

# KEEPING IT AWAY FROM THE FAMILY: DEFENDING BABY BOOMERS' FINANCIAL INTERESTS FROM THEIR OWN CHILDREN BREACHING FIDUCIARY DUTY

Comment

*by Catherine A. Schraegle\**

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\* J.D. Candidate, Texas Tech University School of Law, May 2016.

# I. THE BABY BOOMER GENERATION AND FINANCIAL ABUSE— AN INTRODUCTION

The generation born after World War II is collectively known as the “baby boomer generation.”<sup>1</sup> In 2030, all of the baby boomers will be at least 65 years of age, and more than twenty percent of the United States population will be 65 years of age or older.<sup>2</sup> As the baby boomers age, many of them will become dependent—in some way or another—on their children, spouses, or caregivers.<sup>3</sup> Unfortunately, elder abuse, which “includes physical, sexual, or psychological abuse, as well as neglect, abandonment, and financial exploitation[,]” is becoming more and more prevalent in society.<sup>4</sup> Elder abuse is more than just a tragedy that occurs in nursing homes or assisted living facilities.<sup>5</sup> In fact, “[o]ne out of every ten people ages 60 and older who live at home suffers abuse, neglect, or exploitation.”<sup>6</sup> Financial exploitation is just as important as any other form of abuse that an elderly person may suffer.<sup>7</sup> It is not uncommon to hear about children taking advantage of their parents’ estates, whether a court has legally appointed the children to regulate their finances or an implied financial duty exists.<sup>8</sup> According to a study conducted by the American Association of Retired Persons, “60 percent of adult protective services (APS) cases of financial [elder] abuse nationwide involved an adult child of the elderly person.”<sup>9</sup> This comment will discuss the steps estate planners can take to prevent their clients’ children from taking financial advantage of their clients.<sup>10</sup>

As baby boomers age, guardianship law and elder law will become increasingly vital areas of practice because these areas help secure the rights of the elderly.<sup>11</sup> The estate planning community must stay updated on these two areas of law, and it must understand all the problems that aging clients may face in order to safeguard the elderly against exploitation and abuse.<sup>12</sup>

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1. Sandra L. Colby & Jennifer M. Ortman, *The Baby Boom Cohort in the United States: 2012 to 2060*, U.S. CENSUS BUREAU 1 (May 2014), available at <http://www.census.gov/prod/2014pubs/p25-1141.pdf> [<http://perma.cc/H9XR-3S5T>].

2. *Id.* at 9.

3. *See id.* at 12.

4. Marie-Therese Connolly et. al., *The Elder Justice Roadmap: A Stakeholder Initiative to Respond to an Emerging Health, Justice, Financial, and Social Crisis*, U.S. DEP’T OF JUSTICE 1, 3 (2013), [http://ncea.acl.gov/library/gov\\_report/docs/ejrp\\_roadmap.pdf](http://ncea.acl.gov/library/gov_report/docs/ejrp_roadmap.pdf) [<http://perma.cc/J4LK-8Z2K>].

5. *See id.*

6. *Id.*

7. *See id.*

8. *See Gray v. Sangrey*, 428 S.W.3d 311, 314–15 (Tex. App.—Texarkana 2014, pet. denied).

9. Leslie Callaway & Jerry Becker, *Stopping the Financial Abuse of Seniors*, ABA BANK COMPLIANCE 10, 11 (July–Aug. 2011) <https://www.aba.com/Products/bankcompliance/Documents/JulyAug11CoverStory.pdf> [<http://perma.cc/6FAC-H3ZL>].

10. *See infra* Part VI.

11. *See Patrick Emery Longan, Middle-Class Lawyering in the Age of Alzheimer’s: The Lawyer’s Duties in Representing a Fiduciary*, 70 FORDHAM L. REV. 901, 902 (2001).

12. *See infra* Part VI.

In fact, due to the vulnerability elderly citizens face, the state of Texas has criminalized elder abuse.<sup>13</sup> It is a felony to exploit children, disabled individuals, or the elderly.<sup>14</sup> An attorney's duty is always to his or her client; therefore, every financial issue a client faces is incredibly relevant to estate and probate attorneys.<sup>15</sup>

In his article *Middle-Class Lawyering in the Age of Alzheimer's: The Lawyer's Duties in Representing a Fiduciary*, Patrick Emery Longan opined that if children who financially abuse their parents did so simply because the children were of poor character, then society would have a "shameful but isolated problem," since most people are not morally bankrupt.<sup>16</sup> However, Longan acknowledges many other factors that may drive a child to misappropriate his parents' funds—such as a feeling of entitlement—especially if the child is the primary caregiver of his aging parent.<sup>17</sup> This comment will discuss the different ways in which adult children may originally obtain access to their parents' finances and ways to prevent misappropriation of clients' finances.<sup>18</sup> Children may come into contact with their parents' estates through court-appointed legal relationships—such as power of attorney, estate executorship, or legal guardianship—or implied legal relationships, like fiduciary or confidential relationships.<sup>19</sup> By first explaining the parameters of these different relationships, members of the estate planning, guardianship, and elder-law communities can educate their clients to make appropriate financial decisions so they can protect their money and assets.<sup>20</sup> The goal is to empower the baby boomers by increasing their knowledge regarding the correct measures to take, which will ensure the distribution of their estates according to their wishes.<sup>21</sup> Financial exploitation can be costly, not only to victims, but also to families, businesses, and governmental programs like Medicaid.<sup>22</sup>

Next, this comment will discuss Texas specific laws, including the differing rationale appellate courts use to arrive at their rulings.<sup>23</sup> This comment will also compare Texas cases to cases in other states: there may be law in other states that better preserves the financial rights of elderly people than current Texas law.<sup>24</sup> Then, this comment will discuss instances of elder abuse in other countries and what actions those countries have employed to

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13. TEX. PENAL CODE ANN. § 22.04 (West 2013).

14. *Id.* § 22.04(4)(e)–(g).

15. *See* Longan, *supra* note 11, at 902.

16. *Id.* at 906.

17. *Id.*

18. *See infra* Part II.

19. *See infra* Part II.

20. *See infra* Parts II, VI.

21. *See infra* Part VI.

22. *See* Connolly, *supra* note 4, at 4.

23. *See infra* Part III.

24. *See infra* Part IV.

combat this breach.<sup>25</sup> Finally, this comment will outline the best course of action an estate-planning attorney can take to protect clients from their children unjustly enriching themselves with their parents' estate.<sup>26</sup>

## II. THE WAYS IN WHICH AN ADULT CHILD MAY OBTAIN ACCESS TO A PARENT'S FINANCES

### A. Breach of Fiduciary Duty

The concept of fiduciary relationships is extremely valuable to the legal systems of the United States, Canada, and the United Kingdom because it "provides a very flexible legal remedy often used to protect vulnerable individuals who have been wronged by another who holds a position of power over them."<sup>27</sup> A child becomes a fiduciary to his parent if he is responsible for his parent's assets.<sup>28</sup> The child breaches his fiduciary duty to control his parent's funds in the way his parent wishes if he takes an asset for payment, collection, or value that will benefit himself, instead of appropriating the assets according to the parent's wishes.<sup>29</sup> A fiduciary relationship is a very grave matter because a person is completely entrusting his or her own financial welfare to another person.<sup>30</sup> There are three types of breaches of this fiduciary duty:

- (a) Unauthorized transfer of assets or self-dealing: When an agent transfers funds from the principal's account, makes changes to the last will and testament, and generally uses the power of attorney to use the principal's funds for the agent's well being.
- (b) Intentional breach of fiduciary duty against the principal's wishes: When the agent purposefully and knowingly commits an action against the principal's expressed wishes according to the power of attorney document or trust.
- (c) Negligent misuse of funds actions beyond the scope: Any time an agent goes beyond the scope of the powers allowed in a durable power of attorney document or within a trust, or when an agent does not use funds to care for the principal as stipulated.<sup>31</sup>

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25. See *infra* Part V.

26. See *infra* Part VI.

27. Trevor Todd, *Fiduciary Relationships*, DISINHERITED (Nov. 19, 2013) <http://disinherited.com/fiduciary-relationships/> [<http://perma.cc/KMD8-PYMB>]

28. TEX. BUS. & COM. CODE ANN. § 3.307(a)(1) (West 2013).

29. *Id.* § 3.307(b)(i).

30. See *Compton v. Sesso*, No. 03-04-00625-CV, 2006 WL 2032394, at \*1 (Tex. App.—Austin July 21, 2006, no pet.) (mem. op.).

31. Kathryn Bosse, *It's What She Would Want: The Need to Criminalize Personal Financial Elder Abuse*, NAEAL Student Journal 27, 5–6 (2011), available at [http://www.naela.org/app\\_themes/public/PDF/Library%20Tab/06\\_Kathryn\\_Bosse.pdf](http://www.naela.org/app_themes/public/PDF/Library%20Tab/06_Kathryn_Bosse.pdf) [<http://perma.cc/Y6ZG-S2ZM>]

Estate planners must remember that the mere existence of a familial relationship, although an important consideration, is not the single determining factor of fiduciary duty; a fiduciary duty exists when an agent has a duty to act in the best interest of the principal and the principal trusts the agent.<sup>32</sup>

### *B. Breach of Confidential Relationship*

In Texas, determining whether a breach of a confidential relationship occurred could be a dense question because the answer may vary; in some situations a breach of a confidential relationship may be a question of law for the court, while in other situations it may be a question of fact.<sup>33</sup> The matter is further complicated because there are two types of confidential fiduciary relationships.<sup>34</sup> The first is a confidential fiduciary relationship that arises as a matter of law, like a relationship between business partners or between a business and a client.<sup>35</sup> The second is an informal fiduciary relationship, which may derive from a “moral, social, domestic, or merely personal” relationship where one person trusts in and relies on another.<sup>36</sup> Because the relationship between parent and child is both domestic and personal, a breach of fiduciary duty by a child may constitute a breach of an informal fiduciary duty.<sup>37</sup> However, Texas courts also examine other factors in determining whether a confidential relationship existed.<sup>38</sup> These factors include whether: (1) the principal relied on the agent for help or support, (2) the principal placed his trust in the agent, or (3) the principal was elderly or sickly.<sup>39</sup> For example, in *Gray v. Sangrey*, the courts determined a confidential relationship existed between a mother and daughter because the daughter cared for her mother as her health failed, initiated maintenance and repairs at her mother’s house, paid her bills when her mother was hospitalized, cared for her mother after surgery, and had access to her mother’s checkbook.<sup>40</sup> The court found that the daughter breached the fiduciary relationship that she owed to her mother, which was predicated by the informal confidential relationship.<sup>41</sup>

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32. See *Wilcox v. Wilcox*, No. 09-06-045-CV, 2006 WL 3824012 (Tex. App.—Beaumont Dec. 28, 2006, no pet.) (mem. op.).

33. See *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied); *Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 678 (Tex. App.—Fort Worth 2010, no pet.).

34. See *Crim Truck & Tractor Co. v. Navistar Int’l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992).

35. *Id.*

36. *Id.* at 594 (quoting *Fitz-Gerald v. Hull*, 237 S.W.2d 256, 261 (Tex. 1951)).

37. *Id.*

38. See *Trostle v. Trostle*, 77 S.W.3d 908, 914–15 (Tex. App.—Amarillo 2002, no pet.).

39. *Id.*

40. See *Gray v. Sangrey*, 428 S.W.3d 311, 314–17 (Tex. App.—Texarkana 2014, pet. denied).

41. See *id.* at 317.

### C. Abuse of Power of Attorney

A power of attorney is a document which designates an agent to act on behalf of another person, who is also known as the principal.<sup>42</sup> A power of attorney creates a fiduciary relationship between the agent and the principal as a matter of law.<sup>43</sup> A power of attorney is effective until the principal revokes it, until the death of the principal, or until the principal becomes incompetent and is no longer able to revoke the agent's authority.<sup>44</sup> The latter stipulation exists to prevent the agent from committing financial abuse against the legally incompetent principal.<sup>45</sup> At any time, the principal may request an account summary from the agent, and the agent must comply.<sup>46</sup>

A durable power of attorney, however, is a power of attorney that remains in effect when the principal becomes legally incompetent and no longer possesses the capacity to revoke the authority.<sup>47</sup> Durable powers of attorney are helpful if one wishes to avoid a court-appointed guardianship or conservatorship in the event of legal incapacitation.<sup>48</sup> Most principals give their agents a large amount of discretion in handling the principal's affairs.<sup>49</sup> Therefore, a durable power of attorney can quickly become a "license to steal."<sup>50</sup> As a result, in recent years, the number of cases in which an agent abused her power of attorney to financially enrich herself or an agent coerces an elderly principal to make a durable power of attorney have increased.<sup>51</sup> Durable power of attorney abuse is not only a civil problem but also a criminal act.<sup>52</sup>

### D. Abuse of Court-Appointed Guardianship

In Texas, the courts may have no choice but to appoint a legal guardian for a person who cannot care for himself or herself, care for his or her property, drive a car, make a decision over his or her place of residence, or

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42. See Lori A. Stiegel, *Durable Power of Attorney Abuse: It's a Crime Too*, A National Center on Elder Abuse Fact Sheet for Criminal Justice Professionals, AMERICAN BAR ASSOCIATION 1, 1 (2008), available at [http://ncea.aoa.gov/Resources/Publication/docs/DurablePowerOfAttorneyAbuseFactSheet\\_CriminalJusticeProfessionals.pdf](http://ncea.aoa.gov/Resources/Publication/docs/DurablePowerOfAttorneyAbuseFactSheet_CriminalJusticeProfessionals.pdf) [<http://perma.cc/JE8X-24NT>]

43. See Mark R. Caldwell, Elliott E. Burdette & Edward L. Rice, *Winning the Battle and the War: A Remedies-Centered Approach to Litigation Involving Durable Powers of Attorney*, 64 BAYLOR L. REV. 435, 443 (Spring 2012).

44. See Stiegel, *supra* note 42, at 1.

45. See *id.*

46. See Caldwell, *supra* note 43, at 443.

47. See Stiegel, *supra* note 42, at 2 (stating that a "springing" durable power of attorney becomes effective not when it is written and signed by the principal, but on a certain date or when a specific event that the principal designates takes place).

48. *Id.*

49. *Id.*

50. *Id.*

51. See *id.*

52. *Id.*

vote.<sup>53</sup> If a person is able to do some of these things but not all of them, the court may instead appoint a limited guardian.<sup>54</sup> The courts also reserve the ability to appoint a legal guardian for any abused, neglected, or exploited elderly or disabled individual.<sup>55</sup> A court-appointed guardianship may also help people who the state considers incapacitated.<sup>56</sup> In order for the court to consider an individual legally incapacitated, he or she must not be able to: (1) “provide food, clothing, or shelter for himself or herself,” or (2) take care of his or her medical or financial wellbeing due to a mental or physical condition.<sup>57</sup> Once the Department of Aging and Disability Services confirms incapacitation, the department will file a guardianship petition in court to make a referral for a legal guardian to take care of the individual.<sup>58</sup> The court will then appoint the legal guardian; it is not uncommon for the court to appoint a child as the parent’s guardian.<sup>59</sup>

### III. FINANCIAL ELDER ABUSE BY ADULT CHILDREN IN TEXAS

Financial elder abuse is a form of fraud as well as a breach of fiduciary duty.<sup>60</sup> A Texas court held a woman from San Angelo liable for breaching her fiduciary duty to her mother and committing fraud when she removed over \$72,000 from her parents’ safety deposit box without permission.<sup>61</sup> She gradually removed money from the safety deposit to buy extravagant things, including a new car, until only \$1,100 remained.<sup>62</sup> The court determined that an informal, confidential relationship existed between the daughter and mother because the daughter persuaded her parents to sell their house to move closer to her, obtained access to their safety deposit box (in which they kept the cash proceeds of the house sale) in case of emergency, and cared for her mother after her father passed away.<sup>63</sup>

There are two types of common law fraud in Texas: (1) actual fraud, which is deliberately deceiving or misleading another person for personal gain, and (2) constructive fraud, which typically occurs when one person’s actions deceive another person, whether those actions were deliberate or

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53. TEX. EST. CODE ANN. § 1101.151 (West 2014).

54. *Id.*

55. TEX. HUM. RES. CODE ANN. § 48.209(a)(2)(A)–(B) (West 2013).

56. *Id.*

57. EST. § 1002.017.

58. *See* HUM. RES. § 161.101.

59. *See id.* § 48.209(d).

60. *See* *Compton v. Sesso*, No. 03-04-00625-CV, 2006 WL 2032394, at \*1 (Tex. App.—Austin, July 21, 2006, no pet.) (mem. op.).

61. *Id.*

62. *Id.* at \*2.

63. *Id.* at \*1–2.

not.<sup>64</sup> Because a breach of a confidential relationship is such a serious offense, the courts also consider the breach to be fraud.<sup>65</sup>

Another woman committed a breach of fiduciary duty against her mother in Texarkana.<sup>66</sup> She promised to transfer the deed of the house in which her mother lived to her mother upon satisfaction of the house's debt, but neglected to do so once her mother paid the debt.<sup>67</sup> In that case, the mother and daughter shared a confidential relationship because the daughter and her husband performed maintenance on the mother's house, cared for the mother when she was ill or hospitalized, paid the mother's bills when she was hospitalized, and had access to the mother's checkbook.<sup>68</sup> Significantly, the court noted that "there is a consistent pattern of care and assistance that rises above mere acts of child/parent kindness for an extended period of time, and that pattern continued and intensified when Sangrey [the mother] moved next door to Elizabeth [the daughter]."<sup>69</sup> The court's dicta conveys the ambiguity in determining whether a confidential relationship exists between parent and child.<sup>70</sup>

#### IV. FINANCIAL ELDER ABUSE BY ADULT CHILDREN IN OTHER PARTS OF THE UNITED STATES

A Mississippi court determined similar, but slightly more expansive, factors for whether a confidential relationship exists, as compared with Texas courts.<sup>71</sup> These factors include:

(1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.<sup>72</sup>

In this case, *Yarbrough v. Patrick*, the court found that a confidential relationship did not exist between mother and daughter because, although the two maintained a close relationship and had joint bank accounts, the mother, was of advanced age, took care of her own medical and transportation needs,

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64. *Id.* at \*5.

65. *Id.*

66. *Gray v. Sangrey*, 428 S.W.3d 311, 313 (Tex. App.—Texarkana 2014, pet. denied).

67. *Id.* at 317.

68. *Id.*

69. *Id.*

70. *See id.*

71. *See Yarbrough v. Patrick*, 65 So.3d 865, 869 (Miss. Ct. App. 2011).

72. *Id.*



was not physically or mentally weak, and did not give her daughter power of attorney.<sup>73</sup>

In Oregon, a daughter violated the confidential relationship she owed her mother when she unduly influenced her mother into signing two-thirds of her mother's property over to herself.<sup>74</sup> The court determined that a confidential relationship did exist between the two because the mother shared bank accounts with her daughter, cared for her ailing husband with her daughter, and placed trust and confidence in her daughter.<sup>75</sup> Once the courts determine the existence of a legal, confidential relationship, it only takes the slightest amount of evidence to prove undue influence.<sup>76</sup> In this case, the court found undue influence because the mother was increasingly vulnerable; during the first transaction, she was recovering from an illness and had just transferred her husband to an assisted living facility, and during the second transaction was mourning the death of her husband.<sup>77</sup> Because of her vulnerability, the mother remained more susceptible to exploitation by her daughter.<sup>78</sup> Judge Armstrong even asserted in his opinion that the daughter exhibited an obvious lack of conscience because she accepted an enormous gift from her mother when her mother was economically and emotionally crippled.<sup>79</sup>

South Carolina places emphasis on a trustee's conscience in their requirement for a fiduciary relationship: a fiduciary relationship exists when one person "reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence."<sup>80</sup> In one case, a daughter did not act in good conscience when she used some of her father's money to make several personal property purchases and concealed the truth from him.<sup>81</sup> She took care of her father's finances and thus had access to his bank accounts because her father was elderly and not very educated.<sup>82</sup> After she deceived him into signing documents granting her the power of attorney, she used her power to sell some of her father's real estate and transfer his retirement funds.<sup>83</sup> The court found her liable for fraud, conversion, and breach of power of attorney.<sup>84</sup>

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73. *Id.* at 870.

74. *See* Smith v. Ellison, 171 Or. App. 289, 291 (Or. Ct. App. 2007).

75. *Id.* at 295.

76. *See id.* at 294.

77. *Id.* at 296–99.

78. *See id.* at 299.

79. *Id.* at 300.

80. Moore v. Benson, 700 S.E.2d 273, 279 (S.C. Ct. App. 2010) (quoting O'Shea v. Lesser, 416 S.E.2d 629, 631 (S.C. 1992)).

81. *Id.* at 273.

82. *Id.* at 276.

83. *Id.*

84. *Id.* at 279–80.

A parent-child relationship alone does not automatically create a confidential relationship in Virginia.<sup>85</sup> When three sisters brought suit against their brother for constructive fraud, conversion, and unjust enrichment—they alleged he saved a portion of his father's estate for himself—the court not only found no fraud or unjust enrichment, but no confidential relationship either.<sup>86</sup> Even though the brother helped his father with his business dealings until he passed away, the father maintained exclusive control of his finances at all times; therefore no confidential relationship between father and son existed.<sup>87</sup>

## V. FINANCIAL ELDER ABUSE BY ADULT CHILDREN IN OTHER PARTS OF THE WORLD

### A. Canada

In honor of World Elder Abuse Awareness Day on June 15, 2014, the *Vancouver Sun* published an article to educate the Canadian public about the dangers elders face worldwide.<sup>88</sup> Alice Wong, the Richmond Member of Parliament and Minister of State for seniors, estimated that as many as 10% of Canadian elders face some type of abuse.<sup>89</sup> In reality, this number is probably much larger because many victims, like some of those suffering in the United States, are afraid to come forward and report their abuse.<sup>90</sup> Wong speculated that some individuals do not report abuse for a variety of reasons: incapacitation, shame, or fear of legal trouble for their family members.<sup>91</sup>

The Canadian financial elder abuse stories are just as devastating as those in the United States.<sup>92</sup> In British Columbia, an elderly man's daughter—also his caregiver—assumed his bank accounts and home for her own use while he was in the hospital undergoing brain surgery.<sup>93</sup> She did not think he was going to survive, and the man had to fight his daughter to recoup his assets when he ultimately recovered.<sup>94</sup> In Ontario, a family forced an elderly woman to live in an unheated garage while her caregiver and the family members took over her home and financial assets for themselves.<sup>95</sup> Other examples of financial elder abuse may include friends and family members

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85. See *Economopoulos v. Kolaitis*, 528 S.E.2d 714, 718 (Va. 2000).

86. *Id.* at 720.

87. *Id.* at 719.

88. See Kelly Sinoski, *Elder Abuse a 'Hidden Issue'*, VANCOUVER SUN, June 15, 2014, <http://www.vancouversun.com/life/Elder+abuse+hidden+issue/9941983/story.html> [<http://perma.cc/R9FB-AAW6>].

89. *Id.*

90. See *id.*

91. *Id.*

92. See *id.*

93. *Id.*

94. *Id.*

95. *Id.*

“borrowing” money with no intent to repay the balance, businesses intentionally overcharging elderly clients, and caregivers deliberately overmedicating their patients in order to take advantage of their groggy state.<sup>96</sup>

The Canadian government is doing everything it can to combat elder abuse.<sup>97</sup> The New Horizons for Seniors Program appropriated over \$24,500 for a new project called “Breaking the Silence of Abuses: Empowering Elders.”<sup>98</sup> This project will educate the public through video testimonials of elder abuse victims.<sup>99</sup> Funding for the project will also drive awareness sessions that will include peer sharing, mentoring, and networking.<sup>100</sup> The provincial government of British Columbia is also doing its part to spread awareness—it ran a social media campaign to spread elder abuse and ageism awareness throughout the month of June in 2014.<sup>101</sup> British Columbia alone has appropriated over \$1 million in funding for a provincial elder abuse prevention strategy, “to improve prevention, recognition[,] and response services around the province.”<sup>102</sup>

Alberta has undertaken an initiative called the “Taking Action Against Elder Abuse Coordinated Community Response Grant Program,” which funded up to \$150,000 over a period of three years.<sup>103</sup> The four main goals of community responses to elder abuse in Alberta include: (1) improved awareness, (2) skilled service providers, (3) coordinated community response, and (4) protective laws and policies.<sup>104</sup> The government has even developed the Alberta Elder Abuse Awareness Network (AEAAN), a network of professionals throughout the province who advocate for the well-being of the elderly; continually work towards community awareness; develop and utilize resources to combat elder abuse; and promote the right to safety, respect, and dignity.<sup>105</sup>

Unlike the criminal statutes enacted by the American courts, Canada has yet to create a specific legal penalty for elder abuse—partially because there is little empirical data on the subject because so many victims are afraid to

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96. *See id.*

97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* Golden Circle, Red Deer & Community Partnerships, Alberta Seniors, *Coordinated Community Response to Elder Abuse*, THE GREY MATTERS SENIOR SERVICES CONFERENCE (Oct. 1, 2014) at 16, available at <http://www.greymatters2014.ca/pres/Coordinated%20Community%20Response%20to%20Elder%20Abuse%20Therrien%20Morrison.pdf> [<http://perma.cc/FT5Q-NAN5>].

104. *See* Gov’t of Alberta, *Addressing Elder Abuse in Alberta: A Strategy for Collective Action*, ALBERTA SENIORS at 15–16 (2010), available at <http://www.seniors.alberta.ca/documents/elderabuse-strategy.pdf> [<http://perma.cc/KD4H-XZ33>].

105. *See* Alberta Elder Abuse Awareness Network, WHAT IS AEAAN, <http://albertaelderabuse.ca> [<http://perma.cc/9GN8-YKXF>] (last visited Sept. 13, 2015).

report their abuse.<sup>106</sup> Sherry Baker, the executive director of the British Columbian Association of Community Response Networks, reported that health officials and police officers have started to keep track of the cases, which will hopefully lead to effective change.<sup>107</sup> The Canadian government is realizing that elder abuse is not simply a health issue or financial issue, but also potentially a criminal issue.<sup>108</sup> Baker also noted that the federal government is developing “a plan to work with banks to alert the authorities if they notice anomalies with a senior’s bank account that could be consistent with financial abuse . . . , but this will take some time because [the plan] affects privacy laws.”<sup>109</sup>

In 2013, Bill C-36, the Protecting Canada’s Seniors Act, did not make elder abuse a new crime, but it did amend the existing criminal code.<sup>110</sup> This Act considers the health, age, and financial standing of a victim as aggravating circumstances.<sup>111</sup> Estate planners feared the Act could not directly prosecute citizens for elder abuse.<sup>112</sup> However, a couple faced criminal charges in mid-October 2014 for abuse and neglect because they were responsible for the care of the wife’s mother through a power of attorney.<sup>113</sup> The woman was found in a back room with the windows painted black, covered in her own bodily excrement, and has since passed away in long-term care.<sup>114</sup> In January 2015, the court sentenced the unrepentant couple to a year in jail and two years of probation.<sup>115</sup> Justice Guy DiTomaso explained that, because elder abuse is a widespread problem, “a jail sentence is the only reasonable sentence to protect these vulnerable people who are in the care of others.”<sup>116</sup>

### B. The United Kingdom

Approximately 500,000 elders are victims of financial abuse every year.<sup>117</sup> Just like in the United States, citizens of the United Kingdom may

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106. See Sinoski, *supra* note 88.

107. See *id.*

108. See *id.*

109. *Id.*

110. See Lynne Butler, *Protecting Canada’s Seniors Act*, EST. L. CANADA (Feb. 1, 2013) [canadablogspot.com/2013/02/protecting-canadas-seniors-act.html](http://canadablogspot.com/2013/02/protecting-canadas-seniors-act.html) [<http://perma.cc/G34N-MKCR>].

111. See *id.*

112. See *id.*

113. Tracy McLaughlin, *Orillia Couple Jailed for Elder Abuse*, TORONTO SUN (Jan. 16, 2015, 5:27 PM), <http://www.torontosun.com/2015/01/16/barrie-couple-jailed-for-elder-abuse> [<http://perma.cc/6KDS-ECSP>].

114. *Id.*

115. See *id.*

116. *Id.*

117. Emily Dugan, *Elderly Robbed by Their Own Relatives: Family Carers Are Abusing Their Legal Powers and Stealing Their Relations’ Assets*, THE INDEPENDENT (Oct. 20, 2013), <http://www.independent.co.uk/life-style/health-and-families/health-news/elderly-robbed-by-their-own-relatives->

dismiss elder abuse because ageism causes assumptions that the abuse might be the fault of the elderly person.<sup>118</sup> One common justification for children financially abusing their parents is that they are “simply obtaining their inheritance in advance[.]”<sup>119</sup> In the United Kingdom, professionals who suspect elder abuse are allowed to notify the client’s bank in order for the bank to keep an eye on the financial flow in and out of the account.<sup>120</sup> This seems very similar to the bank alert system Canada is trying to obtain in the near future for its citizens.<sup>121</sup> In 2013, 38% of the reported elder abuse took place in the home of the elderly person, and 45% of the reports took place in a care-giving facility.<sup>122</sup> In 16% of these cases, the perpetrator was a member of the victim’s family.<sup>123</sup> However, it seems that British residents may be more likely than Americans to reach out about financial elder abuse—according to a study conducted by Help the Aged and Action on Elder Abuse, 20% of telephone calls made to a charity helpline in 2004 were made regarding financial exploitation.<sup>124</sup> Department of Health representatives are attempting to implement plans in which local authorities would manage situations of elder abuse, with the possibility of holding hospital and nursing home employees personally and criminally accountable if they knowingly allow abuse or neglect to take place.<sup>125</sup> At this time, there is no definitive, comprehensive European Union response to elder abuse.<sup>126</sup>

When a principal assigns a power of attorney in the United Kingdom, the appointee is required to file with the Court of Protection, which “makes decisions on behalf of people deemed to lack mental capacity.”<sup>127</sup> The Court of Protection also has the authority to appoint an agent to handle financial affairs for people deemed unable to handle their own finances.<sup>128</sup> These agents are most often family members because they are usually the closest with the elderly person, and the Court traditionally assumed that these family members would help organize the elder’s money.<sup>129</sup> Tragically, what has happened instead is that the court has handed the appointed family members

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family-carers-are-abusing-their-legal-powers-and-stealing-their-relations-assets-8891782.html [http://perma.cc/EYP7-T6QX].

118. *Financial Abuse*, ACTION ON ELDER ABUSE, [http://www.elderabuse.org.uk/Mainpages/Abuse/abuse\\_financial.html](http://www.elderabuse.org.uk/Mainpages/Abuse/abuse_financial.html) [http://perma.cc/5SEB-KE5N] (last visited Feb. 4, 2015).

119. *Id.*

120. *Id.*

121. See Sinoski, *supra* note 88.

122. ‘Disturbing Rise’ in Elderly Abuse Reports, *Age UK Warns*, BBC NEWS (Oct. 4, 2013 7:25 PM), <http://www.bbc.com/news/uk-24399139> [http://perma.cc/9E65-FW4A].

123. *Id.*

124. See Dugan, *supra* note 117.

125. See BBC NEWS, *supra* note 122.

126. See *A Global Response to Elder Abuse and Neglect: Building Primary Health Care Capacity to Deal with the Problem Worldwide: Main Report*, U.N. WORLD HEALTH ORG., 7 (Aug. 2008), available at [http://www.who.int/ageing/publications/ELDER\\_DocAugust08.pdf](http://www.who.int/ageing/publications/ELDER_DocAugust08.pdf) [http://perma.cc/2USU-2F3F].

127. Dugan, *supra* note 117.

128. See *id.*

129. See *id.*

the tools to misappropriate their relative's money for their own financial gain.<sup>130</sup> Attempting to solve the issue of abuse, the Court of Protection instituted a safeguard where the agent must take out a bond, which is a kind of insurance against misappropriating funds; however, people have taken advantage of this stipulation as well.<sup>131</sup> Manchester Court of Protection solicitor, Gillian Hitchen, reported increasing cases of elder abuse in recent years, to the extent that the courts have appointed the Court of Protection as the agent to manage funds.<sup>132</sup>

In Kent, England, an 81-year-old woman's adult niece financially abused her aunt.<sup>133</sup> The woman legally appointed her niece to handle her financial affairs and the niece then misappropriated over £150,000 (approximately \$238,188) to start a small business breeding reptiles, which she claimed was an investment for her aging aunt.<sup>134</sup> The only time the niece (who claimed to visit her aunt frequently) visited her aunt at the nursing home in which she lived was to coerce her into signing some financial paperwork.<sup>135</sup> The Court of Protection revoked the niece's legal powers during a hearing in December 2012, but the report does not state whether she also faced criminal repercussions or whether the Court of Protection then became the aunt's financial agent.<sup>136</sup> In Lancashire, England, a woman afflicted with dementia appointed her niece as her financial agent when she moved into assisted living, and her niece fraudulently converted her life savings.<sup>137</sup> She did this by paying for renovations on her own property and billing them to her aunt's home.<sup>138</sup> The woman also rented out her aunt's house, arranging for the tenants to pay rent in cash to her for over two years.<sup>139</sup> No one discovered the abuse until the nursing home looked into the aunt's financial records when nursing home bills went unpaid, and reported the abuse to local authorities, who performed an official investigation.<sup>140</sup> The authorities then made a claim against the surety bond the niece signed with the Court of Protection, but they only recovered £58,000 (\$92,099).<sup>141</sup>

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130. *See id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *See id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

## VI. A CALL TO ARMS: THE ESTATE PLANNER'S GUIDE TO PROTECTING ELDERLY CLIENTS FROM FINANCIAL ABUSE BY THEIR CHILDREN

### *A. Lawyers Are More Likely to Discover Financial Abuse Than Anyone Else*

Similar to society depending on health care professionals to report instances of child abuse due to the course of their job enabling them to notice such abuse, lawyers are in a position to discover financial abuse of elderly clients because lawyers are handling elderly clients' wills, power of attorney paperwork, and other financial documents.<sup>142</sup> Society also depends on lawyers to expose financial elder abuse because lawyers have a regular course of dealing with their clients.<sup>143</sup> Elderly people usually leave the house less frequently than they did in their younger years, increasing their isolation from the rest of society.<sup>144</sup> Even if they only meet their attorney periodically, they may interact with their attorney more than any other individual who could also discover financial abuse.<sup>145</sup> Additionally, attorneys will probably have regular phone contact with their elderly clients and the elderly clients' caregivers because many financial dealings will require legal input.<sup>146</sup> For example, if a caregiver is attempting to take financial action in the name of an elderly client, a lawyer may receive inquiries from the client's bank or credit union about the client's power of attorney, and whether the caregiver has the authority to undertake these transactions.<sup>147</sup>

There are several signs estate planners can look for as red flags for financial abuse, including dramatic budget increases.<sup>148</sup> Large account withdrawals should also invite concerned inquiry.<sup>149</sup> Signatures on checks that do not resemble a client's handwriting, or checks signed after the client is not physically able to write, should also be red flags.<sup>150</sup> Preparing clients' taxes (for any professional who provides such services) is also an excellent opportunity to discover potential financial abuse.<sup>151</sup> Additionally, a client who has an adult child move in with her may also need extra supervision over routine spending; if the mother continues to pay all the household expenses, it should be on her own volition, not coerced by the adult child.<sup>152</sup> If a client

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142. See Longan, *supra* note 11, at 907.

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.*

147. See *id.*

148. See Kathy Wetters, *Watch Out for Financial Exploitation of the Elderly*, RIGHT AT HOME: IN HOME CARE & ASSISTANCE BLOG (Aug. 20, 2011) <http://www.rightathome.net/chicago-southwest-suburbs/blog/watch-out-for-financial-exploitation-of-the-elderly/>, [http://perma.cc/77GN-4WNR].

149. See *id.*

150. See ACTION ON ELDER ABUSE, *supra* note 118.

151. See Wetters, *supra* note 148.

152. See *id.*

adds another person to her bank account, whether the person is a family member, friend, or lover, an estate planner can easily have a casual conversation with the client about the new addition.<sup>153</sup> Abrupt changes in a client's will could also be a sign of financial abuse, as could a sudden transfer of assets to another person.<sup>154</sup>

*B. Helping Clients Decide Whether to Establish a Fiduciary Relationship with Their Children and Establishing Boundaries for Those Relationships*

Because the fiduciary relationship between parent and child creates a power imbalance, parents should carefully consider which of their children they might want to establish a power of attorney or other confidential relationship with.<sup>155</sup> No one wants to consider the possibility of a child essentially stealing from their parent, but unfortunately, every parent must remain vigilant to prevent children from committing financial abuse.<sup>156</sup> Justice Lysyk wisely noted when writing the opinion for *Kask Estate v. Welsh* in British Columbia,

[i]n that Ms. Welsh held her father's power of attorney, she owed to him a fiduciary duty: It was her duty not to prefer her interest or that of her family over his in the handling of his money which he had entrusted to her. I do not consider that Ms. Welsh determined she would deplete all of what would be her father's estate once she held his power of attorney and had the opportunity to spend his money. Rather, it seems more probable that she simply found his money to be a ready resource and, instead of persevering it as apart from the costs of maintaining him she was duty bound to do, she spent it.<sup>157</sup>

Justice Lysyk accurately summarizes the most common way in which the breach takes place across the world: in the beginning, most people do not intend to violate a fiduciary duty, but sometimes a violation takes place nonetheless.<sup>158</sup> In determining whether a breach occurred, courts take into account familial relationship, the degree of trust the person placed in the caregiver, whether the person is elderly or mentally incompetent, and the scope of the caregiver's power and control.<sup>159</sup> Because courts are increasingly more likely to find the existence of a confidential relationship and a breach of that duty of care, estate planners must strive to help their

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153. See ACTION ON ELDER ABUSE, *supra* note 118.

154. See *id.*

155. See Todd, *supra* note 27.

156. See *supra* Part I.

157. Todd, *supra* note 27.

158. *Id.*

159. See *Trostle v. Trostle*, 77 S.W.3d 908, 914 (Tex. App.—Amarillo 2002, no pet.); *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 2013); Todd, *supra* note 27.



clients make informed decisions regarding which of their family members they trust with their finances.<sup>160</sup>

The best offense is a good defense; therefore, estate planners should first look for a fiduciary relationship when drafting clients' wills, powers of attorney, and other documents.<sup>161</sup> The more clearly attorneys write the documents they draft, the less likely others will call the documents into question after the death of a principal.<sup>162</sup> Both when writing a power of attorney or giving one heir a disproportionate share of the principal's estate, attorneys should clearly state exactly what the client wishes are and why.<sup>163</sup> If the document spells out the principal's exact wishes, it is less likely that the heirs who are not receiving a larger share, or who have not been appointed to hold the power of attorney, will call the document into question.<sup>164</sup> Additionally, estate planning attorneys highly recommend making detailed notes in the case file regarding the client's wishes should a judge call the document into question and require the principal's attorney to testify at trial.<sup>165</sup> Even after examining a client's potential financial relationships that could come into existence, attorneys should still be wary of granting a durable power of attorney.<sup>166</sup> The financial well-being of a client could depend on the vigilance of her attorney.<sup>167</sup>

Communication is key: Canadian attorney Trevor Todd advises meeting with elderly clients regularly—if anything wayward is going on, frequent communication with a client could help eliminate the financial abuse before it does too much monetary or emotional damage.<sup>168</sup> The more estate planners can educate their clients, the more likely their clients are to make sound choices about establishing fiduciary relationships.<sup>169</sup> For example, if a client needs a caregiver appointed, the attorney should clearly document the terms of the relationship in writing, regardless of whether the caregiver is an outside party or a family member.<sup>170</sup> Subsequently, attorneys can easily draft contracts stating the terms while explaining the legal repercussions of the relationship to both parties.<sup>171</sup> Even if the caregiver is a family member, the

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160. Todd, *supra* note 27.

161. See Cary A. Lind, *Breach of Fiduciary Duty – Who Do You Trust?* (1999), available at <http://www.lindlaw.com/breach-of-fiduciary-duty-who-do-you-trust.shtml> [http://perma.cc/2743-G4M6].

162. See *id.*

163. See *id.*

164. See *id.*

165. *Id.*

166. See Trevor Todd, *Reduce Financial Abuse – 15 Good Suggestions: Part Two in a Series on Financial Abuse*, DISINHERITED (Aug. 5, 2011) <http://disinherited.com/financial-abuse-part-two-15-good-suggestions-reduce/> [http://perma.cc/URU3-HKF9].

167. *Id.*

168. *Id.*

169. See *id.*

170. See *id.*

171. *Id.*

principal should have a written agreement regarding just compensation, as well as a stipulation that the caregiver will not accept more than a token of appreciation from the principal outside of the agreed upon compensation.<sup>172</sup> Mandatory respite care for the caregiver should also be a stipulation of the contract; not only does this prevent the caregiver from feeling overwhelmed with the constant responsibility of caring for the elder, but it also prevents the elder from being isolated from all people outside of the caregiver.<sup>173</sup> Therefore, if elder abuse is taking place, the principal has the opportunity to communicate with another party.<sup>174</sup> Todd also suggests including a clause that provides for a few months of caregiver compensation after the principal passes away, so the caregiver is not suddenly unemployed.<sup>175</sup> If the principal fairly compensates a caregiver for his time and effort, it is substantially less likely that the caregiver will feel justified in misappropriating the principal's finances.<sup>176</sup>

Estate planners and their aging clients can also take preemptive measures to ensure the financial security of the client.<sup>177</sup> The Internet can be a valuable resource in reducing the need to create a power of attorney—initiating automatic bill pay online for recurring expenses may help the client pay his or her bills on time without enlisting the help of a third party.<sup>178</sup> The advisor should counsel elderly clients to keep bank statements and financial reports either off the premises or under lock and key, to prevent caregivers from intentionally or inadvertently viewing confidential financial information.<sup>179</sup> Creating an understanding that any third parties in charge of financial transactions will give regular reports to the principal is also an effective deterrent to financial abuse.<sup>180</sup> If estate planners take preemptive action, the potential for financial abuse may decrease.<sup>181</sup>

### C. *The Benefits of State-Appointed Guardianship*

A court-supervised fiduciary relationship between an incapacitated person (the ward) and a court-appointed supervisor (the guardian) is called a guardianship in Texas.<sup>182</sup> The probate courts in Texas supervise guardianship; if a district does not have a probate court, the court that handles the

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172. *Id.*

173. *Id.*

174. *See id.*

175. *Id.*

176. *See id.*

177. *See id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. Lisa Montoni Garvin, *Guardianship and Caregiver Liability*, GPSOLO MAGAZINE (July–Aug. 2008) [http://www.americanbar.org/newsletter/publications/gp\\_solo\\_magazine\\_home/gp\\_solo\\_magazine\\_index/guardianshiability.html](http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/guardianshiability.html) [<http://perma.cc/G5DW-SXK9>].

probate work supervises guardianships.<sup>183</sup> A person's guardian takes care of the ward's physical needs, and a guardian of the estate manages the ward's property—in most cases, the same person plays both roles.<sup>184</sup> An attorney must file a petition for guardianship, and that attorney needs to demonstrate the potential ward's incapacity with clear and convincing evidence.<sup>185</sup> The attorney must also submit a certified doctor's report to the probate court, demonstrating the potential ward's incapacity.<sup>186</sup> The court appoints an attorney *ad litem* to argue on behalf of the potential ward if the potential ward cannot appoint an attorney for herself.<sup>187</sup>

In Texas, the courts try to allow the ward to keep as much autonomy as possible by employing the doctrine of least restrictive alternatives—one reason for this is to reduce the risk of physical, mental, financial, or other kinds of abuse.<sup>188</sup> Before the state declares a ward incapacitated, she has the ability to designate a caregiver, and should inform her attorney of that designation.<sup>189</sup> If a ward has not specified a caregiver, the court will appoint a relative or friend.<sup>190</sup> The following individuals are ineligible to serve as the ward's guardian: minors; individuals whose conduct is notoriously inappropriate; incapacitated individuals; anyone who is a party to a lawsuit concerning the ward's welfare; anyone who is indebted to the ward; any individual who has an adverse claim to the ward's property; anyone incapable of managing the ward's estate; anyone declared unsuitable for guardianship by the court; or any individual the ward has disqualified in a declaration made before incapacity.<sup>191</sup>

Because the guardianship rules in Texas are so specific, the process is very costly.<sup>192</sup> If the estate in question is sizeable, the guardianship process may be well worth the expense.<sup>193</sup> However, there are alternatives to guardianship that persons of limited financial means can consider, such as the previously discussed durable power of attorney, medical power of attorney, living will, a surrogate decision maker, or a trust.<sup>194</sup>

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183. See TEXAS GUARDIANSHIP ASS'N, Frequently Asked Questions, <http://texasguardianship.org/guardianship-information/faqs-2/> [<http://perma.cc/5QAH-XLUV>] (last visited Feb. 4, 2015).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *See id.*

191. TEXAS YOUNG LAWYERS ASS'N, *Protecting the Incapacitated: A Guide to Guardianship in Texas From Application to Oath* (Apr. 2008), available at <http://www.texasbar.com/AM/Template.cfm?Section=Veterans2&Template=/CM/ContentDisplay.cfm&ContentID=23612> [<http://perma.cc/85FV-SVAN>].

192. TEXAS GUARDIANSHIP ASS'N, *supra* note 183.

193. *See id.*

194. *See* TEXAS YOUNG LAWYERS ASS'N, *supra* note 191.

*D. How to Deliver an Inter-Vivos Gift While Keeping All Other Assets Private*

*Inter-vivos* gifts can result in many benefits for both the donor and the donee, including the donee's immediate enjoyment, the donor's satisfaction in watching the donee enjoy the gift, the donor's relief of responsibility for the property, potential tax reduction for the donor, and protection of the property from the donor's creditors.<sup>195</sup> However, *inter-vivos* gifts may result from financial abuse.<sup>196</sup> In *Kester v. Rocco*, the Florida courts considered whether certain financial transfers from the decedent to her daughter were a result of *inter-vivos* undue influence.<sup>197</sup> The court decided undue influence would be present when "(i) a person with a confidential relationship with the testator, (ii) was active in procuring or securing the preparation or execution of the devise and (iii) is a substantial beneficiary thereof."<sup>198</sup> However, these factors are less relevant to *inter-vivos* transfers than they are in determining undue influence through a will or revocable trust.<sup>199</sup> Instead, the court should have considered the *inter-vivos* undue influence factors, which are:

1. Donee's level of involvement in the donor's affairs;
2. Donee's level of involvement in the actual gift in question;
3. Relationship of the donee to the donor as compared to the natural objects of the donor's bounty;
4. Secrecy or openness of the transaction;
5. Effect of the transfer on the donor's pre-existing estate plan; and
6. Physical health and mental acuity of the donor at the time of the gift.<sup>200</sup>

The First District Court of Florida seemed to examine the *inter-vivos* factors above, instead of the undue influence factors they laid out in the opinion.<sup>201</sup> These factors seem very similar to the factors the Texas courts examine to determine whether a confidential relationship exists.<sup>202</sup> Therefore, all estate planners should keep familial interactions and caregiver/patient relationships in mind when assisting clients in making financial plans.<sup>203</sup> Some economic studies have indicated that as many as 75% of parents transfer *inter-vivos*

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195. GERRY W. BEYER, *EXAMPLES AND EXPLANATIONS: WILLS, TRUSTS, AND ESTATES* 280 (5th ed. 2012).

196. See Patrick J. Lannon, *Estate of Kester – Undue Influence Challenge to Inter-Vivos Transfers*, ACTIONLINE 25, 25 (Winter 2014), <http://www.flprobate litigation.com/files/2014/02/Lannonarticle.pdf> [<http://perma.cc/9J3L-RWLS>].

197. *Estate of Kester v. Rocco*, 117 So. 3d 1196, 1198 (Fla. Dist. Ct. App. 2013).

198. *Id.* at 1199.

199. See Lannon, *supra* note 196, at 25.

200. *Id.*

201. *Id.*

202. See *Trostle v. Trostle*, 77 S.W.3d 908, 914–15 (Tex. App.—Amarillo 2002, no pet.), *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594–95 (Tex. 2013).

203. See Todd, *supra* note 166.

gifts to their children in unequal amounts, but that does not eliminate the risk of a child manipulating a parent into making an *inter-vivos* transfer against the parent's will.<sup>204</sup> Because the elements of making an *inter-vivos* gift are donative intent, delivery, and acceptance, the recipient needs to understand the donor's state of mind at the time of acceptance of the gift.<sup>205</sup> Estate planners should be aware of the client's intention, and would be well-advised to make notes in the client's file.<sup>206</sup>

## VII. CONCLUSION

Elder abuse takes place all over the world, regardless of cultural customs or geographic location.<sup>207</sup> However, the nations of the world have yet to enact a global response to this growing epidemic.<sup>208</sup> Even the United States lacks a federal reaction—most states recommend that those who discover elder abuse notify Adult Protective Services, but this is not a national requirement.<sup>209</sup> It is imperative that more states criminalize elder abuse, just as Texas has.<sup>210</sup> On an international scale, the United Nations is diligently endeavoring to develop a plan that would create a unified system to both prevent and combat financial elder abuse.<sup>211</sup> Until courts around the world develop a standardized response to financial elder abuse, the estate planning community must strive not only to protect their clients, but also to arm their clients with the knowledge to protect themselves.<sup>212</sup>

Because attorneys are in a unique position to notice potential financial exploitation in the elderly community, they must become the first line of defense against elder abuse.<sup>213</sup> Estate planners must counsel their clients to understand financial relationships, so they may decide together whether these clients desire establishing fiduciary duties with their children.<sup>214</sup> It is also essential to familiarize clients with their domiciliary jurisdiction's elements of an informal financial relationship.<sup>215</sup> Once attorneys have explained these elements, clients will know which actions to take—and which actions to

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204. Audrey Light & Kathleen McGarry, *Why Parents Play Favorites: Explanations for Unequal Bequests* (2003), <http://economics.sbs.ohio-state.edu/pdf/alight/wp03-01.pdf> [<http://perma.cc/E25C-N3B7>].

205. See BEYER, *supra* note 195, at 280.

206. See generally Lind, *supra* note 161 (emphasizing the importance of keeping detailed notes in the client's files in case the client's actions, or an agent's actions, are called into question).

207. See U.N. World Health Org., *supra* note 126, at 7.

208. See *id.*

209. See Callaway, *supra* note 9, at 11.

210. See TEX. PENAL CODE ANN. § 22.04 (West 2013).

211. See TEXAS GUARDIANSHIP ASS'N, *supra* note 183.

212. See Longan, *supra* note 11, at 907.

213. See *id.*

214. See Lind, *supra* note 161.

215. See generally *Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 2013) (defining the legal elements of an informal fiduciary relationship in Texas).

avoid—if they do not desire to establish an informal fiduciary relationship with one of their children.<sup>216</sup> Armed with the proper knowledge, regarding the danger of financial elder abuse, some clients may still desire to execute a power of attorney with a family member as their agent, which an attorney could easily draft when executing the client's will.<sup>217</sup> State-appointed guardianships are also a valuable tool for estate planners: these court-regulated relationships may not fit the needs of every client, but they may drastically improve the financial future of others.<sup>218</sup> Still other clients may feel more secure transferring assets to their children while still alive, and reaping the benefits of *inter-vivos* gifts.<sup>219</sup>

Many options exist for the baby boomers and their attorneys to plan a secure financial future for both themselves and their children.<sup>220</sup> Until there is a federal or international answer to financial elder abuse, the fight against breaches of fiduciary duties and undue influence continues.<sup>221</sup> Because most children who financially abuse their parents do not initially intend to commit a crime, education is the best offensive tactic to prevent such tragic situations from occurring.<sup>222</sup> Once a breach has occurred, the estate planning community is armed with various legal remedies to use defensively to restore justice.<sup>223</sup> The battle against financial elder abuse still wages on, but hopefully not for much longer.<sup>224</sup>

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216. See Todd, *supra* note 27.

217. See Stiegel, *supra* note 42, at 2; Todd *supra* note 166.

218. See TEXAS GUARDIANSHIP ASS'N, *supra* note 183.

219. See BEYER, *supra* note 193, at 280.

220. See TEXAS GUARDIANSHIP ASS'N, *supra* note 183.

221. See U.N. WORLD HEALTH ORG., *supra* note 126, at 7.

222. Longan, *supra* note 11, at 906.

223. See *supra* Part VI.

224. See generally Connolly, *supra* note 4, at 4 (stating that cases of financial elder abuse are increasing in the United States every year).