

# FOR EVERY ACTION THERE IS AN EQUAL AND OPPOSITE REACTION: LINKING BEHAVIOR TO INHERITANCE

## Comment

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I. INTRODUCTION .....	25
II. BACKGROUND.....	28
A. <i>Changes in Society and Inheritance Laws</i> .....	28
B. <i>A Look to Other Areas: Criminal Law Consequences</i> .....	30
III. INHERITANCE LAW CONSEQUENCES .....	31
A. <i>Inheritance Statutes Dealing with Abusive or Neglectful Behavior</i> .....	31
1. <i>Disabled Individual or Elder Abuse Statutes</i> .....	31
2. <i>“Bad Parent” Statutes</i> .....	32
3. <i>Post-mortem Voidable Marriage Statutes</i> .....	32
4. <i>Slayer Statutes</i> .....	33
5. <i>Spousal Abuse or Neglect Statutes</i> .....	33
B. <i>Recent Cases Dealing with Abusive or Neglectful Behavior</i> .....	34
IV. TEXAS .....	37
A. <i>Recently Enacted Probate Statutes</i> .....	37
B. <i>A Look to Other Areas: Family and Criminal Law</i> .....	38
C. <i>Judicial Responses</i> .....	41
V. POTENTIAL NEW STATUTES AND CHANGES TO CURRENT STATUTES .....	45
A. <i>New Statutory Bars to Inheritance</i> .....	45
B. <i>Changes to Make Current Statutes More Effective</i> .....	46
1. <i>Bad Parent Statute</i> .....	46
2. <i>Post-Mortem Voidable Marriage Statute</i> .....	50
VI. CONCLUSION .....	51

## I. INTRODUCTION

Actions have consequences. This lesson we learned early in our lives. If we mistreated or harmed someone else, the consequences were swift and tough. If we bit another kid on the playground, we were put in timeout. If we told our mom to shut-up, we were grounded. We were not rewarded for bad behavior nor did our parents pretend like it did not happen. As adults this continues to be true. If you break the law, you are punished. If you get caught

speeding, you get a ticket. You've seen the commercial say, if you drink and drive, you go to jail. What about if you abuse or neglect someone?

By any reasonable measurement, the treatment of Melinda Williams' children was deplorable. She had three sons: T.H., R.W., and F.W.<sup>1</sup> In 2003 police received a call that two boys were found locked in a basement.<sup>2</sup> Police found T.H. and R.W. in the basement of Sherry Murphy's, Melinda's sister, apartment with only a bed.<sup>3</sup> There was no sink, toilet, or food.<sup>4</sup> The boys were starving and dressed in clothes soaked in urine and feces.<sup>5</sup> They told caseworkers that Murphy had abused them repeatedly, such as burning them with cigarettes.<sup>6</sup> They had bruises and burn marks all over their bodies, they were severely weak and hungry, and they had marks around their ankles, wrists, and necks indicating they were bound with some sort of restraint.<sup>7</sup> No one knew where F.W. was, and R.W. said that he had not seen F.W. in a long time.<sup>8</sup> Police officers returned to the basement and found a decaying body fifteen feet from where the two boys were found.<sup>9</sup> Melinda said she left them with her sister while she was serving a jail sentence.<sup>10</sup> After returning from her sentence, she briefly lived with her sons and Murphy but left after a dispute with Murphy.<sup>11</sup> When the authorities asked Melinda about the boys she expressed no remorse, sadness, or anger towards Murphy.<sup>12</sup> New Jersey Division of Youth and Family Services was accused of being negligent in protecting the children and settled the case for \$7.5 million.<sup>13</sup> Melinda demanded her share of the settlement, which would have been \$1 million.<sup>14</sup> Should she be allowed to inherit from her son even though she abused, neglected, and abandoned him?

Irving Berk, a successful businessman in his 90s, suffered from memory loss and confusion.<sup>15</sup> Berk's physical condition deteriorated as he aged.<sup>16</sup> Therefore, his family hired a caregiver named Judy Wang, a woman in her 40s, to live with him and help him with his daily tasks.<sup>17</sup> Berk and his family trusted and depended on Wang.<sup>18</sup> His condition continued to deteriorate and

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1. *N.J. Div. of Youth & Family Servs. v. M.W.*, 942 A.2d 1, 3 (N.J. Super. Ct. App. Div. 2007).

2. *See id.* at 4.

3. *Id.*

4. *Id.*

5. *Id.* at 5.

6. *Id.*

7. *See id.*

8. *See id.*

9. *See id.* at 6.

10. *Id.* at 5.

11. *Id.*

12. *Id.* at 7.

13. *Id.* at 11.

14. *See id.*

15. *In re Berk*, 71 A.D.3d 883, 884 (N.Y. App. Div. 2010).

16. *Id.*

17. *Id.*

18. *Id.*

in April 2003, he was diagnosed with dementia.<sup>19</sup> The physicians who examined him said he did not have the mental capacity to enter into a contract or manage his social affairs.<sup>20</sup> However, in June 2005 Mr. Berk and his caregiver were married.<sup>21</sup> Wang never told anyone about the marriage, including Berk's sons, or wore a wedding band.<sup>22</sup> When Mr. Berk died in June 2006, Wang petitioned the court for her elective shares of Berk's estate.<sup>23</sup> Should his caregiver be allowed to inherit from him although she took advantage of his vulnerability?

In both family and criminal law there are consequences to abusive and neglectful actions.<sup>24</sup> However, inheritance laws have historically been based on mechanical rules that did not take into account the conduct of the heir toward the decedent.<sup>25</sup> In recent years, states have begun to enact more legislation to deal with these types of situations; especially elder abuse.<sup>26</sup> As the population ages, elderly abuse and neglect problems are expected to increase.<sup>27</sup> In conjunction with this expected increase, inheritance statutes must be modernized to respond to social changes.<sup>28</sup>

In this article I will lay out the current state of inheritance laws in dealing with abusive and neglectful individuals and I will propose solutions for more effective ways Texas can deal with this behavior.<sup>29</sup> First, I will discuss how inheritance laws have historically been structured in the United States.<sup>30</sup> Then I will look at how the America's landscaper is changing with an increase in more non-traditional families and the trend among states to enact more legislation to deal with abuse and neglect of vulnerable members of society.<sup>31</sup> I will also discuss how another area of the law is responding to abuse and neglect so that I can compare how this area of law is dealing with the issue as opposed to probate laws.<sup>32</sup>

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19. *Id.*

20. *Id.*

21. *See id.*

22. *Id.* at 884–85.

23. *Id.* at 885.

24. *See, e.g.*, TEX. FAM. CODE ANN. § 161.001 (West 2011) (stating that a court may involuntarily terminate parental rights if the court finds that the parent has engaged in conduct that endangers the physical or mental well-being of the child); *see also* TEX. PENAL CODE ANN. § 32.53 (West 2011) (stating that illegal or improper use of a child, elderly individual, or disabled individual or their resources for monetary or personal gain is a third-degree felony).

25. *See* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 79 (1998).

26. *See infra* Part III.A.

27. Elizabeth O'Brien, *Power of Attorney: It's Easily Abused*, MARKETWATCH (Mar. 19, 2013), <http://www.marketwatch.com/story/power-of-attorney-its-easily-abused-2013-03-19>.

28. *See infra* Part II.A.

29. *See infra* Part III.A.; *see also* Part V.

30. *See infra* Part II.A.

31. *See infra* Part II.A.

32. *See infra* Part II.B.

Second, I will look at how different states are dealing with abuse and neglect through legislation and case law.<sup>33</sup> I will explore several different types of inheritance statutes enacted throughout the nation.<sup>34</sup> Then I will look at recent court cases to see how judges are dealing with abuse and neglect issues.<sup>35</sup>

Third, I will focus on how Texas is responding to this issue.<sup>36</sup> I will discuss two recently enacted probate statutes: the bad parent statute and the voidable marriage statute.<sup>37</sup> Then I will take a look at how other areas of the law deal with abuse and neglect.<sup>38</sup> I will also examine the principles espoused in several court cases and how these same principles support the adoption of other probate laws that take behavior into account.<sup>39</sup> Next, I will discuss some new statutes that Texas could adopt and the deficiencies in the current statutes.<sup>40</sup> I will argue that the current statutes in Texas are not adequate to deal with this issue.<sup>41</sup> Although the statutes are a step in the right direction, more needs to be done to make sure that people who financially, physically, or emotionally abuse and neglect someone cannot benefit from their wrongdoing by inheriting from the victim.<sup>42</sup> I will advocate solutions for better ways Texas can more effectively deal with these issues.<sup>43</sup>

## II. BACKGROUND

### A. *Changes in Society and Inheritance Laws*

For the most part, descent and distribution statutes in the United States have followed mechanical rules based on the relationship of the heir to the decedent.<sup>44</sup> Generally, these rules gave the decedent's property to the family members in the closest relation to the decedent based on principles of consanguinity.<sup>45</sup> Conduct did not play a major role in determining an heir's ability to inherit.<sup>46</sup> If the heir stood in a specific relationship to the decedent, then they were entitled to inherit from their estate regardless of how they

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33. *See infra* Part III.

34. *See infra* Part III.A.

35. *See infra* Part III.B.

36. *See infra* Part IV.

37. *See infra* Part IV.A.

38. *See infra* Part IV.B.

39. *See infra* Part IV.C.

40. *See infra* Part V.

41. *See infra* Part V.A.

42. *See infra* Part III.

43. *See infra* Part IV.D.

44. *See Foster, supra* note 25, at 79.

45. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 *LAW & INEQ.* 1, 2 (2000).

46. *See* LAWRENCE M. FREIDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* 32 (2009).

treated the decedent during the heirs' lifetime.<sup>47</sup> Courts did not concern themselves with whether the heir deserved to inherit, or whether the person actually had an ongoing relationship with the decedent.<sup>48</sup> There were two main exceptions in which conduct would play a role in inheritance: adultery and slayer statutes.<sup>49</sup>

Changes in American families have helped lead to a reconsideration of inheritance laws.<sup>50</sup> Historically, the use of mechanical rules fit those times because most families consisted of the same nuclear unit and divorce was a rare occurrence.<sup>51</sup> However, times have changed and the reality today is that the nuclear family is not the norm.<sup>52</sup> All you have to do is turn on the television to see that shows like *Modern Family*, *Two and a Half Men*, and *Trophy Wife* have replaced *Leave it to Beaver* and *Ozzie and Harriet*.<sup>53</sup> The structure of families has shifted “from what we might call the *bloodline family* to the *family of affection and dependence*.”<sup>54</sup> Many families today do not resemble what a typical family would have looked like thirty years ago.<sup>55</sup> Traditional families have given way to more blended families, gay marriages, adopted children, couples who live together without getting married, people who marry at older ages, and so on.<sup>56</sup> Additionally, “the number of children reported as abused or neglected in the United States grew by thirty-three percent during the 1990’s and it is estimated that over 1,071,000 children were abused in 1999” and the number of children abandoned is more prevalent today. As stated earlier, elder abuse is a growing problem and is expected to get worse as the population ages.<sup>57</sup> As such, it is going to be harder and harder to rely on mechanical based inheritance statutes without taking into account the changes in society.<sup>58</sup> In light of these changes, many states have moved further toward behavior-based models of inheritance.<sup>59</sup> The overall trend across the United States is that more states are enacting

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47. Foster, *supra* note 25, at 79.

48. *See id.* at 35; Gary, *supra* note 45, at 3.

49. *See* Anne-Marie Rhodes, *Consequences of Heirs Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 978–82 (2007).

50. Gary, *supra* note 45, at 12.

51. *See id.* at 27–31.

52. *See id.*

53. *Modern Family* (ABC television broadcast Sept. 2009 – Sept. 2014); *Two and a Half Men* (CBS television broadcast Sept. 2003 – Feb. 2015); *Trophy Wife* (ABC television broadcast Sept. 2013 – May 2014); *Leave It to Beaver* (CBS & ABC television broadcast Oct. 1957 – June 1963); *The Adventures of Ozzie and Harriet* (ABC television broadcast 1952 – Sept. 1966).

54. FREIDMAN, *supra* note 46, at 11.

55. *See id.*

56. *See id.* at 12.

57. *See Swindling the Elderly: A Real and Growing Problem*, THINKADVISOR (June 13, 2012), [www.thinkadvisor.com/2012/06/13/swindling-the-elderly-a-real-and-growing-problem?page\\_all=1](http://www.thinkadvisor.com/2012/06/13/swindling-the-elderly-a-real-and-growing-problem?page_all=1).

58. *See id.*

59. *See* Anne-Marie Rhodes, *On Inheritance and Disinheritance*, 43 REAL PROP. TR. & EST. L. J. 433, 445 (2008).

statutes to deal with abusive and neglectful individuals.<sup>60</sup> There is no doubt that some discretion carries with it risks and an increase in litigation; however, to ensure that inheritance statutes are going to be effective and responsive to a changing society “some degree of discretion is necessary.”<sup>61</sup>

### B. A Look to Other Areas: Criminal Law Consequences

The societal goal of protecting vulnerable members is seen in many other areas of the law.<sup>62</sup> For example, several states have recently enacted or enhanced their criminal laws to deal with the problem of abuse and neglect.<sup>63</sup> Alabama recently enacted a statute called Protecting Alabama’s Elders Act that provides new avenues for law enforcement officers and prosecutors to prosecute elder abuse, neglect, and financial exploitation.<sup>64</sup> In North Dakota, the legislature enacted a mandatory reporting of abuse or neglect of vulnerable adults and a penalty for those who fail to report.<sup>65</sup> The legislature also stiffened the penalties relating to the exploitation of a disabled or vulnerable adult.<sup>66</sup> Now it is a Class A felony if the value of the property stolen exceeds \$50,000, instead of \$100,000, and the legislature added a Class A misdemeanor for stolen property under \$1,000.<sup>67</sup> In Illinois, the legislature also stiffened penalties for punishment of abuse or exploitation of an elderly person or person with disability by lowering the dollar amount for a Class 1 felony.<sup>68</sup> In 2002, Maryland adopted a statute that states that “a person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or [has reason to] know is a vulnerable adult with intent to deprive” that person of their property.<sup>69</sup> The penalty prescribed is based on the amount of the property with a maximum penalty of twenty-five years imprisonment or a fine of \$25,000.<sup>70</sup>

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60. See, e.g., Kate Tormey, *Crackdown on Elder Abuse*, CSG MIDWEST (Apr. 2012), <http://www.csgmidwest.org/policyresearch/0412eldabuse.aspx>.

61. Gary, *supra* note 45, at 70.

62. See, e.g., Kellie Singleton, *New Law Aims at Strengthening Elder Abuse Cases*, FRANKLIN COUNTY TIMES (May 29, 2013), <http://www.franklincountytimes.com/2013/05/29/new-law-aims-at-strengthening-elder-abuse-cases/>.

63. See *id.*

64. ALA. CODE §§ 13A-6-190–201 (2014).

65. N.D. CENT. CODE ANN. § 50-25.2-10 (West 2013); N.D. CENT. CODE ANN. § 50-25.2-03 (West 2013).

66. N.D. CENT. CODE ANN. § 12.1-31-07.1 (West 2013).

67. *Id.*

68. 720 ILL. COMP. STAT. ANN. 5/17-56 (West 2013).

69. MD. CODE ANN., CRIM. LAW § 8-801 (West 2013).

70. *Id.*

### III. Inheritance Law Consequences

#### A. *Inheritance Statutes Dealing with Abusive or Neglectful Behavior*

One of the first statutes to disinherit an heir based on their behavior toward the decedent was enacted in 1927 by North Carolina.<sup>71</sup> This statute was a legislative response to a case where a father had abandoned his four-year-old daughter, but was still allowed to inherit from her.<sup>72</sup> Subsequently, the legislature expressly made parental behavior a factor in determining inheritance from a child.<sup>73</sup> Since then, and especially recently, there have been an increasing number of states enacting this type of legislation.<sup>74</sup> Examining the various state statutes will provide guidance to how Texas stands in relation to other states in addressing inheritance based on behavior and how our laws could be changed.

##### 1. *Disabled Individual or Elder Abuse Statutes*

A couple of states have enacted statutes that specifically prohibit individuals who are found to have abused or neglected an elder or disabled individual to inherit from the victim.<sup>75</sup> An Illinois statute explains that a person “convicted of financial exploitation, abuse, or neglect of an elderly” or disabled individual will not receive an inheritance from them.<sup>76</sup> Instead, the property will pass as if the person predeceased the testator.<sup>77</sup> Financial exploitation, abuse, and neglect are defined by referring to specific offenses in the Criminal Code.<sup>78</sup> California enacted a statute that restricts a person from receiving certain property from the victim’s estate if: (1) they are proven, by clear and convincing evidence, to have physically abused, neglected, or financially abused the decedent; (2) they acted in bad faith; (3) they were reckless, fraudulent, oppressive, or malicious in these acts; and (4) the decedent was unable to manage their affairs.<sup>79</sup> Maryland enacted a statute in 2010 that explains that a person who is convicted of unlawfully obtaining property from a vulnerable adult or senior is disqualified from

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71. See Rhodes, *supra* note 59, at 442–43.

72. See *id.*; Avery v. Brantley, 131 S.E. 721 (N.C. 1926).

73. See Rhodes, *supra* note 49, at 443; N.C. GEN. STAT. ANN. § 31A-2 (West 2014).

74. Currently I have found at least sixteen statutes dealing with abusive and neglectful parents’ right to inherit; four states that have amended their slayer statutes to include abuse, neglect, or both along with murder; six states that have enacted statutes that allow disinheritance of individuals that abuse an elderly or vulnerable adult; and four states that allow marriages to be voided after death. These are an illustration that states are starting to take into account the actions of the beneficiary in inheritance laws. See, e.g., N.C. GEN. STAT. ANN. § 31A-2 (West 2014).

75. See, e.g., 755 ILL. COMP. STAT. ANN. § 5/2-6.2 (West 2013).

76. See *id.*

77. *Id.*

78. *Id.*

79. CAL. PROB. CODE § 259 (West 2013).

inheriting from them.<sup>80</sup> That person's share of the estate passes as if they had predeceased the decedent.<sup>81</sup>

## 2. "Bad Parent" Statutes

Many states have enacted statutes that prohibit neglectful or abusive parents from inheriting from their child.<sup>82</sup> These statutes differ depending on the age of the child and the acts that will disqualify a parent.<sup>83</sup> For example, the Maryland legislature enacted a statute in 2001 that does not allow a parent who has abandoned or willfully failed to contribute to their child to receive distribution from their estate.<sup>84</sup> A parent is considered to have abandoned their child if the parent willfully and intentionally demonstrated a purpose to relinquish all parental rights and duties and forsake the child entirely.<sup>85</sup> New York's statute applies to children under the age of twenty-one.<sup>86</sup> It states that a parent who failed or refused to provide for their child or abandoned their child is prohibited from taking a distributive share of their estate unless they resumed parental duties and continued to perform those duties until the death of the child.<sup>87</sup> A New Jersey statute, enacted in 2009, explains that a parent who fails to care for or refused to acknowledge the child; a parent convicted of one of the enumerated crimes; a parent convicted of attempt or conspiracy to murder the child; or a parent whose abuse or neglect contributed to the child's death is disqualified from their right to take by intestate succession.<sup>88</sup> "Child" in this statute means a minor under the age of eighteen.<sup>89</sup>

## 3. Post-mortem Voidable Marriage Statutes

Several states have enacted specific statutes to allow challenges to deathbed marriages while others have done so by case law.<sup>90</sup> Florida enacted legislation in 2010 that allows an interested person to challenge the rights of a surviving spouse within four years after the death of the decedent.<sup>91</sup> The challenge may be brought as a defense, objection, or cause of action.<sup>92</sup> New York has a statute that allows a beneficiary of the decedent to challenge the

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80. MD. CODE ANN., EST. & TRUSTS § 11-111 (West 2013).

81. *Id.*

82. *See, e.g.*, MD. CODE ANN., EST. TRUSTS § 3-112 (West 2013).

83. *See id.*

84. MD. CODE ANN., EST. & TRUSTS § 3-112 (West 2013).

85. *Id.*

86. N.Y. EST. POWERS & TRUSTS LAW § 4-1.4 (McKinney 2013).

87. *Id.*

88. N.J. STAT. ANN. § 3B:5-14.1 (West 2013).

89. *Id.*

90. *See infra* Part III.B.

91. FLA. STAT. ANN. § 732.805(8) (West 2014).

92. *Id.* at § 732.805(b).

marriage on the basis of fraud or duress after the death of one of the spouses.<sup>93</sup> However, the spouses could not have cohabitated after the marriage with full knowledge of the facts.<sup>94</sup> Vermont allows marriages to be challenged on the basis of fraud or force after the death of the decedent.<sup>95</sup> If the party whose consent was fraudulently or forcefully obtained dies before a final decree then the relatives may prosecute the complaint.<sup>96</sup>

#### 4. *Slayer Statutes*

All jurisdictions in the United States stipulate, either by legislative enactments or case law, that murder is a bar to inheritance.<sup>97</sup> However, recently several states have amended their slayer statutes to include abuse.<sup>98</sup> In 2012 Michigan amended its slayer statute to include a person convicted of committing abuse, neglect, or exploitation of the decedent.<sup>99</sup> If the person commits one of these acts then they forfeit all benefits they would have received from the decedent's estate.<sup>100</sup> Washington amended its slayer statute in 2009 to include abusers as those not being able to inherit from the decedent.<sup>101</sup> The Washington legislature also amended their statute relating to other benefits the slayer or abuser might receive because of the decedent's death.<sup>102</sup> For example, if the abuser was to receive insurance proceeds as the beneficiary of life insurance the money will instead pass to the estate of the decedent or the secondary beneficiary.<sup>103</sup> Oregon amended its slayer statute in 2005 to include abusers of the decedent in those that will be disqualified from a share of the estate.<sup>104</sup>

#### 5. *Spousal Abuse or Neglect Statutes*

Another category of conduct that states have addressed is abuse or neglect by one spouse of the other spouse.<sup>105</sup> For example, a Pennsylvania statute explains that a person who has willfully neglected or failed to support the other spouse for one year or more, or willfully and maliciously deserted the other spouse has no right to share in the estate of the other spouse.<sup>106</sup> A

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93. N.Y. DOM. REL. LAW § 140(e) (McKinney 2013).

94. *Id.*

95. VT. STAT. ANN. 15, § 516 (West 2013).

96. *Id.*

97. *See Rhodes, supra* note 49, at 442.

98. *See, e.g.,* MICH. COMP. LAWS § 700.2803 (West 2013).

99. *See id.*

100. *Id.*

101. WASH. REV. CODE ANN. § 11.84.020 (West 2009).

102. *Id.*

103. *Id.*

104. OR. REV. STAT. § 112.465 (West 2013).

105. *See, e.g.,* 20 PA. CONS. STAT. ANN. § 2106 (West 2013).

106. *See id.*

Virginia statute prohibits an individual who has willfully abandoned or deserted their spouse from receiving their interest in the decedent's estate by intestate succession or elective share.<sup>107</sup> Connecticut's statute devising a share of the estate to the spouse states that a surviving spouse is not entitled to a statutory share or intestate share if the spouse abandoned the other spouse and the abandonment continued until death.<sup>108</sup>

### *B. Recent Cases Dealing with Abusive or Neglectful Behavior*

In addition to states enacting statutes to deal with the conduct of potential heirs, courts have been asked to declare that a potential heir who abused or took advantage of the decedent should not be allowed to inherit from the decedent's estate.<sup>109</sup> The principles the courts use to disinherit heirs in these cases support the adoption of behavior-based statutes.<sup>110</sup>

*In re Estate of Laubenheimer* concerned the ability of Wisconsin courts to declare a marriage void after the death of one of the spouses.<sup>111</sup> In this case, Nancy Laubenheimer, the decedent, executed a will in 1999 leaving most of her estate to her deceased husband's two children.<sup>112</sup> Some time around 2003, Joseph McLeod went to live with Nancy, who later suffered a stroke.<sup>113</sup> In 2008, Nancy was admitted to a hospital with stroke-like symptoms and while she was hospitalized, two doctors noted her diminished capacity.<sup>114</sup> Thereafter, she went to live in a nursing home.<sup>115</sup> Several days later McLeod removed Nancy from the nursing home for a marriage ceremony, but he did not inform her family, friends, doctors, or social workers about the wedding.<sup>116</sup> In 2009, one of her deceased husband's children obtained guardianship, because the court concluded Nancy was likely incompetent.<sup>117</sup> Nancy died that same year and McLeod sought to receive his share of Nancy's estate.<sup>118</sup>

Wisconsin has no statute directly on point that allows courts to void a marriage after death.<sup>119</sup> In fact, the statute allowing a court to annul a marriage prohibits annulment after death of one of the parties.<sup>120</sup> However, the court explained that at common law there was a distinction between a

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107. VA. CODE ANN. § 64.2-308 (West 2013).

108. CONN. GEN. STAT. ANN. § 45a-436 (West 2013).

109. *See, e.g., In re Estate of Laubenheimer*, 833 N.W.2d 735, 737 (Wis. 2013).

110. *See id.*

111. *In re Estate of Laubenheimer* at 737.

112. *Id.*

113. *Id.*

114. *Id.* at 738.

115. *Id.*

116. *See id.*

117. *See id.* at 739.

118. *See id.*

119. *See id.* at 741.

120. *See id.*

marriage that was voidable by annulment and a void marriage that could be declared so by a court even after death.<sup>121</sup> The court stated that Wisconsin case law has continued to draw this distinction and cited several cases where marriages were voided after death of one of the parties.<sup>122</sup> If one of the parties to a marriage is incompetent and dies before they are able to ratify the marriage, then the marriage can be held void.<sup>123</sup> The court held that “a court may use its declaratory judgment powers to declare that a marriage prohibited by law was void and incapable of validation by the parties to the marriage.”<sup>124</sup>

One reason the courts allow a marriage to be voided after death is based on public policy and legislative intent on marriage.<sup>125</sup> The legislature intended for marriage to “promote stability and best interests of marriage and the family” and not allowing a court to address legitimate questions of a spouse’s mental incapacity after death does not serve the best interests of marriage.<sup>126</sup> Similarly, not taking into account the conduct of a potential heir who abused, neglected, or took advantage of an innocent, vulnerable individual does not serve the best interests of the decedent or society.

In the case of *In re Estate of Haviland*, the court interpreted Washington’s recent amendments to their slayer statute to include financial abusers.<sup>127</sup> In this case, Mary Haviland met James Haviland while he was a patient at a hospital.<sup>128</sup> The age difference between the two was fifty years.<sup>129</sup> After his discharge from the hospital they were married, and Mary spent millions of Haviland’s money during their marriage and transferred assets from his estate for her own benefit.<sup>130</sup> The trial court invalidated his will because it found that Haviland was extremely vulnerable to undue influence and the will was a product of undue influence.<sup>131</sup> The personal representative of Haviland’s estate filed a petition to disqualify Mary as an abuser, which would have prevented her from receiving any benefit from the decedent’s estate.<sup>132</sup> Mr. Haviland died before the amendment of the slayer statute, but the contest over the will was still in progress when the amendment was added; therefore, the court had to decide whether it would apply to this case.<sup>133</sup>

The court examined the statute in order to decide whether the triggering event for application of the statute was the abuse, which occurred before the enactment, or the filing of the petition for disqualification, which occurred

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121. *See id.* at 744.

122. *See id.* at 743–48.

123. *See id.* at 749.

124. *Id.* at 753.

125. *Id.* at 752.

126. *See id.*

127. *See In re Estate of Haviland*, 251 P.3d 289, 290–91 (Wash. Ct. App. 2011).

128. *Id.*

129. *Id.*

130. *See id.*

131. *See id.*

132. *Id.*

133. *Id.*

after the enactment.<sup>134</sup> The court determined that the statute may apply in this case because the triggering event was the attempt by the abuser to receive the property, not the date of the abuse.<sup>135</sup>

The court reasoned that the statute does not regulate abuse itself or impose punitive consequences on the abuser.<sup>136</sup> The purpose of the statute is to “prevent[ ] the abuser from benefiting from any financial exploitation after the exploited person dies.”<sup>137</sup> Therefore, the attempt by the abuser to receive the property is what the statute is intended to prohibit.<sup>138</sup> This reasoning explains what conduct-based statutes are intended to do—keep the abuser from benefiting from their evil acts.<sup>139</sup> “[N]o person [should] be allowed to profit by his or her own wrong.”<sup>140</sup>

*Campbell v. Thomas* concerns the problem of caregiver abuse and illustrates how the court used equitable principles to keep the caregiver from benefiting from her wrongdoing.<sup>141</sup> In this case, Howard Thomas was diagnosed with dementia due to Alzheimer’s disease.<sup>142</sup> When Howard’s daughter went on vacation she hired a caregiver, defendant Nidia Thomas, to take care of him.<sup>143</sup> While the daughter was on vacation, Nidia married Howard and transferred his assets into her name.<sup>144</sup> When Howard died his children filed an action to declare the marriage void because Howard lacked capacity to enter into the marriage due to severe dementia and the progression of cancer.<sup>145</sup> Nidia filed a right of election.<sup>146</sup> The court, in a previous holding, already declared the marriage of Nidia and Howard void; however, Nidia claimed that, as a surviving spouse, she was still entitled to an elective share from his estate.<sup>147</sup>

The court began by noting that elder abuse has been receiving more attention recently, but New York does not have a statute specifically addressing whether a surviving spouse whose marriage was declared void still has a right to an elective share.<sup>148</sup> A strict reading of the statute would allow the spouse to receive the right of election even though the marriage was void; therefore, Nidia would technically have a right to an elective

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134. *See id.* at 291.

135. *See id.* at 292.

136. *See id.* at 291.

137. *Id.*

138. *See id.*

139. *See, e.g.*, WASH. REV. CODE ANN. § 11.84.900 (West 2013).

140. *See Haviland*, 251 P.3d at 291 (quoting WASH. REV. CODE ANN. § 11.84.900 (West 2013)).

141. *Campbell v. Thomas*, 897 73 A.D.3d 460 (N.Y. App. Div. 2010).

142. *See id.* at 462.

143. *Id.*

144. *Id.*

145. *See id.* at 463.

146. *Id.*

147. *See id.* at 465–66.

148. *See id.* at 462.

share.<sup>149</sup> However, the court ended up utilizing its equitable power to hold that Nidia had no legal interest as Howard's spouse.<sup>150</sup>

The court reasoned that allowing a right of election procured through undue influence would invite deathbed marriages and allow the person to benefit from their own wrongdoing.<sup>151</sup> It concluded that potential heirs who take unfair advantage of vulnerable individuals "should not be permitted to benefit from that conduct any more than should a person who engages in overreaching and undue influence by having himself or herself named in the will of a person he or she knows to be mentally incapacitated."<sup>152</sup> The court's reasoning is useful in explaining the need for conduct-based statutes.<sup>153</sup> Individuals who abuse or take advantage of vulnerable members of society should not be entitled to benefit from their wrongdoing.<sup>154</sup> Legislatures should "prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and infirm and unjustly enrich themselves at the expense of such victims and their rightful heirs."<sup>155</sup>

#### IV. TEXAS

##### A. Recently Enacted Probate Statutes

Recently, Texas enacted two new probate laws dealing with this issue.<sup>156</sup> In 2007, the Texas legislature amended the Probate Code to include disqualification of a "bad parent" under certain circumstances.<sup>157</sup> The statute specifies three ways a parent might be disinherited: (1) voluntary abandonment and failure to support the child for at least three years before the child's death; (2) voluntarily abandoning the mother of the child, not providing her with adequate medical care or support, and remaining separate from the child; or (3) criminally responsible for death or serious injury to a child according to a list of penal statutes.<sup>158</sup> The probate court must find that the parent has committed one of these acts by clear and convincing evidence.<sup>159</sup> The child must be under eighteen years of age.<sup>160</sup> If the child lives to be eighteen years or older the statute does not apply no matter what bad acts the parent might have committed during their life.<sup>161</sup> If the court

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149. *See id.* at 469.

150. *See id.* at 472.

151. *See id.* at 469.

152. *Id.* at 471.

153. *See id.*

154. *See id.* at 469.

155. *See id.* at 473.

156. *See infra* notes 145, 151, and accompanying text.

157. *See* TEX. ESTATES CODE ANN. § 201.062 (West 2014).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

does decide the parent has committed one of the acts, then the parent will be treated as though they predeceased the child.<sup>162</sup>

In 2007, the Texas legislature also enacted a statute that deals with the disqualification of a surviving spouse after one of the parties to the marriage has died.<sup>163</sup> This allows courts to declare a marriage void after the death of one of the spouses when the marriage was entered into without mental capacity.<sup>164</sup> If a proceeding under the Family Code is pending at the time of death to declare the marriage void based on lack of mental capacity, then the court may still make the determination that the marriage should be voided even after death.<sup>165</sup> If a Family Code proceeding was not pending at the time of death, there are several formalities that must be satisfied before the court can void the marriage.<sup>166</sup> First, the marriage must have been entered into within the last three years before the spouse's death.<sup>167</sup> Second, an application requesting the court to void the marriage must have been filed within a year of spouse's death.<sup>168</sup> Third, the court must find that the decedent lacked the mental capacity at the date of marriage to consent to the marriage and did not understand the nature of any marriage ceremony that occurred.<sup>169</sup> Last, the court must determine that the decedent did not gain mental capacity to recognize the marriage and did not in fact recognize the marriage before the date of death.<sup>170</sup> If the court declares the marriage void, the surviving spouse is not treated as the decedent's spouse for any purposes under Texas law.<sup>171</sup>

### *B. A Look to Other Areas: Family and Criminal Law*

The legislature uses laws to express public policies and order social relationships.<sup>172</sup> "Inheritance laws, like-child support statutes, reflect social values about family."<sup>173</sup> Unlike inheritance laws, the Texas Family Code and Penal Code have addressed abuse and neglect problems.<sup>174</sup> The Family Code has many provisions that deal with the duties of parents to their children and

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162. *Id.*

163. *Id.* at § 123.101-04.

164. *Id.*

165. *Id.* at § 123.101.

166. *Id.* at § 123.102-03.

167. *Id.* § 123.102.

168. *See id.*

169. *See id.* § 123.103.

170. *See id.*

171. *See id.* § 123.104.

172. Paula A. Monopoli, "Deadbeat Dads": Should Support and Inheritance be Linked, 49 U. MIAMI L. REV. 257, 258-59 (1994).

173. *Id.* at 258-59.

174. *See generally* TEX. FAMILY CODE ANN. § 261 (West 2013); *see also* TEX. PENAL CODE ANN. § 22 (West 2013).

penalties for parents who refuse to support or acknowledge their children.<sup>175</sup> Section 151.001(a) of the Family Code sets out the rights and duties parents owe to their children.<sup>176</sup> It says, among other things, that a parent has the “duty of care, control, protection, and reasonable discipline of the child; the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education; [and] the duty to . . . manage the estate of the child.”<sup>177</sup>

The Family Code also has statutes that impose obligations on parents to support their children and sanctions for parents who fail to do so, including termination of parental rights.<sup>178</sup> Section 154.001 gives the court the discretion to direct one or both parents to support the child until either the child turns eighteen years of age or graduates from high school, the child is emancipated, or the death of the child.<sup>179</sup> If the child is disabled, then the court may order the parent to support the child for an indefinite period of time.<sup>180</sup>

The Family Code has statutes that allow a court to terminate a parent-child relationship.<sup>181</sup> Section 161.002 addresses the termination of the rights of an alleged biological father.<sup>182</sup> It states that the rights of an alleged father may be terminated if the alleged father is served with a citation and does not respond to the citation by filing an admission of paternity or a counterclaim for paternity.<sup>183</sup> Section 161.007 addresses termination of the parent-child relationship when pregnancy results from a criminal act.<sup>184</sup> It states that the court shall terminate the relationship if the court finds by clear and convincing evidence that the parent engaged in one of the criminal acts specified, a pregnancy resulted from that conduct, and termination is in the best interest of the child.<sup>185</sup> Section 161.001 addresses involuntary termination by the court of the parent-child relationship.<sup>186</sup> The statute enumerates twenty conditions that the court could find by clear and convincing evidence to terminate the parent-child relationship.<sup>187</sup> For example, the parent knowingly placed or allowed the child to remain in conditions that endanger the

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175. *See, e.g.*, TEX. FAM. CODE ANN. § 151.001(a) (West 2013).

176. *See id.*

177. *Id.*

178. *See* TEX. FAM. CODE ANN. §§ 154.001–.309 (West 2013) (Chapter 154 of the Family Code concerns child support obligations).

179. *See id.* § 154.001(a)(1)–(3).

180. *See id.* at § 154.001(a)(4).

181. *See id.* § 161.001–.211.

182. *See id.* § 161.002.

183. *See id.* at § 161.002(b)(1).

184. *See id.* § 161.007.

185. *See id.* at § 161.007(a)(1)–(3).

186. *See id.* § 161.001.

187. § 161.002.

child, failed to support the child, abandoned the child, or voluntarily and knowingly abandoned the mother of the child.<sup>188</sup>

The Family Code also has provisions that deal with abuse of children.<sup>189</sup> Section 156.104 addresses modification of an order when the parent has been previously convicted of child abuse.<sup>190</sup> It states that conviction for “an offense involving [ ] abuse of a child . . . is a material and substantial change of circumstances sufficient to justify . . . [changing] . . . of an existing court order [that] . . . sets . . . the possession of or access to a child.”<sup>191</sup> Section 154.1045 addresses modification of a court order for a conviction of family violence.<sup>192</sup> It states that a conviction for family violence is a material and substantial change of circumstances sufficient to justify modification of a court order.<sup>193</sup> Section 153.004 of the Family Code states that the court may consider evidence of intentional physical or sexual abuse against a spouse, parent of the child, or any person younger than eighteen years old occurring within the two years before filing suit when deciding whether to appoint a party as a sole or joint managing conservator.<sup>194</sup> It also states that the court may not allow access to the child by a parent if it is shown by a preponderance of the evidence that there is a history of committing family violence within two years of the suit.<sup>195</sup>

Additionally, the Texas Penal Code sets forth penalties for individuals who abuse and neglect of children, the elderly, or disabled adults.<sup>196</sup> Section 22.041 makes it a crime to intentionally abandon a child “in any place under circumstances that expose the child to an unreasonable risk of harm” if that person has custody, care, or control of a child under the age of fifteen.<sup>197</sup> “Abandon” is defined as leaving a “child in any place without providing reasonable and necessary care for the child” when no reasonable adult would leave a child of that age.<sup>198</sup> Section 22.04 addresses injury to a child, elderly individual, or disabled individual.<sup>199</sup> It states that “a person commits an offense if [they either] intentionally, knowingly, recklessly, or with criminal negligence . . . causes a child, elderly individual, or disabled individual serious bodily injury; serious mental deficiency, impairment or injury; or bodily injury.”<sup>200</sup> If the actor committed the offense knowingly or inten-

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188. *Id.*

189. *See id.*

190. *See id.* § 156.104.

191. *See id.*

192. *See id.* § 154.1045(a).

193. *See id.*

194. *See id.* § 153.004(a).

195. *See id.*

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

197. *See id.* at § 22.041(b).

198. *Id.* at § 22.041(a).

199. *See id.* § 22.04.

200. *Id.* at § 22.04(a)(1)–(3).

tionally, then they have committed a first-degree felony.<sup>201</sup> If they committed the offense recklessly, then they have committed a second-degree felony.<sup>202</sup> If the person acts with criminal negligence, then they have committed a state jail felony.<sup>203</sup> In 2011, a statute was enacted concerning the exploitation of children, elderly, and disabled individuals.<sup>204</sup> It states that an individual found to have “intentionally, knowingly, or recklessly cause[d] the exploitation of a child, elderly individual, or disabled individual” can be punished with a third-degree felony.<sup>205</sup> “Exploitation” means illegal or improper use of an individual or their resources for monetary or personal benefit, profit, or gain.<sup>206</sup>

So why are inheritance laws failing to deal with these issues? Is it because we prefer rigid rules to flexible rules or we think it is more important to have certainty than fairness? Should our dislike of judicial discretion override our belief in justice and fairness?

### C. Judicial Responses

Examining a few Texas cases can help see how courts handle abusive and neglectful conduct. The same reasoning and equitable principles supporting the imposition of constructive trusts and the termination of parental rights in these cases can be used to support inheritance statutes that take behavior into account. Although mechanical rules have been the norm, Texas courts have previously used equitable principles to get around the rules to effectuate justice and fairness.<sup>207</sup>

In *Bailey v. Bailey* Rodney and Deborah were married and had two sons, but eventually the couple divorced.<sup>208</sup> Deborah was granted the right to establish the primary residence of one of the children and receive child support from Rodney, and Rodney was permitted to establish the primary residence of the other child and receive child support from Deborah.<sup>209</sup> The court set the amount of child support and Rodney appealed.<sup>210</sup> The appellate court then went into a discussion of child support generally.<sup>211</sup> It stated that “a parent ha[s] a ‘natural and moral obligation’ to provide for or support his

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201. *Id.* at § 22.04(e).

202. *See id.*

203. *See id.* at § 22.04(f).

204. *See id.* § 32.53.

205. *Id.* at § 32.53(b).

206. *See id.* § 32.53(a)(2).

207. *See, e.g., Parks v. Dumas*, 321 S.W.2d 653 (Tex. Civ. App.—Fort Worth 1959, no writ) (imposing a constructive trust on a beneficiary who murdered his parents even though Texas has no slayer statute).

208. *Bailey v. Bailey*, 987 S.W.2d 206, 207 (Tex. App.—Amarillo 1990, no pet.).

209. *Id.* at 208.

210. *See id.*

211. *See id.*

offspring.”<sup>212</sup> This duty falls to both the mother and the father of the child even if the parents divorce.<sup>213</sup> It is a continuing obligation to the child.<sup>214</sup> However, the obligation to support the child is more than just a monetary one.<sup>215</sup> The obligation also “encompasses the rather boundless task of maintaining and educating, [citation omitted] which at a minimum obligates the parent to provide the child those things necessary in sickness and health, [citation omitted] such as clothing, food, shelter, medical and dental attention, and education.”<sup>216</sup> If supporting a child is a legal and moral obligation of the parent then logically a failure to adhere to this obligation would have consequences, not only in family courts, but in inheritance rights as well.<sup>217</sup>

*In re S.M.* involves the termination of parental rights.<sup>218</sup> S.M. was born in 2009.<sup>219</sup> When the baby was not even seven months old, the mother left the infant in a motel room alone.<sup>220</sup> The neighbor heard the baby screaming and discovered her alone in the room.<sup>221</sup> The Texas Department of Family and Protective Services were called and in 2011 the mother’s parental rights were terminated.<sup>222</sup> The father of the child had been in prison for all of the baby’s life.<sup>223</sup> He had four prior convictions, three for assault and one for possession of cocaine, and he pled guilty to two counts of family violence.<sup>224</sup> The father claimed that he was innocent and wanted custody of the baby when he got out of prison, but the trial court terminated his parental rights.<sup>225</sup> The appellate court upheld the termination.<sup>226</sup> It acknowledged that parental rights are of “constitutional magnitude” but they are not absolute.<sup>227</sup> If the court finds that the parent’s conduct directly resulted in the child’s endangerment, then it may terminate the parent’s rights.<sup>228</sup> “Endanger” means acts that constitute physical endangerment as well as emotional endangerment.<sup>229</sup> The court may infer endangerment from “parental misconduct, including conduct that subjects the child to a life of uncertainty and

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212. *Id.* (quoting *Lane v. Phillips*, 6 S.W. 610, 611 (Tex. 1887)).

213. *See id.*

214. *See id.*

215. *See Bailey*, at 208.

216. *Id.* at 209.

217. *See id.*

218. *See In re S.M.*, 389 S.W.3d 483 (Tex. App.—El Paso 2012, no pet. h.).

219. *Id.* at 486.

220. *Id.*

221. *Id.*

222. *See id.*

223. *See id.*

224. *See id.* at 486–87.

225. *See id.* at 488.

226. *Id.* at 494.

227. *See id.* at 490.

228. *See id.* at 491.

229. *See id.*

instability.”<sup>230</sup> The court found that the father’s multiple convictions plus his failure to attempt or maintain any significant contact with S.M. supported the conclusion that the father was not able to meet the child’s emotional or physical needs.<sup>231</sup>

One prominent constructive trust case in Texas is *Pope v. Garrett*.<sup>232</sup> In this case, Carrie Simons requested that Thomas Green prepare a will leaving all her property to Claytonia Garrett, who was unrelated to Carrie.<sup>233</sup> The will was prepared and brought to her room.<sup>234</sup> After the will was read and Carrie declared it to be her last will, she prepared to sign her name. However, Evelyn Jones and Lillie Clay Smith, her niece and sister, “by physical force or by creating a disturbance, prevented her from carrying out her intention to execute of the will.”<sup>235</sup> Shortly after this incident, Carrie Simons suffered a severe hemorrhage and lapsed into a semi-comatose condition until her death; she never had another chance to sign the will.<sup>236</sup> Claytonia Garrett brought suit to impose a constructive trust on the property that passed to her heirs because she was forcefully prevented from carrying out the execution of the will.<sup>237</sup> The trial court held that a constructive trust should be imposed on all property passing under the will.<sup>238</sup> The Supreme Court agreed.<sup>239</sup> It stated that equity should step in and prevent the heirs of Carrie Simons from benefiting from their wrongful conduct by impressing a constructive trust “in favor of the one who is in good conscience entitled to it.”<sup>240</sup> The court even imposed a constructive trust on the property that would have passed to the innocent heirs because none of the heirs should profit as the result of wrongful acts.<sup>241</sup> Equity prevents a “wrongdoer, who by his fraudulent or otherwise wrongful act has acquired title to property, from retaining and enjoying the beneficial interest therein, by impressing a constructive trust on the property in favor of the one who is truly and equitably entitled to the same.”<sup>242</sup>

In *Pritchett v. Henry*, the court, for the first time in Texas, dealt with the question of whether a person who willfully and unlawfully murdered the decedent may take and hold title to the property as an heir of their victim.<sup>243</sup> In this case, the complainant was alleged that Percy Henry shot and killed his

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230. *Id.* at 492.

231. *See id.* at 493–94.

232. *Pope v. Garrett*, 211 S.W.2d 559 (Tex. 1948).

233. *See id.*

234. *See id.*

235. *Id.* at 560.

236. *See id.*

237. *See id.* at 559.

238. *See id.*

239. *See id.* at 562.

240. *Id.* at 561.

241. *See id.* at 562.

242. *Id.* at 560.

243. *See Pritchett v. Henry*, 287 S.W.2d 546, 548 (Tex. Civ. App.—Beaumont 1955, writ dism’d).

wife, Melba Henry, unlawfully.<sup>244</sup> Percy was a beneficiary of Melba's will and several life insurance policies.<sup>245</sup> Melba's parents contested the will and asked the court to impress a constructive trust on the property passing under the will to Percy for their benefit.<sup>246</sup> Percy claimed that intestate law is absolute and Texas does not have a statute that makes inheritance conditioned upon not committing murder or an exception barring the right of succession to murderers.<sup>247</sup> Although technically true, and previous Texas cases were decided based on this principle, this did not end the analysis for the court.<sup>248</sup> The court decided that Texas should adopt the more modern view that imposition of a constructive trust is the proper remedy when the murderer stands to inherit from their victim.<sup>249</sup> This ensures that the heir will not benefit from his own wrong.<sup>250</sup> The court also stated that the equitable principle is applicable "where the title is acquired by fraud, duress, or undue influence."<sup>251</sup> The court held that imposing a constructive trust on Melba's property would have passed to Percy was appropriate.<sup>252</sup>

In the case of *Parks v. Dumas*, the defendant, James Clifford Parks, murdered his parents willfully and intentionally by shooting them.<sup>253</sup> He was convicted of murdering his mother and sentenced to twenty years.<sup>254</sup> His mother and father both died intestate so Parks would be a recipient of their property.<sup>255</sup> The other heirs of both parents filed suit to impose a constructive trust on the community estate of their parents.<sup>256</sup> The trial court held that a constructive trust should be imposed upon all property for the benefit of the lawful heirs.<sup>257</sup> Parks appealed.<sup>258</sup> The appellate court agreed that a constructive trust should be imposed.<sup>259</sup> The court said that a constructive trust was the proper remedy because the murderer acquired the property in an unconscionable manner.<sup>260</sup> This would not violate forfeiture or the statutes of descent and distribution because constructive trusts are creatures of equity that prevent unjust enrichment by wrongdoers.<sup>261</sup> Of particular importance

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244. *See id.* at 547.

245. *See id.*

246. *See id.*

247. *Id.* at 548.

248. *See id.* at 548–49.

249. *See id.* at 548.

250. *See id.* at 549.

251. *Id.*

252. *See id.* at 548.

253. *See Parks v. Dumas*, 321 S.W.2d 653, 654 (Tex. Civ. App.—Fort Worth 1959, no writ).

254. *Id.*

255. *See id.*

256. *See id.*

257. *See id.*

258. *Id.*

259. *See id.* at 655.

260. *See id.*

261. *See id.*

was the court's reasoning that the "statutes of descent and distribution may not be used as an instrument for perpetrating or protecting fraud."<sup>262</sup>

## V. Potential New Statutes and Changes to Current Statutes

### A. New Statutory Bars to Inheritance

Previously, I discussed statutes of other states because in a new and developing area it is often beneficial to look to others for guidance. With the growth of behavior-based statutes there are a variety of solutions.<sup>263</sup> In examining these statutes, it is helpful to keep in mind the major concerns of moving to behavior-based models of inheritance in order to adopt the most effective statute. Two major reasons legislatures are reluctant about moving to behavior-based statutes are the increase in judicial discretion and more litigation.<sup>264</sup> In the current statutory scheme, the court only needs to decide who is the mother, father, brother, spouse, etc.<sup>265</sup> Under a statute that takes behavior into account, the parties might argue that there was an abusive relationship or the heir neglected the decedent, and then the court must decide whether their conduct constitutes abuse, abandonment, or neglect.<sup>266</sup> However, one way to curb this discretion and litigation would be to tie a finding of abuse, neglect, or abandonment to a prior judicial ruling, for example, a prior conviction or adjudication by a family court.<sup>267</sup> The court could then impose a constructive trust on the property that would have passed to the convicted heir.<sup>268</sup> Another solution would be to mandate that if the action was brought in bad faith or lacked sufficient merit, then the court shall award attorney fees and costs to the other party.<sup>269</sup>

The Texas Estates Code does not have a statute specifically addressing abuse or neglect of elderly or disabled individuals.<sup>270</sup> As previously discussed, Illinois and Maryland both have statutes addressing this situation that Texas could potentially adopt.<sup>271</sup> The Illinois statute particularly addresses "financial exploitation, abuse, and neglect of an elderly" or disabled individual.<sup>272</sup> It defines abuse, neglect, and financial exploitation as offenses already in place in the Criminal Code.<sup>273</sup> It says that:

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262. *Id.*

263. *See supra* Part III.A.

264. *See* Monopoli, *supra* note 172, at 292.

265. *See* TEX. EST. CODE ANN. § 201.001-03 (West 2014).

266. *See* Monopoli, *supra* note 172, at 294-96.

267. *See id.* at 292.

268. *See id.* at 287-89.

269. *See* FED. R. CIV. P. 11(b)(2), 54.

270. *See* TEX. EST. CODE ANN. (West 2014).

271. *See supra* Part III.A.1.

272. 755 ILL. COMP. STAT. ANN. § 5/2-6.2 (West 2014).

273. *See id.*

[p]ersons convicted of financial exploitation, abuse, or neglect of an elderly person or a person with a disability . . . shall not receive any property, benefit, or other interest by reason of the death of that elderly person or person with a disability, whether as heir, legatee, beneficiary, survivor, appointee, claimant . . . or in any other capacity and whether the property, benefit, or other interest passes pursuant to any form of title registration, testamentary or nontestamentary instrument, intestacy, renunciation, or any other circumstance.<sup>274</sup>

This statute requires a conviction, which would reduce judicial discretion and litigation to only cases where the heir was already convicted of abuse, neglect, or financial exploitation.<sup>275</sup> If Texas were to adopt a similar statute it could reference statutes already in the Texas Penal Code dealing with abuse, neglect, and financial exploitation.<sup>276</sup>

Maryland has a statute addressing financial abuse of vulnerable adults or elderly individuals that Texas could also potentially adopt.<sup>277</sup> This statute also requires a conviction.<sup>278</sup> It states that “[a] person convicted of unlawfully obtaining property from a victim in violation of [a penal code] shall be disqualified from inheriting, taking, enjoying, receiving, or otherwise benefiting from the estate, insurance proceeds, or property of the victim.”<sup>279</sup> This could be connected to Texas’ recently enacted criminal law concerning exploitation of a child, elderly or individual.<sup>280</sup>

## *B. Changes to Make Current Statutes More Effective*

### *1. Bad Parent Statute*

Texas does have a statute concerning parents who abuse or neglect their children.<sup>281</sup> Despite the fact that the new statute is a movement in the right direction, there are several changes that could be made to make the statute more effective.

One problem with the bad parent statute is that part of the statute might be unconstitutional.<sup>282</sup> The Attorney General issued an opinion that the statute’s possible disqualification of a parent because they were convicted of one of the enumerated crimes might be unconstitutional.<sup>283</sup> The crimes that

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274. *Id.*

275. *See id.*

276. *See, e.g.*, TEX. PENAL CODE ANN. § 22.04 (West 2013) (making it a crime to intentionally, knowingly, or recklessly cause serious bodily injury to a child, elderly, or disabled individual).

277. MD. CODE ANN., EST. & TRUSTS § 11-111 (West 2013).

278. *See id.*

279. *Id.*

280. TEX. PENAL CODE ANN. § 32.53 (West 2013).

281. TEX. ESTATES CODE ANN. § 201.062 (West 2014).

282. *See* Tex. Op. Atty. Gen. GA-0632 (2008).

283. *Id.*

would constitute a bar to inheritance in the statute include murder, capital murder, manslaughter, indecency with a child, assault, sexual assault, aggravated assault, aggravated sexual assault, injury to a child, abandoning or endangering child, prohibited sexual conduct, sexual performance by a child, and possession or promotion of child pornography.<sup>284</sup> This part of the statute may violate the Texas Constitution's prohibition of forfeiture.<sup>285</sup> However, the court should apply the constructive trust doctrine to save this part of the statute.<sup>286</sup>

Many of the equitable principles that support the imposition of a constructive trust, in other situations, also support the adoption of the constructive trust here.<sup>287</sup> Most, if not all, of the enumerated crimes would be seen by many of the population as extremely reprehensible. Part of the reasoning behind constructive trusts is that wrongdoers should not be allowed to profit from those they have harmed.<sup>288</sup> In an early slayer case, the court held that:

[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, . . . or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.<sup>289</sup>

Similarly, an heir who has financially, emotionally, or physically abused the decedent should not benefit from a wrong they have committed.<sup>290</sup> For example, a caregiver who marries a disabled or incompetent testator for their money should not be able to profit from this wrongdoing by then receiving an elective share or community property from their estate.<sup>291</sup> The court is, in effect, forcing a slayer or abuser to “surrender the profits of his crime and thus preventing his unjust enrichment.”<sup>292</sup>

Statutes based on conduct prevent heirs from benefiting from their previous evil acts. These statutes are grounded in policy rationales and legislative judgments that the conduct of an heir is reprehensible; therefore,

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284. See TEX. EST. CODE ANN. § 201.062.

285. TEX. CONST. art. 1, § 21 (“No 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.”).

286. See generally Tex. Op. Atty. Gen. GA-0632 (2008) (stating that this provision would probably violate the Texas Constitution unless the court applies another recognized legal doctrine like the constructive trust).

287. See *id.*

288. See *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

289. *Id.* at 190–91.

290. See generally *id.* (explaining that ill motives related to the treatment of those one could afford to inherit from are reason to disallow such inheritance.).

291. See generally *id.* (discussing issues with family members taking advantage of those less fortunate, at an opportune moment, for the purpose of gaining some benefit.).

292. *Pritchett v. Henry*, 287 S.W.2d 546, 549 (Tex. Civ. App.—Beaumont 1955, writ dismissed).

forfeiture of their share of the estate is appropriate. When the legislature disinherits an individual because they abused or neglected the decedent, the legislature indicates societies' view of certain types of conduct and reflects the public policy of protecting vulnerable members of the population.<sup>293</sup> Additionally, the policies sends the message that certain behavior is inappropriate or harmful and the legislature should be discouraged while at the same time encouraging “good” behavior.<sup>294</sup> This would provide additional punishment to a parent who neglected or seriously harmed their child by distributing the property to the other parent or relative who did not harm the child.<sup>295</sup> There is a strong public policy against abandoning or seriously injuring a child and inheritance laws should reflect that policy rather than turning a blind eye.<sup>296</sup>

Another problem with the statute is that it only bars inheritance until the child turns eighteen.<sup>297</sup> Once the child turns eighteen a parent will be able to inherit from them no matter what bad acts they might have committed or how they treated the child.<sup>298</sup> However, the fact that a child has turned a certain age does not automatically expunge the bad conduct of the parent. Inheritance is a privilege provided by state statutes and as such the privilege should not be granted to those who are abusive.<sup>299</sup> A majority of courts hold that “it is not a natural, inalienable right to be able to make a will and have freedom of testation” and, accordingly, “it is doubted that the right to take property by will is a natural and inalienable right.”<sup>300</sup>

One reason given for the limited age in the statute is that people are free to make wills if they do not like the intestacy scheme and only allow those to inherit their property that they want to.<sup>301</sup> However, the reality is that “[t]he majority of Americans fail to execute a simple will, much less prepare a comprehensive estate plan in the event of lifetime incompetency or death.”<sup>302</sup> Therefore, intestacy statutes are necessary for many people.<sup>303</sup> One of the primary goals of intestacy statutes is to carry out the decedent's intent.<sup>304</sup> Although it may not be true for every single person, the majority of people who have been abused or neglected most likely would not want the person

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293. N.J. Div. of Youth & Family Servs. v. M.W., 942 A.2d 1, 18 (N.J. Super. Ct. App. Div. 2007) (“Equity, morality, and common sense dictate that physically or sexually abusive parents have no right of inheritance by intestacy.”).

294. *Id.*

295. *See id.*

296. *See id.* at 19.

297. *See* TEX. ESTATES CODE ANN. § 201.062 (West 2014).

298. *See id.*

299. *See* 1 PAGE ON THE LAW OF WILLS § 1.7 (2d ed. 2003).

300. 1 PAGE ON THE LAW OF WILLS § 17.1 (2d ed. 2003).

301. Gary, *supra* note 45, at 2.

302. Gerry W. Beyer, *Statutory Fill-in Will Forms—The First Decade: Theoretical Constructs and Empirical Findings*, 72 OR. L. REV. 769, 771 (1993).

303. *See id.*

304. Gary, *supra* note 45, at 2.

who took advantage of their vulnerability to be able inherit from them. They would want the property to pass to the family member who cared for them during their lifetime.<sup>305</sup> This supports the use of disinheritance statutes and judicial discretion to allow the property to pass to those who loved and cared for the decedent or did not improperly benefit from their vulnerability.<sup>306</sup> Another goal of intestacy statutes is to carry out public policy and provide benefits to society.<sup>307</sup> Inheritance laws reflect society's views about social relationships and the obligations of one family member to another.<sup>308</sup> Allowing abusers to inherit seemingly expresses the view that society prefers limited discretion to what is fair and just.<sup>309</sup> However, including a statute that would allow disinheritance in certain circumstances reflects a collective sense of public policy against abuse and neglect as well as respect, deterrence, and punishment. "By shifting from an objective rule to judicial discretion. . .the legal system may be underscoring the public policy of protecting a particularly vulnerable population."<sup>310</sup>

The statute should be amended to include any child who dies intestate, not just children under the age of eighteen. As it stands right now, abusers can still benefit from their wrongdoing. The statute is designed to disallow parents who abuse or neglect their children from benefiting from an inheritance from the child; whether the child is eighteen or thirty years old. The presumption should hold that the parent has failed to meet their obligations of support and care; therefore, they should not be entitled to inherit from the child. If the child nonetheless wants to include the parent in their estate plan they may make a will to include that parent. "The burden should be on the abandoning parent to change conduct; it should not be on the abandoned child to execute a will."<sup>311</sup>

The third problem with the statute is that it only applies to parents of the child.<sup>312</sup> Other family members, such as grandparents or siblings, who might have abused the child may still inherit from them.<sup>313</sup> Under the Texas intestacy scheme, if an unmarried individual does not have descendants or parents then the next person in line to inherit would be their siblings.<sup>314</sup> If they do not have siblings then it would go to the grandparents.<sup>315</sup> If the individual is married and has separate property but no surviving children,

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305. *See id.* at 875.

306. *See id.*

307. Gary, *supra* note 45, at 10; *see* Rhodes, *supra* note 49, at 977.

308. Monopoli, *supra* note 172, at 258; Gary, *supra* note 45, at 13 ("[t]he definition of family may reflect society's view both of what a family is and what a family should be.").

309. *See* Gary, *supra* note 45, at 13.

310. Rhodes, *supra* note 49, at 985.

311. *See id.* at 893.

312. *See* TEX. EST. CODE ANN. § 201.062 (West 2014).

313. Gerry W. Beyer, *Texas Practice Series: Texas Law of Wills* § 7.17 (3d ed. 2013).

314. TEX. ESTATES CODE ANN. § 201.001 (West 2014).

315. *See id.*

then their siblings could inherit one-half of their real property.<sup>316</sup> Therefore, a grandparent or sibling who abused the child may still inherit from the child.<sup>317</sup> The statute could be amended to include any family member who abuses the child, not just the parents.

Societies utilize laws to guide human behavior and express our feelings about what is right and wrong.<sup>318</sup> It is not uncommon for legislatures to use statutes to address public policy concerns and abuse of children, mentally ill, and the elderly are serious problems facing the United States.<sup>319</sup> Inheritance laws should be used to protect testators not to be vehicles for people to profit from abuse and neglect. “Probate has always been an essential part of the legal system, and probate courts, when they run well, work to protect vulnerable members of society.”<sup>320</sup>

## 2. *Post-Mortem Voidable Marriage Statute*

The voidable marriage statute should also be amended to make it more effective. In Vermont and New York, a beneficiary of the decedent may challenge the marriage on the basis fraud or duress.<sup>321</sup> Florida allows a marriage to be challenged on the basis of fraud, duress, or undue influence.<sup>322</sup> As the statute is currently written, the Texas statute is only applicable if the decedent lacked the mental capacity to consent to the marriage.<sup>323</sup> Therefore, a claim of fraud, duress, undue influence, or threats may not allow an interested person to challenge the validity of the marriage.<sup>324</sup> Section 6.111 of the Texas Family Code states that “a marriage subject to annulment may not be challenged in a proceeding . . . after the death of either party,” except as provided by the voidable marriage statute in the Estates Code.<sup>325</sup> During the lifetime of the parties, a marriage may be subject to annulment for the

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316. *Id.* § 201.002.

317. *Id.* §§ 201.001-02.

318. *See* Monopoli, *supra* note 172, at 258.

319. *See Child Abuse & Neglect Deaths in America*, EVERY CHILD MATTERS (July 2012), [http://www.everychildmatters.org/storage/documents/pdf/reports/can\\_report\\_august2012\\_final.pdf](http://www.everychildmatters.org/storage/documents/pdf/reports/can_report_august2012_final.pdf) (finding that 15,510 children died from child abuse and neglect during the 2001–2010 period and that the United States had higher incidences of child maltreatment deaths than other European countries, Canada, and Japan); *Child Maltreatment 2011*, ADMIN. FOR CHILD. & FAM. (Dec. 12, 2012), <http://www.acf.hhs.gov/sites/default/files/cb/cm11.pdf> (finding that 4/5ths of child fatalities were caused by one or more parents); *Elder Abuse and Neglect: In Search of Solutions*, AM. PSYCHOL. ASS'N (2013), <http://www.apa.org/pi/aging/resources/guides/elder-abuse.aspx?item=1> (stating that an estimated four million older Americans are abused or neglected each year, which is probably an underestimate, and that most elder abuse and neglect is by family members or caregivers in the elder’s own home).

320. PAULA A. MONOPOLI, *AMERICAN PROBATE: PROTECTING THE PUBLIC, IMPROVING THE PROCESS* 11 (2003).

321. N.Y. DOM. REL. LAW § 140 (McKinney 2013); VT. STAT. ANN. tit.15, § 516 (West 2013).

322. FLA. STAT. ANN. § 732.805 (West 2013).

323. *See* TEX. ESTATES CODE ANN. § 123.101-04 (West 2014).

324. *See id.*

325. TEX. FAM. CODE ANN. § 6.111 (West 2013).

following reasons: (1) the person was under the age of eighteen and the marriage occurred without parental consent or court order; (2) one of the parties was under the influence of alcohol or narcotics; (3) one of the parties is impotent and the other party did not have knowledge of this; (4) one of the parties used fraud, duress or force to induce the other to enter into the marriage; (5) mental incapacity at the time of marriage; or (6) concealed divorce by one party.<sup>326</sup> However, the only reason the court may void the marriage after the death of one of the parties is mental incapacity.<sup>327</sup> Yet, a person who procures a marriage by deceiving an elderly or disabled person should experience the same consequences as someone who marries them knowing they are mentally incapacitated. The statute could be amended to include marriages entered into because of fraud, force, undue influence, or duress, in addition to mental disabilities.

## VI. Conclusion

American families are changing, yet we continue to rely on mechanical statutes that fail to take into account the reality of families today.<sup>328</sup> We need more effective statutes to deal with this issue because inheritance statutes should not be allowed to be used as an instrument to perpetrate fraud.<sup>329</sup> An individual who emotionally, physically, or financially abuses or neglects a decedent should not be allowed to profit from their wrongdoing.<sup>330</sup> The 2007 additions to the Texas Probate Code begin to address the problem of abusive or neglectful heirs; however, the statutes could be amended to better carry out their underlying policies and make them more effective.<sup>331</sup> Texas could also use a statute that addresses abuse and neglect of elderly and disabled individuals.<sup>332</sup> This is essential if Texas does not want people like Melinda Williams and Judy Wang to financially profit from their abusive and neglectful actions.<sup>333</sup>

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326. *Id.*

327. *See* TEX. ESTATES CODE ANN. § 123.101-04.

328. *See supra* Part III.

329. *See* Parks v. Dumas, 321 S.W.2d 653, 655 (Tex. Civ. App.—Fort Worth 1959, no writ).

330. *See* Pope v. Garrett, 211 S.W.2d 559 (Tex. 1948).

331. *See supra* Part IV.A.

332. *See supra* Part III.A.

333. *See supra* Part I.