

HEIR ABUSE: IS THE TEXAS PROBATE CODE REWARDING ABUSERS?

Comment

by Sarah Stefaniak

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I. THE TRUTH ABOUT INTRA-FAMILIAL ABUSE

The United States defines child abuse and neglect as “any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation . . . [or] which presents an imminent risk of serious harm.”¹ Potential abuse ranges from failing to provide necessary food or clothing to such extremes as shaken baby

1. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-599, COMMITTEE ON WAYS AND MEANS: CHILD MALTREATMENT: STRENGTHENING NATIONAL DATA ON CHILD FATALITIES COULD AID IN PREVENTION 6-7 (2011) (citing 42 U.S.C. §§ 5106a(b)(1)-(2), 5106(g)(2)).

syndrome or sexual abuse.² Researchers estimate that child abuse kills five children every day across the United States, and, shockingly, 80% of these fatalities are children under the age of four.³ Furthermore, no specific characteristic is determinative of the type of person that becomes a child abuser and commits such heinous acts against children.⁴ Statistics demonstrate that an abuser is commonly a member of the child's family.⁵ Abuse can range from scenarios where a mother burns her children's feet in a hot bathtub to a grandparent who denies a young child consistent meals.⁶ Child abuse can happen to individuals of all different backgrounds.⁷

Alternately, the National Center on Elder Abuse has estimated that up to five million elderly individuals experience abuse every year, but only 16% of these abuse victims ever receive help.⁸ Most individuals will either have a dependent elderly adult in his or her own life or will watch someone else deal with this type of situation.⁹ Like children, elderly adults can become completely dependent on others to function daily.¹⁰

Imagine an individual dependent upon someone to keep him or her safe from the dangers of life. Instead of helping, that person ends up emotionally, physically, financially, or sexually hurting the individual.¹¹ These situations happen to a large portion of the population every day; therefore, society has a duty to step in and protect these innocent individuals from abuse.¹²

In 2007, the Texas legislature established protections in the Texas Probate Code to prevent parents from inheriting intestate from a child if they contributed to the death or serious injury of the child.¹³ Although the enactment of this statute was a big step in preventing child abusers from benefiting from their crimes, the statute does not protect against many forms of abuse society sees today.¹⁴ Specifically, the legislature has only recognized one

2. See generally *id.* at 4–7 and 21–34 (discussing the various forms of abuse).

3. *National Child Abuse Statistics*, CHILDHELP, http://www.childhelp.org/pages/statistics?Gclid=CMXOmPvT_6sCFYaW7QodFCOWWA (last visited Oct. 18, 2012).

4. See *id.* (stating that “Child abuse occurs at every socioeconomic level, across ethnic and cultural lines, within all religions and at all levels of education”).

5. See *id.*

6. See *id.*

7. See *id.*

8. *Frequently Asked Questions*, NATIONAL CENTER ON ELDER ABUSE, http://www.ncea.aoa.gov/NCEARoot/Main_Site/FAQ/Questions.aspx (last visited Oct. 17, 2012).

9. See generally Lara Queen Plaisance, *Will You Still... When I'm Sixty-Four: Adult Children's Legal Obligations to Aging Parents*, 21 J. AM. ACAD. MATRIM. LAW 245, 247 (2008) (explaining that the growing elderly population leads to greater dependency and abuse).

10. See generally Joseph W. Barber, *The Kids Aren't All Right: The Failure of Child Abuse Statutes as a Model for Elder Abuse Statutes*, 16 ELDER L.J. 107, 114–15 (2008) (discussing impairment of elderly individuals).

11. See Plaisance, *supra* note 9, at 250.

12. See *infra* Part II.

13. See TEX. PROB. CODE ANN. § 41(e) (West 2007).

14. See Elizabeth Henderson, Comment, *Two Constitutional Wrongs Don't Make Forfeiture Right: Does Section 41(e) of the Texas Probate Code Violate the Texas Constitution?*, 41 TEX. TECH L. REV. ADD. 1, 8–9, 12, 14 (2009), <http://www.texastechlawreview.org/Online/Henderson.pdf>.

relationship, between the parent and child, in which the heir's probate rights terminate.¹⁵ The legislature's definition of the parent-child relationship leaves many openings for abusers to still inherit, and the statute itself may not be constitutional.¹⁶ Further, although the legislature has addressed child abuse, albeit in an ineffective way, it has not taken notice of the serious impacts elder abuse has on the probate system.¹⁷

This comment discusses the need for new legislation to cure the problem of heir abuse and the many relationships in which this type of abuse can occur.¹⁸ If the State of Texas takes these steps, it will far exceed protections afforded to abuse victims in comparison to other states.¹⁹ Because the State of Texas follows a system of constructive trusts, creating new legislation may take time, but raising awareness about the problem starts the process for change.²⁰

Part II of this comment will discuss the prevalence of abuse throughout the country, and then specifically in Texas—and explains the intestate distribution system in Texas. Part III of this comment will discuss the available statutes in Texas that protect abuse victims as well as the problems concerning the limited protections available. Part IV of this comment will discuss the steps that other states have taken to prevent abuse. Part V will discuss how the constructive trust system should apply to abusive situations. Lastly, Part VI will propose a legislative solution to the problem of abusive heirs. In sum, this comment will address the need for the Texas Probate Code to incorporate more protections for abuse victims against wrongdoers to discourage this abusive activity.

II. ABUSE STATISTICS AND THE PROBATE SYSTEM

The violence present in the American home is greater than in any other setting.²¹ Domestic violence causes nearly one-third of all visits to an emergency room.²² Further, although a family may have a history of spousal abuse, judges still frequently award custody of children to fathers who committed spousal abuse.²³ These statistics are surprising considering “[40] to

15. *See id.*

16. *See id.* at 14.

17. *See infra* Part III.B.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. Thomas H. Shepherd, Comment, *It's the 21st Century. . . Time for Probate Codes to Address Family Violence: A Proposal that Deals with the Realities of the Problem*, 20 ST. LOUIS U. PUB. L. REV. 449, 454 (2001) (“The American family and the American home are perhaps as or more violent than any other single American institution or setting. . . Americans run the greatest risks of assault, physical injury, and even murder in their own homes by members of their own families.”).

22. *Id.* at 455 (citing Marva Bledsoe, *Domestic Violence Is a Serious Problem*, in DOMESTIC VIOLENCE 15–18 (Tamara J. Roleff ed., 2000)).

23. *Id.* at 457.

[60%] of men who beat their wives also beat their children.”²⁴ The statistics below demonstrate the dire need to protect against intrafamilial abuse.

A. Child Abuse Statistics

The first reported criminal action involving child abuse that occurred in the United States happened in the late 1600s.²⁵ Yet, not until the creation of a nonprofit organization titled “New York Society for the Prevention of Cruelty to Children” in 1874, did states begin noticing the problem.²⁶ The United States government first recognized the need for protections against child abuse in the 1960s after the medical community’s recognition of “battered child syndrome.”²⁷ This recognition followed the publication of an article published in 1962 titled, *The Battered Child Syndrome*.²⁸ By 1967, every state addressed the concern of child abuse with mandatory reporting laws.²⁹ As further protection, “Congress enacted the Child Abuse Prevention and Treatment Act” (CAPTA) in 1974 to encourage state participation in recognizing and eliminating child abuse.³⁰

In 2009, national reports detailed that Child Protective Agencies across the country received approximately 3.6 million reported cases of child maltreatment.³¹ More astoundingly, national estimations indicate, “1,770 children . . . died from abuse and neglect” in that same year.³² A parent of the child made up almost 80% of the abusers in these reported cases with another 6% comprised of other relatives.³³ Abusive mothers are the most likely cause of children killed within the first week of a child’s life with fathers or stepfathers being the highest offenders after the first week.³⁴ Research also shows that although 90% of Americans want to eliminate the child abuse problem, only about 30% reported child abuse when faced with the situation.³⁵

24. *Id.* at 458 (citing Catherine Elton, *Why Courts Award Batterers Custody*, in BATTERED WOMEN 87–88 (Louise Gerdes ed., 1999)).

25. Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 189 (1998).

26. *Id.* See also NEW YORK SOCIETY FOR THE PREVENTION OF CRUELTY TO CHILDREN, <http://www.nyspcc.org/nyspcc/> (last visited Oct. 19, 2012).

27. Arthur Meirson, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 436 (2008) (citing Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 82 (1998)).

28. Trost, *supra* note 25, at 191 (citing C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS’N 17 (1962)).

29. Meirson, *supra* note 27, at 436.

30. *Id.*

31. U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, ADMIN. ON CHILDREN, YOUTH AND FAMILIES, CHILDREN’S BUREAU, CHILD MALTREATMENT 2009, 1, 6 (2010), <http://www.archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf>.

32. *Id.* at 54.

33. *Id.* at 56.

34. Kristen Ditta, *Who Will Protect Me Now? An In-Depth Look at the Laws Protecting Children in Texas*, 50 S. TEX. L. REV. 285, 289 (Winter 2008).

35. *Id.*

The most serious problem with child abuse, besides the physical injuries incurred, is that its victims suffer emotional hardships for the rest of their lives.³⁶ As child abuse victims grow older, they experience a higher rate of substance abuse, and are at a substantially increased risk of becoming an abuser themselves.³⁷ Victims tend to suffer mental, emotional, or societal problems.³⁸ Further, child abuse victims experience higher rates of arrest throughout their lives, including higher rates of arrest for violent crimes.³⁹

B. Elder Abuse Statistics

In addition to children, the elderly are common targets for abuse.⁴⁰ Yet, elder abuse did not reach the national stage until the late 1970s when articles published in England analyzed “granny bashing.”⁴¹ This sparked a domestic violence researcher, Dr. Suzanne Steinmetz, to testify before Congress regarding the seriousness of elder abuse.⁴² Congress instituted federal funding to encourage states to engage in elder abuse prevention in 1981 when “the United States House of Representatives, Select Committee on Aging, issued a landmark report, entitled: *Elder Abuse: An Examination of a Hidden Problem*,” addressing the extent of elder abuse in the United States.⁴³ Since then, all fifty states enacted some form of elder abuse protection statute.⁴⁴ These state enacted elder abuse statutes are not uniform, many states protect only some elderly individuals or only protecting against specific kinds of abuse.⁴⁵ Some states enacted new statutes to address problems of elder abuse, while others only altered the language of their existing statutes; for example, state legislatures added language into assault or battery statutes in an attempt to

36. *See id.* at 290–91 (stating that child abuse causes “abnormalities in ‘(1) the perception of threat, (2) the recognition of emotionally relevant stimuli, (3) the regulation of emotional behavior and inhibition of maladaptive or inappropriate behavioral responses, and (4) the feedback control of cortisol secretion”).

37. *See id.* (citing Ellen Jaffe-Gill et al., *Child Abuse Neglect: Types, Signs, Symptoms, Causes and Getting Help*, HELPGUIDE.ORG, Oct. 10, 2007, http://www.helpguide.org/mental/child_abuse_physical_emotional_sexual_neglect.htm). *See also* Debra Niehoff, *Invisible Scars: The Neurological Consequences of Child Abuse*, 56 DEPAUL L. REV. 847, 848 (2007) (“[A]pproximately one-third of abused children become abusive parents themselves”).

38. Ditta, *supra* note 34, at 291 (stating that “[a]buse victims also suffer various emotional problems including low self-esteem, depression and anxiety, eating disorders, relationship difficulties, alienation and withdrawal, and various personality disorders”). “One longitudinal study of individuals with a history of childhood abuse found that as many as 80% met the diagnostic criteria for at least one mental health condition by age twenty-one.” *Id.* at n.29 (citing Debra Niehoff, *Invisible Scars: The Neurological Consequences of Child Abuse*, 56 DEPAUL L. REV. 847 (2007)).

39. *See id.*

40. *See* Barber, *supra* note 10, at 113.

41. Meirson, *supra* note 27, at 436 (citing Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 82 (1998)).

42. *See id.*

43. *See id.* (citing H. SELECT COMM. ON AGING, 97TH CONG., *ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM* (Comm. Print 1981)).

44. *See id.* at 437.

45. *See id.* at 437–38.

increase penalties on crimes against the elderly.⁴⁶ To better protect the elderly, one state needs to create a comprehensive model statute for other states to follow.

According to the National Center on Elder Abuse, “between 1 million and 2 million Americans age 65 or older have been injured, exploited, or otherwise mistreated by someone on whom they depended for care or protection.”⁴⁷ Furthermore, for every incidence of elder abuse reported, five more go unreported.⁴⁸ The elderly are less likely to report their abuse because of family pressures; inability to report due to isolation by the abuser; fear of the government taking them away from those family members they love; denial of the abuse; and often a parental instinct to protect the abuser because of the familial relationship.⁴⁹

In 2009, there were 39.6 million people aged 65 years old or older in the United States.⁵⁰ In 2010, this number grew to 40.3 million.⁵¹ The United States Census Bureau projected that the elderly will be 20% of the United States population by 2030.⁵² For the first time ever, people over the age of 65 will soon outnumber those under the age of five in the world’s population for the first time ever.⁵³ Like child abusers, “[i]mmEDIATE family members commit almost 70% of the instances of elder abuse in the residential setting, a number that rises to almost 90% when extended family is included.”⁵⁴ Thus, abuse within the family can happen in a variety of family relationships, including, but not limited to: parent to child, child to parent, uncle or aunt to nephew or niece, and grandparent to grandchild.⁵⁵

C. Abuse in Texas

In 2009, Texas polls demonstrated that 196,713 Texans were victims of domestic violence, and “73% of Texans believe that domestic violence is a

46. See *id.*

47. *Crime and Victim Stats*, WITNESS JUSTICE, <http://www.witnessjustice.org/news/stats.cfm> (last updated Nov. 15, 2011).

48. *Id.*

49. See Barber, *supra* note 10, at 124–25 (stating “four main reasons why a domestic violence victim may not report the abuse: power and control, denial, family and economic reasons, and emotional attachment”).

50. *Older Americans Month*, U.S. CENSUS BUREAU, http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff08.html (last visited Oct. 16, 2011).

51. Sally Holland, *2010 Census Shows More Elderly Than Ever Before in the U.S.*, CNN, (Dec. 1, 2011, 12:17 PM) [http://www.cnn.com/2011/11/30/us/census-elderly/index.html?iref=all search](http://www.cnn.com/2011/11/30/us/census-elderly/index.html?iref=all%20search).

52. Plaisance, *supra* note 9, at 247.

53. Kevin Kinsella & Wan He, *An Aging World: 2008*, U.S. CENSUS BUREAU (2009) www.census.gov/prod/2009pubs/p95-09-1.pdf.

54. Barber, *supra* note 10, at 113 (citing Mary Twomey et al. *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 73, 74 (2005)).

55. See Henderson, *supra* note 14, at 12–14.

serious problem” in the state.⁵⁶ Looking at child abuse victims alone, “184 children died from abuse or neglect in 2003.”⁵⁷ In Texas, an estimated 388,310 elderly are victims of abuse, one of the highest rates of abuse per population.⁵⁸ In addition, researchers estimate that Texas accounts for 6.5% of all elder abuse projections, ranking only behind California, Florida, and New York.⁵⁹ According to census figures, these two groups—children and the elderly—constitute 38% of the entire state’s population of 25,647,681 people.⁶⁰

D. Texas Intestacy Laws

Furthermore, the majority of Americans die without executing a will.⁶¹ Therefore, to explore how these cases of familial violence affect a person’s intestate probate rights, an outline of intestate succession in Texas is necessary to understand the important familial relationships to which the Probate Code applies.⁶²

In Texas, the Probate Code lays out specific procedures for the distribution of intestate property to heirs in a particular order.⁶³ The intestate distribution statute begins by exploring an individual who leaves no spouse, with the children inheriting first, a parent inheriting second, siblings inheriting third, and other relatives inheriting last.⁶⁴ If the decedent leaves a surviving spouse, the distribution occurs in proportional share to the other heirs.⁶⁵ Therefore, an abusive family member can have an interest in an intestate share upon the death of the abuse victim.⁶⁶ Because of the strong correlation between abusers and the direct familial relationship with their victims, the statistics demonstrate the great need for society to protect these individuals both during life and after death.⁶⁷

56. *Facts and Statistics*, TEXAS COUNCIL ON FAMILY VIOLENCE, <http://www.tcfv.org/resources/facts-and-statistics> (last visited Oct. 19, 2012).

57. Ditta, *supra* note 34, at 288 (citing Prevent Child Abuse Texas, Texas Yearly Abuse Facts, <http://www.preventchildabusetexas.org/vitalsdaily.html> (last visited Oct. 19, 2012)).

58. See Donna Thomas, *Elder Abuse*, CEUFAST.COM, <https://ceufast.com/courses/viewcourse.asp?id=11&nurse-ce-course-title=Elder+Abuse>.

59. *Id.*

60. *State and County Quickfacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/48000.html> (last modified Sept. 18, 2012).

61. Ronald J. Scalise Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 172 (2006).

62. See TEX. PROB. CODE ANN. § 38 (West 2007).

63. *Id.*

64. *Id.* § 38(a)(1)–(4).

65. *Id.* § 38(b).

66. See *id.* § 38.

67. See *supra* Part II.

III. TEXAS ABUSE PROTECTIONS

With such high numbers of the population vulnerable to abuse, the states should take steps to protect these persons and their estates.⁶⁸ Surprisingly, Texas enacted only one statute regarding abusive heirs in these family relationships.⁶⁹ Further, Texas acknowledged the need for such protections and attempted to incorporate some integral protections into the state Probate Code, but these attempts proved unsuccessful.⁷⁰

A. Child Abuse Statute

The case of *Williams v. State* provides a good demonstration of the severity of child abuse in Texas.⁷¹ In *Williams*, the court convicted a mother of three counts of injury to a child after the Allen police investigated reports of child abuse.⁷² Police investigators witnessed a three-year-old child with “a swollen frontal area of his head, a black eye, abrasions to his nose, a bruise on the left side of his cheek, abrasions on the right temple area, some scars on his neck and completely covering his upper torso,” along with other indications of child abuse.⁷³ The mother admitted to spanking the child with both her hand and a belt, as well as biting him to discipline and “ma[k]e him behave better.”⁷⁴ Sadly, this type of abuse occurs in households across America everyday.⁷⁵ If this child ultimately died in a way that allowed the mother to sue on behalf of the child, the mother would have all the rights to whatever judgment a jury awarded, even though the mother treated her child so horribly.⁷⁶

Texas Probate Code Section 41(e) disinherits a parent of a minor under the age of eighteen for two reasons: voluntary abandonment and conviction.⁷⁷ Specifically dealing with abuse, Section 41(e)(3) disinherits a parent when the court finds:

by clear and convincing evidence that the parent has . . . been convicted or has been placed on community supervision, including deferred adjudication

68. See *supra* Part II.

69. See TEX. PROB. CODE ANN. § 41(e) (West 2007).

70. See *id.*

71. *Williams v. State*, No. 05–08–00617–CR, 2009 WL 2343259, at *1 (Tex. App.—Dallas July 31, 2009, no pet.) (not designated for publication). See also *Dotson v. State*, No. 05–09–01034–CR, 2011 WL 1288640, at *1, *5 (Tex. App.—Dallas Feb. 28, 2011) (mem. Op., not designated for publication), (*pet. dismissed, improvidently granted*, No. PD–1389–11, 2012 WL 4675354, at *1 (Tex. Crim. App. Oct. 3, 2012)(per curiam)) (stating that stepfather disciplined a five year old child by hitting child, kicking child, putting child in closet with her hands tied, and making her run in place with weights held over her head).

72. *Williams*, 2009 WL 2343259, at *1.

73. *Id.*

74. *Id.*

75. See *supra* Part II.

76. See generally TEX. CIV. PRAC. & REM. CODE ANN. § 71.021 (West 2011) (“A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person.”).

77. See TEX. PROB. CODE ANN. § 41(e) (West 2007).

community supervision, for being criminally responsible for the death or serious injury of a child . . . [and] for conduct that caused the death or serious injury of a child and that would constitute a violation⁷⁸ [of several criminal acts].⁷⁹

However, this is the only protection provided in the Texas Probate Code.⁸⁰

1. Problems with the Texas Probate Code 41(e)

Because Section 41(e) is the only statute incorporated into the Probate Code that discusses disinheritance of abusers and it is the first version of the statute, the statute is not perfect.⁸¹ As critics have pointed out, the protections in Section 41(e) do not come into effect unless a court declares the termination of parental rights, the child dies before the age of eighteen, or the parent commits an “evil act,” including, but not limited to causing the death or serious injury of the child proven by clear and convincing evidence.⁸² The first problem with this statute is that it requires an abused child to, immediately on their eighteenth birthday, go out and execute a will to prevent the parent from inheriting upon the abused person’s possible death.⁸³ The second problem is the wording of the statute discusses “a child,” not the particular child of the abuser, which leaves the statute’s applicability very open-ended.⁸⁴ The third problem with the statute is it only protects against one familial relationship.⁸⁵

For example, Mary, who recently turned eighteen, acquired a substantial amount of property through an inheritance from another family member. Tom, Mary’s uncle, sexually abused her at the age of fourteen, but Mary never executed a will disinheriting Tom. Mary confided in friends about the abuse. Mary died in a car accident with both of her parents. Because Mary has no husband, no children, no siblings, and no living parents, her uncle inherits from her because she died intestate. The niece-uncle relationship does not fall under Section 41(e), meaning there is no way for Mary’s friends to present evidence of the abuse to disinherit Tom.⁸⁶ Thus, Tom benefits from Mary’s death even though he sexually abused Mary.

78. *See id.*

79. These criminal acts include: murder; capital murder; manslaughter; indecency with a child; assault; sexual assault; aggravated assault; aggravated sexual assault; injury to a child, elderly individual, or disabled individual; abandoning or endangering child; prohibited sexual conduct; sexual performance by a child; and possession or promotion of child pornography. *See id.*

80. *See id.*

81. *See id.*

82. Gerry W. Beyer, *Wills and Trusts*, 61 SMU L. REV. 1179, 1180–81 (2008).

83. *See* PROB. § 41(e) (stating that the parent cannot inherit from a “child under 18 years of age,” and failing to protect upon attainment of age 18).

84. Beyer, *supra* note 82, at 1181.

85. *See* PROB. § 41(e) (specifying the “parent-child relationship” only).

86. *See id.*

Another problem is Section 41(e) of the Texas Probate Code may be unconstitutional according to Greg Abbott, Attorney General of Texas.⁸⁷ Rick Perry, the current Texas Governor, asked about this statute in an official letter to the attorney General; Greg Abbott explained in his response that, according to the Texas Constitution, “the corruption of blood or forfeiture of estate, as a result of conviction of crime, [is] expressly prohibited by the organic law.”⁸⁸ Greg Abbott quoted current case law that established the prevention of the complete disinheritance of a convicted heir in Texas.⁸⁹ The Attorney General concluded his evaluation by stating that for Section 41(e)(3) to be deemed constitutional, the courts would have to expand the limitations of the “Slayer Rule” and the “constructive trust doctrine.”⁹⁰ Therefore, after acknowledging the flaws in Section 41(e), two Texas government officials with platforms to change the statute have not acted since the Governor’s letter in 2008.⁹¹

Further, the Texas legal system failed to apply Texas Probate Code § 41(e) to any case since its incorporation in 2007.⁹² The problem presented by this fact is that an abuse protection failed to protect anyone for the past four years.⁹³

2. Child Abuse Reporting Requirements

Every state, along with the District of Columbia, Puerto Rico, and the Virgin Islands, developed mandatory reporting requirements for child abuse.⁹⁴ The Texas Family Code requires that a person report suspicions of child abuse.⁹⁵ Section 261.101(b) names specific people who have a duty to report, including “teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers,” but the statute also includes all “professionals.”⁹⁶ Further, professional means “an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct

87. Op. Tex. Att’y Gen. No. GA-0632 (2008), available at <https://www.oag.state.tx.us/opinions/50abbott/op/2008/htm/ga-0632.htm>.

88. *Id.* (citing *Davis v. Laning*, 19 S.W. 846 (Tex. 1892)).

89. *Id.* (citing *In re B.S.W.*, 87 S.W.3d 766, 770 (Tex. App.—Texarkana 2002, pet. denied). “The Texas Supreme Court has interpreted [article I, section 21] to mean that unlike in England where a convict is deemed civilly dead and cannot inherit, Texas preserves the inheritance of a convicted felon from forfeiture through corruption of blood.” *Id.*

90. *Id.*

91. *See id.*

92. *See* TEX. PROB. CODE ANN. § 41(e) (West 2007) (containing no case history).

93. *See generally id.*

94. Trost, *supra* note 25, at 192; Brooke Albrandt, *Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women*, 81 TEX. L. REV. 655, 656 (2002).

95. TEX. FAM. CODE ANN. § 261.101 (West 2011).

96. *Id.* § 261.101(b).

contact with children.”⁹⁷ This leaves many unspecified individuals with the duty to report suspected child abuse.⁹⁸ This reporting requirement also applies to those who would normally have an expectation of confidentiality, such as a priest or an attorney.⁹⁹ If a person fails to report his suspicions, the person can be convicted of a Class A misdemeanor.¹⁰⁰ However, a professional receives immunity from any litigation upon a good faith report.¹⁰¹ Texas seems to have covered all of the bases for reporting and penalizing abusers in the family code statutory language, so the legislature cannot allow the problems with Section 41(e) to continue.¹⁰²

B. Elder Abuse Statute

The Texas Probate Code does not contain a specific provision that protects against an abusive heir from receiving inheritance after taking advantage of or abusing an elderly individual.¹⁰³ The majority of elder abusers are family members, generally those tasked with taking care of the individual.¹⁰⁴ Further, the typical victim profile is “a physically or mentally impaired, frail woman who is over seventy-five-years-old, living with relatives, who has little income, but abuse of the elderly takes many forms and crosses all demographic lines.”¹⁰⁵ As noted above, Section 41(e), discussing the parent-child relationship, only protects a child from abuse by a parent, not an elderly parent abused by a child.¹⁰⁶ Yet, many family members accept the burden of caring for an elderly parent as opposed to putting the elderly individual in a better-equipped care facility.¹⁰⁷ Untrained individuals taking care of elderly family members, who are often disabled or in need of skilled care, can lead to horrific endings for the elderly individual.¹⁰⁸

97. *Id.*

98. *See id.*

99. *Id.* § 261.101(c).

100. *Id.* § 261.109(b).

101. *Id.* § 261.106(a) (stating that “[a] person acting in good faith who reports or assists in the investigation of a report of alleged child abuse or neglect or who testifies or otherwise participates in a judicial proceeding arising from a report, petition, or investigation of alleged child abuse or neglect is immune from civil or criminal liability that might otherwise be incurred or imposed.”).

102. *See* Op. Tex. Att’y Gen. No. GA-0632 (2008) (acknowledging the issues with section 41(e)).

103. *See* TEX. PROB. CODE ANN. § 41 (West 2007).

104. Plaisance, *supra* note 9, at 250; *see also* Errold F. Moody, *Elder Abuse*, ERROLD F. MOODY, JR., <http://www.efmoody.com/miscellaneous/elderlyabuse.html> (“The most common relationships of victims to alleged perpetrators were adult child (32.6%) and other family member (21.5%)”).

105. Plaisance, *supra* note 9, at 250 (citing Sally Balch Hurme, *Perspectives on Elder Abuse*, http://www.assets.aarp.org/www.aarp.org/_articles/international/revisedabusepaper1.pdf).

106. *See* PROB. § 41(e).

107. Plaisance, *supra* note 9, at 248–50.

108. *Id.* The elderly population requires massive amount of care. As an example, nearly “[70%] of Alzheimer’s sufferers live at home, with three-quarters of those receiving care from a family member . . .” *Id.* at 250.

I. Physical Abuse

The Texas case of *Billingslea v. State* offers a perfect example of familial abuse an elderly individual may endure.¹⁰⁹ In *Billingslea*, a granddaughter asked the Social Security Office to check on her grandmother, who was living with an adult son, after thwarted attempts to see her grandmother.¹¹⁰ Police found the woman in her bed where the officers “discovered that part of [her] heel was eaten away by a large decubitus (bedsore) [with] [o]ther decubiti on her hip and back” [that had eaten down] to the bone.¹¹¹ Along with the bedsores, she had “second degree burns and blisters . . . on her inner thighs, caused by lying in pools of her own urine [and] [m]aggots were festering in her open bedsores.”¹¹² The court found that the son had no duty to care for his mother because the criminal statute did not impose an offense of omission, or inaction.¹¹³ The statute needed to specifically hold the son liable for failing to actively provide care for his mother.¹¹⁴ While the legislature later altered the criminal statute to include liability for some failure to act, the lack of language in the Texas Probate Code does not prevent people, such as the son in this case, from inheriting from the intestate decedent after allowing the parent to suffer.¹¹⁵

The Human Resources Code and the Penal Code demonstrate the steps that the legislature has taken in an attempt to provide more protection to other types of relationships; however, it does not disinherit an heir who violates these sections of the code.¹¹⁶ The Human Resources Code states that “[a]n elderly individual . . . has the right to be free from abuse, neglect, and exploitation,” and yet when this exploitation or abuse occurs, the Probate Code does not specifically exclude the abuser from inheriting from the intestate victim.¹¹⁷ The Texas Penal Code provides the same consequences for abusing the elderly as it does for abusing children.¹¹⁸ The punishment for this type of crime is a state jail felony, which results in a prison term of not less than 180 days and not more than two years, with a possible fine of not more than \$10,000.¹¹⁹ Therefore, after the maximum two years in jail, the wrongdoer who abused the

109. *Billingslea v. State*, 780 S.W.2d 271 (Tex. Crim. App. 1989) (en banc).

110. *Id.* at 272.

111. *Id.*

112. *Id.* at 273.

113. *Id.*

114. *See id.*

115. *See* TEX. PENAL CODE ANN. §§ 22.04(b), 22.04(d) (West 2012) (stating that “[f]or purposes of an omission. . . the actor has assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for a child, elderly individual, or disabled individual.”).

116. *See* Penal § 22.04; TEX. HUM. RES. CODE ANN. § 102.003 (West 2001).

117. TEX. HUM. RES. CODE ANN. § 102.003(b)(2) (West 2001).

118. TEX. PENAL CODE § 22.04(a)(1)–(3) (“A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury”).

119. TEX. PENAL CODE ANN. §§ 12.35(a)–(b), 22.04(g) (West 2012).

elderly family member gets out and can access the inheritance after the intestate elderly individual dies.¹²⁰

Because the Human Resources Code and the Texas Penal Code define elder abuse clearly, Texas has a higher rate of elder abuse investigations compared to other states.¹²¹ The rate of reporting in Texas “is 12.1 instances of [elder] abuse per 1000 elderly . . . [and] the substantiation rate is 8.0 per 1,000 [elderly]”¹²² With Texas such a leader in the field of informing people about elder abuse and reporting suspected instances, how the Probate Code has overlooked such a large portion of society is unclear.¹²³

For example, Sam is eighty years old and very dependent upon his son, Joe. After finding out that Sam has no will, Joe, in a pinch for money and expecting to inherit quite a sum, constantly hits and batters his father because of his money frustrations. Joe blames his father for his financial struggles, deciding that the old man should have gifted his son larger sums of money at holidays. Sam ends up dying from a heart attack leaving two living sons, Joe and Ed. Although the Human Resources Code attempts to protect elderly individuals like Sam, Joe is not the technical cause of his father’s death and can inherit equally with Ed under Texas law. He can do so because the Probate Code contains no provision specifying the disqualification of heirs in this sort of situation.¹²⁴

2. Fiduciary Abuse

Although abuse often means physical violence or injury, another way that heirs can take advantage of elderly intestate family members is abusing the financial status of the elderly individual, essentially weeding out the family member’s inheritance before the elder’s death.¹²⁵ Most elderly individuals over the age of sixty-five are eligible for social security benefits.¹²⁶ An elderly individual on social security receives monthly checks to benefit him or her, but Congress allows the payee, often a family member, to be a representative of the elderly individual.¹²⁷

According to the National Center on Elder Abuse, “[a]s of December 2003, there were more than 6.8 million individuals who had representative

120. See generally PENAL § 12.35(a)–(b) (showing that a felon would be released within a maximum of two years).

121. Plaisance, *supra* note 9, at 253–54.

122. *Id.*

123. See TEX. PROB. CODE ANN. § 41(e) (West 2007) (showing how parents cannot inherit from their children if they abused them).

124. See *id.*

125. See Erica F. Wood, THE AVAILABILITY AND UTILITY OF INTERDISCIPLINARY DATA ON ELDER ABUSE at 47–48 (A White Paper for the National Center on Elder Abuse, Commission on Law and Aging for the National Center on Elder Abuse, May 2006), available at http://www.ncea.aoa.gov/ncearoot/Main_Site/Library/Statistics_Research/Abuse_Statistics/National_Statistics.aspx.

126. See 42 U.S.C. § 306 (2011).

127. Wood, *supra* note 125, at 48–49.

payees—approximately 60 percent children and 40 percent adults. Currently there are about 5.4 million representative payees, managing almost \$4 billion in monthly benefit payments.”¹²⁸ Another way to abuse this fiduciary duty is to misuse veteran affairs benefits, which, like social security benefits, are accessible to family members who take care of an elderly individual.¹²⁹ However, no true calculations explain how often family members abuse the receipt of social security checks, leaving the elderly individuals unprotected.¹³⁰

Also, an Associated Press publication in 1987 stated “that the nation’s guardianship system, a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect,” and, according to more recent reports, this has not improved despite such massive press about the dangers of the guardianship system.¹³¹ Under the Texas Probate Code, the preference for guardianship of non-minors first favors spouses, and then favors “the eligible person nearest of kin to the ward . . . if the ward’s spouse is not one of the eligible persons.”¹³² Although this seems like the most reasonable person to choose, those “nearest of kin” are also more likely to abuse the elderly individual.¹³³

C. Slayer Statutes

Many states enacted Slayer Statutes to prevent the person who caused the death of an intestate individual from inheriting because of that evil act.¹³⁴

128. *Id.* at 48.

129. *See id.* at 49–50.

130. The following is an excerpt from a study conducted by the National Center on Elder Abuse; the scenario is based on a real complaint of elder abuse with the name changed in order to protect the individual:

MARION was a 53-year-old woman with developmental disabilities who had lived with her brother Hank since her parents died. She had been physically abused by Hank for several years but thought that if she told anyone she would have no place to live. She was also financially exploited by Hank, who was the payee for her Social Security check and used that money to support his drinking habit.

A Response to the Abuse of Vulnerable Adults: The 2000 Survey of State Adult Protective Services, THE NATIONAL CENTER ON ELDER ABUSE, www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/research/apsreport030703.pdf.

131. *See Wood, supra* note 125, at 51 (quoting Fred Bayles, *Guardians of the Elderly: An Ailing System Part I: Declared ‘Legally Dead’ by a Troubled System*, ASSOCIATED PRESS, (Sept. 19, 1987) available at <http://www.apnewsarchive.com/1987/Guardias-of-the-Elderly-An-Aging-System-Part-I-Declared-Legally-Dead-by-a-Troubled-System/id-1198f648605d9c1cc690035983c02f9f>).

132. TEX. PROB. CODE ANN. § 677(a)(2) (2007).

133. *See supra* Part II.

134. ALASKA STAT. § 13.12.803 (2010); ARIZ. REV. STAT. ANN. § 14-2803 (2012); ARK. CODE ANN. § 28-11-204 (West 2012); COLO. REV. STAT. ANN. § 15-11-803 (West 2011); CONN. GEN. STAT. ANN. § 45a-447 (West 2012); DEL. CODE ANN. tit. 12 § 2322, tit. 25 § 744 (2007); D.C. CODE § 19-320 (2012); GA. CODE ANN. § 53-1-5 (1996); HAW. REV. STAT. § 560:2-803 (2011); IDAHO CODE ANN. § 15-2-803 (2009); 755 ILL. COMP. STAT. ANN. 5/2-6 (2007); IND. CODE § 29-1-2-12.1 (2000); IOWA CODE ANN. § 633.525 (West 2003); KAN. STAT. ANN. § 59-513 (2005); KY. REV. STAT. ANN. § 381.280 (LexisNexis 1999); LA. CIV. CODE ANN. arts. 941, 945–946 (2000); MICH. COMP. LAWS ANN. § 700.2803 (West 2002); MISS. CODE ANN. §§ 91-1-25, 91-5-33 (West 1999); MONT. CODE ANN. § 72-2-813 (1995); NEV. REV. STAT. ANN. §§ 111.067, 134.007, 688A.420 (West 2004); N.M. STAT. ANN. § 45-2-803 (West 1995); N.C. GEN.

Unlike these states, Texas is unique and does not have a true Slayer Statute because the Texas Constitution states that “[n]o conviction shall work corruption of blood, or forfeiture of estate, and the estates of those who destroy their own lives shall descend or vest as in case of natural death.”¹³⁵ Texas establishes that Texas does not completely disinherit someone for bringing about the death of an individual.¹³⁶ Instead, Texas evokes a constructive trust “because of a manifestation of intention to create it.”¹³⁷ Texas “impose[s] [constructive trusts] by law because the person holding the title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property.”¹³⁸ This means that constructive trusts apply to someone who feloniously kills with the intentions of inheriting from the murdered individual.¹³⁹ In *Bounds v. Caudle*, the Texas Supreme Court held constructive trusts constitutional because “[t]he trust is a creature of equity and does not contravene constitutional and statutory prohibitions against forfeiture because title to the property does actually pass to the killer. The trust operates to transfer the equitable title to the trust beneficiaries.”¹⁴⁰ However, in Texas, to invoke this system of constructive trusts, the wrongdoer must be the actual cause of the individual’s death.¹⁴¹

For example, imagine if Cindy decided that she no longer loved her husband, Dan, and she concocted a plan to kill him. If Cindy succeeded and she was convicted of murder, although legal title to Dan’s estate would normally pass to Cindy, the estate in this scenario, would be held in trust for those who should really have the interest, such as their children or Dan’s parents.¹⁴²

Because Texas does not follow a traditional slayer statute model, unless the abuser caused the death of the individual, the abuser technically would not

STAT. §§ 31A-3–31A-15 (2003); N.D. CENT. CODE ANN. § 30.1-10-03 (West 2007); OHIO REV. CODE ANN. § 2105.19 (West 2005); OKLA. STAT. ANN. tit. 84, § 231 (West 2011); OR. REV. STAT. §§ 112.455, 112.465–112.555 (1999); 20 PA. CONS. STAT. ANN. §§ 8801–8815 (West 2005); R.I. GEN. LAWS ANN. §§ 33-1.1-1 to -1.1-15 (West 1995); S.D. CODIFIED LAWS § 29A-2-803 (1995); TENN. CODE ANN. § 31-1-106 (2001); UTAH CODE ANN. § 75-2-803 (West 2006); VT. STAT. ANN. tit. 14, § 551(6) (2002); VA. CODE ANN. §§ 55-401–55-414 (2003); WASH. REV. CODE §§ 11.84.010–11.84.900 (2006); W. VA. CODE § 42-4-2 (1997); WIS. STAT. § 854.14 (2002); WYO. STAT. ANN. § 2-14-101 (2005).

135. TEX. CONST. art. I, § 21.

136. See Henderson, *supra* note 14, at 2 (noting that Texas has not enacted a similar slayer statute and, instead, uses a system of constructive trusts).

137. *Omohundro v. Matthews*, 341 S.W.2d 401, 405 (Tex. 1960).

138. *Id.*; see also *Bounds v. Caudle*, 560 S.W.2d 925, 928 (Tex. 1977) (“the law will impose a constructive trust upon the property of a deceased which passed either by inheritance or by will if the beneficiary willfully and wrongfully caused the death of the deceased.”).

139. See TEX. PROB. CODE ANN. § 41 (West 2007); see also TEX. INS. CODE ANN. art. 21.23 (repealed 2009).

140. *Bounds* 560 S.W.2d at 928.

141. See TEX. CONST. art. I, § 21.

142. “When the legal title to property has been obtained through means that render it unconscionable for the holder of legal title to retain the beneficial interest, equity imposes a constructive trust on the property in favor of the one who is equitably entitled to the same.” *Medford v. Medford*, 68 S.W.3d 242, 249 (Tex. App.—Fort Worth 2002, no pet.).

fall under the system of constructive trusts.¹⁴³ In accordance with the Texas Constitution, abuse statutes need to be valid under the constructive trust system (as discussed below) to prevent abusers from inheriting from intestate abuse victims.¹⁴⁴

IV. OTHER STATES' RESPONSES TO ABUSE

To better evaluate Texas's elder abuse and child abuse statutes, it is helpful to look at how California and New York protect their citizens because, Texas, like California and New York, has a high population.¹⁴⁵

A. California

California, much like to Texas, also experienced several incidents of abusive heirs.¹⁴⁶ The California legislature responded to this abuse by stating that:

The Legislature finds and declares that crimes against elders and dependent adults are deserving of special consideration and protection . . . because elders and dependent adults may be confused, on various medications, mentally or physically impaired, or incompetent, and therefore less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf.¹⁴⁷

In response to this issue, California also took substantial steps by adding an elder abuse provision into the California Probate Code requiring that a person “feloniously and intentionally [kill] the decedent” to be precluded from inheritance.¹⁴⁸ California was the first state to recognize the need to prevent elder abusers from inheriting from their victims.¹⁴⁹ This section of the

143. See *infra* Part V.

144. See *infra* Part V.

145. At the time of the 2010 census, California had a population of 37,253,956, Texas had a population of 25,145,561, and New York had a population of 19,378,102. See U.S. Dep't of Commerce, U.S. Census Bureau, *2010 Population Finder*, CENSUS.GOV, available at <http://www.census.gov/popfinder/?f1=06:48:36> (last updated Mar. 13, 2012).

146. See Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 537–39 & n.2–12 (2001) (discussing several severe incidents of elder abuse in California).

147. Meirson, *supra* note 27, at 436 (citing CAL. PENAL CODE § 368(a) (West 2008)).

148. CAL. PROB. CODE § 250 (West 2002). See generally *People v. McKelvey III*, 230 Cal. App. 3d 399 (1991) (stating that an elderly mother with multiple sclerosis was found covered in excrement and insects, with large bed sores, while in the care of her children); *People v. Heitzman*, 886 P.2d 1229 (Cal. 1994) (describing how a son withheld food from his sixty-seven year old, partially paralyzed father and allowed him to simply rot away upstairs in his home in order to prevent the house from smelling of his father's fecal matter); *People v. Balestra*, 76 Cal. App. 4th 57 (1999) (explaining how a daughter beat her sixty-nine year old mother after an argument).

149. Thomas H. Shephard, *It's the 21st Century. . . Time for Probate Codes to Address Family Violence: A Proposal that Deals with the Realities of the Problem*, 20 ST. LOUIS U. PUB. L. REV. 449, 450 (2001)

California Probate Code asserts that it protects against abuse, but it specifically requires the actual death of the individual at the heir's hands.¹⁵⁰

However, the California Probate Code also deems a person to have predeceased an intestate individual if the "person is liable for physical abuse, neglect, or fiduciary abuse of the decedent, who was an elder or dependent adult."¹⁵¹ The problem with this statute, even as amended, is that it requires the forfeit of "property, damages, or costs that are awarded to the decedent's estate" because of the conviction or liability of elder abuse.¹⁵² An abuser should not only have to forfeit some inheritance rights, but to properly protect the elderly and deter these events from happening—the abuser should forfeit all inheritance rights.¹⁵³ Therefore, California's attempt at curing elder abuse falls short of actual deterrence or effective punishment.¹⁵⁴

California noticed the need for protecting elders from abuse but has failed to enact any legislation regarding child abuse and the probate system.¹⁵⁵ Like most states, California recognizes child abuse as a penal code matter but does not protect children in the state's probate code.¹⁵⁶ As discussed above, because abuse often occurs between family members and intestate distribution occurs between family members, the California courts have taken several admirable steps towards protecting its citizens, but they have forgotten some of the youngest and most vulnerable citizens, children.¹⁵⁷

("Specifically, only one state has adopted a probate code section that disqualifies an heir from his or her right to inherit through intestate succession, elective share, homestead allowance, or any other statutory allowances for a pattern of physical violence directed towards the decedent").

150. See PROB. § 250. Title 7 under the General Provisions of the California Probate Code is titled "Effect of Homicide or Abuse of an Elder or Dependent Adult" but requiring the actual killing of the individual does not incorporate all abusive conduct that should prevent intestate receipt of property. *Id.*

151. *Id.*; see also CAL. PROB. CODE § 259(a)(1) (West 2002). At the time of this writing, the California legislature was revising the statute to read "financial" instead of "fiduciary." 2011 Cal. Legis. Serv. Ch. 308 (West).

152. CAL. PROB. CODE § 259(c) (West 2002).

153. See Korpus, *supra* note 146, at 576 (stating that "[i]n the event of an insolvent abuser that could not pay the judgment, section 259 would provide no deterrence. However, even for someone that could afford to pay the judgment, the size of the judgment might be insignificant or non-existent depending on whether the elder was able to retain an attorney, to survive litigation, or prove the case").

154. *Id.*; see also Meirson, *supra* note 27, at 441 (suggesting an objective element to CAL. PENAL CODE § 368 to combat the hardships of proving the elements of elder abuse).

155. See CAL. PROB. CODE § 250 (West 2002).

156. See CAL. PENAL CODE ANN. § 288(a) (West 2012) ("Except as provided in subdivision (i), any person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.").

157. See *People v. Jerry Z.*, 133 Cal. Rptr. 3d 696 (Cal. App. 2011) (describing a father who sexually molested his two daughters who, at the time, were under the age of 14).

B. New York

Similar to Texas, New York, another largely populated state, enacted a statute that purports to protect against improper intestate inheritance because of child abuse.¹⁵⁸ The statute prevents a parent from inheriting from an intestate child “while such child is under the age of twenty-one years [if the parent] . . . has been the subject of a proceeding pursuant to section three hundred eighty-four-b of the social services law [also known as a child abuse proceeding].”¹⁵⁹ The statute requires the child abuse proceeding to either terminate the parental rights or suspend the parental rights until the parents meet certain criteria.¹⁶⁰

Unlike the Texas statute, the New York statute does not name the specific circumstances or offenses that will result in termination or suspension of parental rights.¹⁶¹ The New York statute appears similar to the Texas statute in the sense that they exhibit the same problems, as discussed above.¹⁶²

New York may have taken some steps to address the child abuse problem in the probate code, but in regards to elder abuse, New York only recognizes the penal code consequences to elder abuse.¹⁶³ The New York Penal Code, however, only protects against “physical injury,” disregarding all other types of elder abuse.¹⁶⁴ New York does provide an abuse education and outreach program to the elderly, but as discussed above, the elderly are less likely to utilize these programs when the abuser is a family member.¹⁶⁵

Although it appears that states have taken notice of the horrendous issue of abusive heirs, no state has formulated a comprehensive statute preventing an abusive heir from inheriting in the various situations that abuse occurs.¹⁶⁶

V. TEXAS SHOULD APPLY THE CONSTRUCTIVE TRUST SYSTEM TO ABUSE STATUTES

As discussed above, Texas utilizes the constructive trust to disinherit an heir because the wrongdoer does not morally deserve the proceeds of the deceased.¹⁶⁷ The Texas Supreme Court could interpret section 41(e) as constitutional only if it decides to broaden the interpretation of the constructive

158. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 2011).

159. *Id.* § 4-1.4(a)(2).

160. *Id.* § 4-1.4(a)(2)(A)–(B).

161. *Id.* § 4-1.4.

162. *See supra* Part II.A.

163. N.Y. PENAL LAW § 260.32–.34 (McKinney 2012).

164. *Id.* (stating that in order to be criminally liable the perpetrator must “1. With intent to cause physical injury to such person, he or she causes such injury to such person; or 2. He or she recklessly causes physical injury to such person; or 3. With criminal negligence, he or she causes physical injury to such person by means of a deadly weapon or a dangerous instrument; or [causes sexual contact]”).

165. *See* N.Y. ELDER LAW § 219 (McKinney 2007); *see also supra* Part II.

166. *See supra* Part IV.

167. *See supra* Part II.C.

trust doctrine.¹⁶⁸ The Texas Probate Code protections in section 41(e) cannot function properly because under the Texas Constitution complete dissolution of inheritance rights cannot occur.¹⁶⁹ Therefore, for Texas to institute a statute that protects abusive heirs from inheriting from their evil actions, Texas would need to implement a constructive trust in these abuse situations.¹⁷⁰

Because Texas has never applied section 41(e), the Texas Supreme Court has not stated whether the constructive trust doctrine applies to this abuse situation.¹⁷¹ The legislature should take the steps to pass new legislation in revised statutes, which instead of predeceasing the intestate abuse victim, the government holds the abuser's inheritance in constructive trust for the abuser to allow other heirs to inherit.¹⁷² Conversely, the state could try a test case under section 41(e) and allow the courts to broaden the interpretation of the constructive trust doctrine.¹⁷³ This could take many years as the appellate process takes time.¹⁷⁴ If a court were truly cognizant of the need for this section of the probate code, it may certify a question to the Texas Supreme Court asking for guidance.¹⁷⁵ Either way, the Texas government should not allow heir abusers to continue to benefit from their wrongdoing.¹⁷⁶

For example, James abuses his ninety-year-old father, Bob, out of the frustration of taking care of an elderly man with several medical problems. When Bob passes away, under the Texas constructive trust system, James will inherit Bob's fortune in trust for the more deserving beneficiaries. Therefore, James's children or Bob's other relatives will technically have the rights to the money.¹⁷⁷

Whether the courts end up interpreting the constructive trust doctrine to apply to abuse situations or not, acknowledging that section 41(e) is ineffective is the first step in enabling this type of legislation.

VI. THE SOLUTION TO A SUCCESSFUL ABUSE STATUTE

Several commentators make suggestions about the proper legislation needed for abuse victims by either addressing child or elder abuse.¹⁷⁸ One commentator proposed a revision to Section 41(e) of the Texas Probate Code and Texas Constitution to solve the problems posed in Part III, but those

168. Op. Tex. Att'y Gen. No. GA-0632, at 6 (2008).

169. *See id.* at 2.

170. *See id.*

171. *See id.* at 1.

172. *See id.* at 4–5.

173. *See id.* at 7.

174. *See id.*; *see also* APPELLATE ADVOCATES, www.appad.org/FAQs/Howlong.aspx.

175. *See generally id.* at 6 (explaining that the supreme court is the only entity that can expand the doctrine).

176. *See supra* Part III.

177. *See* TEX. PROB. CODE ANN. § 38 (West 2010).

178. *See* Henderson, *supra* note 14; *see also* Barber, *supra* note 10.

revisions do not address the problems of elder abuse.¹⁷⁹ The revisions do not account for the other relationships affected by the abuse, and the revisions maintain the heading “Parent-Child Relationship” while attempting to incorporate other relatives into the statute.¹⁸⁰ This commentator’s proposed revised statute addresses the parent-child relationship but does not address disinheriting a child that abuses an elderly parent.¹⁸¹ Most relatives expect to inherit from an elderly individual over a child because they have lived much longer and had the ability to acquire more property to leave behind.¹⁸² Therefore, the commentator’s revisions fail to take all of the steps necessary to prevent Texas from rewarding abusers.

Another commentator recently proposed a solution to the elder abuse problem striving to “focu[s] on the abusers, empowe[r] the victims, enforc[e] existing laws, and improv[e] educational efforts.”¹⁸³ This commentator suggests likening elder abuse to domestic abuse statutes rather than to child abuse statutes because they are more similar; with the statutes sharing the same “type of victim-abuser relationship” because of the power an abuser has over an elderly individual.¹⁸⁴ This commentator argues that elders are less likely to report abuse because of family pressures—similar to the psychological control a parent has over a minor child.¹⁸⁵ Therefore, the solid distinction between elder abuse and child abuse is not as clear-cut as commentators may claim.¹⁸⁶ Some commentators also recommend that Congress create federal statutes that address elder abuse to serve as a guide for states; the states should instead take their

179. Henderson proposed that the language in section 41(e) change to the following:

Parent-Child Relationship:

(1) A probate court may declare that the parent of a child under 18 years of age may not inherit from or through the child under the laws of descent and distribution if the court finds by clear and convincing evidence that the parent has: (A) voluntarily abandoned and failed to support the child in accordance with the parent’s obligation or ability for at least three years before the date of the child’s death, and did not resume support for the child before that date; or (B) voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at the time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before birth of the child and remained apart from and failed to support the child since birth.

(2) A probate court may also declare an individual who qualifies to inherit from a child under 18 years of age under the laws of descent and distribution may not inherit from or through the child under the laws of descent and distribution if the court finds by clear and convincing evidence that the individual has been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of the child under the following sections of the Penal Code . . . :[all of the penal code sections referred to above].

Henderson, *supra* note 14, at 15–16.

180. *See id.*

181. *See id.*

182. *See* Wood, *supra* note 125, at 48.

183. Barber, *supra* note 10, at 107.

184. *Id.* at 124.

185. *Id.* at 124–25.

186. *See id.* at 124; *see also* Henderson, *supra* note 14, at 2–3.

own initiative to protect this vulnerable section of the population without waiting for federal guidance.¹⁸⁷

The only solution to guarantee abuse prevention is for the legislature to incorporate an entirely exclusive statute into the Texas Probate Code that disinherits any family member by clear and convincing evidence of abuse by creating a constructive trust in accordance with the Texas Constitution. To do this, a complete alteration of the Texas Probate Code layout is necessary. The Parent-Child Relationship in Section 41 of the Texas Probate Code should read:

- (e) Parental Misconduct.** A probate court may declare that *the family member* of a child under 18 years of age may *be subject to a constructive trust* from or through the child under the laws of descent and distribution if the court finds by clear and convincing evidence that the *family member* has:
- (1) voluntarily abandoned and failed to support the child in accordance with a parent's obligation or ability for at least three years before the date of the child's death, and did not resume support for the child before that date;
 - (2) voluntarily and with knowledge of the pregnancy, abandoned the mother of the child beginning at a time during her pregnancy with the child and continuing through the birth, failed to provide adequate support or medical care for the mother during the period of abandonment before the birth of the child, and remained apart from and failed to support the child since birth; or
 - (3) been convicted or has been placed on community supervision, including deferred adjudication community supervision, for being criminally responsible for the death or serious injury of a child under the following sections of the Penal Code or adjudicated under Title 3, Family Code, for conduct that caused the death or serious injury of a child and that would constitute a violation of one of the following sections of the Penal Code:
 - (A) Section 19.02 (murder); (B) Section 19.03 (capital murder); (C) Section 19.04 (manslaughter); (D) Section 21.11 (indecency with a child); (E) Section 22.01 (assault); (F) Section 22.011 (sexual assault); (G) Section 22.02 (aggravated assault); (H) Section 22.021 (aggravated sexual assault); (I) Section 22.04 (injury to a child, elderly individual, or disabled individual); (J) Section 22.041 (abandoning or endangering child); (K) Section 25.02 (prohibited sexual conduct); (L) Section 43.25 (sexual performance by a child); or (M) Section 43.26 (possession or promotion of child pornography).
- (f) After age 18.** *If the child suffered abuse under (e)(3) before attaining 18 years of age but dies after attaining 18 years of age, a court may decide to institute a constructive trust against a relative upon clear and convincing evidence of such abuse.*
- (g) Elder Abuse.** *A probate court may declare that the heir of an elderly individual who dies intestate must be subject to a constructive trust upon the determination that they are found by clear and convincing evidence to have violated the duties to the elderly as stated in HUM. RES. CODE ANN. § 102.003 or TEX. PENAL CODE § 22.04.*

187. Barber, *supra* note 10, at 107.

(h) Treatment of Certain Relationships. On a determination that the *family member* may not inherit from or through the child under Subsection (e) of this section, the *family member* shall be *subject to a constructive trust to prevent unjust enrichment*.¹⁸⁸

VII. CONCLUSION

Every individual starts life as a child who depends upon their family members for essentials such as mealtimes and getting dressed in the morning.¹⁸⁹ Alternately, every individual may live late into life and may become dependent upon their children or family members to assist them with daily living. As seen above, both situations leave the individual vulnerable to abuse.¹⁹⁰

The Texas legislature must address the serious problem of intrafamilial abuse in the state.¹⁹¹ Since children and the elderly comprise a very significant portion of the United States population, it only makes sense that abuse affects both of those groups in an astoundingly high rate.¹⁹² Further, family members are the most common offenders of the abuse that children and the elderly experience, those whom children and the elderly depend on for the majority of their daily activities.¹⁹³ This abuse can occur physically, emotionally, sexually, or financially.¹⁹⁴ Abuse victims are more likely to become abusers; a cycle, which needs to be broken.¹⁹⁵ Although fixing this one problem will not end abuse entirely, it does take another step towards becoming more conscious of the effects of abuse on society.¹⁹⁶

While most states, including Texas, have addressed this problem by incorporation into the state's penal code, the effects of these acts go deeper than the criminal justice system.¹⁹⁷ Texas needs a comprehensive statute in the Texas Probate Code preventing relatives from taking intestate from those they abuse, whether young or old.¹⁹⁸

Abuse does not only occur from parent onto child (child abuse) or child onto parent (elder abuse), as discussed above, any family member can abuse.¹⁹⁹ For example, as discussed earlier in the Tom and Mary hypothetical, an uncle can inherit from his niece by default when both parents of the niece are

188. See generally TEX. PROB. CODE ANN. § 41(e) (West 2007). This author has altered and made additions to the language of the statute with the intention of better protecting abuse victims. The proposed alterations and additions are in bold and italics.

189. See *supra* Part II.

190. See *supra* Part II.

191. See *supra* Part II.

192. See *supra* Part II.

193. See *supra* Part II.

194. See *supra* Part II.

195. See *supra* Part II.

196. See *supra* Part II.

197. See TEX. PROB. CODE ANN. § 41(e) (West 2007).

198. See *supra* Part VI.

199. See *supra* Part II.

deceased.²⁰⁰ Further, when an individual dies soon after turning eighteen but before executing a will, the child abuse statute does not protect this person's assets.²⁰¹ Then, an abuser may benefit from the heinous acts they committed against the individual.²⁰² In Texas, because of the ineffectiveness of Section 41(e) of the Probate Code, this injustice occurs.²⁰³ Sisters can abuse brothers, grandparents can abuse grandchildren, aunts can abuse nephews, cousins can abuse cousins, and the Texas Probate Code can do nothing.²⁰⁴

Although the Texas legal system minimally protects abuse victims, New York and California are examples of states where legislation to protect such still does not exist in probate codes.²⁰⁵ Although California was first to consider abuse victims in the probate code, it too is lacking.²⁰⁶ Alternately, New York and Texas have similar statutes with similar problems.²⁰⁷ In recognizing this, Texas should take the opportunity to pave the way in this type of probate legislation.

The Texas system of constructive trusts as well as the Texas Constitution create another hurdle to protecting abuse victims.²⁰⁸ To completely protect these victims, Texas needs to take the proper steps to declare constructive trusts applicable in this type of abusive situation rather than just in the "slayer statutes" type of crime.²⁰⁹ Through proper legislation, Texas can start this change, or more quickly, the Texas Supreme Court can fix this problem through the interpretation power.²¹⁰ Section 41(e) of the Texas Probate Code needs to actually protect the class of citizens it purports to protect, abuse victims.²¹¹

The recommended altered statute above allows section 41(e) to function the way the legislature intended it to by adding other relatives to the language and recognizing elder abuse.²¹² Texas can prevent intra-familial violence against such vulnerable portions of our society and become a model for change across the United States.²¹³

200. *See supra* Part III.A.

201. *See supra* Part III.A.

202. *See supra* Part III.A.

203. *See supra* Part III.

204. *See supra* Parts II–III.

205. *See supra* Part IV.

206. *See supra* Part IV.

207. *See supra* Part IV.

208. *See supra* Part V; Part III.C.

209. *See supra* Part V.

210. *See supra* Part V.

211. *See supra* Part III.

212. *See supra* Part V.

213. *See supra* Part VI.