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# Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code § 259 and Using It as a Model

## I. INTRODUCTION

Police found Ms. Brown, a seventy-four-year-old woman, partially fused to an arm chair surrounded by her own filth.<sup>1</sup> Her son and primary caretaker, James Owens, left her in the chair for days, allegedly complying with her request to let her die at home.<sup>2</sup> Luckily for Ms. Brown, James tried to endorse her social security check, and authorities eventually found her.<sup>3</sup> Ms. Brown was pried from her arm chair and died of a stroke in the hospital several days later, and James was eventually sentenced to one year in prison.<sup>4</sup> Although it is shocking that police found Ms. Brown in such a life-threatening and atrocious condition, it is almost equally shocking that nothing in Missouri's elder abuse statutes would keep James from inheriting from his mother's estate.<sup>5</sup>

Accounts like this are disconcerting for several reasons. First, for every disheartening story of elder abuse, there are several—perhaps dozens of—other stories that are never reported. Second, abusers have an eighty-four percent chance of living in a state that has not yet enacted a statute that disinherits elder abusers.<sup>6</sup> Third, even in the eight states that have recognized that stories like Ms. Brown's are a major problem,<sup>7</sup> the statutes that states have enacted to deal

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1. Matt Campbell, *Son of Independence Woman Fused to Chair Pleads to Abuse*, KANSAS CITY STAR (Sep. 20, 2012, 1:28 AM), <http://www.kansas.com/2012/09/19/2496444/independence-man-pleads-to-elder.html>.

2. *Id.*

3. *Id.*

4. *Id.*

5. Missouri statutes create a class A felony for “knowingly caus[ing] or attempt[ing] to cause serious physical injury” to persons above the age of sixty, but they do not have a clause disinheriting those who commit this felony. *See* MO. ANN. STAT. § 565.180 (West 2012).

6. *See infra* Figure 1.

7. *See* ARIZ. REV. STAT. ANN. § 46-456; 755 ILL. COMP. STAT. ANN. 5/2-6.2 (West 2012); KY. REV. STAT. ANN. § 381.280 (West); MD. CODE ANN., CRIM. LAW § 8-801 (West 2012); OR. REV. STAT. ANN. § 112.465 (West 2012); WASH. REV. CODE ANN. § 11.84.020 (West 2012).

with this problem fail to provide strong incentives for people closest to elders to report abuse.

Existing scholarship tends to welcome elder abuse disinheritance statutes without extreme criticism, noting their potential deterrent effects.<sup>8</sup> However, I argue that these statutes have severely limited their potential deterrent effects by relying too strongly on antiquated notions of inheritance rights, by refusing to treat many forms of elder abuse as perpetrations that can be deterred by probate law, and by refusing to disengage themselves from criminal law.

Most enacted elder abuse disinheritance statutes suffer from one of two common deficiencies. First, six of the eight states that have enacted such statutes require a criminal conviction, which deprives family members of an incentive to report and prosecute the abuse because they may lack evidence to support a conviction beyond a reasonable doubt. Second, three of the states provide for disinheritance only in cases of financial elder abuse, relying on false ideas about which kinds of abusive acts actually relate to inheritance.

California's statute does not suffer from the foregoing deficiencies, but it is particularly weak because it merely offsets the amount that an abuser would receive through inheritance by the amount of any judgment awarded to the abused elder's estate.<sup>9</sup> These statutes provide a poor guide for states that are considering such legislation, as evidenced by a recent proposal in Connecticut that perpetuates many of their shortcomings.<sup>10</sup> Figure 1 outlines the current condition of elder abuse disinheritance statutes in the eight states that have passed them.

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8. Lisa C. Dumond, *The Undeserving Heir: Domestic Elder Abuser's Right to Inherit*, 23 QUINNIPAC PROB. L.J. 214, 237 (2010); Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247, 274–76 (2011) (using elder abuse disinheritance statutes as an example of what spousal abuse disinheritance statutes could be).

9. I provide a much more detailed account of how this statute works in Part III.

10. See Dumond, *supra* note 8 at 234–35 (proposing a statute that requires a conviction of elder abuse to become effective, while lowering the standard of proof for the *mens rea* element of the conviction). Although the intentions of this proposal are clearly in the right direction, it is unclear how lowering the standard of proof for the *mens rea* element would provide the right incentives if the *actus reus* portion of the statute still requires proof beyond a reasonable doubt.

Figure 1

State	Statute Requires Criminal Conviction	Statute Targets Only Financial Elder Abuse	Statute Provides a Weak Penalty
Arizona	√	√	
California			√
Illinois	√		
Kentucky	√		
Maryland	√	√	
Michigan	√		
Oregon	√		
Washington		√	

Several authors have criticized California's incomplete effort at disincentivizing elder abuse,<sup>11</sup> but none have proposed language to fix this statute. Small changes in California's elder abuse disinheritance statute could transform it into a model statute that effectively disincentivizes many forms of elder abuse while still

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11. See Kimberleigh N. Korpus, *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 (2001) (discussing the disinheritance statute's shortcomings); Anne-Marie Rhodes, *Blood and Behavior*, 36 ACTEC J. 143, 173 (2010) ("The significance of section 259 lies not in its sweep but its existence."); Thomas H. Shepherd, *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, 473 (2001) (criticizing California Probate § 259 as a failure to address familial abuse done at earlier ages and proposing a statute that seeks broader application). Mr. Shepherd's proposal is closest to my own, but it applies to abuse that happens to minors. See Shepherd, *supra* at 464–65. A statute of this magnitude is beyond the scope of this Comment and raises many issues about testamentary freedom.

respecting testamentary freedom of elders, and I propose such changes in this Comment. The most effective way to ensure that states are aware of this model statute would be to include it in the Uniform Probate Code.<sup>12</sup>

Following this introduction, Part II explains why treating elder abuse as a probate law problem—and not just a criminal law problem—will successfully supplement state criminal elder abuse statutes by disincentivizing elder abuse by family members. Part II also explains why enacting elder abuse disinheritance legislation falls clearly within states' powers under the Constitution, even if it is a break from antiquated notions of inheritance rights. Part III explains why the common law doctrine of undue influence is inadequate to prevent or remedy elder abuse. Part IV explains why existing disinheritance elder abuse statutes in the states of Washington, Oregon, California, Illinois, Arizona, Kentucky, Michigan, and Maryland are also ineffective in preventing many kinds of elder abuse by family members and thus, why new legislation is needed. Part V explains the changes to California Probate Code § 259 that will be needed—if it is used as a model statute—to curb the epidemic of elder abuse and presents a proposed draft of such changes. Part VI concludes.

## II. GENERAL CRIMINAL ELDER ABUSE LAWS

The number of incidents of elder abuse is rapidly increasing. Yet no one knows how big the problem really is. One report claims that elder abuse has increased by fifty percent since 1980.<sup>13</sup> Others estimate that between one and two million elderly people are abused each year, but the estimates vary greatly.<sup>14</sup> Even the most shocking report may actually be conservative, however, because “studies have

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12. Cf. Spivack, *supra* note 8 (proposing a Uniform Probate Code section that disinherits spousal abusers).

13. H.R. Rep. No. 101-997, pt. II.II (1990).

14. NAT'L RESEARCH COUNCIL, ELDER MISTREATMENT: ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA 1 (Richard J. Bonnie & Robert B. Wallace eds., 2003) (“According to the best available estimates, between 1 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.”); Jill C. Skabronski, *Elder Abuse: Washington's Response to a Growing Epidemic*, 31 GONZ. L. REV. 627, 629 (1996) (“It is estimated that 700,000 to 2,000,000 elderly persons are abused each year.” (citing John J. Regan, *Planning for Aging or Incapacity 1994: Legal and Financial Issues*, in ESTATE PLANNING AND ADMINISTRATION 1994, at 548-59)).

found that only one of every 13 or 14 cases of abuse is ever reported.”<sup>15</sup> Whatever the actual number of abuse incidents is, this number is likely to escalate as older people continue to live “longer and longer.”<sup>16</sup>

One piece of the puzzle concerning underreporting of elder abuse may be that elder abuse “is largely hidden under the shroud of family secrecy.”<sup>17</sup> Elder abuse—like other forms of abuse—is not completely limited to the home, but the “typical elder abuser is generally a somewhat distant relative or acquaintance of the elder who is acting as caregiver.”<sup>18</sup> Another hypothesis is that family

15. Ralph J. Riviello, *Elder Abuse*, in ELDER ABUSE, in EVIDENCE-BASED EMERGENCY MEDICINE 635 (Brian H. Rowe ed., 2009). See also Elizabeth J. Santos & Deborah A. King, *The Assessment of Elder Abuse*, in HANDBOOK OF ASSESSMENT IN CLINICAL GERONTOLOGY 229 (Peter A. Lichtenberg ed., 2d ed. 2010) (“Worldwide, the World Health Organization (WHO) estimates that the number of older adults affected by abuse is 4–6% and this is widely believed to be an underestimation.”); Erik J. Lindbloom et al., *Elder Abuse*, in EVIDENCE-BASED GERIATRIC MEDICINE: A PRACTICAL CLINICAL GUIDE 166 (Jayna M. Holroyd-Leduc & Madhuri Reddy eds., 2010) (“It is likely that at least 4% of adults 65 years of age or older have suffered, or will suffer, some form of abuse in their later years, and this prevalence is significantly higher if one considers the broadest definition of elder mistreatment, including financial exploitation.”); NAT’L CENTER ON ELDER ABUSE AT AM. PUBLIC HUMAN SERV. ASS’N, NATIONAL ELDER ABUSE INCIDENCE STUDY (1998) (“[O]ver five times as many new incidents of abuse and neglect were unreported than those that were reported.”).

16. See MARY JOY QUINN & SUSAN K. TOMITA, ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTION STRATEGIES 6 (1986) (“There are more and more older people, and they are living longer and longer. The 75-plus group is currently the fastest growing segment of the population.”); Joann Blair, “*Honor Thy Father and Thy Mother*”—but for How Long?—*Adult Children’s Duty to Care for and Protect Elderly Parents*, 35 U. LOUISVILLE J. FAM. L. 765, 766 (1997) (“The burgeoning of the elderly population is a major reason why our society must confront the problem of elder abuse immediately”); Pamela J. Murphy, *Elder Abuse: Where We Stand*, WYO. LAW. 15 (Dec. 2007).

17. NAT’L CENTER ON ELDER ABUSE, ELDER ABUSE INFORMATION SERIES NO. 1: TYPES OF ELDER ABUSE IN DOMESTIC SETTINGS 1 (finding that domestic elder abuse often goes undetected), available at <http://www.ncea.aoa.gov/Resources/Publication/docs/fact1.pdf>.

18. Skabronski, *supra* note 14, at 632. See also *Elder Justice and Protection: Stopping the Abuse, Hearing Before the Subcommittee on Aging of the S. Comm on Health, Education, Labor, and Pensions*, 108th Cong. 1 (2003) (Statement of Paul Vescovo) (“Because most abuse occurs in the home by family members or care givers, there needs to be a concerted effort to educate the public about the special needs and problems of the elderly.”); NAT’L CENTER ON ELDER ABUSE, ELDER ABUSE INFORMATION SERIES NO. 2: TRENDS IN ELDER ABUSE IN DOMESTIC SETTINGS (“Adult children are the most frequent abusers of the elderly, and this category experienced the biggest increase in its composition of the total reports: 30.1 percent in 1990 to 36.7 percent in 1996. Other family members and spouses ranked as the next most likely abusers of the elderly. Other family members comprised 16.1 percent of all reports in 1990 and 10.8 percent of all reports in 1996, while spouses comprised 15.9 percent of all

members have little incentive to report abuse after the victim has died and the problem has ceased. So it is surprising that states have taken few steps to deter abuse by family members.

*A. Mandated Reporter Laws Fail to Address Abuse by Family Members*

States have dealt with deterring elder abuse in a very logical way: they have criminalized it, and they have mandated that certain individuals report the abuse. States have modeled elder abuse statutes “after legislation designed to attack the problem of child abuse,”<sup>19</sup> relying on the assumption that criminalizing a heinous act is the most effective and direct way to deter that act.<sup>20</sup> What distinguishes elder abuse from most heinous acts, however, is that elder abuse is often inextricably tied to the abuser’s right to inherit, especially if the abuser is a family member or other trusted individual. Elder abuse happens to elders, and so occurs relatively close in time to when an estate plan takes effect. Further, in many cases the abuser commits the abuse to alter the elder’s estate plan and benefit the abuser.<sup>21</sup>

Mandated reporter laws are under-enforced and under-inclusive, failing to address the problem of familial elder abuse.<sup>22</sup> Most states have statutes that require professionals to report elder abuse if they think that an elder “is suffering from or has died as a result of a [r]eportable [c]ondition.”<sup>23</sup> Those who fail to comply are often

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reports in 1990 and 12.6 percent in 1996.”), available at <http://www.ncea.aoa.gov/Resources/Publication/docs/fact2.pdf>.

19. Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 74 (1982); see also 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, 115–16 (2008).

20. My purpose here is not to make some new argument in this highly controversial area of criminal law; it is simply to offer one rational reason as to why states would focus on criminalizing elder abuse without focusing on other civil remedies. Many claim that criminalizing an act does nothing to deter criminals in engaging in that act. See e.g., Bazelon, *Crime: Toward a Constructive Debate*, 67 A.B.A.J. 438 (1981). Others claim that deterrence can still be achieved in a general sense, even if specific deterrence is not a realistic concept. See e.g., Frank G. Carrington, *Deterrence, Death, and the Victims of Crime: A Common Sense Approach*, 35 VAND. L. REV. 587, 590 (1982).

21. Julia L. Birkel et al., *Litigating Financial Elder Abuse Claims*, L.A. LAW. 19 (October 2007) (“[O]ver 70 percent of people over the age of 50 have been approached fraudulently, with no less than \$3.8 billion lost by seniors to financial scams.”).

22. Barber, *supra* note 19, at 134.

23. See e.g., 651 MASS. CODE REGS. 5.02 (2004); WIS. STAT. ANN. § 46.90 (West

subject to civil damages,<sup>24</sup> or under more stringent statutes, may face criminal liability.<sup>25</sup> Although reportable conditions cover the gamut of abusive acts,<sup>26</sup> the statutes usually mandate only that certain government and medical officials report abuse if they suspect it.<sup>27</sup> Encouragingly, several states have expanded their mandated reporter laws for elder abuse to include, “[a]ny person having reasonable cause to suspect” abuse.<sup>28</sup> However these states are by far the minority, and family members are almost never listed among mandated reporters.

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2013) (mandating a person “who has seen an elder adult at risk in the course of the person’s professional duties shall file a report with the county department”).

24. CAL. WELF. & INST. CODE § 15630.1 (West 2012) (“Failure to report financial abuse under this section shall be subject to a civil penalty not exceeding one thousand dollars (\$1,000) or if the failure to report is willful, a civil penalty not exceeding five thousand dollars (\$5,000)”); ALASKA STAT. ANN. § 47.24.010 (West 2013) (“A person who recklessly makes a false report under this section is civilly liable for actual damages suffered by the person who is the subject of the report.”).

25. *See e.g.*, 320 ILL. COMP. STAT. ANN. § 20/4 (West 2013) (“Any other mandated reporter required by this Act to report suspected abuse, neglect, or financial exploitation who willfully fails to report the same is guilty of a Class A misdemeanor.”); S.D. CODIFIED LAWS § 22-46-9 (West 2013) (“Any person who knowingly fails to make the required report is guilty of a Class 1 misdemeanor.”); CONN. GEN. STAT. ANN. § 17b-451 (West 2013) (“Any person required to report under the provisions of this section who fails to make such report within the prescribed time period shall be fined not more than five hundred dollars, except that, if such person intentionally fails to make such report within the prescribed time period, such person shall be guilty of a class C misdemeanor for the first offense and a class A misdemeanor for any subsequent offense.”).

26. *See e.g.*, GA. CODE ANN. § 30-5-3 (West 2013) (covering “willful infliction of physical pain, physical injury, mental anguish, unreasonable confinement, or the willful deprivation of essential services to a disabled adult or elder person”); *see also* ALA. CODE § 38-9D-2.

27. Massachusetts’s statutory scheme is representative of the type of individuals to whom mandated reporter laws apply. For example, the Massachusetts statute levies fines on “[a]ny physician, physician assistant, medical intern, dentist, nurse, family counselor, probation officer, social worker, policeman, firefighter, emergency medical technician, licensed psychologist, coroner, registered physical therapist, registered occupational therapist, osteopath, podiatrist, executive director of a licensed home health agency or executive director of a homemaker service agency or manager of an assisted living residence.” 651 MASS. CODE REGS. 5.02 (2004). *See also* S.D. CODIFIED LAWS § 22-46-9 (West 2013); GA. CODE ANN. § 30-5-4 (West 2013); KY. REV. STAT. ANN. § 209.030 (West 2013).

28. *See e.g.*, MO. ANN. STAT. § 660.255 (West 2013) (mandating that such individuals “shall report such information”). However, under the Missouri statutes, fines are only specified for in-home service providers and only “if the supervising in-home services provider willfully and knowingly failed to report known abuse by such employee.” MO. ANN. STAT. § 660.255 (West 2013).



Because mandated reporter laws were designed for child abuse and not for elder abuse, they do not provide the right incentives to report. Mandated reporter laws are practically identical for elder abuse and child abuse.<sup>29</sup> This is problematic both because children and elders live in different situations and because elders enjoy different relationships with family members than children enjoy. Elders are often more isolated than children; they do not go to school, they are often retired, and they are not compelled by anyone to schedule doctor's appointments.<sup>30</sup> Unlike children, elders are legally competent to make their own decisions, so even those who suspect abuse may not want to report it because to do so would undermine the elder's autonomy and "self-determination."<sup>31</sup> Additionally, elder abuse is much harder for doctors to diagnose than child abuse because bruising on elderly persons can occur not only because of abuse, but because "balance and stability decline with age."<sup>32</sup>

Unlike abuse by workers in care facilities, abuse by family members flies cleanly under the radar of mandated reporter laws. Isolation and autonomy concerns are compacted when family members are the abusers. Elders may be isolated in nursing homes, but elders can be especially isolated when they are taken care of by a relative in their own home.<sup>33</sup> Workers in care facilities may feel the need to respect an elder's autonomy, but when the potential reporter or the abuser is a relative of the elder, the demand for respect can be much stronger. Care facility workers often know the elder in a physically or mentally diminished capacity. Contrastingly, family members know elders from the time when they have been in control

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29. Compare S.C. CODE ANN. § 63-7-310 (2010) (requiring certain individuals to report child abuse) with S.C. CODE ANN. § 43-35-25 (West 2013) (requiring essentially the same individuals to report elder abuse). See also Faulkner, *supra* note 19, at 79; Barber, *supra* note 19, at 121.

30. Barber, *supra* note 19, at 121 ("If an adult chooses to remain in her home, there is nothing the government can legally do.")

31. Heath R. Oberloh, *A Call to Legislative Action: Protecting Our Elders from Abuse*, 45 S.D. L. REV. 655, 665 (2000); Faulkner, *supra* note 19, at 86.

32. Barber, *supra* note 19, at 123–24.

33. Eloise Rathbone-McCuan, *Elder Abuse Within the Context of Intimate Violence*, 69 UMKC L. REV. 215, 215 (2000) ("Home health workers, social workers, and case managers encountered elderly victims living in the midst of poverty, isolated in geographically remote areas, or in serious conditions of social and psychological isolation.")

of all of their faculties and could physically and verbally defend themselves.

Mandated reporter laws also do not incentivize elders themselves to report abuse. Reporter laws correctly assume that many elders are unable to report on abuse themselves because of societal pressures on elders to preserve their dignity, their right to self-determination, and their frailty, so self-reporting of abuse will probably not be a reasonable expectation under any statutory scheme.<sup>34</sup> Elders may feel responsible for the actions of the abuser—even if the abuser is an adult—if the abuser is the elder’s child or grandchild.<sup>35</sup> Elders may assume, reasonably, that the abusive situation at home is better than being moved to a state facility for abuse victims,<sup>36</sup> or they may simply feel very attached to their own home. Elders may fear retaliation or may reasonably assume that they will not be believed due to memory loss or other mental deficiencies.<sup>37</sup> Elders may irrationally believe that such abuse is a deserved consequence of asking others to care for them.<sup>38</sup>

Mandated reporter laws overlook the pressure family members feel not to report. This is especially true if the elders themselves are silent. This pressure may come because they are unable to provide the same services that the abuser provides, because they do not want to sour family relations, or because they do not want to incur an abusive family label if there is no actual abuse or if a conviction cannot be made. Mandated reporter laws often give civil immunity to professionals who make false positive reports, but this immunity

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34. Molly Dickinson Velick, *Mandatory Reporting Statutes: A Necessary Yet Underutilized Response to Elder Abuse*, 3 *ELDER L.J.* 165, 173 (1995) (“For a variety of reasons, however, some mentally competent elderly victims cannot or will not report abuse or seek assistance.”); Faulkner, *supra* note 19, at 86.

35. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 *IDAHO L. REV.* 203, 213 (2000) (“[T]he victim may believe that some deficit in the abuser’s upbringing turned the child into an abuser and that the victim is merely suffering the consequences of his own shortcomings.”).

36. QUINN & TOMITA, *supra* note 16, at 11–12; Barber, *supra* note 19, at 123–24.

37. Barber, *supra* note 19, at 123–24.

38. QUINN & TOMITA, *supra* note 16, at 11 (“One man who lived in a nursing home was aware that his son had taken \$90,000 from his bank account. He told the state ombudsman, however, that he did not want his son prosecuted and he did not want to take any steps to recover the money. ‘The money isn’t important,’ he said. ‘My son is. After all, some family is better than none. He’s all I got.’ The son rarely visited his father in the nursing home.”); Dessin, *supra* note 35, at 213.

does not usually extend to family members.<sup>39</sup> Even if it did, civil immunity does little to mend family relationships.

Policymakers have been limited to dealing with mandated reporter laws, and so some authors have argued that states should create shelters for elder abuse victims, enforce existing mandated reporter laws, and increase the penalties for elder abuse.<sup>40</sup> These measures would be important steps toward eradicating elder abuse, but they do not overcome the already stated obstacles to reporting by family members.<sup>41</sup> Elders and family members may have more incentive to report abuse if there are shelters for abuse victims, but not where the elder needs “services that cannot be delivered in a domestic violence shelter.”<sup>42</sup> Also, increasing criminal penalties may create a disincentive, especially if the elder financially supports the abuser.<sup>43</sup> Other family members and interested persons may not recognize the abuse—and in many states would have no charge to report the abuse if they did recognize it.<sup>44</sup>

If the problem of familial elder abuse cannot be solved by relying on criminal elder abuse laws and their mandated reporter law counterparts, then potential elder abusers must be disincentivized. One effective way to do this is by disinheriting elder abusers. States could enact statutes—much like California’s statute, but with stronger disincentives—that bar elder abusers from inheriting from anyone that they abuse. If such statutes were enacted, they would likely lead to more reporting and eventually to a reduction in incidents of abuse. Other family members would have strong

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39. See e.g., OR. REV. STAT. ANN. § 124.075 (West 2013). See also Oberloh, *supra* note 31, at 658 (“The [South Dakota] legislature has granted complete immunity to any health care institution, its employees, agents, and staff so long as they make a “good faith” report of abuse or neglect.”).

40. Barber, *supra* note 19, at 133–34.

41. See *supra* text accompanying notes 29–33.

42. See Mary Twomey, et. al., *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CENTER FOR FAMS. CHILD. & CTS. 73, 76 (2005) (claiming that elder abuse victims are confronted “with barriers that are both similar to those faced by younger victims and also different as a result of age and disability”); Barber, *supra* note 19, at 123–24.

43. QUINN & TOMITA, *supra* note 16, at 11; Dessin, *supra* note 35, at 213.

44. See Audrey S. Garfield, *Elder Abuse and the States’ Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 874 (1991) (“Almost all state APS laws mandate a wide variety of professionals to report known or suspected cases of elderly abuse. The ‘professionals’ most often include health care and social service professionals including law enforcement officers, social workers, physicians, and nurses.”).

incentives to bring suit: if the abuser is disinherited, it will leave a larger pot for the rest of the beneficiaries. This incentive does not exist in states where there is no disinheritance statute.

*B. It Is Constitutionally Permissible for States to Create Disinheritance Statutes for Elder Abuse*

Some states may have failed to enact elder abuse disinheritance statutes due to lack of knowledge about them, but others may have concerns about “punishing” an abuser twice and taking property without due process of law. Under a disinheritance statute, an abuser could potentially be punished criminally and “punished” under the probate laws of a state, creating something similar to double-jeopardy.<sup>45</sup> Or, an abuser could potentially be acquitted in a criminal trial but still be barred from inheritance in a civil action.<sup>46</sup> However, inheritance is not a right granted in the United States Constitution.<sup>47</sup> Thus, a plaintiff in a civil suit should not be required to prove beyond a reasonable doubt that elder abuse occurred because the abuser’s “life, liberty, or property”—as those terms have been interpreted—are not at jeopardy in cases involving inheritance.<sup>48</sup>

Since the right to inherit is not a constitutionally guaranteed right, states generally have free rein to determine probate laws.<sup>49</sup> The Supreme Court has said that states may “even abolish the power of

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45. *In re Estate of Blodgett*, 147 P.3d 702, 711–12 (Alaska 2006); *In re Estate of Benson*, 548 So. 2d 775, 778 (Fla. Dist. Ct. App. 1989) (finding that although the convicted murderer of decedent was clearly disinherited from his mother’s estate, his children could still inherit under his mother’s will).

46. *In re Glenn’s Estate*, 299 A.2d 203, 206, (Pa. 1973) (Although a son was not found guilty of murder because of insanity that the slayer statute still applied and did not violate his rights to due process. “There is no hint in the [slayer] Act that a prior criminal conviction of murder is the necessary antecedent of disinheritance.”); *In re Estate of Howard*, 542 So. 2d 395 (Fla. Dist. Ct. App. 1989) (acquitted defendant disqualified under slayer statute).

47. *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 828 (Ohio C.P. 1974) (“Basically, the right to receive property by will is a creature of the law, and is not a natural right or one guaranteed or protected by either the Ohio or the United States constitution.”). The right to inherit is not included in any state’s constitution besides Louisiana’s. *See* LA. CONST. art. XII, § 5. However, Louisiana’s forced heirship no longer applies to adult children. LA. CIV. CODE ANN. art. 1493 (2000 & Supp. 2008).

48. J.D. Trout & Shahid A. Buttar, *Resurrecting “Death Taxes”: Inheritance, Redistribution, and the Science of Happiness*, 16 J.L. & POL. 765 (2000).

49. Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 84–85 (1990).

testamentary disposition over property within its jurisdiction.”<sup>50</sup> This statement can only be considered dicta because such an issue has never come directly before the Supreme Court,<sup>51</sup> but it represents the potential freedom that states have to determine inheritance laws. If states can actually abolish the power of “testamentary disposition over property,” then it follows that the right to inherit is not on an equal level as—or included in the definition of—the rights to life, liberty, and property under the Fifth and Fourteenth Amendments;<sup>52</sup> states do not possess the power to take or abolish these fundamental constitutional rights “without due process of law.”<sup>53</sup>

Despite states’ broad powers over inheritance law, they may be reticent to impinge on assumptions that testators pass their property to relatives and friends. Children have no constitutional or statutory right to inherit their parents’ property in most states,<sup>54</sup> but the assumption that property should pass from parent to child has worked its way into United States probate law in the forms of the doctrine of undue influence and statutes that govern intestate succession.<sup>55</sup> With undue influence, any suspicious bequest is scrutinized by a court—and the court treats property leaving traditional family circles as a clear indication of suspicious

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50. *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1942); *see also Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 48 (1944).

51. Ascher, *supra* note 49, at 85.

52. States have extinguished inheritance rights without considering due process by creating a distinction between property interests, whether future or contingent, and mere possibilities of property interests. *See* CAL. CIV. CODE § 700 (West 2007) (“A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.”); *In re Rosin*, 248 B.R. 625, 633 (Bankr. M.D. Fla. 1998) (“A descendant has no present or future interest in property owned by an ancestor, absent some conveyance . . . . Although there is a possibility that a descendant may inherit property from an ancestor, it is only a possibility.”).

53. U.S. CONST. amend. V (stating that citizens shall not “be deprived of life, liberty, or property, without due process of law.”); U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”).

54. *See* Garfield, *supra* note 44.

55. *In re Estate of Olson*, 451 N.W.2d 33 (Iowa Ct. App. 1989). *See also* 95 C.J.S. *Wills* § 242 (1956 & Supp. 2001); Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 250 n.70 (1996); Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 587 (2001) (“While courts have declared that a testator’s bequest of property to a person who is not a natural object of his bounty raises no presumption of mental incapacity or of undue influence, they often, and without much inquiry, deem a testator’s disposition ‘unnatural’ when it disproportionately benefits ‘strangers of the blood.’”).

circumstances.<sup>56</sup> Statutes that govern intestate succession give decedents' entire estates to their spouse and children if there is no estate plan.<sup>57</sup> Yet there are many instances where the state removes the right to inherit, even for family members, because it finds the family members to be undeserving of an inheritance. Abandonment and "slayer" statutes—statutes that remove inheritance if the beneficiary abandons or kills the decedent—are clear examples of this.<sup>58</sup>

Even if the right to inherit were a property right protected by either the Constitution or the traditions of state law, neither state nor federal law requires property rights to be protected by the criminal law's standard of proof. The standard of proof necessary to remove someone's property is much lower than the standard of proof necessary to remove someone's liberty through criminal law.<sup>59</sup> The government takes property using a standard of proof far short of "beyond a reasonable doubt," and this has been found to not violate the due process clause.<sup>60</sup>

There are no real double jeopardy concerns when states enact elder abuse disinheritance statutes. A disinheritance statute falls under civil law, even if it would be considered a punitive device,<sup>61</sup> and courts draw a distinction between criminal sanctions and punitive damages in civil cases.<sup>62</sup> When a defendant faces both criminal fines and punitive civil damages for a single act, courts have found that there is no implication of double jeopardy.<sup>63</sup>

56. Storrow, *supra* note 55, at 587.

57. See *e.g.*, N.D. CENT. CODE ANN. §§ 30.1-04-02 and 30.1-04-03 (West 2010); OR. REV. STAT. ANN. §§ 112.035 and 112.045 (West 2011).

58. Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 102 (2007); *In Re Estate of Edward J. Secon*, 23 QUINNIPIAC PROB. L.J. 1, 3–4 (2009).

59. EDWARD RUCKER & MARCK OVERLAND, CALIFORNIA CRIMINAL PRACTICE: MOTIONS, JURY INSTRUCTIONS & SENTENCING § 43:12 (3d ed.) ("Some of you may have served as jurors in civil cases where a lesser standard of proof was employed, such as proof by a preponderance of the evidence. In criminal cases, however, the prosecution's proof must be more convincing. The proof must be beyond a reasonable doubt.").

60. *Fuentes v. Shevin*, 407 U.S. 67, 83, 92 (1972); Linda Beale, Note, *Connecticut v. Doehr and Procedural Due Process Values: The Sniadach Tetrad Revisited*, 79 CORNELL L. REV. 1603 (1994) (explaining the minimal due process constitutional requirements for attachment proceedings as interpreted by several Supreme Court rulings).

61. *In re Estate of Blodgett*, 147 P.3d 702, 711 (Alaska 2006) (implying that a slayer statute is civil, even if it is "arguably punitive" and claiming that "[i]t is unclear whether the *ex post facto* clause applies to purely civil statutes").

62. *Hudson v. United States*, 522 U.S. 93, 99 (1997).

63. *Id.* ("The [Double Jeopardy] Clause protects only against the imposition of multiple

This same constitutional logic is used to uphold certain slayer and abandonment statutes that are triggered when clear and convincing evidence shows that the killing or abandonment took place.<sup>64</sup> A slayer can lose all rights to inheritance and face criminal liability, but a court can find an individual not guilty in a criminal trial and still disinherit the individual under the state's slayer statute.<sup>65</sup> There are no double jeopardy concerns because a person is not being criminally punished twice for the same act.<sup>66</sup> And there are no due process concerns because due process does not require proof beyond a reasonable doubt in probate cases.<sup>67</sup> Although abandonment statutes have been criticized as not actually deterring deadbeat parents from abandoning their children,<sup>68</sup> there is some evidence that because slayer statutes have existed for so long, they do have some deterring effect.<sup>69</sup>

*C. Elder Abuse by Family Members Can Be Disincentivized, and Reporting on Elder Abuse by Family Members Can Be Incentivized*

One question that remains is whether enacting a disinheritance statute would actually disincentivize elder abuse. Some claim that certain forms of elder abuse may not be deterrable. The abuser may be aware of certain future consequences of his actions, but he

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*criminal* punishments for the same offense.”). However, courts must still find that it was a legislature’s intent to make a statute a civil statute. *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938). And the court must find that the civil statute was not so punitive in effect as to “transfor[m] what was clearly intended as a civil remedy into a criminal penalty.” *Rex Trailer Co. v. United States*, 350 U.S. 148, 154 (1995). Because inheritance is a civil matter and given completely to the states to decide, however, it is unlikely that any disinheritance statute would be considered a criminal penalty.

64. *Estate of Blodgett*, 147 P.3d at 711.

65. *See supra* notes 45–46.

66. *Hudson*, 522 U.S. at 99. *See also supra* note 53.

67. *Cary v. Riss*, 433 S.E.2d 546, 552–53 (W. Va. 1993) (outlining the minimal requirements of notice for due process in probate cases).

68. Theresa Louise Davis, *Not Just for Kids: Why Georgia’s Statutory Disinheritance of Deadbeat Parents Should Extend to Intestate Adults*, 43 GA. L. REV. 867, 891 (2009) (“Nonetheless, deterrence is a legitimate goal if, in even one case, an abandonment statute influences a parent to support or care for a child, especially where the child possesses a significant estate during life.”).

69. Sneddon, *supra* note 58, at 103 (“To the extent that a potential killer is aware of the possible application of the slayer rule, he or she may be deterred from committing an economically motivated killing.”). *See also* Callie Kramer, *Guilty by Association: Inadequacies in the Uniform Probate Code Slayer Statute*, 19 N.Y.L. SCH. J. HUM. RTS. 697, 702 (2003) (“Thus, the slayer rule has an effect on deterring economically motivated killings.”).

commits the abuse without taking these consequences into account.<sup>70</sup> Although caretaker frustrations may cause certain forms of elder abuse,<sup>71</sup> other forms of elder abuse, including financial elder abuse and neglect, can also occur because the family member wants to enhance his share of the elder's estate. Further, disinheritance statutes reflect the will of the elder and comply with the equitable principle that individuals should not reap benefit from their wrongs.

Many forms of elder abuse are caused by an abuser's desire to gain from the abused's estate—that is, the possibility of gaining from the estate creates an incentive to abuse. This may be due to the definition of elder abuse, which is broader than the definitions of other kinds of abuse, including such concepts as financial abuse and exploitation,<sup>72</sup> but it may also be due to the nature of elder abuse. Elder abuse can occur not only when the abuser intentionally assaults the abused, but also when the abuser intentionally withholds care from the abused.<sup>73</sup> For example, a caretaker child of an aging parent may refuse to seek medical attention for his parent because he does not want the parent's estate to be reduced by medical bills.<sup>74</sup> Another example comes from *In re Estate of Lowrie*, in which the son of the abused elder isolated the elder from her family and community in order to influence her to change her will, mainly benefitting himself.<sup>75</sup> These examples show that unlike other forms of abuse, rooted in many psychological and emotional causes, elder

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70. Spivack, *supra* note 8, at 275–76.

71. BONNIE BRANDL ET AL., ELDER ABUSE AND INTERVENTION: A COLLABORATIVE APPROACH 38 (2007) (noting that “[g]iven the challenges that sometimes occur when providing care for an older person, the notion that caregivers can be pushed past their limits resonates with professionals and community members,” but noting also that “more recent studies have not supported caregiver stress as a primary cause of elder abuse”).

72. See WIS. STAT. ANN. § 46.90 (West 2014) (including not only definitions of physical and emotional elder abuse but also a definition of financial exploitation that includes “[o]btaining an individual's money or property by deceiving or enticing the individual, or by forcing, compelling, or coercing the individual to give, sell at less than fair market value, or in other ways convey money or property against his or her will without his or her informed consent”).

73. See, e.g., ALA. CODE § 38-9D-2 (Lexis 2014) (“Neglect. The intentional or unintentional failure by the caregiver to obtain adequate goods or services for the elderly person's maintenance and well-being. Examples include a caregiver who fails to buy groceries or prescription medications.”).

74. Farah Farouque, *Our Frail Elderly Are Being Abused*, THE AGE (Mar. 19, 2005), available at <http://www.theage.com.au/news/National/Our-frail-elderly-are-being-abused/2005/03/18/1111086011259.html>.

75. *In re Estate of Lowrie*, 12 Cal. Rptr. 3d 828, 829–31 Cal. Ct App (2004).



abuse, at least in some cases, is caused by monetary incentives in that the abusers may harm or refuse care to the elder to ensure that their share of the estate is maximized when the victim dies.<sup>76</sup> In cases where the abuse is an avenue to getting some or all of the elder's estate, elder abuse can be disincentivized.

Even in cases where the caretaker's frustration or carelessness leads to abuse, some authors claim that a disinheritance clause could inspire more patience and dutiful care.<sup>77</sup> In general, there are both skeptics and advocates of law as a deterrent,<sup>78</sup> and this is true of disinheritance statutes as well. Most critics claim that enacting a law does not deter in many cases because potential perpetrators may be unaware of the intricacies of the law.<sup>79</sup> However, some advocates of law as a deterrent claim statutes that have become common knowledge—such as slayer statutes—may deter individuals who would otherwise consider killing in order to inherit.<sup>80</sup> If the argument advanced against disinheritance statutes as a deterrent is that these laws would deter abusers only if more people knew about them, then it seems counterintuitive not to enact the law. Enacting and enforcing a law brings notice and eventually the law too, may become common knowledge in the same way that slayer statutes have.<sup>81</sup>

Even if elder abuse disinheritance statutes would not deter all forms of elder abuse, they may still be rationalized in the same way that the common law doctrine of undue influence and many other disinheritance statutes are rationalized: The statute reflects the will of the elder,<sup>82</sup> and individuals should not reap benefits from their

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76. *Id.*

77. See Korpus, *supra* note 11, at 573 (“People that know that misconduct could cost them their inheritances would be more motivated to react promptly to the needs of dependent family members, invest time and energy into maintaining emotional control, seek assistance when they feel overwhelmed, and find appropriate outlets for frustration and anger.”).

78. See Faulkner, *supra* note 19 and accompanying text.

79. Isaac Ehrlich, *The Deterrent Effect of Criminal Law Enforcement*, J. LEGAL STUD. 259, 260 n.7 (1972) (giving a general overview of relevant literature and noting that the general idea of law as a deterrent “has been seriously questioned in the criminological literature of the past hundred years or so”).

80. See *supra* note 65 and accompanying text.

81. Cf. Liezl Walker, *The Deterrent Value of Imposing Prison Sentences for Tax Crimes*, 26 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 21 (2000) (“In order for the threat of prison to have any deterrent value, the general public must be aware that the Guidelines mandate the imposition of a prison term.”).

82. Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's*

wrongful acts.<sup>83</sup> If the elder could have made a decision free from whatever psychological or physical influence the abuser had over her, then the elder would have disinherited the abuser.<sup>84</sup> And because probate law serves the ultimate purpose of allowing for testamentary freedom,<sup>85</sup> a disinheritance statute should ensure that the abuser is disinherited in cases where elders themselves are unable to disinherit abusers.

Some may be concerned that such a statute is overbroad, leading to disinheritance even in cases where elders themselves would not want to disinherit. This is a question of the drafting of the statute, however, and by limiting the scope of the statute, a state may ensure that the statute will not reach individuals that the elder himself would not want to disinherit. California, for example, has included a ratification clause in its disinheritance statute that makes the statute ineffective if the alleged abuser can prove that the elder “was substantially able to manage his or her financial resources and to resist fraud or undue influence” after the time of the alleged abuse.<sup>86</sup> This ensures that acts that could arguably be considered abuse will not be considered abuse by a court if the elder had capacity to change his or her estate plan after the act and failed to do so.

### III. UNDUE INFLUENCE IS INEFFECTIVE TO REMEDY ELDER ABUSE

Undue influence cannot solve elder abuse because it provides no major disincentive for potential elder abusers. First, an undue influence action targets only financial elder abuse, not physical abuse. Second, a successful undue influence action prevents the perpetrator from getting more than his intestate share of the victim’s estate but

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*Love Got to Do with It?*, 57 U. PITT. L. REV. 841, 868 (1996).

83. John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 715 (1936) (“[I]t has long been the policy of the common law that no one should be allowed to profit by his own wrong; the maxim, *Nullus commodum capere potest de injuria sua propria*, in one or another of its forms, has had a very general application both at law and in equity. That a man who murders another and then seeks to take property as a result of his death is attempting to take advantage of his own wrong is clear.”).

84. Cf. Spivack, *supra* note 8, at 287 (arguing that spousal abuse victims may “intend” to give assets to abusers in a shallow sense of the word, but that because of the psychological brainwash of abuse, this intent is tainted and should give way to other, more just factors).

85. See, e.g., Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453 (2002).

86. CAL. PROB. CODE § 259(c) (West 2012).

does not penalize him for attempting to get more. Third, even a successful challenge still results in the perpetrator getting an intestate share. I will use the scenario of James and Ms. Brown, the account with which I introduced this paper, to illustrate how this doctrine would be ineffective in certain situations.

Many states do not have legislation that disinherits elder abusers. In these states, the only possible remedy to elder abuse is laws that serve other purposes, including tort laws and the common law doctrine of undue influence. In most will contests, however, allegations of undue influence and lack of testamentary capacity are the primary arguments used to seek to invalidate a will.<sup>87</sup> Undue influence will not protect elders from physical abuse or neglect by family members.<sup>88</sup> Undue influence will only protect the elder's estate from being inherited by an abuser when an abuser seeks to coerce a testator into making an inter vivos or testamentary transfer against her will.<sup>89</sup> But there is significant evidence that the doctrine of undue influence fails in this respect as well.<sup>90</sup> Undue influence is notoriously difficult to prove,<sup>91</sup> and it is often applied inconsistently by courts.<sup>92</sup> It has also been criticized as "vague and destructive."<sup>93</sup>

Undue influence works only where a perpetrator seeks to get more than his "fair share."<sup>94</sup> Even if it can be shown that the

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87. Jeffrey A. Schoenblum, *Will Contests: An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 647–49 (1987); Kurt Wanless, *Rethinking Oregon's Law of Undue Influence in Will Contests*, 76 OR. L. REV. 1027 (1997) (finding that "undue influence is among the most common cause of action used to contest wills").

88. WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES 278–79 (1988); EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 7:1 (2d ed. 2012).

89. MCGOVERN ET AL., *supra* note 88; ROSS & REED, *supra* note 88.

90. Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 250 (2010).

91. *Hyatt v. Wroten*, 43 S.W.2d 726, 728 (Ark. 1931). (noting that undue influence "is generally exercised in secret, not openly, and, like a snake crawling upon a rock, it leaves no track behind it, but its sinister and insidious effect must be determined from facts and circumstances surrounding the testator, his physical and mental condition as shown by the evidence, and the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes"); Frolik, *supra* note 82, at 851 ("For any claim of undue influence to succeed, it must be proven that the testator was susceptible to the will of the influencer, and so it is very difficult to successfully claim undue influence if the testator is physically robust and mentally alert.").

92. David W. Kirch, *A Donor's Rights to Disposition of Assets Versus Undue Influence Protection*, COLO. LAW., Oct. 2010, at 47.

93. Spivack, *supra* note 90.

94. *See Mullins v. Ratcliff*, 515 So. 2d 1183, 1185 (Miss. 1987) (claiming that the

perpetrator did get more than his fair share under a will and the will is thrown out, the perpetrator can still inherit if the perpetrator is a family member or there is another valid will bequest.<sup>95</sup> This means not only that physical elder abuse is not remedied by this doctrine, but also that coercion, emotional abuse, intentional isolation, and other forms of abuse cannot be remedied where the abuser would not receive any more than he would receive under intestacy. If the perpetrator did not receive more under the estate plan than he would have received under a state's intestacy laws, the amount that he will inherit will not be reduced, even if a court finds undue influence. Other beneficiaries will have little incentive to present a case, making discovery of abuse unlikely.

In Ms. Brown's case, the prosecutors were unable to find enough evidence for conviction for involuntary manslaughter,<sup>96</sup> and there is no indication that there was a will contest. Thus, the doctrine of undue influence was ineffective and would have been ineffective, even if James had intentionally physically assaulted his mother.

#### IV. EXISTING DISINHERITANCE STATUTES ARE INEFFECTIVE TO REMEDY ELDER ABUSE

The different types of deficiencies in existing elder abuse disinheritance statutes divide those statutes into three categories: statutes that require a criminal conviction to be effective, statutes that target only financial elder abuse, and statutes that do not completely disinherit abusers. Several of the states' statutes fall into both the first and second categories by requiring a criminal conviction before the disinheritance statute can apply and by targeting only financial elder abuse. I will take each of these types of statute in turn and explain why they are ineffective against many forms of elder abuse. I will use the scenario of James and Ms. Brown,

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entire reason for the appeal was the "use of undue influence to obtain a larger than fair share of the family property").

95. *Wehrheim v. Golden Pond Assisted Living Facility*, 905 So. 2d 1002, 1008 (Fla. Dist. Ct. App. 2005) ("The Wehrheims argue that only the testamentary portion of the will is invalid based on the undue influence exerted on the decedent and that the revocation clause is unaffected by the wrongdoing and, therefore, valid. Thus, they assert the revocation clause invalidates the prior wills thereby requiring intestacy proceedings which would allow them to share in the decedent's estate.").

96. *Campbell*, *supra* note 1.

with certain modifications, to illustrate how these statutes would be ineffective in certain situations.

*A. Statutes That Require a Criminal Conviction to be Effective*

Arizona, Illinois, Kentucky, Maryland, Michigan, and Oregon all require that the abuser be convicted under the relevant criminal elder abuse statute in order to be disinherited.<sup>97</sup> In Oregon, an “[a]buser” means a person who is convicted of a felony by reason of conduct that constitutes physical abuse . . . or financial abuse.”<sup>98</sup> In Arizona, the disinheritance statute can be applied only to fiduciaries of the decedent, and only if the fiduciary does not “use the vulnerable adult’s assets solely for the benefit of the vulnerable adult.”<sup>99</sup> In Kentucky, the disinheritance statute comes into effect only if the abuser “victimizes the decedent by the commission of any felony under KRS Chapter 209.”<sup>100</sup> KRS Chapter 209 includes descriptions of felonies for both financial and physical elder abuse.<sup>101</sup> In Maryland, a conviction of financial elder abuse can lead to a prison sentence “not exceeding 15 years,” if the abuser manipulated over \$1,000 of the elder’s estate, and the abuser can be disinherited if he “fails to restore fully the property taken or its value as ordered.”<sup>102</sup> Michigan’s disinheritance statute applies only to an individual “who is convicted of committing abuse, neglect, or exploitation.”<sup>103</sup> Illinois bars inheritance to individuals that are “convicted of financial exploitation, abuse, or neglect of an elderly person.”<sup>104</sup>

Requiring a high standard of proof before disinheritance creates a disincentive to report and a disincentive to litigate. Convictions under elder abuse statutes are fueled by mandated reports and thus fail for the same reason that criminal elder abuse statutes fail: elders

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97. ARIZ. REV. STAT. ANN. § 46-456; 755 ILL. COMP. STAT. ANN. 5/2-6.2 (West 2013); KY. REV. STAT. ANN. § 381.280 (West 2012); MD. CODE ANN., CRIM. LAW § 8-801 (West 2013); MICH. COMP. LAWS ANN. § 700.2803 (West 2012); OR. REV. STAT. ANN. § 112.455 (West 2013).

98. OR. REV. STAT. ANN. § 112.455 (West 2013).

99. ARIZ. REV. STAT. ANN. § 46-456. (Lexis 2014)

100. KY. REV. STAT. ANN. § 381.280 (West 2012).

101. KY. REV. STAT. ANN. § 209.020 (West 2012).

102. MD. CODE ANN., CRIM. LAW § 8-801 (West 2013), *amended by* 2013 MD. LAWS 415.

103. MICH. COMP. LAWS ANN. § 700.2803 (West 2012).

104. 755 ILL. COMP. STAT. ANN. 5/2-6.2 (West 2013).

and their family members are pressured by society and by abusers to not report the abuse.<sup>105</sup> Although the possibility of disinheriting a rival claimant gives some incentive to report, proof beyond a reasonable doubt is a standard that is extremely difficult to overcome.<sup>106</sup> Some states may see the requirement of a conviction as a necessity to ensure that frivolous lawsuits are not filed simply as another weapon in the arsenal of a messy fight amongst potential beneficiaries. Although keeping out frivolous lawsuits may be a legitimate concern, one state statute that requires a looser standard of proof uses standing requirements to ensure that frivolous lawsuits are weeded out,<sup>107</sup> and judges have many other doctrines at their disposal to ensure that a frivolous lawsuit will not lead to a lengthy, expensive trial.<sup>108</sup>

Further, although the accused in a criminal elder abuse case has a constitutional right to require the prosecution to prove its case beyond a reasonable doubt,<sup>109</sup> this same constitutional right does not continue on in the right to inherit.<sup>110</sup> Courts need not find beyond a reasonable doubt that a defendant exercised undue influence or duress over a decedent to ensure that the defendant does not receive inheritance under a will,<sup>111</sup> so why should the state require the court to find beyond a reasonable doubt that the abuser committed elder abuse before barring him from inheriting?

In the example of James and Ms. Brown, where James neglected his mother to the point that she became physically fused to her own arm chair, James was convicted under a statute that would have triggered disinheritance in any one of these states. There are many

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105. *See supra* notes 26–31 and accompanying text.

106. *See supra* notes 50–55 and accompanying text.

107. *Lickter v. Lickter*, 188 Cal. Rptr. 3d 123, 127 (Cal. Ct. App. 2010) (stating that a person claiming elder abuse does not have standing unless that person has “an interest that may be impaired, defeated, or benefited by the proceeding”).

108. CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2712 (3d ed. 1998) (claiming that several Supreme Court cases imply that “summary judgment should be relied upon to weed out frivolous lawsuits and avoid wasteful trials”).

109. *Cool v. United States*, 409 U.S. 100, 104 (1972) (per curiam).

110. *See supra* notes 56–60 and accompanying text.

111. *See, e.g., Cripe v. Atl. First Nat’l Bank of Daytona Beach*, 422 So. 2d 820, 823 (Fla. 1982) (“The trier of fact determines the question of undue influence, the standard of proof required of the moving party being the preponderance (greater weight) of the evidence.”); *In re Estate of Wagner*, 522 N.W.2d 159, 165 (Neb. 1994) (“The setting aside of a contract for undue influence requires clear and convincing evidence.”).

situations like James's, however, that are not reported.<sup>112</sup> Even the cases that are reported are not always prosecuted. Also, according to news reports, James pleaded guilty to the charges against him,<sup>113</sup> but it is not clear that he would have been convicted if he had pleaded not guilty. Thus, there are many protections that are afforded criminal defendants like James, and it falls to state legislatures to determine whether these protections are necessary when an individual's inheritance, and not his constitutional rights, is at stake.

*B. Statutes That Target Only Financial Elder Abuse*

Arizona, Maryland, and Washington have disinheritance statutes that fail to include physical abuse, sexual abuse, and psychological abuse as disinheritance-worthy offenses. Like the doctrine of undue influence, these statutes seem to limit themselves to a very literal construction of the common law maxim used to justify slayer statutes: no one can benefit from his (or her) own wrongdoing.<sup>114</sup> If that is the rationale behind not including physical elder abuse as a disinheritance-worthy act, however, then the creators of these statutes failed to recognize that many forms of physical elder abuse can also create a tangible benefit for the abuser.<sup>115</sup> For example, the abuse can be a method of keeping the elder from spending or distributing her assets in a way that could take money away from the amount that the abuser would inherit. Thus, it is hard to see why even a strict construction of the wrongful-benefiting rationale would justify excluding so many forms of abuse from the statute.

Arizona's elder abuse statute provides the following:

A person who is in a position of trust and confidence to a vulnerable adult shall use the vulnerable adult's assets solely for the benefit of the vulnerable adult and not for the benefit of the person who is in the position of trust and confidence to the vulnerable adult or the person's relatives.<sup>116</sup>

This statute fails to consider two separate situations that are common in elder abuse cases. First, the statute fails to address

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112. *See supra* Part II.

113. Campbell, *supra* note 1.

114. *See supra* note 69 and accompanying text.

115. *See supra* notes 70–75 and accompanying text.

116. ARIZ. REV. STAT. ANN. § 46-456 (Lexis 2014).

situations where the abuser is an intended beneficiary under a will, but not in a “position of trust and confidence.”<sup>117</sup> For example, the abuser could be a relative that is not a trustee of the elder, but who stands to inherit from the elder’s estate. Second, this statute fails to address situations where assets are simply withheld from the elder.<sup>118</sup>

Maryland’s elder abuse statute is much broader than Arizona’s, but it also fails to include a disinheritance clause for the physical abuse of elders. The statute provides in relevant parts 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 reasonably should know is at least 68 years old, with intent to deprive the individual of the individual’s property,”<sup>119</sup> and “a person may not knowingly and willfully obtain by deception, intimidation, or undue influence the property of an individual that the person knows or reasonably should know is a vulnerable adult with intent to deprive the vulnerable adult of the vulnerable adult’s property.”<sup>120</sup> This statute, unlike Arizona’s disinheritance statute, includes the concept of withholding property as a disinheritance-worthy act, but it still fails to address many forms of physical abuse that could be deterred.

Washington’s disinheritance statute is effective only if financial exploitation was committed.<sup>121</sup> However, like the Maryland statute, the Washington statute is broad and includes this definition of financial exploitation: “‘Financial exploitation’ means the illegal or improper use, control over, or withholding of the property, income, resources, or trust funds of the vulnerable adult by any person or entity for any person’s or entity’s profit or advantage other than for the vulnerable adult’s profit or advantage.”<sup>122</sup> This also addresses the problem of the abuser withholding assets, but again, it does not address the problem of physical elder abuse.

Washington’s statutory scheme does show some innovation, however, in lowering the standard of proof that is required to disinherit an abuser. In the absence of a criminal conviction, a court may determine “[b]y clear, cogent, and convincing evidence whether

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117. *Id.*

118. Farouque, *supra* note 74.

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

120. *Id.*

121. WASH. REV. CODE ANN. § 11.84.010 (West 2013).

122. *Id.* § 74.34.020 (Westlaw).



a person participated in conduct constituting financial exploitation against the decedent.”<sup>123</sup>

Physical abuse often accompanies financial elder abuse and may be one of the intimidation methods used to coerce the elder to change a will in favor of the abuser, distribute assets inter vivos to the abuser, or make the abuser a designee on a life insurance policy or retirement plan.<sup>124</sup> In cases where physical abuse is present, but it is less clear that the abuser committed financial exploitation, these statutes would be ineffective in keeping the abuser from reaping benefits from the harm that she caused the elder.<sup>125</sup> However, there are other reasons for barring inheritance from physical elder abusers, including taking advantage of law’s expressive function and possibly deterring such abuse.<sup>126</sup>

In the case of James and Ms. Brown, James would have been disinherited in Arizona only if it could be proven that he had a fiduciary duty to Ms. Brown. This may have been the case, but it is easy to imagine a similar case in which James was not a fiduciary. In that case, James would still be able to inherit. In Maryland, James may have been convicted under the financial elder abuse statute because it includes such concepts as “depriv[ing] the vulnerable adult of the vulnerable adult’s property,”<sup>127</sup> but it is not clear that Ms. Brown was deprived of her property. She allegedly requested to die at home,<sup>128</sup> and if she had requested to be taken to the hospital, nothing indicates that James would not have complied with this request. In Washington, James would not have needed a conviction of financial elder abuse to be disinherited, but there would still have to be clear and convincing evidence that James withheld property or resources for the advantage of someone other than Ms. Brown. It is clear that James withheld resources to the disadvantage of Ms. Brown, but it is not clear that he withheld resources to the advantage

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123. *Id.* § 11-84-150 (Westlaw).

124. Namkee G. Choi & James Mayer, *Elder Abuse, Neglect, and Exploitation: Risk Factors and Prevention Strategies*, J. GERONTOLOGICAL SOC. WORK, Oct. 2008, at 5, 10 (“More often than not, however, multiple forms of abuse and neglect are committed simultaneously. For example, it is quite likely that physical abuse is accompanied by psychological abuse and/or neglect.”).

125. *In re Estate of Lowrie*, 12 Cal. Rptr. 3d 828, 829–31 (Cal. Ct. App. 2004).

126. *See supra* note 8 and notes 81–88 and accompanying text.

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

128. CAL. PROB. CODE § 259 (West 2012).

of anyone, including himself. Thus, it may be difficult to find the clear and convincing evidence needed to disinherit James in Washington.

*C. Statutes That Do Not Completely Bar Inheritance for Elder Abusers*

Although California, like Washington, has shown innovation in lowering the standard of proof necessary to disinherit elder abusers, it fails to completely disinherit abusers. This is problematic because it provides much less incentive for family members to bring an elder abuse claim. California's elder abuse statute claims to "disinherit" abusers "where all of the following apply:" (1) there is clear and convincing evidence that the abuse occurred, (2) the alleged abuser acted in bad faith, (3) the alleged abuser is found to have been "reckless, oppressive, fraudulent, or malicious," and (4) the abused is found to have been "substantially unable to manage his or her financial resources or to resist fraud or undue influence."<sup>129</sup> However, this disinheritance clause applies only "to the extent provided in subdivision (c)."<sup>130</sup>

Subdivision (c) states that an abuser will not be able to share in the judgment from a civil case brought by the decedent's estate against the abuser.<sup>131</sup> This still means that the abuser will be able to inherit everything that she would have otherwise, just minus her share of a judgment against her.<sup>132</sup>

If James and Ms. Brown had lived in California, James's siblings or another beneficiary under the will would be able to file a civil suit against James, acting in the interest of Ms. Brown. If the suit was successful, and the judge entered judgment in the amount of \$100,000 against James, then this amount would be given to the estate of Ms. Brown. James would not be able to inherit any fraction of this \$100,000, but he would still be able to inherit anything else that the will specified. The only way that this statute would act as a complete bar to inheritance is if the judge decided that Ms. Brown

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129. *Id.* § 259(a)(Westlaw).

130. *Id.*

131. *Id.* § 259(c)(Westlaw).

132. *In re Estate of Lowrie*, 12 Cal. Rptr. 3d 828, 829–30 (Cal. App. 2004); Spivack, *supra* note 7, at 275 ("The abuser is barred, . . . only from inheriting monies that were added to the decedent's estate as the result of an action based on the abuse.").

had suffered in an amount equal to or greater than the amount of Ms. Brown's estate.

## V. ASPECTS OF THE PROPOSED LEGISLATION

As shown above, the one drawback to California's legislation is that its penalty is too weak. Its strengths are that it already includes a ratification clause to ensure that elders actually intend to disinherit abusers, and it has a lower burden of proof. To transform this statute into one that effectively disinherits elder abusers, I propose the following modifications: (1) the definition of elder abuse should be included in the statute and not referenced to the criminal code, and it should specifically include sexual elder abuse as a disinheritance-worthy offense; (2) there should be a provision stating that the filing of a petition to disinherit on grounds of elder abuse does not, as a matter of public policy, violate a no-contest clause; (3) the statute should specify who has standing, instead of relying on case law to determine this; and (4) the statute should completely—and not just partially—disinherit abusers.

### A. Definition

Most states recognize at least three main forms of elder abuse: physical abuse, financial abuse, and sexual abuse.<sup>133</sup> For many states, physical harm or serious physical harm will trigger the physical abuse statute.<sup>134</sup> For others, the harm must be done purposely or knowingly.<sup>135</sup> Financial abuse includes using the assets of the elder for the benefit of others besides the elder without the elder's consent in most states,<sup>136</sup> but a few also provide that an individual commits financial elder abuse by withholding the elder's assets from her.<sup>137</sup>

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133. See, e.g., CAL. WELF. & INST. CODE § 15657 (West 2005); WIS. STAT. ANN. § 46.90(a) (West 2013) (“‘Abuse’ means any of the following: 1. Physical abuse. 2. Emotional abuse. 3. Sexual abuse.”).

134. E.g., ARK. CODE ANN. § 5-28-101(4)(a)(1) (West 2013) (applies to adults “found to be in a situation or condition that poses an imminent risk of death or serious bodily harm to the adult”).

135. 473 NEB. ADMIN. CODE § 7-002 (2002) (abuse includes “knowingly or intentionally causing” harm).

136. E.g., HAW. REV. STAT. § 412:3-114.5(f) (West 2013) (“Financial abuse means to wrongfully take, appropriate, obtain, or retain, or assist in taking, appropriating, obtaining, or retaining, real or personal property of an elder by any means, including undue influence, or with intent to defraud the elder.”).

137. E.g., CAL. WELF. & INST. CODE § 15610.30(a)(1) (West 2013) (stating that

Sexual elder abuse includes the touching, fondling, or penetrating of an elder without his or her consent for sexual gratification.<sup>138</sup> Other forms of abuse covered in state statutes include neglect, emotional abuse, psychological suffering, and isolation.<sup>139</sup> Because many states have already defined elder abuse in broad terms, a cross reference from the disinheritance statute is all that would be necessary for them. For states that have either not defined elder abuse or have overbroad elder abuse statutes, however, a completely new definition may be useful.

### *B. No-Contest Clauses*

Because the purpose of a disinheritance statute is to remove barriers for family members and other interested persons to bring actions against elder abusers, it makes sense to include a provision that would make any no-contest clause in the governing instrument inapplicable to such actions.<sup>140</sup> Many states have statutes that nullify no-contest clauses when a claimant has probable cause to contest the will.<sup>141</sup> Such statutes would likely apply to elder abuse disinheritance statutes, but in states where no-contest clauses are given more deference, it would be wise to include a provision in the disinheritance statute itself stating that, for public policy reasons, no-contest clauses would not be triggered in the event that the will contest alleges elder abuse.

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financial abuse occurs when an individual “[t]akes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both”).

138. See, e.g., N.Y. PENAL LAW § 260.31 (McKinney 2010); 651 MASS. CODE REGS. 5.02(2) (2004); LA. ADMIN. CODE tit. 4, pt. VII, § 1239 (2013).

139. E.g., CAL. WELF. & INST. CODE § 15610.07 (West 2013).

140. Cf. David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1734 (2009) (arguing that the doctrine of unconscionability should steer courts’ decisions in probate law in order to ensure that no-contest clauses do not lead to inequitable results). While I agree with Professor Horton’s analysis, I propose a solution that circumvents the need of probate courts to apply unconscionability in general: I include a waiver of no-contest clauses in the statute itself.

141. See, e.g., CAL. PROB. CODE § 21311(a) (West 2013) (“A no contest clause shall only be enforced against the following types of contests: (1) A direct contest that is brought without probable cause.”); NEV. REV. STAT. ANN. § 137.005 (West 2011) (“Notwithstanding any provision to the contrary in the will, a devisee’s share must not be reduced or eliminated under a no-contest clause because the devisee institutes legal action seeking to invalidate a will if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that the will is invalid.”).

*C. Zone of Interest*

Courts in California have had to look to legislative history to find standing for individuals other than the personal representative of the decedent, and they have found that an “interested” party, meaning any person that has “an interest that may be impaired, defeated, or benefited by the proceeding” has standing to sue.<sup>142</sup> Like the scheme that the courts in California have created, an effective statute should allow standing to interested persons: close relatives of the decedent, the personal representative, and anyone who has an interest, vested or contingent, in the estate that is in question.

*D. Proposed Modifications to California Probate Code § 259<sup>143</sup>*

(a) Any interested person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) where all of the following apply:

(1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, sexual abuse, neglect, or financial abuse of the decedent, who was an elder or dependent adult.

(2) The person is found to have acted in bad faith.

(3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.

(4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.

(b) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) if that person has been convicted of a violation of [the criminal elder abuse statute of the state].

(c) Predeceasing a decedent includes forfeiting all benefits under this article with respect to the decedent’s estate, including a devise, an intestate share, an elective share, an omitted spouse’s or child’s share, a homestead allowance, a family allowance, and exempt

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142. Lickter v. Lickter, 118 Cal. Rptr. 3d 123, 127 (Cal. App. 2010), *review denied* (Jan. 26, 2011), *reb’g denied* (Nov. 18, 2010).

143. I have underlined the modifications that I propose to the statute.

property. If the decedent died intestate, the decedent's intestate estate passes as if the abuser disclaimed his or her intestate share.

(d) For purposes of this section, the following definitions shall apply:

(1) "Physical abuse" means the sustaining of any physical injury by a vulnerable adult as a result of cruel or inhumane treatment or as a result of a malicious act by any person.<sup>144</sup>

(2) "Neglect" means the willful deprivation of a vulnerable adult of adequate food, clothing, essential medical treatment or rehabilitative therapy, shelter, or supervision.

(3) "Financial abuse" means any action that involves the misuse of a vulnerable adult's funds, property, or person.

(4) "Sexual abuse" includes the touching, fondling, or penetrating of an elder or vulnerable adult for sexual gratification without his or her consent.

(5) "Elder adult" means any individual who has attained the age of 68 years.

(6) "Interested Person" means (i) the personal representative of the estate at issue, or (ii) any person with an interest, vested or contingent, in the estate at issue, or (iii) any person who would be an intestate heir of the decedent if the decedent has died intestate.

(e) Any no-contest clauses in a will or other instrument that would preclude a suit under this article are void as against public policy.<sup>145</sup>

## VI. CONCLUSION

An elder abuse statute would be particularly relevant for the Uniform Probate Code because such a statute and the Uniform Probate Code both aim to provide for the just and efficient disposition of elders' estates in today's world.<sup>146</sup> With elders today living much longer than they have in the past,<sup>147</sup> in order to ensure

144. Although these are the original definitions used in California Probate Code § 259, I have included definitions to the terms themselves, instead of referencing the criminal code.

145. The original statute can be found in Appendix 1.

146. UNIF. PROBATE CODE § 1-102 (amended 1993) ("The underlying purposes and policies of this [code] are: (1) to simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons; . . . [and] (3) to promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to his successors.").

147. Laura B. Shrestha, CONG. RESEARCH SERV., RL32792, LIFE EXPECTANCY IN THE

that elders' estates are efficiently disposed of, it is necessary to protect their intent even after death and provide disincentives towards those that intend them harm. The fact that eight states have already enacted a similar kind of statute speaks to its necessity, but there is still a need for a model statute that other states could adopt; California's statute is a good candidate to be that model.

*Travis Hunt\**

### Appendix 1

(a) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) where all of the following apply:

(1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or financial abuse of the decedent, who was an elder or dependent adult.

(2) The person is found to have acted in bad faith.

(3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.

(4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.

(b) Any person shall be deemed to have predeceased a decedent to the extent provided in subdivision (c) if that person has been convicted of a violation of Section 236 of the Penal Code or any offense described in Section 368 of the Penal Code.

(c) Any person found liable under subdivision (a) or convicted under subdivision (b) shall not (1) receive any property, damages, or costs that are awarded to the decedent's estate in an action described in subdivision (a) or (b), whether that person's entitlement is under a will, a trust, or the laws of intestacy; or (2) serve as a fiduciary as defined in Section 39, if the instrument nominating or appointing

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UNITED STATES (2006) (noting that "life expectancy at birth for the total population has reached an all-time American high level, 77.5 years, up from 49.2 years at the turn of the 20<sup>th</sup> century").

\* J.D. Candidate, April 2014, J. Reuben Clark Law School, Brigham Young University. Travis would like to thank Professor Rust Tippett, whose expert knowledge of probate law proved invaluable in crafting this Comment.

that person was executed during the period when the decedent was substantially unable to manage his or her financial resources or resist fraud or undue influence. This section shall not apply to a decedent who, at any time following the act or acts described in paragraph (1) of subdivision (a), or the act or acts described in subdivision (b), was substantially able to manage his or her financial resources and to resist fraud or undue influence within the meaning of subdivision (b) of Section 1801 of the Probate Code and subdivision (b) of Section 39 of the Civil Code.

(d) For purposes of this section, the following definitions shall apply:

(1) "Physical abuse" as defined in Section 15610.63 of the Welfare and Institutions Code.

(2) "Neglect" as defined in Section 15610.57 of the Welfare and Institutions Code.

(3) "False imprisonment" as defined in Section 368 of the Penal Code.

(4) "Financial abuse" as defined in Section 15610.30 of the Welfare and Institutions Code.

(e) Nothing in this section shall be construed to prohibit the severance and transfer of an action or proceeding to a separate civil action pursuant to Section 801.



