16 & PREGNANT AND THEN A *TEEN MOM*: UNMARRIED MINOR PARENTS' INABILITY TO COMPOSE AN EFFECTIVE WILL TO PROVIDE FOR THEIR CHILD

Comment

by Torrie Taylor

I. INTRODUCTION

If you have not seen the show, you have more than likely heard of it. The second-season premiere of MTV's *16 & Pregnant*—the surprisingly popular American reality television series—graced the living rooms of 3.4 million avid viewers, beating out "NBC's Olympic coverage among women under 34" and earning honors such as the "most-watched program on cable

for the day."[1] The show has been most popular among young women, and you could even say that it has turned out to be "quite the bundle of joy" for the television network.[2] The hour-long documentary series focuses on "the controversial subject of teen pregnancy" and follows the life of various teenagers as they "navigate[] the bumpy terrain of adolescence, growing pains, rebellion, and coming of age[,] all while dealing with [pregnancy]."[3] The show's producers, however, hope to shed a different light on the usual stigma placed on unmarried, teenage parents.[4] The show endeavors to show the incredible adult decisions and sacrifices that the teenagers are forced to make as they work to provide the best for their babies.[5]

16 & Pregnant even spurred spin-off television shows including *Teen Mom*, *Teen Mom 2*, and *Teen Mom 3*, which also air on the MTV network.[6] The spin-offs follow the young women who initially starred on *16 & Pregnant* as pregnant teenagers, but this time the show follows the girls raising their children and facing "the wide variety of challenges young mothers can face: marriage, relationships, family support, adoption, finances, graduating high school, starting college, getting a job, and the daunting and exciting step of moving out to create their own families."[7] MTV continues to capitalize on the endless dramatization portrayed in the reality series.

With recent drastic increases in teenage pregnancy in the United States, it is no surprise that viewers receive the reality television series so well.[8] The pregnancy rate of premarital females ages fifteen to nineteen increased from 28% in the early 1930s to 89% in the early 1990s.[9] "In 2005, about 725,000 teenage girls ages fifteen to nineteen became pregnant" and about 415,000 gave birth.[10] Even more shocking, about three

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1. Josef Adalian, *It's a Hit! MTV's '16 and Pregnant' Delivers Huge Ratings*, THE WRAP (Feb. 18, 2010, 12:17 PM), http://www.thewrap.com/tv/column-post/its-hit-mtvs-16-and-pregnant-delivers-huge-ratings-14381.

2. *Id.*

3. *See MTV's 16 & Pregnant*, MTV, http://www.mtv.com/shows/16_and_pregnant/season_4/series.jhtml (last visited Apr. 27, 2013).

4. *See id.*

5. *See id.*

6. *See MTV's Teen Mom*, MTV, http://www.mtv.com/shows/teen_mom/season_4/series.jhtml (last visited Apr. 27, 2013).

7. *See id.*

8. *See* Amara Bachu, *Trends in Premarital Childbearing*, US CENSUS BUREAU, 5 (Oct. 1999), http://www.census.gov/prod/99pubs/p23-197.pdf.

9. *See id.*

10. Ellen Stutheit Jackson & Margo Abouaf, *16 & Pregnant: Should Minors with Children Be Able to Make a Valid Last Will and Testament?* JD SUPRA LAW NEWS, 1 (2011), *available at* http://www.jdsupra.com/post/documentViewer.aspx?fid=b09dfc05-f3b9-493e-8f4e-940917ccb4a9. *See also Teenage Pregnancy*, MARCH OF DIMES (Nov. 2009), http://www.marchofdimes.com/downloads/teenagepregnancynodate.pdf (citing STEPHANIE J. VENTURA ET AL., *Estimated Pregnancy Rates by Outcome for the United States, 1990-2005: An Update*, 58 NAT'L VITAL STATISTICS REPORTS 4 (2009)).

in ten teenage girls under the age of twenty become pregnant at least once.[11] Teenagers having children out-of-wedlock "has always been of concern to policymakers because of the emotional and economic vulnerability of young women and the resulting consequences for their infant children."[12] However, what happens on the legal side of teenage pregnancy—more specifically, what happens when the unmarried minor parent tries to write a will to provide for the child(ren)?

This comment discusses an important topic that will unquestionably affect unmarried teenage parents—the inability to write an effective will to provide for their children because they are under the age of majority. Part II of this comment will discuss the reason an unmarried, teenage parent would find it necessary to write an effective will.[13] Part III of this comment will address current requirements set forth by various states, including Texas, to make a valid will;[14] Part IV will discuss exceptions that certain states, including Texas, have incorporated into their state statutes allowing minors to create wills and the policies behind these exceptions.[15] Part V of the comment will discuss areas of the law outside of estate planning that parallel and support the idea of an unmarried minor parent writing a will.[16] For example, this section will draw a comparison to an emancipated minor's ability to contract and how this capability should allow for unmarried minor parents to make a will, as well.[17] Finally, Part VI will provide and discuss an example of potential statutory language that could be utilized to enforce such a rule in Texas.[18] Overall, this comment will parallel legislative reasoning behind current laws allowing minors to create wills with the potential new exception of an unmarried minor parent's ability to make a will. Furthermore, this comment will discuss the policy reasons behind why enacting such a statute would prove not only extremely beneficial but ultimately necessary as society moves forward with the no-longer-taboo subject of teenage pregnancy.

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11. *See Teenage Pregnancy*, *supra* note 10 (citing *Why It Matters*, NAT'L CAMPAIGN, http://www.thenationalcampaign.org/why-it-matters/ (last visited Apr. 12, 2013)).

12. *See* Bachu, *supra* note 8.

13. *See infra* Part II.A–C.

14. *See infra* Part III.

15. *See infra* Part IV.A–C.

16. *See infra* Part V.

17. *See infra* Part V.

18. *See infra* Part VI.

II. WHY DO UNMARRIED, TEENAGE MINORS NEED THE ABILITY TO WRITE AN EFFECTIVE WILL?

A. Intestate Succession

To understand the importance of granting an unmarried minor the ability to write a legally enforceable will, one must first understand what happens when the minor is unable to write a valid will. "Chapter II of the [Texas] Probate Code governs what happens when a person dies without a valid will or dies with a valid will which does not encompass all of the person's probate estate."[19] "Intestate succession" is the scheme by which property not covered by a valid will is distributed.[20] The Probate Code contains the three sections describing the intestate distribution scheme in Texas: "[Section] 38 (distribution of property of an unmarried decedent and the separate property of a married decedent), [section] 45 (distribution of the community property of a married decedent), and [section] 43 (determination of the type of distribution)."[21] Section 38 encompasses an unmarried individual who dies without a will (intestate).[22] Under section 38, if an unmarried individual is survived by one or more child or grandchild, all of their property passes to the children or grandchildren.[23] Given the current intestate scheme, some might wonder why the minor parent would even need to write a will when all of their property would go to their child or children by default. They would reach this conclusion because "[m]any people are naïve about the critical importance of having a will."[24] Many individuals may never think about where their property goes at death, or even worse, they may have "serious misconceptions about at-death property distribution[s]."[25] What if the minor parent did not want everything to go to their child or children via intestacy laws? Perhaps the minor parent wanted some of her property to pass to parents, siblings, friends, or maybe even to the father of her child. If the minor wished to control her estate, she would not be able to do so without an enactment of a statutory exception granting minors the ability to create a valid will.[26]

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19. Gerry W. Beyer, *The Basics of Texas Intestate Succession Law*, 4 (Jan. 8, 2008), http://www.professorbeyer.com/Articles/Intestate_Succession_Texas_ Basics.pdf. *See also* TEX. PROB. CODE ANN §§ 37–47a (West 2011).

20. Beyer, *supra* note 19, at 4.

21. *Id. See also* TEX. PROB. CODE ANN. §§ 38, 43, 45 (West 2011).

22. Beyer, *supra* note 19, at 4 (The statute applies "assuming that the decedent died on or after September 1, 1993."). *See also* PROB. § 38.

23. Beyer, *supra* note 19, at 4. *See also* PROB. § 38.

24. Beyer, *supra* note 19, at 2.

25. *Id.*

26. *See* PROB. § 38.

B. What Assets Would a Minor Even Possess?

Although one might assume a minor would not have a substantial amount of property to include in a will, multiple instances could emerge that would give rise to a larger amount of property owned by the minor.[27] The fact that the property in the estate might be minimal now "does not mean it [could] not be large at the time of death."[28] For example, the minor could "inherit a hefty sum of money under intestacy, be a significant [] beneficiary, or land a high-paying job."[29] Furthermore, the minor could "die in a manner which gives the person's estate a winnable survival action against the individual . . . that contributed to the death, such as a drunk driver or the manufacturer of a defective vehicle."[30]

C. The Value of a Will—More Than Just Property Distribution

The issues previously mentioned pertain to the disposition of a minor's property; however, a valid will may be used for more than distributing property. If some unfortunate event were to lead to their demise, unmarried minor parents need the ability to adequately provide for their children. The drastic increase in teenage pregnancy makes this especially important. Some purposes behind estate planning are to "plan for their children, ensure that their property will be transferred to desired individuals, determine who should handle the business affairs of the estate, and determine who will handle the children's property until they are older."[31] Because the possibility exists that an unmarried minor parent will not have substantial assets to leave for the child, an important benefit of the ability to create a will is the capability of dictating who would care for the child if the parent dies.[32] Under the current system, when a minor parent cannot validly create a will and, therefore, cannot nominate a guardian, "the court must appoint [a guardian] even though it cannot possibly know the values, lifestyle and child-rearing philosophy of the parent[]."[33] Although the best interest of the children should be the highest priority, "[i]t is often difficult to determine the children's best interest in a brief court hearing."[34] Ideally, the parents should be allowed to make a decision of such magnitude (deciding who will be responsible for the upbringing of their child), and they should not be

27. *See* Beyer, *supra* note 19, at 1.
28. *Id.*
29. *Id.*
30. *Id.*
31. Celeste Holder Kling, *Estate Planning for Parents of Minor Children*, COLO. STATE UNIV., CONSUMER SERIES, FINANCE 9.102, 1 (2008), http://www.ext.colostate.edu/pubs/consumer/09102.pdf.
32. *See id.* at 2.
33. *Id.*
34. *Id.*

precluded from such a decision because of restrictions imposed on a minor's creation of wills.

III. CURRENT LAWS REGARDING WILL REQUIREMENTS

Property succession at death is governed by state law, not federal law.[35] Generally, a will is not enforceable unless the testator met each of the following requirements: "(1) legal capacity, (2) testamentary capacity, (3) testamentary intent, and (4) compliance with statutory formalities."[36] The age requirement to write a will falls under the "legal capacity" requirement.[37] Although states create their own laws with their own specific details, each state "grants a person the legal capacity to execute a will upon reaching a statutorily specified age."[38] The common age adopted among most states is eighteen;[39] however, Georgia and Louisiana allow the testator to be fourteen and sixteen years old, respectively.[40] In Texas, like most other states, "[e]very person who has attained the age of eighteen years and is of sound mind has the legal capacity to make a will . . . ."[41] More specifically, Texas requires the individual to be eighteen at the time the will is executed, and if the individual is younger (a minor), the will is void for lack of capacity.[42]

IV. EXCEPTIONS GIVING MINORS THE ABILITY TO WRITE A WILL

A few states already allow certain exceptions to the legal capacity requirement including California, Florida, Idaho, Indiana, Missouri, New Hampshire, Oregon, Texas, and Virginia.[43] Some of these states create exceptions for minors currently serving in the military that allow them to write a will.[44] Indiana, Missouri, and Texas are three examples.[45] Next,

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35. GERRY BEYER, EXAMPLES & EXPLANATIONS: WILLS, TRUSTS, AND ESTATES 6 (Vicki Been et al. eds., 4th ed. 2007). For state statutes dealing with their respective will requirements, *see, e.g.*, ALA. CODE § 43-8-130 (2011), ALASKA STAT. § 13.12.501 (West 2011), ARIZ. REV. STAT. ANN. § 14-2501 (2011), TEX. PROB. CODE ANN. § 57 (West 2011).

36. *See* BEYER, *supra* note 35, at 71–72.

37. *See id.* at 72.

38. *See id.*

39. *See id.*

40. GA. CODE ANN. § 53-4-10 (2012); LA. CIV. CODE ANN. art. 1476 (2012). *See also* Jackson, *supra* note 10.

41. GERRY BEYER, TEXAS LAWS OF WILLS § 15.2 (3d ed. 2011). *See also* TEX. PROB. CODE ANN. § 57 (West 2011).

42. *See* BEYER, *supra* note 41, § 15.2. *See also* PROB. § 57.

43. CAL. PROB. CODE § 6100 (West 2013); FLA. STAT. § 732.501 (West 2013); IDAHO CODE ANN. § 15-2-501 (West 2013); IND. CODE § 29-1-5-1 (West 2013); MO. REV. STAT. § 474.310 (2013); N.H. REV. STAT. ANN. § 551:1 (2013); OR. REV. STAT. ANN. § 112.225 (West 2013); TEX. PROB. CODE ANN. § 57 (West 2011); VA. CODE ANN. §§ 64.1-46, -47 (West 2012).

44. *See infra* Part IV.A.

Missouri, New Hampshire, Oregon, and Texas all have statutory exceptions granting married minors the ability to write a will.[46] Last, some of the states create exceptions allowing emancipated minors to write a valid will, including California, Florida, Idaho, Missouri, and Virginia.[47] Missouri is the only state to provide all three exceptions, while Texas provides the two exceptions of allowing minors currently in the military and minors who have been married to create a valid will.[48] With all of the aforementioned states already ahead of the curve, each should continue to pursue and enact another exception providing unmarried minor parents the legal ability to draft a will. The state legislatures should attune themselves to the policy reasons supporting the other states' updated statutes, and they should weigh the rationale against their own state policy to determine if an additional exception for minor parents works with the goals of their respective states.

A. Minors and the Military Exception to Writing a Will

As mentioned above, certain states allow exceptions to the "no individual under the age of eighteen" requirement for drafting a will.[49] The Missouri statute provides that "[a]ny person of sound mind, eighteen years of age or older or any minor emancipated by adjudication, marriage or *entry into active military duty into the military* may [devise a will]."[50] Similarly, the Texas statute provides that "[e]very person who has attained the age of eighteen years, or who is or has been lawfully married, or *who is a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service at the time the will is made*, . . . shall have the right and power to make a last will and testament. . . ."[51] The general policy that "a person mature enough to die for his or her country certainly is old enough to execute a will" stands behind the variation of the normal eighteen-years-of-age rule to allow the military exception.[52]

The initiative of "exempting soldiers from the ordinary requirements concerning formalities in the making of testamentary dispositions had its origin in the Roman law" and is said to have been first introduced by Julius

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45. IND. CODE § 29-1-5-1 (West 2013); MO. REV. STAT. § 474.310 (2013); TEX. PROB. CODE ANN. § 57 (West 2011).

46. MO. REV. STAT. § 474.310 (2013); N.H. REV. STAT. ANN. § 551:1 (2013); OR. REV. STAT. ANN. § 112.225 (West 2013); TEX. PROB. CODE ANN. § 57 (West 2011). *See infra* Part IV.B.

47. CAL. PROB. CODE § 6100 (West 2013); FLA. STAT. § 732.501 (West 2013); IDAHO CODE ANN. § 15-2-501 (West 2013); MO. REV. STAT. § 474.310 (2013); VA. CODE ANN. §§ 64.1-46, -47 (West 2012). *See infra* Part IV.C.

48. MO. REV. STAT. § 474.310 (2013); TEX. PROB. CODE ANN. § 57 (West 2011).

49. IND. CODE § 29-1-5-1 (West 2013); MO. REV. STAT. § 474.310 (2013); TEX. PROB. CODE ANN. § 57 (West 2011).

50. MO. REV. STAT. § 474.310 (2013) (emphasis added).

51. TEX. PROB. CODE ANN. § 57 (West 2011) (emphasis added).

52. *See* BEYER, *supra* note 41, § 5.1.3.

Caesar.[53] The practice of granting leeway to soldiers still continues today and still exists in the civil law.[54] This exemption first became apparent in "Anglo-American law in the Statute of Frauds, was continued in the Wills Act," and currently exists in Canada and in the United States, as well.[55]

1. States Utilizing the Military Exception and Justification as to Why

Indiana, Missouri, and Texas have no reported cases regarding minors writing wills in the military; this absence in the caselaw demonstrates the statute has either been extremely effective or the statute was unnecessary to begin with.[56] There are two cases, however, dealing with minor soldiers from Vermont and Iowa—two states that do not currently acknowledge the minor in the military exception to write a will.[57] Both cases reflect the same views that most states support when dealing with the capabilities of minors in the military to draft a will—they do not allow it.[58] Each case demonstrates policy reasons in favor of not having such an exception.[59]

The 1867 Vermont case of *Goodell v. Pike* arose from a minor soldier's creation of a will.[60] The court denied the validity and, therefore, the probate of the will stating, "We do not think the statute enables an infant to make a valid will under any circumstances."[61]

One argument raised before the court in *Goodell* was how the statute allows leniency for soldiers who create wills while serving because it is impracticable for them to have to abide by all of the usual strict requirements for will creation—they are in atypical conditions requiring constant combat readiness.[62] The court noted that infancy will be present regardless of where the minor child resides—whether he be active in the military or whether he be home as a civilian.[63] The court focused on the execution of the will and the requirements that are difficult to meet when minors are serving in the military (for example, soundness of mind); the court understandably explained that reaching the age of majority is not one of those difficult-to-meet requirements that arise during military service.[64]

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53. Note, *Soldiers' Wills of Personalty*, 31 HARV. L. REV. 1022, 1022 (1918).
54. *Id.*
55. *Id.*
56. *See generally* Jackson, *supra* note 10.
57. *See generally* Goodell v. Pike, 40 Vt. 319 (Vt. 1867); *In re* Evan's Will, 188 N.W. 774 (Iowa 1992). These two cases were admirably originally located and discussed in *Sixteen & Pregnant: Should Minors with Children Be Able to Make a Valid Last Will and Testament?* (2011). *See* Jackson, *supra* note 10, at 3.
58. *See supra* note 57 and accompanying text.
59. *See supra* note 57 and accompanying text.
60. *See Goodell*, 40 Vt. at 319.
61. *Goodell*, 40 Vt. at 323. *See also* Jackson, *supra* note 10, at 3.
62. *See Goodell*, 40 Vt. at 324.
63. *See id.*
64. *See id.*

In the *Goodell* opinion, the exception was viewed from more of an administrative standpoint.[65] The court favored the drawing of an arbitrary line because it is easily enforceable and it makes sense that the disability of minority is carried with a soldier regardless of whether he stays home as a civilian or not.[66] The court recognized that it was an arbitrary line and explained that if the "statute had limited the right to make wills to males, the probate of the will of a female would have been as easily justifiable as this."[67] However, the court overlooked the policy argument that minor soldiers are risking their lives and are more likely to be killed in warfare than the average minor civilian. For this reason, it would be beneficial for a minor in the military to have the legal ability to write a will, and the simplicity of such an exception would put little strain on the administration of the law.

Similarly, in the Iowa Supreme Court case of *In re Evan's Will*, the court held that the will executed by a nineteen-year-old soldier was invalid (Iowa's statute at the time required the testator to be over the age of nineteen for a will to be valid).[68] The court explained how the issue was a case of statutory interpretation, how it would merely interpret the legislative intent, and how the present law limits the ability to write a will to people of "full age and sound mind, and to no one else."[69] Much like the court in *Goodell*, the court explained why it thought the legislature decided to write the statute the way it did and why the statute was adequate to satisfy the needs of individuals in the military.[70] The court mentioned how the "[l]egislature in its wisdom extends to a soldier in actual service the privilege of making a verbal will disposing of all his personal estate."[71] The court explained that because of the "hazardous nature of [their] employment and the ordinary lack of opportunity to observe the legal formalities requisite to a testamentary disposition[,]" it is correct that the legislature provide this exception "due to the nature and character of their employment."[72] The court stressed that the allowance of a verbal will is not to provide the servicemen with special privileges, but rather to meet the needs of their mobile and perilous job.[73] For this reason, much like the court in *Goodell*, the court saw no reason to recognize a difference in a

65. *See id.* at 319.
66. *See id.* at 324.
67. *Id.*
68. *See generally In re* Evan's Will, 188 N.W. 774 (Iowa 1922). *See also* Jackson, *supra* note 10, at 3.
69. *In re* Evan's Will, 188 N.W. at 776.
70. *Id.* at 775. *See also Goodell*, 40 Vt. 319.
71. *In re* Evan's Will, 188 N.W. at 775.
72. *Id.*
73. *See id.*

minor soldier and a minor civilian's rights to make a will and proceeded to hold the minor soldier's will invalid.[74]

Nevertheless, significant reasons to permit minors in the military to create their own wills exist. It is for the very reason that the court discussed in *In re Evan's Will* that minor soldiers should be allowed to write a will—because of the hazardous nature of their employment.[75] As asserted above, by joining the military, minor soldiers put their lives at risk by entering into such a perilous position.[76] Minors placed in the military are expected to act like adults and are most certainly treated like adults. If minors are old enough to make such a monumental decision and enlist in the military, it follows that they should be old enough and mature enough to write a will to dispose of their property if the worst were to happen while serving their country.[77]

2. The Military Exception's Policy Application to Minor Parents

For similar policy reasons, unmarried minor parents should be allowed to write a will. These unmarried parents are also faced with adult decisions and are held to an adult standard once they have a child. For example, "states overwhelmingly consider minors who are parents to be capable of making critical decisions affecting the health and welfare of their children without their own parents' knowledge or consent."[78] Either expressly or by making no distinction, "[forty] states and the District of Columbia allow minors to place their children for adoption," with only ten states requiring the involvement of an adult during the adoption process.[79] Moreover, "[thirty] states and the District of Columbia allow minors to consent to medical care for their children," and twenty states have no specified policy.[80] As a result, minor parents are making significant decisions regarding the well-being of their children.[81] Deciding whether to put the child up for adoption is hardly different than deciding who will take care of your child if you were to pass away. A minor's ability to choose medical treatment for their child also equates to a tremendous responsibility. Therefore, if states can give minors such vast discretion and control in these two areas, what is the difference in allowing a will to be written? Each discretionary area aims for a common goal—to instill some responsibility within the minor parent. Society and the individual states expect minor

74. *See id.*
75. *See id.*
76. *See* Jackson, *supra* note 10, at 4.
77. *See id*.
78. Guttmacher Institute, *State Policies in Brief: Minors' Rights as Parents*, GUTTMACHER, 1 (Apr. 1, 2013), http://www.guttmacher.org/statecenter/spibs/spib_MRP.pdf.
79. *Id.*
80. *Id.*
81. *See id.*

parents to address certain adult decisions, and these "adult decisions" should include the ability to write a will to effectively provide for that child.

B. Minors and the Marriage Exception to Writing a Will

Missouri, New Hampshire, Oregon, and Texas all have statutory exceptions giving married minors the capacity to write a will.[82] The Texas statute, as mentioned above, states:

> Every person who has attained the age of eighteen years, *or who is or has been lawfully married*, or who is a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service at the time the will is made, being of sound mind, shall have the right and power to make a last will and testament.[83]

Little material exists referencing the legislative intent behind the enactment of this particular statute; however, another Texas statute from the Texas Family Code provides a similar rule and may be a little more useful to demonstrate legislative intent.[84] The Family Code statute states the following: "Except as expressly provided by statute or by the constitution, a person, regardless of age, who has been married in accordance with the law of [Texas] has the capacity and power of an adult, including the capacity to contract."[85] The language in this statute reflects the legislative intent that if a minor (or "person, regardless of age") is old enough to get married and abides by the laws of Texas in doing so, he or she is most definitely old enough to act as an adult and receive the rights of an adult.[86] Essentially, the legislature gives adult responsibilities to minors once they have taken it upon themselves to participate in adult activities, and it is likely that this is the reasoning behind the marriage exception behind writing a will as well.

The Court of Civil Appeals of Texas case *Lawder v. Larkin* demonstrates judicial support of married minors obtaining the rights of adults.[87] In this case, a woman named Marion H. Lawder executed a deed of trust before she reached the age of majority; however, she was married at the time of the deed execution.[88] At the time of this case, the age of majority was twenty-one.[89] The court stated that Marion, upon marrying Mr. Lawder, was emancipated from the disability of minority and because

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82. MO. REV. STAT. § 474.310 (2013); N.H. REV. STAT. ANN. § 551:1 (2013); OR. REV. STAT. ANN. § 112.225 (West 2013); TEX. PROB. CODE ANN. § 57 (West 2011).

83. TEX. PROB. CODE ANN. § 57 (West 2011) (emphasis added).

84. *See* TEX. FAM. CODE ANN. § 1.104 (West 2011).

85. *Id.*

86. *See id.*

87. *See generally* Lawder v. Larkin, 94 S.W. 171, 172 (Tex. Civ. App.—Dallas 1906, no writ).

88. *Id.*

89. *Id.*

she never disaffirmed said deed of trust, it was valid.[90] The appellee—the individual attempting to prove that Ms. Lawder's execution of the deed was ineffective—had been adversely possessing the land in question for about twenty years.[91] The court held that because she was married, it would be impracticable to say that the deed was ineffective merely because Ms. Lawder was a minor at the time of the execution.[92] She was married and old enough to execute the deed of trust and to take care of her own property.[93]

Because little material exists demonstrating legislative intent behind a married minor's ability to create a will, reasoning similar to the Family Code and *Lawder* should be applied: Minors choosing to partake in adult activities should be given the necessary "tools" to do so. Similarly, the same should apply to unmarried minor parents. Because they have assumed the position of an adult and taken on adult responsibilities (much like a married minor), the unmarried minor parent should be allowed to make a will.

The New Hampshire statute contains a similar provision: "Every person of the age of eighteen years and *married persons* under that age, of sane mind, may devise and dispose of their property, real and personal, and of any right or interest they may have in any property, by their last will in writing."[94] Again, there is little material explaining legislative intent; however, one could infer that the general reasoning behind the marriage exception is that when a minor is old enough and responsible enough to enter into a marriage, the minor is old enough to write a valid will.

C. Minors and the Emancipation Exception to Writing a Will

Some states create exceptions for emancipated minors to write a will, including California, Florida, Idaho, Missouri, and Virginia.[95] The result of emancipation for a minor in Texas, however, gives the minor the "capacity of an adult, including the capacity to contract."[96] Nevertheless, the emancipated minor in Texas is not given the ability to draft a valid will.[97]

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90. *Id.*
91. *Id.*
92. *See id.*
93. *See id.*
94. N.H. REV. STAT. ANN. § 551:1 (2013) (emphasis added).
95. CAL. PROB. CODE § 6100 (West 2013); FLA. STAT. § 732.501 (West 2013); IDAHO CODE ANN. § 15-2-501 (West 2013); MO. REV. STAT. § 474.310 (2013); VA. CODE ANN. §§ 64.1-46, -47 (West 2012).
96. TEX. FAM. CODE ANN. § 31.006 (West 2011).
97. *See id.*

1. The History of the Emancipation Doctrine

Emancipation "is defined as the 'legal process by which a child is released from the control and authority of his parent.'"[98] Emancipation originated in the Roman law and unexpectedly arose in the United States "in the context of a father's claim to the services and earnings of his son."[99] "Courts resolved this issue in early cases by accepting the father's claim to the child's earnings; if the claim was refused, the court would, in essence, declare the child emancipated."[100] Therefore, the issue in the primary cases "focused on the circumstances which would give rise to terminating the father's claim to the child's earnings prior to the date at which the child reached majority."[101]

A new concept of emancipation arose with the advent of the Industrial Revolution encouraging the use of child labor—"courts began to shift their focus to the issue of whether the facts and circumstances indicated the minor was emancipated."[102] The court would terminate the minor's disabilities if the facts and circumstances reflected emancipation.[103] This analysis was valuable "when the inquiry focused merely on the child's earnings or domicile."[104] However, public policy reflected that not all disabilities should terminate upon the emancipation of a minor, and courts addressed the policy suggestion that "emancipation could be partial as well as total, resulting in the child retaining some of the disabilities of infancy."[105] The remaining issue, however, was that "no rational basis existed for determining which disabilities end on emancipation and which survive."[106] The courts resolved this issue by focusing on "whether the reasons and circumstances had changed, obviating the continuation of the minor's disability."[107]

2. States' Approaches to Emancipated Minors

The laws of Iowa and California will now be discussed to demonstrate the need for expectation and consistency in emancipation laws and the conflict between a minor's need for independence and a minor's need for

98. John C. Polifka, *The Status of Emancipated Minors in Iowa: The Case for a Clearly Drafted Statute*, 44 DRAKE L. REV. 39, 40 (1995) (quoting HOMER H. CLARK JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 548 (2d ed. 1987)).

99. *Id.* at 40 (citing *In re* Sonnenberg, 99 N.W.2d 444, 447 (Minn. 1959)).

100. *Id.* (citing Inhabitants of Springfield v. Inhabitants of Wilbraham, 4 Mass. 493, 498 (1808)).

101. *Id.* (citing Inhabitants, 4 Mass. at 549).

102. *Id.*

103. *Id.*

104. *Id.* at 40–41.

105. *Id.* at 41 (citing *In re* Sonnenberg, 99 N.W.2d 444, 447–48 (Minn. 1959)).

106. *Id.*

107. *Id.*

parental guidance; the reasoning behind Iowa and California law will be applied to Texas law in the next section.[108] Although Iowa does not allow an emancipated minor to create a will, John C. Polifka's law review article, *The Status of Emancipated Minors in Iowa: The Case for a Clearly Drafted Statute*, offers useful insight in the area of emancipation in Iowa.[109] In the article, Polifka discusses the need for a clear and "well reasoned emancipation of minors statute."[110] He believes that a statute should be formulated to give minors expectations in respect to their legal rights and obligations rather than just provide subjective guidelines for courts issuing emancipation decrees.[111] He further discusses dangers involved when a minor, because of inconsistent emancipation guidelines, is given certain rights but not others.[112] For example, issues arise "when a minor living on her own is presumed incapable of entering into a lease."[113] In other words, uncertainty and inconsistency can be extremely problematic in carrying out the intended use of the guidelines.[114]

California, on the other hand, does allow emancipated minors to draft a valid will.[115] In California, a "minor may become emancipated in one of three ways out of ordinary course: by a valid marriage; by entry into the armed forces; by a court's declaration of emancipation."[116] Once the minor gains emancipation status, he or she is considered an adult for several purposes, a few being the right to "consent to medical, dental, or psychiatric care;" the right to "[e]nter into a binding contract or give a delegation power;" the right to "[b]uy, sell, lease, encumber, exchange, or transfer an interest in real or personal property;" the ability to "[s]ue or be sued in the minor's own name;" the ability to make a gift, outright or in trust; and the ability to "[m]ake or revoke a will."[117]

The policy behind California's emancipation statute supports the primary contention of this comment—that minor parents should be sufficiently capable of drafting a will. The significance of the policy is apparent when learning of the specific reasoning behind the legislature's decision to adopt such a statute. A need for reform existed in the state, and the California Emancipation of Minors Act resulted from dissatisfaction expressed by many public interest lawyers in San Francisco "in the late 1970s over persistent and seemingly unnecessary problems faced by

108. *See infra* Part IV.C.3.
109. Polifka, *supra* note 98.
110. *Id.* at 39.
111. *Id.* at 39, 42–43.
112. *Id.* at 44.
113. *Id.*
114. *See generally id.*
115. CAL. FAM. CODE § 7050 (West 2013).
116. Tia Wallach, *Statutory Emancipation in California: Privilege or Poverty?*, 11 J. CONTEMP. LEGAL ISSUES 669, 669 (2000). *See* CAL. FAM. CODE § 7002 (West 2013).
117. FAM. § 7050.

teenage clients on account of their minority."[118] The problems arose from two situations: first, "the minors' inability to negotiate the basic contracts necessary to maintain their independent lives, such as contracts for rent, work, or sale;" and second, "the vulnerability of just being on the street, a precariousness brought about by the possibility of being picked up and detained by the police as a person in need of supervision under California's incorrigibility statute."[119] Because no statute existed and the status of minors was unclear, police were uncertain what to do with the children loitering about the streets—should they be taken home, or were they living independently of their parents?[120]

The emancipation bill was sponsored by social service agencies stressing the importance of a clearer and more available legal mechanism "to uncomplicate the lives of independent, self-supporting minors."[121] The organization Social Advocated for Youth, Inc. explained:

> In this agency we see, from time to time, young people who are de facto emancipated but who are impaired in their day to day functioning because their status is not recognized and clear . . . . They are teenagers who are trying to make a life for themselves despite the obstacles they confront as minors. This legislation would do a great deal to remove these obstacles and acknowledge that they are "on their own and making it."[122]

The nature of the impairment extended to instances, for example, when the minor attempted to rent an apartment or enter into various contracts.[123] The agencies unambiguously sought for the emancipation exception to apply to certain types of kids—"good kids."[124] The "brighter, more industrious self-reliant youngsters who have matured earlier than the arbitrary eighteen year designation" were the type of teenagers the emancipation statute advocates sought to assist.[125] The statute arose in response to the minors' needs "to be freed from the burdens of minority, not from the complications of modern family life"; it seems to be a statute created for the convenience of emancipated minors.[126] The legislature designed the new statute to create a process for gaining emancipation status to be initiated by the minor; this process proved to be extremely simple in theory and in practice.[127] Note, however, that the emancipated minors are not completely treated as

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118. Carol Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 250–51 (1992).

119. *Id.* at 251.

120. *See id*.

121. *Id.* at 253–54.

122. *Id.* at 254.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 242.

127. Wallach, *supra* note 116, at 669; CAL. FAM. CODE § 7002 (West 2013).

adults—they still remain within the juvenile court jurisdictions for committing criminal acts, for school attendance laws, for purchasing alcohol, and for child labor laws.[128] Nevertheless, the emancipated minors in California are still granted substantial independence in economic and familial areas of the law.[129]

Another relevant issue brought up in California regarding emancipation of minors is discussed in Carolyn Ballard's law review article, *Mother May I? Minors as Parents*.[130] The author explains how, under California law, "the act of becoming a parent does not [automatically] emancipate the [minor] child, therefore, the parental rights and duties of the minor's parents do not terminate."[131] This inevitably results in the minor's parents making decisions for the minor, and the minor making decisions for his or her own child.[132] The solution proposed in the article "lies in the law of emancipation" and declares that "[m]aybe the act of giving birth, or impregnation of one who eventually gives birth," should automatically emancipate the minor.[133] Such a proposition would give the minor the ability to legally fulfill the parental duties that come with parenthood; furthermore, she could assume more responsibility for herself.[134] The author stresses the importance of this because "[i]n California, when it comes to the privacy rights in which parenting lies, a minor as a parent is responsible for making some serious adult decisions."[135] While courts protect the "minor parent from her vulnerability and immaturity in some aspects of her life," courts refuse to interfere with the parenting of the child "unless it is proven to the court that it is not in the best interest of the minor's child for the minor child to retain custody and control of the child."[136] Such an emancipation statute would make it easier for the minor parent to carry out these decisions and exercise the vast discretion in deciding how to raise the child without the minor's parents controlling his or her day-to-day life.[137] Furthermore, the minor's parents would benefit because they would be relieved from their duty to support the minor.[138]

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128. Sanger, *supra* note 118, at 259–60.
129. *Id.* at 260.
130. *See generally* Carolyn Ballard, *Mother May I? Minors as Parents*, 23 J. JUV. L. 29 (2003).
131. *Id.* at 39.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *See id.*
138. *Id.* at 39–40.

3. Other States' Reasoning Should Apply to Texas

Iowa and California law demonstrate how much concern exists regarding the need for expectations and consistency in emancipation laws and the conflicting idea of a minor's need for independence and a minor's need to be protected and cared for by their own parents.[139] This same conflict becomes apparent in the minor parent's need to draft a will for a child in Texas. While this is a task originally designated for individuals over the age of eighteen, with the exceptions discussed in this comment, the emancipation exception provided in California provides constructive insight as to why a minor parent should be allowed to write a will.[140]

The history of the emancipation concept has portrayed an existing struggle to determine which disabilities end on emancipation and which survive.[141] Some courts have resolved this issue by seeking insight on whether the circumstances have changed, hindering the continuation of the previous disability.[142] A minor becoming a parent is one of these particular instances. Becoming a parent changes the minor's circumstances and creates a strong reason the parent should be given optimal rights to provide for that child, regardless of the minority status.

Similar to Polifka's proposal and what the legislature considered in drafting California's emancipation statute, the minor parents need an avenue to "uncomplicate" their lives, much like the "good kids" that Social Advocated for Youth, Inc. mentioned when rallying for the California legislation whom they believed needed a more clear legal mechanism allowing them the ability to rent apartments, enter into contracts, etc.[143] To be clear, a minor parent could potentially be much different than the minors mentioned by Social Advocated for Youth, Inc.[144] The minor parents may or may not be willing to live on their own, and it is unknown as to whether they are "good kids" or not; however, with a child comes great responsibility and one could hardly argue that allowing the minor parents to draft a will would not "uncomplicate" the process of raising their child.[145] With a statute allowing the minor parent to draft a valid will, the minor would be given skills necessary to raise the child and would be "freed from the burdens of minority."[146] Allowing the minor parent to draft a will

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139. *See generally* Sanger, *supra* note 118; Ballard, *supra* note 130.

140. *See* BEYER, *supra* note 41, § 15.2. *See generally* Sanger, *supra* note 118; Ballard, *supra* note 130.

141. *See* Polifka, *supra* note 98, at 41.

142. *See id.*

143. *See generally* Polifka, *supra* note 98. *See also* Sanger, *supra* note 118, at 253–54.

144. *See* Sanger, *supra* note 118, at 254.

145. *Id.* at 253–54.

146. *Id.* at 242.

would remove such "obstacles" that the California Legislature considered when drafting their emancipation statute.[147]

As the article discussing Iowa's emancipation law emphasizes, it is not imperative that an emancipation statute terminate all of the minor's disabilities—rather, there is a need for consistency and expectation; this comment agrees with such assertion.[148] This comment, however, takes a less drastic approach than Ballard advances in *Mother May I? Minors as Parents*.[149] Although Ballard suggests an automatic emancipation upon birthing a child, oftentimes a minor parent needs the help of his or her own parents to raise the child.[150] The minor is likely in school when the pregnancy occurs, and raising a child can be difficult even for an adult who has a steady income, a spouse, and deliberate plans to have a child. Nevertheless, Ballard's article provides a good argument why minor parents should be allowed to write wills—often, minor parents are troubled by strict restrictions imposed upon them by the law.[151]

In the United States Supreme Court case of *Bellotti v. Baird*, the Court states that "the guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors."[152] Furthermore, "the State commonly protects its youth . . . from their own immaturity by requiring parental consent to or involvement in important decisions by minors."[153] Minors with children will likely need help from their own parents, and this article does not assert that minors should automatically gain complete control over their own lives as a result of having children. Nevertheless, for minors to raise their own children, such leniency with their decisions should be provided. In particular, minors should be allowed to execute a will to provide for their own child(ren).

V. THE EMANCIPATED MINORS' ABILITY TO CONTRACT COMPARISON IN TEXAS

The emancipated minor's ability to contract provides an interesting and convincing parallel as to why an unmarried minor parent should be able to draft a will. In Texas, as discussed above, the age of majority is eighteen years old and upon reaching the age of majority, a minor has nearly all the rights of other persons.[154] More specifically, a "child" or "minor" is an

147. *Id.* at 254.
148. *See* Polifka, *supra* note 98, at 41, 44.
149. *See* Ballard, *supra* note 130.
150. *See id.*
151. *See id.*
152. Bellotti v. Baird, 443 U.S. 622, 637 (1979).
153. *Id.*
154. TEX. CIV. PRAC. & REM. CODE ANN. § 129.001 (West 2011); 39A TEX. JUR. 3D FAMILY LAW § 907 (2013).

individual below eighteen years of age "who is and has not been married or who has had the disabilities of minority removed for general purposes."[155]

In Texas, the mentioned disabilities of minority terminate and the granting of the new rights transpires on the happening of specific events, including "the minor's marriage in accordance with Texas law, or entry of a decree removing the disabilities of minority."[156] Alternatively, for a minor to petition to have his or her disabilities removed or become emancipated as discussed above, the minor must be a Texas resident and must be at least seventeen years old, or at least sixteen years of age, and "living separate and apart from his or her parents, managing conservator, or guardian and self-supporting and managing his or her own financial affairs."[157] All educational rights granted to the parent of a student are given to the emancipated minor.[158] More importantly, "[e]xcept for specific constitutional and statutory age requirements," a minor with his or her disabilities removed for "general purposes has the capacity of an adult, including the capacity to contract."[159]

The fact that Texas grants minors the "capacity to contract" is notable because of the standards placed on the capacity of an individual to contract in comparison to the standards placed on the capacity of an individual to draft a will.[160] The standard of mental capacity for contracting is higher than for creating a will; "[l]ess mental capacity is required . . . to execute a will than to execute a contract or carry on business transactions."[161] Despite some authority to the contrary, Texas courts generally believe that "the testator is not required to have a 'high order of intelligence' to dispose of property by will."[162]

It is notable that a mentally incompetent individual may draft a valid will if he or she meets other necessary requirements; however, a contract created by a mentally incompetent individual is voidable.[163] When establishing mental capacity in a contract situation, "the evidence must show that, at the time of contracting, the person appreciated the effect of what the person was doing and understood the nature and consequences of his or her acts and the business he or she was transacting."[164] "Mere mental weakness" is not enough to deem an individual incapacitated, nor is "mere

155. TEX. FAM. CODE ANN. § 101.003(a) (West 2011); 39A TEX. JUR. 3D FAM. LAW. § 907 (2013).

156. 39A TEX. JUR. 3D FAM. LAW § 917 (2013). *See also* Husband v. Pierce, 800 S.W.2d 661, 661 (Tex. App.—Tyler 1990, no writ); Fernandez v. Fernandez, 717 S.W.2d 781, 781 (Tex. App.—El Paso 1986, writ dismissed).

157. TEX. FAM. CODE ANN. § 31.001(a) (West 2011); 39A TEX. JUR. 3D FAM. LAW. § 919 (2013).

158. TEX. FAM. CODE ANN. § 31.006 (West 2011).

159. FAM. § 31.006.

160. *See* BEYER, *supra* note 41, § 16.4.

161. *Id.*

162. *Id.*

163. 14 TEX. JUR. 3D CONTRACTS § 40 (2013).

164. *Id.* at § 41.

nervous tension, anxiety, or personal problems [that] do not amount to mental incapacity to enter into contracts."[165] As stated before, a contract created by an incompetent person is voidable and may be disaffirmed by a legal guardian.[166] The right to disaffirm also passes to "his or her heirs, devisees, or personal representatives" after the incompetent has passed away.[167] It follows that even though the other party may have acted in complete good faith and had no knowledge of the other's incompetence, the contract may still be set aside.[168]

On the other hand, an "incompetent individual" may create a valid will.[169] "Competency to execute a contract is not applied to determine testamentary capacity."[170] Whether one has capacity largely depends on facts and circumstances; however, "[t]he required degree of mental capacity . . . must exist at the time of the execution of the will and at the time the attesting witnesses affix their signatures."[171] The Texas Supreme Court case of *Prather v. McClelland* sets forth a list of five factors the testator must meet to satisfy the requisite testamentary capacity; it must be shown that the testator:

> 1. understands the business in which one is engaged;
> 2. understands the effect of one's act in making the will;
> 3. understands the general nature and extent of one's property;
> 4. knows one's next of kin and natural objects of one's bounty, and their claims upon the testator; and
> 5. has sufficient memory to collect in one's mind the elements of the business to be transacted, and to hold them long enough to perceive at least their obvious relation to each other, and be able to form a reasonable judgment as to them.[172]

Therefore, a mentally incompetent individual could meet all of these elements, as "the testator is not required to have a 'high order of intelligence' to dispose of property by will."[173]

The mental capacity required for an individual to form a valid contract and to draft a valid will is extremely relevant in comparison to a minor parent's ability to draft a valid will. To summarize the confounding statements above, Texas law recognizes a lower standard of capacity for

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165. *Id.*
166. *Id.* at § 44.
167. *Id.*
168. *Id.*
169. BEYER, *supra* note 41, § 16.4.
170. *Id.*
171. *Id.* at § 16.2.
172. *Id.* (citing Prather v. McClelland, 13 S.W. 543, 546 (1890)).
173. *Id.* at § 16.4.

individuals writing wills than it does for individuals writing contracts.[174] However, one of the rights emancipated minors gain is the ability to form a contract, yet they are not allowed to make a valid will.[175] It only follows that if the State of Texas recognizes an emancipated minor's capacity to enter into a contract with a higher capacity standard than required for making a will, then the state should also view an unmarried, minor parent as qualifying to create a will.

VI. EXAMPLE STATUTORY LANGUAGE

The language currently utilized by the Texas Probate Code regarding the exceptions to individuals who can draft a valid will states:

> Every person who has attained the age of eighteen years, or who is or has been lawfully married, or who is a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service at the time the will is made, being of sound mind, shall have the right and power to make a last will and testament, under the rules and limitations prescribed by law.[176]

This comment proposes a change so that the language of the statute appears as the following:

> Every person who has attained the age of eighteen years, or who is or has been lawfully married, or who is a member of the armed forces of the United States or of the auxiliaries thereof or of the maritime service at the time the will is made, *or who has birthed a child or more than one child, or who is the biological father of the child or more than one child*, being of sound mind, shall have the right and power to make a last will and testament, under the rules and limitations prescribed by law.[177]

The additional language keeps consistent with the format of the other exceptions, and it specifies that the minor could gain the ability to make a will regardless of how many children they have born. Importantly, the second clause of the new language regarding the father of the child has been added so that the unmarried mother of the child and the unmarried father of the child may draft a will to provide for the child. Furthermore, the word "birthed" serves to limit this exception to the minor parent's biological children.

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174. *Id.*
175. *See generally id.*
176. TEX. PROB. CODE ANN. § 57 (West 2011).
177. *See* PROB. § 57. The italicized and underlined language is the proposed addition to this statute.

VII. CONCLUSION

Overall, many reasons exist as to why minor parents should have the ability to make a valid will for the benefit of their child or children. Much like a minor making the momentous decision to serve in the military, similar to a minor who makes a choice to get married, and also analogous to a minor who makes the decision to gain emancipation status, a minor with a child needs the tools necessary to carry out the great responsibility that he or she has endeavored. Inconsistent areas exist in Texas law, as mentioned above, in which the ability to contract comes with emancipation status, yet the ability to write a valid will does not.[178] Because the mental requirements to write a will are lower than the ability to contract, it follows that unmarried, minor parents should also gain the status to draft a will.[179]

"As Jane Ellis has observed in studying the implementation of the State of Washington's [] custody law:"

> We pass laws based on unexamined assumptions all the time and [do not] return to examine the result. Where the laws affect economically sound adults, this is less of a problem. The system is self-correcting to the extent the adults can afford to appear in court to litigate the interpretation or application of the new statute. When the law affects parties and nonparties who have little or no resources (i.e., children and many divorcing parents of both genders), the state has more responsibility for tracking the result of what it has imposed and correcting problems as they come to light.[180]

Allowing an exception to draft a will would be a step in the right direction for legislative advancement in this area. Even more, it would benefit minors who likely have little resources to influence any significant changes. The State of Georgia already allows individuals over the age of fourteen to draft a will, and Louisiana allows individuals over the age of sixteen to draft a will.[181] The system does not appear to create burdensome legislation within the states, and there are many positive reasons for the change in the statute.[182] Therefore, Texas should continue with the trend and make a legislative change to allow minor parents to draft a valid will to provide for their child or children.

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178. TEX. FAM. CODE ANN. § 31.006 (West 2011). *See* BEYER, *supra* note 41, § 16.4.

179. *See* Beyer, *supra* note 41, § 16.4.

180. Sanger, *supra* note 118, at 349 (quoting Jane W. Ellis, *Plans, Protections, and Professional Intervention: Innovations in Divorce Custody Reform and the Role of Legal Professionals*, 24 U. MICH. J.L. REFORM 65, 180–81 (1990)).

181. GA. CODE ANN. § 53-4-10 (2012); LA. CIV. CODE ANN. art. 1476 (2012). *See also* Jackson, *supra* note 10.

182. *See generally* Jackson, *supra* note 10.