V. Dorsaneo in the Texas Litigation Guide, Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over one hundred and fifty (150) continuing legal education courses.

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I. INTRODUCTION

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 instituted broad changes to the Texas Estates Code's Texas Durable Power of Attorney Act regarding durable power of attorney provisions. A new aspect of the 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.

This paper discusses the durable power of attorney statute, powers that power of attorney agents have and financial institutions' obligations and rights. The paper discusses the statutory duties to report incidences of financial exploitation of elderly customers and SAR reporting requirements. The Author hopes that this paper provides Texas-specific guidance on this very important topic that impacts so many in our society.

II. THE DURABLE POWER OF ATTORNEY ACT

A. Introduction

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. 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. A statutory durable power of attorney is legally sufficient 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.

E. Effect of Court-Appointed Guardian of the Estate

If, after execution of a durable power of attorney, a court appoints a permanent guardian of the estate for a ward who is the principal who executed the power of attorney, on the qualification of the guardian the powers and authority granted to the attorney in fact or agent named in the power of attorney are automatically revoked. *Id*. at § 751.052. If a court appoints a temporary guardian of the estate for a ward who is the principal who executed the power of attorney, on the qualification of the guardian the powers and authority granted to the attorney in fact or agent named in the power of attorney are automatically suspended for the duration of the guardianship unless the court enters an order that: (A) affirms and states the effectiveness of the power of attorney; and (B) confirms the validity of the appointment of the named attorney in fact or agent. *Id*. If the powers and authority of an attorney in fact or agent are revoked due to the appointment of a guardian of the estate, the attorney in fact or agent shall: (1) deliver to the guardian of the estate all assets of the ward's estate that are in the possession of the attorney in fact or agent; and (2) account to the guardian of the estate as the attorney in fact or agent would account to the principal if the principal had terminated the powers of the attorney in fact or agent. *Id*.

F. Effect of Bankruptcy

The filing of a voluntary or involuntary petition in bankruptcy in connection with the debts of a principal who has executed a durable power of attorney does not revoke or terminate the agency as to the principal's agent. *Id*. at § 751.057.

G. 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.

H. 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*.

I. 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.

J. Agent's Powers

1. Grants of Authority

A durable power of attorney document can grant to an agent a narrow authority to perform one or a few acts. If so, the document should be construed to allow just those acts and no other. However, if a durable power of attorney grants to an agent the authority to perform all acts that the principal could perform, the agent has the general authority conferred below. *Id*. at § 751.031(a).

An agent has authority described in the general powers section below if the durable power of attorney refers to general authority with respect to the descriptive term for the subjects stated in Chapter 752 or cites the section in which the authority is described. *Id*. at § 751.034. "A reference in a durable power of attorney to general authority with respect to the descriptive term for a subject in Chapter 752 or a citation to one of those sections incorporates the entire section as if the section were set out in its entirety in the power of attorney." *Id*. "A principal may modify authority incorporated by reference." *Id*.

In *Wise v. Mitchell*, a power of attorney holder, Mitchell, filed a revocation of a deed that the principal issued to Wise. No. 05-15-00610-CV, 2016 Tex. App. LEXIS 6502 (Tex. App.—Dallas June 20, 2016, pet. denied). After the principal's death, Mitchell, as executor, moved for partial summary judgment to cancel the deed based on the revocation document, and the trial court granted that relief. Wise appealed, arguing in part that Mitchell did not have the authority to revoke the deed and that her revocation was not effective because she had not filed her power of

attorney document in the public records before the revocation document was filed.

The court of appeals first addressed the filing requirement. The statute that was in effect at the time required that for a real estate transaction, a durable power of attorney form had to be filed in the office of the county clerk of the county in which the property was located. The court of appeals held that this did not require a particular sequence, and that Mitchell complied with this requirement by filing her form at the same time as the revocation document.

The court of appeals then addressed Mitchell's authority to execute the revocation document. The court held that the power of attorney document was governed by former Texas Probate Code sections 481 through 489, which allowed for a non-statutory durable power of attorney form. The court held that the language of a power of attorney determines the extent of the authority conveyed to the agent, and that it would construe a power of attorney as a whole in order to ascertain the parties' intentions and rights. The court held that the authority granted by a power of attorney is strictly construed, so as to exclude the exercise of any power that is not warranted either by the actual terms used, or as a necessary means of executing the authority with effect.

Here, the power of attorney document authorized Mitchell to "perform any and all acts in my stead and to do and perform all such other matters as may be necessary and expedient for the purpose of carrying out the objects above mentioned." The decedent placed no restrictions on the acts that Mitchell could take as her agent. The court noted that "Where an instrument is free from qualifying features either on its face or from the evidence, the agent has unlimited power to act in complete substitution for any act which the principal might himself do if present and acting." Finally, because the deed was testamentary in nature and vested no interest in Wise prior to the decedent's death, the Deed was subject to revocation by Mitchell acting as the decedent's agent under the power of attorney. The court held that Mitchell had the power to revoke the deed and affirmed the trial court's judgment for Mitchell.

2. Limitations on General Authority

The Act provides certain limitations on a general grant of authority:

> (b) An agent may take the following actions on the principal's behalf or with respect to the principal's property only if the durable power of attorney designating the agent expressly grants the agent the authority and the exercise of the authority is not otherwise prohibited by another agreement or instrument to which the authority or property is subject: (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.

Id. at § 751.031(b). Moreover, the Act provides:

> (c) Notwithstanding a grant of authority to perform an act described by Subsection (b), unless the durable power of attorney otherwise provides, 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).

Regarding gifting powers, the Act provides:

> (b) Unless the durable power of attorney otherwise provides, a grant of authority to make a gift is subject to the limitations prescribed by this section.
>
> (c) Language in a durable power of attorney granting general authority with respect to gifts authorizes the agent to only: (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.
>
> (d) An agent may make a gift of the principal's property only as the agent determines is consistent with the principal's objectives if the agent actually knows those objectives. 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. at § 751.032.

3. Statutory DPOA Form

The Act has a statutory form for a durable power of attorney document. *Id*. at § 752.051-.052. A statutory durable power of attorney is legally sufficient 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. . *Id*. at § 752.004. This statutory for is not exclusive, and other forms may be used. *Id*. at § 752.003.

4. Construction of DPOA In General

Regarding the construction of a durable power of attorney document, the Act provides:

> By executing a statutory durable power of attorney that confers authority with respect to any class of transactions, the principal empowers the attorney in fact or agent for that class of transactions to: (1) demand, receive, and obtain by litigation, action, or otherwise any money or other thing of value to which the principal is, may become, or may claim to be entitled; (2) conserve, invest, disburse, or use any money or other thing of value received on behalf of the principal for the purposes intended; (3) contract in any manner with any person, on terms agreeable to the attorney

in fact or agent, to accomplish a purpose of a transaction and perform, rescind, reform, release, or modify that contract or another contract made by or on behalf of the principal; (4) execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the attorney in fact or agent considers desirable to accomplish a purpose of a transaction; (5) with respect to a claim existing in favor of or against the principal: (A) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise; or (B) intervene in an action or litigation relating to the claim; (6) seek on the principal's behalf the assistance of a court to carry out an act authorized by the power of attorney; (7) engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant; (8) keep appropriate records of each transaction, including an accounting of receipts and disbursements; (9) prepare, execute, and file a record, report, or other document the attorney in fact or agent considers necessary or desirable to safeguard or promote the principal's interest under a statute or governmental regulation; (10) reimburse the attorney in fact or agent for an expenditure made in exercising the powers granted by the durable power of attorney; and (11) in general, perform any other lawful act that the principal may perform with respect to the transaction.

Id. at § 752.101.

5. General Power For Real Estate Transactions

Regarding real estate transactions, the Act provides:

> (a) The language conferring authority with respect to real property transactions in a statutory durable power of attorney empowers the agent, without further reference to a specific description of the real property, to:
>
> (1) accept as a gift or as security for a loan or reject, demand, buy, lease, receive, or otherwise acquire an interest in real property or a right incident to real property;
>
> (2) sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition or consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease or sublet, or otherwise dispose of an estate or interest in real property or a right incident to real property;
>
> (3) release, assign, satisfy, and enforce by litigation, action, or otherwise a mortgage, deed of trust, encumbrance, lien, or other claim to real property that exists or is claimed to exist;
>
> (4) perform any act of management or of conservation with respect to an interest in real property, or a right incident to real property, owned or claimed to be owned by the principal, including the authority to: (A) insure against a casualty,

liability, or loss; (B) obtain or regain possession or protect the interest or right by litigation, action, or otherwise; (C) pay, compromise, or contest taxes or assessments or apply for and receive refunds in connection with the taxes or assessments; (D) purchase supplies, hire assistance or labor, or make repairs or alterations to the real property; and (E) manage and supervise an interest in real property, including the mineral estate;

(5) use, develop, alter, replace, remove, erect, or install structures or other improvements on real property in which the principal has or claims to have an estate, interest, or right;

(6) participate in a reorganization with respect to real property or a legal entity that owns an interest in or right incident to real property, receive and hold shares of stock or obligations received in a plan or reorganization, and act with respect to the shares or obligations, including: (A) selling or otherwise disposing of the shares or obligations; (B) exercising or selling an option, conversion, or similar right with respect to the shares or obligations; and (C) voting the shares or obligations in person or by proxy;

(7) change the form of title of an interest in or right incident to real property;

(8) dedicate easements or other real property in which the principal has or claims to have an interest to public use, with or without consideration;

(9) enter into mineral transactions, including: (A) negotiating and making oil, gas, and other mineral leases covering any land, mineral, or royalty interest in which the principal has or claims to have an interest; (B) pooling and unitizing all or part of the principal's land, mineral leasehold, mineral, royalty, or other interest with land, mineral leasehold, mineral, royalty, or other interest of one or more persons for the purpose of developing and producing oil, gas, or other minerals, and making leases or assignments granting the right to pool and unitize; (C) entering into contracts and agreements concerning the installation and operation of plants or other facilities for the cycling, repressuring, processing, or other treating or handling of oil, gas, or other minerals; (D) conducting or contracting for the conducting of seismic evaluation operations; (E) drilling or contracting for the drilling of wells for oil, gas, or other minerals; (F) contracting for and making "dry hole" and "bottom hole" contributions of cash, leasehold interests, or other interests toward the drilling of wells; (G) using or contracting for the use of any method of secondary or tertiary recovery of any mineral, including the injection of water, gas, air, or other substances; (H) purchasing oil, gas, or other mineral leases, leasehold interests, or other interests for any type of consideration, including farmout agreements

requiring the drilling or reworking of wells or participation in the drilling or reworking of wells; (I) entering into farmout agreements committing the principal to assign oil, gas, or other mineral leases or interests in consideration for the drilling of wells or other oil, gas, or mineral operations; (J) negotiating the transfer of and transferring oil, gas, or other mineral leases or interests for any consideration, such as retained overriding royalty interests of any nature, drilling or reworking commitments, or production interests; (K) executing and entering into contracts, conveyances, and other agreements or transfers considered necessary or desirable to carry out the powers granted in this section, including entering into and executing division orders, oil, gas, or other mineral sales contracts, exploration agreements, processing agreements, and other contracts relating to the processing, handling, treating, transporting, and marketing of oil, gas, or other mineral production from or accruing to the principal and receiving and receipting for the proceeds of those contracts, conveyances, and other agreements and transfers on behalf of the principal; and (L) taking an action described by Paragraph (K) regardless of whether the action is, at the time the action is taken or subsequently, recognized or considered as a common or proper practice by those engaged in the business of prospecting for, developing, producing, processing, transporting, or marketing minerals; and

(10) designate the property that constitutes the principal's homestead.

(b) The power to mortgage and encumber real property provided by this section includes the power to execute documents necessary to create a lien against the principal's homestead as provided by Section 50, Article XVI, Texas Constitution, and to consent to the creation of a lien against property owned by the principal's spouse in which the principal has a homestead interest.

Id. at § 752.102.

6. General Power Over Tangible Personal Property

Regarding tangible personal property, the Act provides:

> The language conferring general authority with respect to tangible personal property transactions in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) accept tangible personal property or an interest in tangible personal property as a gift or as security for a loan or reject, demand, buy, receive, or otherwise acquire ownership or possession of tangible personal property or an interest in tangible personal property;
>
> (2) sell, exchange, convey with or without covenants, release, surrender, mortgage, encumber,

> pledge, create a security interest in, pawn, grant options concerning, lease or sublet to others, or otherwise dispose of tangible personal property or an interest in tangible personal property;
>
> (3) release, assign, satisfy, or enforce by litigation, action, or otherwise a mortgage, security interest, encumbrance, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property; and
>
> (4) perform an act of management or conservation with respect to tangible personal property or an interest in tangible personal property on behalf of the principal, including: (A) insuring the property or interest against casualty, liability, or loss; (B) obtaining or regaining possession or protecting the property or interest by litigation, action, or otherwise; (C) paying, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments; (D) moving the property; (E) storing the property for hire or on a gratuitous bailment; and (F) using, altering, and making repairs or alterations to the property.

Id. at § 752.103.

7. <u>General Power Over Stock and Bond and Commodity and Option Transactions</u>

Regarding stock and bond transactions, the Act provides:

> The language conferring authority with respect to stock and bond transactions in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) buy, sell, and exchange: (A) stocks; (B) bonds; (C) mutual funds; and (D) all other types of securities and financial instruments other than commodity futures contracts and call and put options on stocks and stock indexes;
>
> (2) receive certificates and other evidences of ownership with respect to securities;
>
> (3) exercise voting rights with respect to securities in person or by proxy;
>
> (4) enter into voting trusts; and
>
> (5) consent to limitations on the right to vote.

Id. at § 752.104.

Regarding commodity and option transactions, the Act provides:

> The language conferring authority with respect to commodity and option transactions in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated options exchange; and

(2) establish, continue, modify, or terminate option accounts with a broker.

Id. at § 752.105.

8. General Power Over Banking and Other Financial Institution Transactions

Regarding banking and other financial institution transactions, the Act provides:

> 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;
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> (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.

9. General Power Over Business Operation Transactions

Regarding business operation transactions, the Act provides:

> The language conferring authority with respect to business operating transactions in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) operate, buy, sell, enlarge, reduce, or terminate a business interest;
>
> (2) do the following, to the extent that an attorney in fact or agent is permitted by law to act for a principal and subject to the terms of a partnership agreement: (A) perform a duty, discharge a liability, or exercise a right, power, privilege, or option that the principal has, may have, or claims to have under the partnership agreement, whether or not the principal is a general or limited partner; (B) enforce the terms of the partnership agreement by litigation, action, or otherwise; and (C) defend, submit to arbitration, settle, or compromise litigation or an action to which the principal is a party because of membership in the partnership;
>
> (3) exercise in person or by proxy, or enforce by litigation, action, or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of a bond, share, or other similar instrument and defend, submit to arbitration, settle, or compromise a legal proceeding to which the principal is a party because of a bond, share, or similar instrument;
>
> (4) with respect to a business owned solely by the principal: (A) continue, modify, renegotiate, extend, and terminate a contract made before execution of the power of attorney with an individual, legal entity, firm, association, or corporation by or on behalf of the principal with respect to the business; (B) determine: (i) the location of the business's operation; (ii) the nature and extent of the business; (iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in the business's operation; (iv) the amount and types of insurance carried; and (v) the method of engaging, compensating, and dealing with the business's accountants, attorneys, and other agents and employees; (C) change the name or form of organization under which the business is operated and enter into a partnership agreement with other persons or organize a corporation to take over all or part of the operation of the business; and (D) demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the business and control and disburse the money in the operation of the business;
>
> (5) put additional capital into a business in which the principal has an interest;

(6) join in a plan of reorganization, consolidation, or merger of the business;

(7) sell or liquidate a business or part of the business at the time and on the terms that the attorney in fact or agent considers desirable;

(8) establish the value of a business under a buy-out agreement to which the principal is a party;

(9) do the following: (A) prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business: (i) that are required by a governmental agency, department, or instrumentality; or (ii) that the attorney in fact or agent considers desirable; and (B) make related payments; and

(10) pay, compromise, or contest taxes or assessments and perform any other act that the attorney in fact or agent considers desirable to protect the principal from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Id. at § 752.107.

10. General Power of Insurance and Annuity Transactions

Regarding insurance and annuity transactions, the Act provides:

(a) 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:

(1) continue, pay the premium or assessment on, modify, rescind, release, or terminate a contract procured by or on behalf of the principal that insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract;

(2) procure new, different, or additional insurance contracts and annuities for the principal or the principal's spouse, children, and other dependents and select the amount, type of insurance or annuity, and method of payment;

(3) pay the premium or assessment on, or modify, rescind, release, or terminate, an insurance contract or annuity procured by the attorney in fact or agent;

(4) designate the beneficiary of the insurance contract, except as provided by Subsection (b);

(5) apply for and receive a loan on the security of the insurance contract or annuity;

(6) surrender and receive the cash surrender value;

(7) exercise an election;

(8) change the manner of paying premiums;

(9) change or convert the type of insurance contract or annuity with respect to which the principal has or claims to have a power described by this section;

(10) change the beneficiary of an insurance contract or annuity, except that the attorney in fact or agent may be designated a beneficiary only to the extent authorized by Subsection (b);

(11) apply for and procure government aid to guarantee or pay premiums of an insurance contract on the life of the principal;

(12) collect, sell, assign, borrow on, or pledge the principal's interest in an insurance contract or annuity; and

(13) pay from proceeds or otherwise, compromise or contest, or apply for refunds in connection with a tax or assessment imposed by a taxing authority with respect to an insurance contract or annuity or the proceeds of the contract or annuity or liability accruing because of the tax or assessment.

(b) 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 or an extension, renewal, or substitute for the contract only to the extent the agent was named as a beneficiary by the principal.

Id. at § 752.108.

11. General Power Over Estate, Trust, and Other Beneficiary Transactions

Regarding estate, trust, and other beneficiary transactions, the Act provides:

> The language conferring authority with respect to estate, trust, and other beneficiary transactions in a statutory durable power of attorney empowers the agent to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, life estate, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including to:
>
> (1) accept, reject, disclaim, receive, receipt for, sell, assign, release, pledge, exchange, or consent to a reduction in or modification of a share in or payment from the fund;
>
> (2) demand or obtain by litigation, action, or otherwise money or any other thing of value to which the principal is, may become, or claims to be entitled because of the fund;
>
> (3) initiate, participate in, or oppose a legal or judicial proceeding to: (A) ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal; or (B) remove, substitute, or surcharge a fiduciary;
>
> (4) conserve, invest, disburse, or use anything received for an authorized purpose; and

> (5) transfer all or part of the principal's interest in real property, stocks, bonds, accounts with financial institutions, insurance, and other property to the trustee of a revocable trust created by the principal as settlor.

Id. at § 752.109.

12. General Power Over Claims and Litigation

Regarding claims and litigation, the Act provides:

> The language conferring general authority with respect to claims and litigation in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) assert and prosecute before a court or administrative agency a claim, a claim for relief, a counterclaim, or an offset, or defend against an individual, a legal entity, or a government, including an action to: (A) recover property or other thing of value; (B) recover damages sustained by the principal; (C) eliminate or modify tax liability; or (D) seek an injunction, specific performance, or other relief;
>
> (2) bring an action to determine an adverse claim, intervene in an action or litigation, and act as an amicus curiae;
>
> (3) in connection with an action or litigation: (A) procure an attachment, garnishment, libel, order of arrest, or other preliminary, provisional, or intermediate relief and use an available procedure to effect or satisfy a judgment, order, or decree; and (B) perform any lawful act the principal could perform, including: (i) acceptance of tender; (ii) offer of judgment; (iii) admission of facts; (iv) submission of a controversy on an agreed statement of facts; (v) consent to examination before trial; and (vi) binding of the principal in litigation;
>
> (4) submit to arbitration, settle, and propose or accept a compromise with respect to a claim or litigation;
>
> (5) waive the issuance and service of process on the principal, accept service of process, appear for the principal, designate persons on whom process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, or receive and execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation;
>
> (6) act for the principal regarding voluntary or involuntary bankruptcy or insolvency proceedings concerning: (A) the principal; or (B) another person, with respect to a reorganization proceeding or a receivership or application for the appointment of a

> receiver or trustee that affects the principal's interest in property or other thing of value; and
>
> (7) pay a judgment against the principal or a settlement made in connection with a claim or litigation and receive and conserve money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

Id. at § 752.110.

13. General Power Over Personal and Family Maintenance

Regarding personal and family maintenance, the Act provides:

> The language conferring authority with respect to personal and family maintenance in a statutory durable power of attorney empowers the agent to:
>
> (1) perform the acts necessary to maintain the customary standard of living of the principal, the principal's spouse and children, and other individuals customarily or legally entitled to be supported by the principal, including: (A) providing living quarters by purchase, lease, or other contract; or (B) paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals;
>
> (2) provide for the individuals described by Subdivision (1): (A) normal domestic help; (B) usual vacations and travel expenses; and (C) money for shelter, clothing, food, appropriate education, and other living costs;
>
> (3) pay necessary medical, dental, and surgical care, hospitalization, and custodial care for the individuals described by Subdivision (1);
>
> (4) continue any provision made by the principal for the individuals described by Subdivision (1) for automobiles or other means of transportation, including registering, licensing, insuring, and replacing the automobiles or other means of transportation;
>
> (5) maintain or open charge accounts for the convenience of the individuals described by Subdivision (1) and open new accounts the agent considers desirable to accomplish a lawful purpose;
>
> (6) continue: (A) payments incidental to the membership or affiliation of the principal in a church, club, society, order, or other organization; or (B) contributions to those organizations;
>
> (7) perform all acts necessary in relation to the principal's mail, including: (A) receiving, signing for, opening, reading, and responding to any mail addressed to the principal, whether through the United States Postal Service or a private mail service; (B) forwarding the principal's mail to any address; and (C) representing the principal before the United States Postal Service in all matters relating to mail service; and

(8) subject to the needs of the individuals described by Subdivision (1), provide for the reasonable care of the principal's pets.

Id. at § 752.111.

14. Power Over Benefits From Governmental Programs or Civil or Military Service

Regarding benefits from governmental programs or civil or military service, the Act provides:

> The language conferring authority with respect to benefits from social security, Medicare, Medicaid, or other governmental programs or civil or military service in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) execute a voucher in the principal's name for an allowance or reimbursement payable by the United States, a foreign government, or a state or subdivision of a state to the principal, including an allowance or reimbursement for: (A) transportation of the individuals described by Section 752.111(1); and (B) shipment of the household effects of those individuals;
>
> (2) take possession and order the removal and shipment of the principal's property from a post, warehouse, depot, dock, or other governmental or private place of storage or safekeeping and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose;
>
> (3) prepare, file, and prosecute a claim of the principal for a benefit or assistance, financial or otherwise, to which the principal claims to be entitled under a statute or governmental regulation;
>
> (4) prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits the principal may be entitled to receive; and
>
> (5) receive the financial proceeds of a claim of the type described by this section and conserve, invest, disburse, or use anything received for a lawful purpose.

Id. at § 752.112.

15. Power Over Retirement Plan Transactions

Regarding retirement plan transactions, the Act provides:

> (a) In this section, "retirement plan" means:
>
> (1) an employee pension benefit plan as defined by Section 3, Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1002), without regard to the provisions of Section (2)(B) of that section;
>
> (2) a plan that does not meet the definition of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.) because the plan does not cover common law employees;

(3) a plan that is similar to an employee benefit plan under the Employee Retirement Income Security Act of 1974 (29 U.S.C. Section 1001 et seq.), regardless of whether the plan is covered by Title 1 of that Act, including a plan that provides death benefits to the beneficiary of employees; and

(4) an individual retirement account or annuity, a self-employed pension plan, or a similar plan or account.

(b) The language conferring authority with respect to retirement plan transactions in a statutory durable power of attorney empowers the agent to perform any lawful act the principal may perform with respect to a transaction relating to a retirement plan, including to:

(1) apply for service or disability retirement benefits;

(2) select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals;

(3) designate or change the designation of a beneficiary or benefits payable by a retirement plan, except as provided by Subsection (c);

(4) make voluntary contributions to retirement plans if authorized by the plan;

(5) exercise the investment powers available under any self-directed retirement plan;

(6) make rollovers of plan benefits into other retirement plans;

(7) borrow from, sell assets to, and purchase assets from retirement plans if authorized by the plan;

(8) waive the principal's right to be a beneficiary of a joint or survivor annuity if the principal is not the participant in the retirement plan;

(9) receive, endorse, and cash payments from a retirement plan;

(10) waive the principal's right to receive all or a portion of benefits payable by a retirement plan; and

(11) request and receive information relating to the principal from retirement plan records.

(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 under a retirement plan only to the extent the agent was named a beneficiary by the principal under the retirement plan, or in the case of a rollover or trustee-to-trustee transfer, the predecessor retirement plan.

Id. at § 752.113.

16. Power Over Tax Matters

Regarding tax matter, the Act provides:

> The language conferring authority with respect to tax matters in a statutory durable power of attorney empowers the attorney in fact or agent to:
>
> (1) prepare, sign, and file: (A) federal, state, local, and foreign income, gift, payroll, Federal Insurance Contributions Act (26 U.S.C. Chapter 21), and other tax returns; (B) claims for refunds; (C) requests for extensions of time; (D) petitions regarding tax matters; and (E) any other tax-related documents, including: (i) receipts; (ii) offers; (iii) waivers; (iv) consents, including consents and agreements under Section 2032A, Internal Revenue Code of 1986 (26 U.S.C. Section 2032A); (v) closing agreements; and (vi) any power of attorney form required by the Internal Revenue Service or other taxing authority with respect to a tax year on which the statute of limitations has not run and 25 tax years following that tax year;
>
> (2) pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority;
>
> (3) exercise any election available to the principal under federal, state, local, or foreign tax law; and
>
> (4) act for the principal in all tax matters, for all periods, before the Internal Revenue Service and any other taxing authority.

Id. at § 752.114.

17. <u>Power to Create or Change Beneficiary Designations</u>

The Act provides that a durable power of attorney agent can, under certain circumstances, change or create a beneficiary designation on certain accounts or insurance policies:

> (a) Unless the durable power of attorney otherwise provides, and except as provided by Section 751.031(c), authority granted to an agent under Section 751.031(b)(4) empowers the agent to: (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.
>
> (b) 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).

> (c) 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. This is described in more detail below.

K. 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.).

L. 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.

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.

M. 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.

N. 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.

O. 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).

P. 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).

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.

Q. 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 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.

R. 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.

S. 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.

T. 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.

U. 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.").

V. 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 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

[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).

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.

W. 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.

X. 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.

Y. 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.

Z. 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.

AA. 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.

BB. 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.

III. 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)?

IV. 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 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.

[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.

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.

V. 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. 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.

D. 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.

VI. CONCLUSION

The use of durable power of attorney documents is increasing. The new statutory changes were implemented as a way to encourage the use of durable power of attorney documents to avoid guardianship proceedings. Estate planning attorneys are using these as tools more and more often. Accordingly, financial institutions must know what power of attorney agents can do and cannot do and know the rights that an institution has when presented with such a document. Further, 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 also attempted to describe the various statutes and other authorities that describe financial institutions' duties to report these incidences.