

BORN SINNERS VERSUS BORN WINNERS: THE NEED FOR ESTATE PLANNING INSIDE TEXAS PRISONS

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I. INTRODUCTION

Jeffrey Epstein—the infamous financier and convicted sex offender—signed his last will and testament behind bars while he awaited his trial date for human trafficking charges.¹ Two days after Epstein and his legal team executed the will, news outlets reported that Epstein had committed suicide in his jail cell.²

When the news of his suicide broke, the existence of Epstein’s will was unknown to the general public.³ In that two day period between Epstein’s death and the discovery of his will, reporters and legal experts expressed uncertainty as to the fate of his massive estate.⁴ Reports indicated that Epstein’s brother Mark—Epstein’s only next of kin—was in the position to act as the executor of his deceased brother’s estate.⁵ However, this method of inheritance would leave Mark Epstein vulnerable to a lengthy probate process drawn out by potentially dozens of lawsuits from Jeffrey Epstein’s many victims.⁶

Once Epstein’s will was made public, the uncertainty surrounding the fate of his wealth became more certain.⁷ For better or for worse, the fact that Jeffrey Epstein had a will prior to death came to be a critical decision on the part of his high-priced attorneys.⁸ Epstein’s last will and testament did more than just shorten the time and cost of probate—it shielded his \$577 million-dollar estate from being exposed to probate court and civil judgments.⁹ Indeed, experts recommend that all individuals partake in basic

1. Edwards Helmore, *Jeffrey Epstein Signed New Will to Shield \$577m Fortune Days Before Death*, THE GUARDIAN (Aug. 22, 2019, 10:32 AM), <https://www.theguardian.com/us-news/2019/aug/22/jeffrey-epstein-trust-fund-will-damages> [perma.cc/PNC9-3D9E].

2. *Id.*

3. Eder & Watkins, *Jeffrey Epstein’s Will: He Signed 2 Days Before Killing Himself*, THE NEW YORK TIMES (Aug. 19, 2019), <https://www.nytimes.com/2019/08/19/nyregion/jeffrey-epstein-will.html> [perma.cc/B64N-WR7S].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

estate planning, such as executing a valid will or trust to preserve assets with some value and ensure the desired inheritance of his or her property upon death.¹⁰ True enough, 60% of Americans do not have a will, nor do they have any other estate planning documents prepared in the event of death.¹¹

At the moment he died, Jeffrey Epstein was no different than any other incarcerated person—except for the will his attorneys drafted during his last days.¹² Epstein's financial resources allowed him access to services very few inmates receive, estate planning attorneys.¹³ Unlike Jeffrey Epstein, most inmates do not have multi-billion dollar estates to consider.¹⁴ Still, incarcerated persons need access to estate planning services to ensure the wellbeing of spouses, children, and other family members living on the outside.¹⁵ Accordingly, even the incarcerated have sufficient cause for executing a will.¹⁶ While estate planning may seem trivial to individuals faced with a prison sentence, the vulnerability of the incarcerated population magnifies the need to offer estate planning services in Texas prisons.¹⁷

At the intersection of estate planning and incarceration lies a shared history of inequality.¹⁸ The group with the highest percentage of executed estate plans is comprised of people who are older, white, wealthy, and married.¹⁹ In the United States, 78% of adults ages 18 to 36, 64% of adults ages 37 to 52, and 58% of adults ages 53 to 71 do not have a will—while 81% of individuals age 72 and older do.²⁰ Among the 40% of individuals with a valid will, Americans with an annual household income of \$75,000 or greater make up roughly 55%, while only 33% Americans with household

10. Julia Kagan, *What Is an Estate?*, INVESTOPEDIA (Nov. 27, 2019), <https://www.investopedia.com/terms/e/estate.asp> [perma.cc/74QU-S2HD].

11. Deborah Fowls, *Are You One of the 70% of Americans Without a Will?*, THE BALANCE, <https://www.thebalance.com/why-you-need-a-will-1289264> [perma.cc/RX4W-83QY] (last updated Nov. 4, 2019).

12. James Leggate, *Jeffrey Epstein Joins List of Infamous Inmates Who Died Behind Bars*, FOX BUSINESS (Aug. 12, 2019) <https://www.foxbusiness.com/features/jeffrey-epstein-infamous-criminals-died-behind-bars> [perma.cc/XW2J-5XTG].

13. *See id.*

14. *See* TEX. DEPT. OF CRIM. JUST., ANNUAL REVIEW 2018 (2019); *Texas Prison Inmates*, THE TEXAS TRIBUNE, <https://www.texastribune.org/library/data/texas-prisons/> [perma.cc/27MH-Y7GM] (last updated July 2019); THE PROBATE PROCESS, THE AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/groups/real> [perma.cc/DQ8J-CF8Q]. *property_trust_estate/resources/estate_planning/the_probate_process/* (last accessed Oct. 22, 2019).

15. *See* Hannah Wiley, *Report Highlights the Trauma that Thousands of Texas Families Have Experienced with Incarceration*, THE TEXAS TRIBUNE (Dec. 7, 2018, 11:00 AM), <https://www.texastribune.org/2018/12/07/family-incarceration-texas-prison-system/> [perma.cc/9B2E-X3ET].

16. *See id.*

17. *See* Leggate, *supra* note 12.

18. *See* Wiley, *supra* note 15.

19. *See id.*

20. *See id.*

incomes of less than \$30,000 have a will.²¹ Moreover, only 28% of non-white adults are likely to have wills compared to 51% of white adults.²²

This comment will demonstrate how the inequality found in both estate planning and mass incarceration necessitates the need to provide inmates incarcerated in the Texas Department of Criminal Justice (TDCJ) with access to estate planning attorneys.²³

First, this comment will discuss the circumstances of prison which make incarcerated persons ideal candidates for a will, providing a glimpse into Texas' custodial deaths and the inherent dangers faced by inmates in the TDCJ.²⁴ Next, this comment will highlight the provisions in the Texas Government Code addressing the various types of inmate property and methods of distribution upon an inmate's death.²⁵ Finally, this section will provide a brief overview of probate in Texas, followed by the statutory requirements for executing a valid will as found in the Texas Estates Code.²⁶

The next section discusses do-it-yourself methods of estate planning and the disadvantages involved with handwritten wills, especially when drafted by incarcerated persons.²⁷ This section will show how certain characteristics of the incarcerated population place their desired distribution of property at an even greater risk.²⁸

Subsequently, this comment will call upon the Texas Legislature to provide inmates with in-prison estate planning attorneys.²⁹ This section will then support this request by showing the potential fiscal and social benefits of this policy.³⁰ Specifically, this section argues that providing inmates with estate planning services will both lower county probate fees charged to the taxpayer and counteract the lasting effects of Texas's penchant for mass incarceration.³¹

To conclude, this comment will propose a framework for the management and operation of an organization dedicated to providing estate planning services for inmates in the Texas Department of Criminal Justice.³² The proposal will use the framework for an existing, state-funded organization established to serve indigent offenders.³³ In the event of

21. *See id.*

22. *See id.*

23. *See infra* Parts II–V.

24. *See infra* Part II.A.1–3.

25. *See infra* Part II.B.1–2.

26. *See infra* Parts II.C–D.

27. *See infra* Parts III.A.1–2.

28. *See infra* Parts III.B.1–3.

29. *See infra* Part IV.A.1.

30. *See infra* Parts IV.B.1–2.

31. *See infra* Part IV.B.1.

32. *See infra* Part IV.B.2.

33. *See infra* Parts V.A.1–2.

rejection by lawmakers, this section offers alternative proposals for the Texas Legislature's consideration.³⁴

II. ESTATE PLANNING FOR THE INCARCERATED

The term *estate* is defined as the property individuals own, both outright and jointly—including bank accounts, real estate, stocks and bonds, vehicles, jewelry, retirement accounts and even pets.³⁵ That said, estate planning can take a variety of forms, depending on the size and category of property an individual owns.³⁶

The complexity of estate planning—combined with the general circumstances and demographics of prison—obstruct an inmate's access to legal resources necessary for the successful disposition of property.³⁷ An attorney's expertise is essential to this process because the validity of any estate planning document hinges on its compliance with the Texas Estates Code, Property Code, and other highly specialized areas such as the Internal Revenue Code.³⁸ Accordingly, the costs of hiring an estate planning attorney—averaging \$235 to \$296 per hour in Texas—prevent the vast majority of inmates from hiring an estate planning attorney.³⁹

A. Life and Death in the Texas Department of Criminal Justice

The Texas Department of Criminal Justice (TDCJ) operates 108 correctional facilities throughout Texas, but the TDCJ's bureaucratic power is best represented by the size of its budget.⁴⁰

Research published by the Texas Public Policy Foundation in 2012 reported an increase in the TDCJ budget from \$798 million in 1990 to approximately \$3 billion in 2012.⁴¹ In fact, the 85th Texas legislature approved the TDCJ's \$3,520,335,865 budget for the 2019–2020 fiscal year, expanding the previous year's budget by \$160,000,000 to cover the surmounting costs of inmate healthcare services.⁴² Additionally, Texas

34. See *infra* Parts V.B.1–2.

35. See TEX. EST. CODE ANN. § 22.012 (2019); Julia Kagan, *What Is an Estate?*, INVESTOPEDIA (Nov. 27, 2019), <https://www.investopedia.com/terms/e/estate.asp> [perma.cc/79CS-LN53].

36. *Id.*

37. Julie Garber, *Reasons to Hire an Estate Planning Attorney*, THE BALANCE: ESTATE PLANNING (June 25, 2019), <https://www.thebalance.com/do-you-need-to-hire-an-estate-planning-attorney-3505703>.

38. See *Texas Prison Inmates*, *supra* note 14.

39. See *4 Myths About Estate Planning in Texas*, TEXAS LEGAL: LONE STAR ADVOCATE (June 25, 2019), <https://texaslegal.org/texaslegal-blog/4-myths-estate-planning-texas> [perma.cc/GXU5-3ZST].

40. TEX. DEPT. OF CRIM. JUSTICE, ANNUAL REVIEW 2018 (2019).

41. TEX. BD. CRIM. JUSTICE, TEX. DEPT. OF CRIM. JUSTICE: AGENCY OPERATING BUDGET 2018 (2017); TEX. DEPT. OF CRIM. JUSTICE, ANNUAL REVIEW 2018 (2019).

42. See *infra* Part II.B.1–2.

prisons cost taxpayers about \$50.79 per day and \$18,538 annually.⁴³ Since 2012, the Texas Legislature has continued to increase the size of the TDCJ's budget at the expense of the taxpayers as Texans continue to shoulder a heavier burden on behalf of funding the TDCJ.⁴⁴

Even with its massive budget, the TDCJ does little to improve conditions for inmates inside state prisons as Texas spends less toward inmate welfare than other states with similar budgets.⁴⁵ In fact, Texas is ranked third nationally behind New York in state department of justice spending, but Texas allocates only a fraction of the \$69,355 sum spent per inmate by the New York Division of Criminal Justice Services.⁴⁶

1. Custodial Deaths

Each year, approximately 300 individuals die while in custody of the TDCJ.⁴⁷ Of those reported deaths, approximately 80% die from natural causes, another 10% die from suicide, and the remaining 10% die as a result of violence committed by another inmate.⁴⁸

Notably, middle-aged males still in the early stages of incarceration—typically the first two or three years of their sentence—form the majority of deaths occurring in Texas prisons.⁴⁹ The racial disparities observed in other areas of Texas's criminal justice system generally apply to custodial deaths.⁵⁰ In the decade spanning from 2005 to 2015, a reported 6,913 individuals died in the custody of Texas law enforcement and corrections officers.⁵¹ The majority of these custodial deaths occurred in local jail cells, the backs of police cars, and inside prison walls.⁵² These disparities once again made evident by data showing that about thirty percent of all custodial deaths from 2005 to 2015 were African Americans.⁵³

43. Khorri Atkinson, *Rate of Texas Prison Spending Growth Outpaces Schools*, THE TEXAS TRIBUNE (July 16, 2016, 12:00 AM), <https://www.texastribune.org/2016/07/14/texas-spending-prison-and-jails-higher-any-other-s/> [perma.cc/5SN4-47YS].

44. See *infra* Parts II.C–D. Atkinson, *supra* note 43.

45. See *infra* Parts II.B.1–2.

46. See *infra* Parts II.B.1–2.

47. See TEX. DEPT. CRIM. JUST., ANNUAL REVIEW 2018 (2019); see generally, U.S. DEPT. OF JUSTICE, OFF. OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATS.: MORTALITY IN LOCAL JAILS & STATE PRISONS, 2000–2013 (2015).

48. *Texas Custodial Death Report: Police, Jail, & Prison Deaths 2005–2015*, TEXAS JUSTICE INITIATIVE (2016), <https://texasjusticeinitiative.org/publications/.pdf> [perma.cc/SX6J-RDVE].

49. *Id.* at 2.

50. *Id.* at 4.

51. *Id.* at 7.

52. *Id.* at 3.

53. *Id.*

2. Prison Gangs

The prevalence of gang violence within Texas prisons offers an additional explanation for the relationship between the incarceration and shortened life expectancy of an inmate.⁵⁴ Nearly 100 white supremacist gangs operate in state and federal prisons across the country, and their numbers have grown despite the overall membership stagnation in recent years.⁵⁵ In fact, Texas is considered among the states with the worst prison gang violence.⁵⁶ The Aryan Brotherhood of Texas and the Aryan Circle—two of the largest, most violent prison gangs in the country—most predominantly operate inside Texas’s prisons.⁵⁷ Prison gangs involve a range of criminal operations that typically involve illegal drugs and violence against rival gang members.⁵⁸

3. Inmate Suicide

Sandra Bland, a 28-year-old African-American woman, committed suicide while in custody of the Waller County Jail.⁵⁹ After her arrest during a traffic stop with a Texas State Trooper, Bland sat in a jail cell awaiting her court hearing because she was unable to pay the bail for her release.⁶⁰ Three days later, Bland was found hanging in her jail cell.⁶¹ Investigations conducted following her death revealed that the Waller County jail failed to follow TDCJ policy requiring jail employees to complete mental health training and to conduct time checks on inmates.⁶²

The tragic death of Sandra Bland was met with anger and protest from ordinary Texans and criminal justice advocates alike—but her story is not unique.⁶³ The TDCJ reported a 40% increase in prison suicides from 2008 to 2014, while the number of suicide attempts nearly tripled in the last ten years, increasing from less than 700 in 2009 to almost 2,000 in 2018.⁶⁴ In 2018, prison suicide deaths reached the highest number of the decade.⁶⁵ Relatedly,

54. TEX. DEPT. OF PUB. SAFETY, TEXAS GANG THREAT ASSESSMENT (2018), https://www.dps.texas.gov/director_staff/media_and_communications/2018/txGangThreatAssessment201811.pdf [perma.cc/8RN8-PGL2].

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. Liebelson & Reilly, *Sandra Bland Died One Year Ago: And Since Then, at Least 810 People Have Lost Their Lives in Jail*, THE HUFFINGTON POST: HIGHLINE (July 13, 2016), <https://highline.huffingtonpost.com/articles/en/sandra-bland-jail-deaths/> [perma.cc/RXT6-ZMZZ].

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Jake Bleiberg, *Rise in Suicide Attempts in Texas Prisons Alarms Advocates*, AP NEWS (Apr. 12, 2019), <https://apnews.com/141330abd5c2404f85a6c54ff67da56b> [perma.cc/PWB5-Q8RM].

65. *Id.*

a total of 435 suicide deaths have occurred in Texas prisons since 2005 as the suicide rate for inmates in state prisons reached record numbers in recent years, causing concern among activists and lawmakers within the criminal justice reform movement.⁶⁶ The rise in suicide deaths correlates with the rise in Texas inmates with diagnosed mental health conditions for which corrections officers are ill-equipped to handle.⁶⁷ This trend is not unique to Texas's prisons, however, as correctional facilities nationwide have become the primary providers of mental healthcare.⁶⁸ By late 2018, 19% of Texas's prison population required mental health care.⁶⁹

TDCJ uses another controversial policy called "administrative segregation," used to combat prison gang activity by separating known gang members into individual cells immediately upon entrance to the facility, completely severing all human contact, regardless of the gang members' underlying crimes.⁷⁰ Administrative segregation extends to members of other violent gangs—the Mexican Mafia, the Texas Syndicate, Bloods and Crips—and inmates with known affiliations must also serve their time in segregated custody.⁷¹ Even so, this method of tampering gang violence has made little impact on the growth of criminal organizations within Texas prisons.⁷² Advocates of criminal justice argue that administrative segregation is nothing more than the TDCJ's attempt to rebrand solitary confinement—a method of extended inmate isolation linked to Texas's growing inmate suicide rate.⁷³

4. Shortened Life Expectancy

In addition to having one of the largest incarcerated populations in the United States, Texas has one of the highest populations of elderly incarcerated persons.⁷⁴ Since 2000, the number of inmates age 55 and older has risen to as much as 8% growth each year.⁷⁵ In 2011, the number of elderly inmates reached about 12,500, even though the general inmate population remained relatively stagnant.⁷⁶ The TDCJ reports that the average age of incarcerated persons in Texas is 39.4 years, and the average sentence length

66. Emily Widro, *Incarceration Shortens Life Expectancy*, PRISON POLICY INITIATIVE (June 26, 2017), https://www.prisonpolicy.org/blog/2017/06/26/life_expectancy/ [perma.cc/EEV9-RR78].

67. *Id.*

68. *Id.*

69. *Id.*

70. BUTLER, BURKE, LIMAN & SIMPSON, *A Solitary Failure: The Waste, Cost & Harm of Solitary Confinement in Texas*, AMERICAN CIVIL LIBERTIES UNION OF TEXAS, at 6 (Feb. 2015).

71. *Id.*

72. *Id.*

73. *Id.*

74. TEX. DEPT. CRIM. JUSTICE, ANNUAL REVIEW 2018 (2019).

75. *Id.*

76. *Id.*

is 18.5 years—however the TDCJ’s calculations cap life sentences at 60 years and omit sentences for the death penalty and life without parole.⁷⁷

Current trends of mass incarceration yield an alarming “linear relationship” between mass incarceration and life expectancy: “For each year spent living behind bars, an inmate can expect two years to be subtracted from their life expectancy.”⁷⁸ In a 2013 analysis of New York state parole data, researchers found that for each five year period of incarceration, the likelihood of death increased roughly 78% and reduced the projected life span of a 30-year-old inmate by ten years.⁷⁹ Although researchers were unable to pinpoint the exact circumstances responsible for an inmate’s shortened life expectancy, the study suggests that the shortened life expectancy could be an adverse result of the general environment of a prison and the daily conditions faced by the incarcerated population.⁸⁰

B. Inmate Property Rights

Inmate property rights are restricted, but not irrelevant, and most inmates have some personal property of value that will need to be distributed upon an inmate’s death—a process that can be riddled with uncertainty for an inmate’s family absent a will.⁸¹ Regardless of incarceration, a significant portion of the TDCJ’s incarcerated population have spouses, children, and other family to which inmates desire their property be distributed.⁸²

Historically, Texas courts have strongly disfavored government actions requiring the forfeiture of an individual’s private property.⁸³ Still, the Texas Legislature recognizes the TDCJ’s significant interest in maintaining secure correctional facilities—a responsibility that necessarily involves prison officials seizing potentially dangerous inmate property.⁸⁴ When an inmate is processed for entry into a TDCJ correctional facility, prison officials sort through the inmate’s personal property for illicit items.⁸⁵ Any prohibited property is separated from the inmate and inventoried into the TDCJ’s unit property room until the inmate’s collection upon departure from the TDCJ

77. *Id.*

78. *See* Widro, *supra* note 66.

79. *Id.*

80. *Id.*

81. *See Offender Orientation Handbook*, THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE (Feb. 2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf [perma.cc/M9MN-PESJ].

82. *See* Hannah Wiley, *Report Highlights the Trauma That Thousands of Texas Families Have Experienced with Incarceration*, THE TEXAS TRIBUNE (Dec. 7, 2018, 11:00 AM), <https://www.texastribune.org/2018/12/07/family-incarceration-texas-prison-system/> [perma.cc/DPH6-BXNS].

83. THE STATE OF TEXAS OFFICE OF COURT ADMINISTRATION, *ASSET FORFEITURE IN TEXAS: DPS & COUNTY INTERACTIONS* (2014).

84. *See* Widro, *supra* note 66.

85. *Id.*

unit.⁸⁶ In the meantime, the TDCJ permits inmates to retain possession of certain, pre-approved personal property in exchange for the inmates' consenting to departmental restrictions of personal property.⁸⁷

In the absence of statutory inhibition or public policy violation, inmates have an unrestricted right to hold, take, or dispose of personal property.⁸⁸ What is more interesting, is that inmates have the right to own and sell any written material authored during their incarceration and can generally transfer title of property from behind bars.⁸⁹ Of course, the TDCJ does place certain restrictions on inmates' property rights, including their right to acquire, possess, store, and dispose of personal property.⁹⁰ The rules and regulations of inmate property are codified in Section 501 of the Texas Government Code.⁹¹ These inmate welfare provisions stipulate the statutory rights afforded to Texas's incarcerated population.⁹²

1. Inmate Trust Accounts

Despite being stripped of certain rights, incarcerated persons maintain a constitutionally-protected interest in certain personal property, including the money deposited into their inmate trust accounts.⁹³ Still, an inmate does not have a constitutional right to possess that money while in prison, and a number of restrictions prevent inmates from freely spending the money deposited into their account.⁹⁴ Section 501.014 of the Texas Government Code addresses procedures for the TDCJ's handling of inmate money during incarceration.⁹⁵ These provisions allow the TDCJ to "take possession of all money that an inmate has on the inmate's person" prior to the inmate's admittance into custody at the correctional facility in which the inmate will serve time.⁹⁶

Additionally, the TDCJ controls all money received by the inmate during incarceration, which will then be credited to an account created for the inmate.⁹⁷ Additionally, the department has authority to withdrawal and spend money from an inmate account upon "the written order of the inmate in whose name the account is established or as required by law or policy

86. *Id.*

87. *Id.*

88. *Id.*

89. See Michael B. Mushlin, *Mgmt. of Prop.*, 3 RTS. OF PRISONERS § 16:15 (2019).

90. See Widro, *supra* note 66.

91. See TEX. GOV'T CODE ANN. § 501.

92. See *id.*

93. Harrell v. State, 286 S.W.3d 315 (Tex. App.—San Antonio, 2012); 58 TEX. JUR. 3d PENAL § 63 (2019).

94. See TEX. GOV'T CODE ANN. § 501.014.

95. See *id.* § 501.014(a).

96. See *id.*

97. See *id.* § 501.014(e)–(g).

subject to restrictions on the expenditure established by law or policy.”⁹⁸ The TDCJ’s broad power to control inmate money is further exemplified by the self-regulating nature of the departments accounting system.⁹⁹ The TDCJ’s only statutory obligation is to “ensure that each facility operated by or under contract with the department shall operate an account system that complies with this section, but the department is not required to operate a separate account system for or at each facility.”¹⁰⁰ Stated differently, the TDCJ is primarily responsible for both the operation and oversight of its inmate money account system, creating a conflict of interest that could result in the abuse of inmates’ private property rights.¹⁰¹ The TDCJ cannot appropriate inmate money to satisfy claims for payment exceeding \$2,500.¹⁰² Instead, claims for amounts greater than \$2,500 must make a small estate claim pursuant to Chapter 205 of the Texas Estates Code.¹⁰³

Further, if an inmate dies while in TDCJ custody, “the department shall attempt to give notice of the account to a beneficiary or known relative of the deceased inmate.”¹⁰⁴ The beneficiary or relative of the deceased inmate must claim the account within two years of receiving notice from the TDCJ, or else the TDCJ has authority to seize control of the money in the account.¹⁰⁵ In order to lawfully seize inmate money accounts, the TDCJ need only show that notice of account was “given or attempted,” or that the department was unable to identify an inmate’s beneficiary or known relative.¹⁰⁶ The statute does not require the TDCJ to follow a particular procedure for giving notice, nor does it require the TDCJ’s beneficiary search to be made in good faith.¹⁰⁷ Nevertheless, the statute protects the TDCJ from liability for mishandling of inmate accounts.¹⁰⁸

2. Anatomical Gifts

Different from the provisions addressing the inmate trust account, section 501.0551 of the Texas Government Code requires the TDCJ to provide inmates with a form upon their entry to the corrections facility that includes an option for the inmate to become an organ donor in the event that the inmate dies while incarcerated.¹⁰⁹ This provision specifically allows for

98. *See id.* § 501.014(a).

99. *See id.*

100. *See id.*

101. *See generally, id.* § 501.014 (noting the TDCJ’s statutory authority to control inmate money without being a financial institution).

102. *See id.*

103. *See id.*

104. *Id.* § 501.014(b).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* § 501.0551(a).

an inmate to “indicate whether the inmate wishes to be an eye, tissue, or organ donor if the inmate dies while in the custody of the department.”¹¹⁰ Accordingly, the inmate’s election on the form to become an organ donor has the same effect “as if the inmate executed a statement of gift under Section 521.401 [of the] Texas Transportation Code,” which provides the process for organ donor designation state-issued driver’s licenses.¹¹¹

3. Rights to Creative Works

Creative expression is a popular prison pastime, and several critically acclaimed literary works have been published and sold to the public.¹¹² In fact, the American Center of PEN, a well-known writers group, is in the 28th year of a program that sends authors into prisons to lecture, and arranges publication of the best 1,500 prison manuscripts submitted each year.¹¹³

Edward Bunker, who at age 17 had been the youngest inmate ever in San Quentin, emerged to write a string of gritty, well-received novels of prison life, including *No Beast So Fierce*, which was made into the 1978 movie *Straight Time* with Dustin Hoffman, and *Animal Factory*, just made into a television movie starring Willem Dafoe.¹¹⁴ Mr. Bunker was also a co-writer of the 1985 Oscar-nominated movie *Runaway Train*, starring Jon Voight.¹¹⁵ Another inmate, Malcolm Brady, published his 1967 book, *On the Yard* from behind the bars of a prison cell.¹¹⁶ Chester Himes, the author of *Cotton Comes to Harlem*, wrote his first short stories while serving time for armed robbery in the 1920s and 1930s.¹¹⁷

C. Overview of Estate Distribution

Intestate succession refers to the process of estate distribution for both individuals who die without a valid will (intestate decedent) and process of distribution under a will which fails to adequately dispose of all of an individual’s property.¹¹⁸ The property not accounted for by a will or other *non-testamentary* measure—or one which does not require attestation by

110. *Id.*

111. *Id.* § 501.0551(b).

112. Jeff Somers, *10 Books That Were Written in Prison*, BARNES & NOBLE READS: PRISON (June 16, 2016, 12:00 PM), <https://www.barnesandnoble.com/blog/10-books-that-were-written-in-prison/> [perma.cc/H9UR-NF53].

113. *See id.*

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.*

118. *See The Probate Process*, THE A.B.A., https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/the_probate_process/ [perma.cc/3XWJ-JAHE] (last visited Oct. 22, 2019).

witnesses—falls under chapter 2, section 201, of the Texas Estates Code.¹¹⁹ This is an expensive and lengthy process wherein the State determines the heirs and assets for distribution of the deceased's property.¹²⁰

Section 31.001 of the Texas Estates Code outlines the scope of probate court proceeding.¹²¹ The Texas Estates Code provides the following definition for the term *probate proceeding*:

- (1) The probate of a will, with or without administration of the estate;
- (2) The issuance of letters testamentary and of administration; (3) an heirship determination or small estate affidavit, community property administration, and homestead and family allowances; (4) an application, petition, motion, or action regarding the probate of a will or an estate administration, including a claim for money owed by the decedent; (5) a claim arising from an estate administration and any action brought on the claim; (6) the settling of a personal representative's account of an estate and any other matter related to settlement, partition, or distribution of an estate; (7) will construction suit; and (8) a will modification or reformation proceeding under Subchapter J, Chapter 255.¹²²

In other words, probate refers to the process of administering a decedent's estate after the will or other nontestamentary transfer has been declared valid by the court.¹²³

D. Avoiding Intestate Succession with the Valid Execution of a Will

Of course, an inmate's best chance at probating a will includes the expertise of an estate planning attorney, but the Texas Code makes no mention of an inmate's right to access estate planning services while incarcerated.¹²⁴ That said, a number of key provisions regarding the distribution of inmate property incorporate similar processes to those used for *testate administrations*, or the distribution of an estate according to a probated will.¹²⁵

Absent advice of legal counsel, an inmate—or anyone without a Texas law license and estate planning experience, for that matter—faces narrow odds for successfully drafting a will.¹²⁶ Just like any other individual who

119. See TEX. EST. CODE ANN. § 201 (2019).

120. See Dickler & Obrien, *Famous or Not, Here's Why You Should Have a Will*, CNBC.COM (Sept. 3, 2018, 12:00 PM), <https://www.cnbc.com/2018/08/31/famous-or-not-heres-why-you-should-have-a-will.html> [perma.cc/DWF7-6RYY].

121. *Id.* § 31.001.

122. See *id.* § 31.001(a).

123. See *id.*

124. See generally, TEX. GOV'T CODE ANN. § 501 (referring to the inmate welfare statutes intended to protect the constitutional rights of Texas's incarcerated population).

125. See TEX. EST. CODE ANN. § 201.003.

126. See *id.* § 101.001.

dies intestate, inmates who die without properly executing a will leave the distribution of their estate in the hands of Texas's *laws of succession*.¹²⁷ The validity of a will depends on whether its execution strictly adheres to legal requirements established by the Texas Code.¹²⁸

Courts only recognize the legal formation of a will if the individual executing a will, or the "testator," can prove: (1) an understanding of the business in which he or she is engaged (i.e., the drafting of a will); (2) knowledge as to the effects of making the will; (3) an understanding of the general nature and extent of the testator's personal property; (4) knowledge of the testator's next of kin, the natural objects of the testator's bounty, and any claims on the testator; and (5) the collection in the testator's mind of all the elements for making a will, held together for a period long enough for the testator to perceive the relationship between the elements and form a reasonable judgment.¹²⁹ Texas also imposes statutory requirements for an individual who may lawfully execute a will.¹³⁰ Specifically, the right and power to make a will is available to any person of sound mind if the person: (1) is at least 18 years of age; (2) has been or is married; or (3) is "a member of the armed forces of the United States or the United States, an auxiliary of the armed forces of the United States, or the United States Maritime Service."¹³¹

Notably, the Texas Legislature carved out a specific provision to include members of the armed forces and Maritime Service as parties permitted to execute a will, although the State does not otherwise address any other particular category of employment.¹³² This inclusion demonstrates a deliberate statutory construction of the legislature to provide members of the military with the ability to execute wills based on the dangerous nature of military employment.¹³³ The purpose of this distinct provision derives from the nature of military deployments and the difficult, lengthy separations from friends and family.¹³⁴ Given the inherent risks associated with military service, members of the military are advised to execute an estate plan that gives instructions for the management and distribution of his or her estate in the event of death.¹³⁵ The overall purpose of military service is certainly far removed from the purpose of incarceration as a punishment for criminal acts;

127. *See id.*

128. *See id.*

129. *See* Prather v. McClelland, 76 Tex. 574 (1890).

130. *See id.* § 251.001.

131. *Id.*

132. *See id.* § 251.001(a).

133. *See Canons of Construction: Adopted from Scalia & Garner*, U. OF HOUS. L. SCH., <https://www.law.uh.edu/faculty/adjunct/dstevenson/2018Spring/CANONS%20OF%20CONSTRUCTION.pdf> [perma.cc/7NC5-CS2K] (last visited Oct. 23, 2019).

134. *See id.*

135. *See generally* Somers, *supra* note 112 (inferring that the legislature's reasoning for this provision comes from the routine dangers faced by members of the military during daily activities).

however, the possibility of danger or death looms large for incarcerated persons.¹³⁶

Texas law requires any contests to a will be finalized within two years of the original probate filing, and legal representatives must be present to guide each party through the dispute resolution process.¹³⁷ Intestate succession of small estates requires an affidavit verifying the value of the estate falls within the statutory maximum.¹³⁸ Simpler estates can typically be administered in six months, but probate can take a year or more if the will is contested by family members and other possible beneficiaries, thereby postponing the estate's administration until all disputes are heard by a judge in probate court.¹³⁹ If the estate's value falls under Texas' small estates limit of \$75,000, then the executor of a will can use a method known as "summary probate."¹⁴⁰ Under this method, an executor need only file several forms and wait a certain length of time before distributing the estate—regardless of whether there was a valid will in place.¹⁴¹

III. THE PROBLEMS WITH D.I.Y. ESTATE PLANNING

The Texas Estates Code provides an exception to the requirements of a valid will for *holographic wills* written wholly in the testator's handwriting.¹⁴² Although holographic wills must be in the testator's handwriting, holographic wills need not be written on paper in order to be valid for probate.¹⁴³

In contrast to Texas's requirements for formal wills, the statute addressing holographic wills removes the two-witness rule and allows testators to attest to their own will execution.¹⁴⁴ The writing requirements for holographic wills are the same as required for formal wills, and the signature must be in the testator's actual handwriting: thus proxy signatures are not permissible.¹⁴⁵ Texas uses the *surplusage* approach to holographic wills, meaning that a holographic will that includes extra, non-holographic material is considered "wholly in the testator's handwriting" if the non-holographic

136. *See id.*

137. TEX. EST. CODE ANN. §§ 256.204(a)–(b).

138. *See id.* §§ 205.001–.004.

139. Liza Hanks, *How to Handle a Small Estate in Texas*, LEGAL CONSUMER, <https://www.legalconsumer.com/inheritancelaw/topic.php?TopicID=7&ST=TX> [perma.cc/] (last visited Mar. 24, 2020).

140. TEX. EST. CODE ANN. § 205.001.

141. *See id.*

142. *Id.* § 251.052.

143. Jim D. Solis, *From Tractor Fenders to iPhones: Holographic Wills*, NEW YORK STATE BAR ASSOCIATION (Nov. 2014), <http://jimsarlis.blogspot.com/2014/11/from-tractor-fenders-to-iphones.html> [perma.cc/H3X3-M25J].

144. *Id.*

145. *Id.*

material does not change the disposition plan intended in the holographic will.¹⁴⁶

If executed correctly, a holographic will can be entered into probate, as could any non-holographic will, and could prevent intestate succession in Texas upon validation by the court.¹⁴⁷ In fact, one of the most famous holographic will cases involved a man who, after getting trapped underneath his tractor while making repairs, realized that he was going to be crushed to death and crudely etched his will into the fender of his vehicle.¹⁴⁸ Indeed, the probate court held that the deceased man's will was valid.¹⁴⁹ In a Texas case regarding the probate of a holographic will, a short declaration handwritten on the backside of a printed greeting card and initialed by the decedent, constituted a valid holographic will signed by testator with clear testamentary intent.¹⁵⁰

A. The Increased Vulnerability of Holographic Wills Drafted by the Incarcerated

On the surface, holographic wills appear to be the most accessible option for individuals with neither a legal education nor a comprehensive understanding of the Texas Estates Code.¹⁵¹ To the contrary, the successful execution of a holographic will involves similarly complex legal elements as those required for traditional wills—the difference being holographic wills carry a substantial risk of being contested or declared invalid altogether.¹⁵²

In light of the uncertainty surrounding the validity of a holographic will, probate judges and experienced attorneys advise against using holographic wills except as a last resort to avoiding intestate succession.¹⁵³ According to estate planning experts, the use of holographic wills should be limited to three general situations: (1) in the event of an emergency where the client is pressed for time; (2) if the client prioritizes privacy over reliability of the will; and (3) if the holographic will is used only in the interim until a formal will can be executed.¹⁵⁴

The incarcerated, however, rely on the statutory exception for holographic wills because it is often their only option.¹⁵⁵ Inmates lack access

146. *Id.*

147. TEX. DEPT. OF CRIM. JUSTICE, FISCAL YEAR 2018 STATISTICAL REPORT (2019).

148. *See Solis, supra* note 143.

149. *See id.*

150. *Trim v. Daniels*, 862 S.W.2d 8 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

151. *See Solis, supra* note 143.

152. *See TEX. DEPT. OF CRIM. JUSTICE, supra* note 147.

153. *See* Derick Lancaster, *Estate Planning: How to Write a Holographic Will*, STATE BAR OF TEXAS, <https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=33860> [perma.cc/AMK4-6MZQ] (last visited Dec. 9 2019).

154. *Id.*

155. *Id.*

to the essential resources for drafting a formal, typed will—including an attorney or computer—and must instead execute handwritten wills upon whatever writing materials can be found at the commissary or in their cell.¹⁵⁶

1. *The Criminal Stigma*

Whether or not a court will consider an inmate of sound mind, or competent enough to execute a will—either formal or holographic—depends entirely on the individual inmate and the inmate’s circumstances prior to and during incarceration, including any mental illnesses which contributed to the inmate’s criminal activity or those which arose during incarceration.¹⁵⁷ This comment will not discuss the competency issues for inmates seeking to execute a will.¹⁵⁸ However, one important consideration for all inmates, regardless of their actual competency determinations, is whether a probate judge would view a convicted criminal serving time in prison ostensibly as a credible testator—subconsciously or otherwise.¹⁵⁹

2. *Below Average Education Levels*

The successful execution of a holographic will proves a difficult task even for non-incarcerated, college educated individuals.¹⁶⁰ By extension, the difficulties faced by inmates become even more daunting in consideration of reported education levels for the state prison population nationwide.¹⁶¹ In a 2018 report, the United States Bureau of Justice found that the United States’ incarcerated population had an average Intellectual Quotient (IQ) score of about 90, a score classified as “low-average” (scores closer to 119 are considered “high-average”).¹⁶² The report also revealed that roughly 68 % of state prison inmates do not have a high school diploma, only about 26% had completed their GED, and just 13% had a post-secondary education.¹⁶³ To compare, a 2018 report of national education averages found that 89.90% of Americans had a high school diploma or GED, and 58.34% had at least a bachelor’s degree.¹⁶⁴ Considering the complicated nature of estate planning in Texas, these statistics raise the question of whether the average inmate can

156. See Solis, *supra* note 143.

157. *Id.*

158. *Id.*

159. DETERMINING COMPETENCY TO SIGN A DURABLE POWER OF ATTORNEY, SACRAMENTO COUNTY PUBLIC LAW LIBRARY, <https://saclaw.org/articles/determining-competency-sign-durable-power-of-attorney/> [perma.cc/NF94-X9EF] (last visited Oct. 22, 2019).

160. Caroline Wolf Harlow, *Bureau of Justice Statistics Special Report: Education and Correctional Populations*, U.S. DEPARTMENT OF JUSTICE (Apr. 15, 2003), <https://www.bjs.gov/content/pub/pdf/ecp.Pdf> [perma.cc/M9AJ-E4L8]

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

lawfully execute a will without an attorney.¹⁶⁵ The disadvantage multiplies for inmates who inadequately interpret an inherently difficult, highly specialized area of estate planning law, therefore failing to successfully execute holographic wills.¹⁶⁶ The resulting document results in the inmate's increased exposure to will contests, lengthy probate proceedings, and a devastating financial burden.¹⁶⁷

The below-average education levels and IQ scores of the average state prison inmate impose significant barriers to executing a will without legal counsel, and the contrast between the average education levels of the incarcerated and non-incarcerated populations illustrates the increased risk for inmates in executing a holographic will that fully complies with Texas law.¹⁶⁸ In light of these circumstances, the barriers faced by the average American in executing a holographic will grow in size for the an individual incarcerated in the TDCJ.¹⁶⁹ On that basis, inmates have an even lesser chance of avoiding intestate succession and achieving their desired distribution of property through a holographic will.¹⁷⁰

B. Inmate Access to Legal Resources

It is a well-established principle that individuals charged with a crime have a constitutional right to be represented by an attorney, and if the individual is indigent and cannot afford an attorney, then one must be appointed by the State.¹⁷¹ Even so, Texas provides inmates with virtually zero access to court-appointed or pro bono estate planning services, and Texas law prohibits public criminal defenders from assisting clients in legal matters unrelated to indigent client's defense.¹⁷² The lack of access to estate planning attorneys exacerbates the problems concerning holographic wills because inmates are left with no option other than to rely on secondhand legal knowledge shared among inmates and their own understanding of the law as provided by outdated law textbooks.¹⁷³

165. See TEX. DEPT. OF CRIM. JUSTICE, FISCAL YEAR 2018 STATISTICAL REPORT (2019).

166. *Id.*

167. *Id.*

168. *See id.*

169. *See* Lancaster, *supra* note 153.

170. *See id.*

171. See TEX. CONST. art. I § 10.

172. See TEX. GOV'T CODE ANN. § 79.034.

173. *See id.* (noting the legal representation of indigent defense in Texas does not allow counseling for unrelated legal matters).

1. The Jailhouse Lawyer Rule

In 2017, the TDCJ reported just 122 offender-to-offender legal visits occurred inside state prisons.¹⁷⁴ Nicknamed *jailhouse lawyers*, these inmates informally assist other inmates with legal advice, such as filings or paperwork relating to an appeal or complaint.¹⁷⁵ State prisons have long argued against allowing jailhouse lawyers to advise fellow inmates, claiming that such behavior jeopardizes the prison's ability to maintain order and discipline, but the constitutional right of access to the courts established by the Supreme Court in *Johnson v. Avery* prohibits prison officials from unreasonably limiting inmates' access to the courts, counsel, and public officials unless the prison provides "adequate, effective, and meaningful" alternatives.¹⁷⁶

Occasionally, jailhouse lawyers have a law degree and some experience practicing law prior to incarceration.¹⁷⁷ However, the majority of these inmates do not have a formal legal education and instead rely on their self-taught expertise acquired using the legal resources available in the prison law library.¹⁷⁸ Mumia Abu-Jamal, perhaps one of the most famous jailhouse lawyers in the United States, describes the contrast of a self-taught, jailhouse education with a formal legal education as "law learned in a stew of bitterness, under the constant threat of violence, in places where millions of people live, but millions of others wish to ignore or forget."¹⁷⁹

2. Prison Law Libraries

Texas's Access to Courts Department is a statewide program providing legal resources to TDCJ inmates, the most common of these being a meaningful law library with self-help publications, case law, codes, rules, and standard legal forms.¹⁸⁰ In 2017, the TDCJ reported 393,123 offender visits to law library sessions.¹⁸¹ However, the amount of prison law library access afforded to each inmate depends on an inmate's security

174. *Administrative Review & Risk Management Division, Access to Courts: Fiscal Year 2017 Statistics*, TEX. DEPT. OF CRIM. JUSTICE (2018), <https://www.tdcj.texas.gov/divisions/arm/rescourts.html> [perma.cc/J3XP-4PDS].

175. Adam Brenner, *Are Jailhouse Lawyers Beneficial or Bad for the System?*, ABA JOURNAL (Sept. 19, 2019), <http://www.abajournal.com/news/article/are-jailhouse-lawyers-beneficial-or-bad-for-the-system> [perma.cc/DXN4-D976].

176. *Johnson v. Avery*, 393 U.S. 483 (1969).

177. See Harlow, *supra* note 160.

178. Bobby Allen, *Mumia Abu-Jamal Granted Right of Appeal After Decades in Prison*, NPR (Dec. 28, 2018), <https://www.npr.org/2018/12/28/680781150/mumia-abu-jamal-granted-right-of-appeal-after-decades-in-prison> [perma.cc/8UB3-4AJR].

179. *Id.*

180. Cara Salvatore, *Are Prison Law Libraries Falling Short on Access Goals?*, LAW 360 (Sep. 8, 2019), <https://www.law360.com/articles/1195317> [perma.cc/A9F4-JZ95].

181. See Harlow, *supra* note 160.

classification.¹⁸² For example, low security inmates receive direct access to the prison law library can use the facility for a minimum of 10 hours each week.¹⁸³ On the other hand, high security offenders with indirect access cannot go into the library themselves, and instead these inmates are delivered three items of legal research materials per day, on three alternating days per week in order to ensure all inmates have an opportunity to review the materials.¹⁸⁴

Moreover, the legal materials found in prison law libraries are often outdated.¹⁸⁵ Given the frequent rate at which the Texas Legislature changes certain provisions in the estates code—almost every legislative session—the estate planning resources made available are unlikely to provide inmates with legal guidance.¹⁸⁶

3. *The State Counsel for Offenders*

The TDCJ's budget includes funding for the State Counsel for Offenders (SCFO), which provides the incarcerated population with four additional areas of pro bono legal services: Criminal Defense (for additional charges occurring during incarceration), Civil Defense (for civil charges that arise after completion of the criminal trial process), Appellate Counsel (for any subsequent appeals filed after conviction), and General Legal Services (for other legal issues not covered by the other sections, such as immigration and family law disputes).¹⁸⁷

Since the mid-1960s, the State Counsel for Offenders has operated as a state-funded program providing indigent offenders with legal representation unrelated to the individual's representation in his or her initial criminal trial.¹⁸⁸ The legislature created the SCFO in response to litigation authorizing the provision of legal representation for offenders.¹⁸⁹ The SCFO reports directly to the Texas Board of Criminal Justice and operates independently within the budgeting framework of the TDCJ, encompassing five areas of law: (1) criminal defense, (2) civil defense, (3) appellate cases, (4) immigration, and (5) general legal counsel.¹⁹⁰

182. *See id.*

183. *See id.*

184. *See id.*

185. *See id.*

186. *See id.*

187. *See* OFFENDER ORIENTATION HANDBOOK, THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, (Feb. 2017), https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf [perma.cc/4N79-DTB5].

188. Thomas P. Wingate, *SCFO Provides Legal Representation to Indigent Offenders*, TEX. DEPT. CRIM. JUSTICE: BD. BULLETIN (Nov. 2013), https://www.tdcj.texas.gov/connections/NovDec2013/bulletin_vol21no2.html [perma.cc/XCL4-F99D].

189. *Id.*

190. *Id.*

The criminal defense section provides indigent inmates with legal representation for felony offenses committed while incarcerated at the TDCJ.¹⁹¹ The trial attorneys, legal assistants, and investigators work to protect the constitutional rights of all offenders, which includes “court appearances, investigations, obtaining discovery, plea negotiations, and dispositions by pleas or trials.”¹⁹²

The civil section represents indigent inmates prosecuted under the state’s civil commitment statute for sexually violent predators under Chapter 841 of the Texas Health and Safety Code.¹⁹³ Attorneys in this SCFO division actively conduct discovery under the Federal Rules of Civil Procedure and prepare cases for at least fifty jury trials each fiscal year, relying extensively on the testimony of expert witnesses who have been vetted during the pretrial proceedings.¹⁹⁴ The appellate division of the SCFO assists offenders with the appeal of criminal and civil commitment cases, in addition to writs of habeas corpus, parole, mandatory supervision requirements, and jail-time credits.¹⁹⁵

The SCFO combines the general legal and immigration sections into a single, more efficient section under which attorneys assist offenders with pending charges and detainees.¹⁹⁶ TDCJ and SCFO have been working with the United States federal government since 1996 to provide advice and assistance to offenders placed in removal proceedings.¹⁹⁷ SCFO attorneys and staff attempt to interview all offenders prior to their initial immigration court appearance.¹⁹⁸ SCFO will represent offenders who have valid claims of citizenship or defenses against removal, if those claims or defenses can be supported by appropriate documentation and the offenders’ families are able and willing to pay the necessary fees.¹⁹⁹ In addition, this section is responsible for reviewing the daily mail received by inmates that pertains to family law matters including divorce, child custody, and child support.²⁰⁰ This section also acts as a catch-all for other areas not addressed by any other section of the SCFO, however, estate planning services are not included within any provision of the SCFO.²⁰¹

The State Bar of Texas addressed the inadequacy of the SCFO’s legal services in a 2018 report that found “several issues with the way Texas provides defense lawyers to prison inmates who need legal

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *See* TEX. DEPT. OF CRIM. JUST., ANNUAL REVIEW 2018 (2019).

201. *Id.*

representation.”²⁰² The report highlighted the SCFO’s lack of legal representation provided for “civil rights issues, TDCJ policy or procedure issues, fee-generating cases, and various other legal issues depending on the circumstances.”²⁰³ The report raised concern regarding the financial support from the TDCJ to aid in human resources, budgetary management, and other important administrative matters.²⁰⁴ The report also found a potential conflict of interest between the SCFO’s “subservien[ce] to the Texas Department of Criminal Justice Board” and the reliance on the TDCJ’s discretion in funding the SCFO’s operating budget for human resources, budgetary management, and other important administrative matters.²⁰⁵ In a broader sense, the State Bar of Texas found conflicting interests with the Texas Department of Criminal Justice Board’s role as the governing body for the employment of lawyers who prosecute inmate defendants, and its role as the body responsible for oversight of the day-to-day operations within the prison system that seeks to prosecute them.²⁰⁶

IV. THE BENEFITS OF ESTATE PLANNING FOR THE INCARCERATED

Understandably, a proposal requiring the appropriation of state funding for the benefit of convicted criminals is certain to receive pushback from political skeptics and fiscal conservatives.²⁰⁷ Even so, criminal justice reform has become a platform shared by both political parties, as evidenced by the First Step Act passed in 2018, which received bipartisan support, President Donald Trump included—for its removal of federal mandatory minimums and other sentencing requirements which drew the ire of the criminal justice reform advocates for decades prior.²⁰⁸ To be sure, the First Step Act applies only to federal criminal laws—not state laws.²⁰⁹ Still, the bipartisan momentum toward criminal justice reform presents the Texas Legislature with an opportunity to save local taxpayers from county probate costs, restore the poor reputation of the TDCJ, and heal the damage caused by historical mass incarceration.²¹⁰

202. Paul J. Gately, *Texas Study Finds Prison Defendants not Properly Represented*, KWTX (Jan. 7, 2018), <https://www.kwtx.com/content/news/State-Bar-study-finds-prison-defendants-not-properly-represented-468236153.html> [perma.cc/N7WD-AGAQ].

203. *Id.*

204. *Id.*

205. *Id.*

206. See TEX. DEPT. OF CRIM. JUSTICE, ANNUAL REVIEW 2018 (2019).

207. *Id.*

208. German Lopez, *The First Step Act, Congress’s Criminal Justice Reform Bill, Explained*, VOX (Dec. 11, 2018), <https://www.vox.com/future-perfect/2018/12/3/18122392/first-step-act-criminal-justice-reform-bill-congress> [perma.cc/4F4Q-9LCN].

209. *Id.*

210. *Id.*

A. Reducing the Number of Probate Proceedings Will Reduce the County's Local Taxes

The costs of implementation are certain to be a major point of contention for Texas lawmakers. On the surface, the proposal is a luxury for an undeserving population, awarded by the state government at the expense of taxpayers; but below the surface, the proposal has the potential to reduce local taxes used to fund probate courts in heavily populated counties.²¹¹

Statutory probate courts facilitate this legal process by recognizing a person's death (decedent) and supervising the payment of the decedent's debts and distribution of the decedent's property.²¹² Texas offers two types of probate administration: *dependent* and *independent*.²¹³

Independent administration uses a court appointed administrator to conduct the probate process without approval from the judge. Although independent administrations make up about 80% of probated estates in Texas, a dependent administration will likely be necessary should any beneficiaries or claimed beneficiaries to the estate contest the will's preferred distribution of property.²¹⁴ In contrast, dependent administration protects the rights of beneficiaries by requiring the court appointed administrator to work under the constant supervision of a judge, which lengthens the administration process and increases probate costs significantly.²¹⁵

1. County Probate Courts

Texas continues to experience an increase in the number of probate filings as the average population age continues to rise, jumping 12% during the period from 2017 to 2018.²¹⁶ Consequently, district and county courts accrued lengthy backlogs of pending probate cases that took months or even years to be heard before the court.²¹⁷ In response, the Texas Legislature created statutory probate courts to alleviate courts situated in heavily populated counties.²¹⁸ More than half of the 68,208 probate cases filed were

211. See REGIONAL PUBLIC DEFENDER OFFICE FOR CAPITAL CASES, <https://www.rpdo.org> [perma.cc/UL5F-NDA7] (last visited Oct. 20, 2019).

212. *The Probate Process*, THE AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/the_probate_process/ [perma.cc/VJK4-Q7WV] (last visited Oct. 22, 2019).

213. *Id.*

214. ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2019, STATE OF TEXAS JUDICIAL BRANCH (2020).

215. See Wingate, *supra* note 193.

216. See *id.*

217. *Texas Probate Guide*, FORBES LAW OFFICE, <https://www.forbeslawoffice.com/probate/texas-probate-guide/> [perma.cc/632K-7Y4H] (last visited Dec. 9, 2019).

218. OFF. OF CT. ADMIN., ANN. STAT. REP. FOR THE TEX. JUDICIARY (2018).

cases involving an application for independent administration, and more than 40% were cases involving an application for independent administration.²¹⁹

In 2010, 200 county and probate court judges throughout Texas approved almost \$21 million in court-appointment fees for probate cases, prompting the state to establish The Office of Court Administration (OCA) as a method of increasing oversight and transparency of court activity.²²⁰

Harris County probate judges adopted fee guidelines and caps for court-appointments in 2008, limiting the maximum allowable appointee fees to \$300 per hour for legal work.²²¹ The judges decided to enact these guidelines only after the Houston Chronicle published an article showing the high legal rates for appointees who carried personal favor with judges.²²² Irrespective of guidelines, the same judges responsible for implementing the \$300 maximum were found to have approved \$500 per hour fees for the attorney in a case involving the estate of a man who died twenty years prior.²²³ In that case, the judge argued that it would have “cost even more to hire new lawyers to relearn issues involved in a related IRS tax dispute.”²²⁴ In another case, the probate court approved \$148,229 in court-appointed fees to settle a dispute involving the will of a local surgeon.²²⁵

2. *Avoiding Probate with Revocable Living Trusts, Durable Power of Attorney & Medical Power of Attorney*

Notwithstanding their legitimate need for a will, inmates stand to benefit from other estate planning methods, such as a Revocable Living Trust, Durable Power of Attorney, and Medical Power of Attorney.²²⁶ These measures differ from wills in execution and purpose, but each document still requires an attorney’s expertise to ensure proper drafting according to the statutory requirements imposed by the Texas Estates Code.²²⁷

Texas requires probate for the majority of estates, but the process can be avoided if the decedent has already distributed property and assets into a *revocable living trust* (living trust). A living trust is an agreement between two individuals, in which one person acts as the *principal* and the other acts as the principal’s *agent*, and this agreement can be modified by the principal

219. *Id.*

220. *Id.*

221. Lise Olsen, *Harris County Probate Fees Provide Bonanza for Some Lawyers*, THE HOUSTON CHRONICLE (Oct. 22, 2010), <https://www.chron.com/news/houston-texas/article/Harris-County-probate-fees-provide-bonanza-for-1697470.php> [perma.cc/C87Y-7V6J].

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Julie Garber, *Four Ways to Avoid Probate*, THE BALANCE (June 25, 2019), <https://www.thebalance.com/ways-to-avoid-probate-3505251> [perma.cc/VGF5-LBNQ].

227. *Id.*

at any time.²²⁸ However, the trust becomes inaccessible upon the principal's incapacitation or loss of competency—or “sound mind.”²²⁹ The purpose of a living trust differs from a will in its ability to distribute assets upon the death of the principal without probate court, thus remaining a private agreement for the management of assets upon the principal's death.²³⁰

A *durable power of attorney* (DPOA) is a legal agreement granting an individual power to act on behalf of another person for decisions pertaining to the management of bank accounts, personal residences, trust funds, or the basic payment of bills.²³¹ It is critical to note that DPOAs cannot be used to make healthcare decisions on behalf of another person, as such actions require a separate agreement granting the *medical power of attorney* (MPOA) instead.²³²

Collectively, these two agreements can grant significant decision-making authority to another individual and can be useful in situations where the principal is not yet incapacitated but recognizes the possibility of incapacitation in the near future—for example, an aging parent granting the DPOA and MPOA to their child.²³³ Estate planning attorneys generally advise clients against waiting to execute these agreements because Texas law prohibits the principal who meets the standard for mental incompetency from establishing a DPOA or MPOA, therefore an older individual with Alzheimer's or dementia would be unable to grant either power to children or relatives.²³⁴ If an individual becomes incapacitated without previously granting a DPOA or MPOA, a family member would need to be appointed as that person's legal guardian by the court.²³⁵ Like with other methods of estate planning, the time and money required to seek legal guardianship increases considerably upon the court's involvement.²³⁶

B. Texas's History of Mass Incarceration

Like the rest of the country, the origins of Texas's trend toward mass incarceration can be traced back to the stringent criminal justice policies enacted in pursuit of the “War on Drugs.”²³⁷ Drug offenses play only a supporting role at the state level, and most state prisons and local jails

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Aaron Bramwell, *FAQ About Power of Attorney in the State of Texas*, TEXAS LEGAL: THE LONE STAR ADVOCATE (June 17, 2016), <https://texaslegal.org/texaslegal-blog/faq-power-attorney-state-texas> [perma.cc/RJ2T-TZAM].

234. *Id.*

235. *Id.*

236. *Id.*

237. *Texas Profile*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/profiles/TX.html> [perma.cc/9863-93M3] (last updated Sept. 2018).

continue to incarcerate individuals for non-violent drug possession.²³⁸ Arrests for non-violent offenses in over-policed communities become convictions listed on criminal records, which reduce employment opportunities and increase the likelihood of serving a longer sentence for any future offenses.²³⁹

Since 1978, Texas's prison population has skyrocketed into record highs, with Texas's incarceration rate earning first place by outranking the incarceration rates for the entire United States and the United Kingdom.²⁴⁰ In 2018, the TDCJ officially reported a total of 134,152 inmates currently incarcerated inside the state's 108 facilities.²⁴¹ However, more recent data shows that number has since increased to 137,171—notwithstanding the 216 death row inmates awaiting execution at the TDCJ's Huntsville Unit in Walker County, Texas.²⁴²

1. Prison Politics

Despite recent support from state and national policymakers, Texas consistently ranks among the top ten states with the highest prison populations.²⁴³ In fact, the “tough on crime” policies enacted by the Texas Legislature during the 1980s and 1990s shoulder primary responsibility for state-wide mass incarceration.²⁴⁴

Prior to the so-called “War on Drugs” era, TDCJ admission and release rates for incarcerated persons remained about equal and Texas's incarcerated population grew only slightly because Texas inmates served only 13% of their assessed prison sentence on average.²⁴⁵ After receiving public criticism regarding the brevity of sentence lengths, Texas legislators decided to enact laws that halted the flow of inmates exiting prison and while leaving uninterrupted the steady stream of inmates entering prison.²⁴⁶ In effect, these newly enacted laws required incarcerated persons to serve a greater proportion of their prison sentences before becoming eligible for parole or release.²⁴⁷ For example, certain violent offenders were required to serve at least fifty percent of their sentences before becoming eligible for parole—effectively doubling the length of prison sentences for many incarcerated

238. *See id.*

239. *Id.*

240. *Id.*

241. *Texas Prison Inmates*, THE TEXAS TRIBUNE, <https://www.texastribune.org/library/data/texas-prisons/> [perma.cc/6VJ8-E63X] (last updated Oct. 7, 2019).

242. *Id.*

243. *See Olsen, supra* note 221.

244. Rachel Gandy, *Explaining Texas's Overnight Prison Boom*, PRISON POLICY INITIATIVE (Aug. 7, 2015), https://www.prisonpolicy.org/blog/2015/08/07/texas_overnight_boom/ [perma.cc/2DBP-T2M8].

245. *Id.*

246. *Id.*

247. *Id.*

Texans.²⁴⁸ Beginning in 1993, Texas experienced an overnight prison boom when the state's total number of releases fell behind its total number of admissions.²⁴⁹ In sum, the legislation increasing the minimum time-served for certain offenders destroyed the equilibrium which tempered the growth of Texas's incarcerated population, thereby allowing its total custody population to grow unchecked for the next five years.²⁵⁰

By the time release counts caught up with admission counts several years later, Texas's admissions and releases once again returned to equilibrium and the size of Texas's incarcerated population remained relatively stagnant, yet remarkably high.²⁵¹ Lawmakers were forced to respond to a number of lawsuits concerning the inhumane conditions within overcrowded TDCJ facilities, the Texas Legislature failed to address the substantive policies which directly contributed to the overcapacity of state jails and prisons.²⁵² Instead, the legislature awarded the TDCJ with supplemental funding for the purpose of adding more than 100,000 new prison beds to its facilities during a five-year period.²⁵³

2. Mass Incarceration & Inequality

Incarceration is undoubtedly concentrated among the disadvantaged.²⁵⁴ African-Americans account for 33% of Texas's prison population—staggering overrepresentation considering that African-Americans make up just 12% of Texas's total population.²⁵⁵ In sum, statistics show that the TDCJ incarcerates approximately 2,855 of every 100,000 African-Americans living in Texas.²⁵⁶

Research published in the past decade has established three reasons for the chronic inequality resulting from mass incarceration: “[I]t is invisible, it is cumulative, and it is intergenerational.”²⁵⁷ The *invisible* inequality of mass incarceration stems from the fact that official calculations of economic viability exclude institutionalized populations, thereby causing poverty and unemployment levels to be reported inaccurately.²⁵⁸ These inaccuracies cloak the true inequality experienced by populations with high incarcerations rates.²⁵⁹ By failing to consider the impact felt within a community, the

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. Olsen, *Supra* note 221.

255. *Id.*

256. *Id.*

257. Bruce Western, MASS IMPRISONMENT AND ECONOMIC INEQUALITY, 74 Johns Hopkins University 509, 509–32 (2007).

258. *Id.*

259. *Id.*

number of incarcerated individuals becomes temporarily or permanently removed from a community.²⁶⁰ These statistical determinations result in a portrait that illustrates only some of the prevalent inequality affecting communities with high incarceration rates.²⁶¹ Prior to incarceration, individuals who would eventually serve time in prison qualified as some of the poorest people in the United States.²⁶² According to data from the United States Bureau of Justice, incarcerated persons had a median annual income of \$19,185 prior to incarceration, while non-incarcerated persons of similar ages had a median annual income that was 41% higher.²⁶³ Interestingly, the income gap includes all incarcerated people—regardless of race, ethnicity, or gender.²⁶⁴ In addition, the national income distribution shows the heavy concentration of incarcerated persons at the lowest end of the spectrum.²⁶⁵

The inequality is *cumulative* because existing groups with the weakest economic standing collect the social and economic disadvantages resulting from mass incarceration.²⁶⁶ The cumulative effects of mass incarceration arise because the vast majority of incarcerated persons are of low socioeconomic status.²⁶⁷ When these individuals are pulled from communities with high poverty rates and subsequently incarcerated, the disparity of marginal populations deepens as the opportunity for economic mobility vanishes.²⁶⁸

Half of the parents incarcerated in state prisons throughout the country reported at least one family member who had also been incarcerated at some point in time.²⁶⁹ Of the parents surveyed, 40% reported living in a household that received public assistance and 14% reported living in a foster home, agency, or institution at some point during their childhood.²⁷⁰ At the time of reporting, more than 50% of parents in state prison had served between 12 and 59 months behind bars, but fathers were more than twice as likely to serve longer sentences lasting 60 or more months.²⁷¹ Parents of minor children comprise 52% of state prison populations—a number that has increased by 79% during the period between 1991 and 2007.²⁷² The number of children under age 18 with an incarcerated mother has more than doubled

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

since 1991.²⁷³ By 2007, about 2.3% of the estimated 74 million minor children living in the United States had a parent in prison.²⁷⁴

African-American children were seven and a half times more likely than white children to have an incarcerated parent.²⁷⁵ About 40% of the incarcerated fathers in the United States are African-American, and more than one-third of these minor children will reach age 18 during their parent's incarceration.²⁷⁶ Mothers and fathers serving time in state prison were three times more likely to report living in a single-parent household prior to incarceration, and more than 50% of female state prisoners and 36% of male state prisoners reported living with at least one child in the month preceding arrest or incarceration.²⁷⁷ Approximately half of the parents in state prison reported themselves as the primary provider of financial support for their children prior to incarceration.²⁷⁸

The number of incarcerated parents reinforces *intergenerational* inequality caused by the lack of wealth accumulation for the descendants of the incarcerated.²⁷⁹ Wealth accumulation—or the growth of wealth as it is passed on from generation to generation—becomes stagnant during the period of incarceration because removal of individuals with income earning capacity from their families results in decreased economic earnings from that individual.²⁸⁰

Inadequate financial resources subsequently limit the future economic opportunities available for children by affecting their earning capacity as adults.²⁸¹ For example, a child who is living in a single parent household has half the potential economic opportunity as a child living in a two-parent household.²⁸² In turn, a future that includes a higher education becomes more unattainable for the child.²⁸³ Without a bachelor's degree, the child will be excluded from a large portion of the job market.²⁸⁴ Consequently, the child will likely face the same financial struggles faced by its parents.²⁸⁵

The uphill battle caused by a parent's incarceration can perpetuate the disadvantages which historically afflict low-income communities and communities of color, including restricted political participation, lack of affordable housing and healthcare, and mental health issues.²⁸⁶ These

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. *Id.*

far-reaching effects have led some to characterize incarceration as a criminal credential that results in continuing disadvantage for former prisoners and their relatives.²⁸⁷ The consequences of incarceration spread beyond the formerly incarcerated by increasing the material hardship and familial stress.²⁸⁸ Further, prison exacerbates marital instability, strains family ties, and imposes a variety of adverse effects on children.²⁸⁹

3. How Estate Planning Can Help

Earl G. Graves, Sr., the founder and publisher of the African-American trade publication *Black Enterprise* summarized estate planning's positive impact: "Estate planning means future generations not having to start from scratch to launch their businesses, or to finance the growth of those we leave to them."²⁹⁰ It means lessening our children's and grandchildren's dependence on student loans."²⁹¹ In other words, estate planning facilitates the proper transfer of assets to family members through inheritance, which can benefit individuals now and in the future. In asset transfers, inheritances can potentially increase a beneficiary's income in a way that can assist with major life changes that affect a family's long-term wealth.²⁹² An estate worth \$10,000 may not have a major impact on a family's net worth, but such an inheritance can be used to make a down payment on a home, providing homeownership leading to wealth accumulation.²⁹³

Estate planning by itself cannot cure the wealth disparities engrained in communities of color, but it can be a successful, fair, and effective path to the preservation of wealth and assets.²⁹⁴ As a result of the racial disparities in the creation of wills and other non-testamentary documents, white families are five times more likely than African-American families to inherit a family member's estate.²⁹⁵ The disproportionate rate of inheritance disadvantages people of color in preventing their use of estate planning as a method of limiting displacement by foreclosure and ensuring working families continue contributing economically to their communities.²⁹⁶

287. Wendy Sawyer, *Youth Confinement: The Whole Pie 2019*, PRISON POLICY INITIATIVE (Dec. 19, 2019), <https://www.prisonpolicy.org/reports/youth2019.html> [perma.cc/32MU-4ABW].

288. *Id.*

289. *Id.*

290. Astrid Andre, *Can Estate Planning Be Used to Help Preserve Economic Assets in Low Income Communities?*, SHELTER FORCE (Mar. 1, 2019), <https://shelterforce.org/2019/03/01/can-estate-planning-preserve-economic-assets-in-low-income-communities/> [perma.cc/WQ7R-RSBK].

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

V. PROPOSALS FOR INMATE ACCESS TO ESTATE PLANNING

Texas lawmakers have several viable options for providing estate planning services to inmates within the TDCJ.²⁹⁷ First, the legislature could establish an independent, publicly-funded estate planning organization endowed with the sole purpose of serving indigent inmates incarcerated in the TDCJ's.²⁹⁸ Second, the legislature could require the SCFO to include estate planning as part of its existing structure of legal services.²⁹⁹ Third, lawmakers could incentivize the creation of new, privately-funded pro bono organizations which exclusively offer estate planning services to the TDCJ's incarcerated population.³⁰⁰

A. A Publicly Funded Estate Planning Organization for Indigent Inmates

Unsurprisingly, the most comprehensive solution requires the heaviest involvement from state and local government.³⁰¹ On its face, the Texas Legislature's approval of an expensive program catering to criminal offenders is a long-shot at best.³⁰² However, a state-funded program that offers specialized legal services to indigent criminal offenders is not unfamiliar in Texas.³⁰³

1. A Model for Success

In 2011, the Texas legislature approved funding for the Regional Public Defender Office for Capital Cases (RPDO), a new indigent defense office representing individuals who live in rural counties and have been charged with capital murder where the state is seeking the death penalty.³⁰⁴ Since its creation, RPDO has expanded beyond its principal office in Lubbock, Texas, into Amarillo, Angleton, Burnet, Kingsville, Midland, and San Antonio.³⁰⁵ The legislature's decision to fund legal representation for criminal offenders charged with committing "the worst of the worst of the worst" stemmed not from arguments made by criminal justice reform advocates, but rather from fiscal conservatives aiming to alleviate the burden placed on taxpayers living in small counties shouldering the exorbitant costs of a death penalty trial.³⁰⁶

297. See *infra* Parts V.A.1–2, V.B.1–2.

298. See *infra* Part V.A.1–2.

299. See *infra* Part V.B.1.

300. See *infra* Part V.B.2.

301. See *infra* Part V.A.1–2.

302. See *infra* Part V.A.1–2.

303. See REGIONAL PUBLIC DEFENDER OFFICE FOR CAPITAL CASES, *supra* note 211.

304. *Id.*

305. *Id.*

306. *Id.*

2. *The Proposal*

Unlike the SCFO, the proposed organization would operate independently from the TDCJ and, ultimately, the organization will be present in every correctional facility throughout the state.³⁰⁷ However, an immediate statewide rollout would result in an unmanageable, unprofessional, and ineffective implementation sure to draw the ire of state lawmakers.³⁰⁸ Instead, the proposed organization should follow the RPDO's example and start with a single office in the territory with the most state prisons.³⁰⁹ After a successful trial period, the organization can expand to serve incarcerated population in other regions throughout the state.³¹⁰ To further mirror the RPDO, the proposal presented to the Texas Legislature will use Lubbock, Texas, as the location of its first office.³¹¹

Conveniently, the TDCJ has divided its facilities into six geographical regions.³¹² Lubbock falls within the boundaries of Region VI, which covers Texas's panhandle area and houses nine state prison units operated by the TDCJ: Allred, Clements, Daniel, Dalhart, Jordan-Baten, Neal, Roach, Smith, and Wallace.³¹³ The inmates currently incarcerated in these units face sentences ranging anywhere between life without parole and six months, depending on the prison unit's security classification.³¹⁴ Each facility need not have its own staff of attorneys providing estate planning services to inmates.³¹⁵ Rather, a team of attorneys based in the Lubbock office could travel to each of the prisons on a rotating schedule that designates a certain day for each facility.³¹⁶

If the organization were running at full capacity, the number of attorneys required to meet the needs of Region VI's incarcerated population could exceed twenty.³¹⁷ However, the smaller scale rollout of this proposal would request four to six attorneys that would service the combined 2,556 inmates incarcerated in the two state prison facilities closest to Lubbock (not including the Montford Unit, a psychiatric facility located in Lubbock County): The Price-Daniels Unit in Scurry County and the Smith Unit in Dawson County.³¹⁸

307. *Id.*

308. See REGIONAL PUBLIC DEFENDER OFFICE FOR CAPITAL CASES, <https://www.rpdo.org/perma.cc/676S-EKHL> (last visited Oct. 20, 2019).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. See REGIONAL PUBLIC DEFENDER OFFICE FOR CAPITAL CASES, *supra* note 211.

315. *Id.*

316. *Id.*

317. See Sawyer, *supra* note 287; Garber, *supra* note 226.

318. *Id.*

B. Alternative Proposals

If Texas lawmakers reject the proposal for a state-funded organization, alternative options exist which could achieve substantially equal results with less hands-on involvement from the Texas Legislature.³¹⁹ First, the legislature could incorporate estate planning into the legal services currently provided by the SCFO.³²⁰ Second, pro bono legal organizations could finance the expansion of their work into Texas prisons by receiving a grant from the Real Estate, Probate, & Trust Law Section of the State Bar of Texas (REPTL).³²¹

1. Include Estate Planning under the SCFO

Admittedly, the TDCJ's addition of estate planning attorneys into the existing SCFO framework would be the simplest method for implementation by the legislature.³²² Even so, this option would still require an increase in the TDCJ's budget toward hiring estate planning attorneys to SCFO's staff.³²³ Further, this option offers the least oversight from lawmakers and leaves the operations of the proposal vulnerable to aforementioned conflicts of interests between the SCFO and the Texas Board of Criminal Justice.³²⁴

2. Incentives for Real Estate, Probate & Trust Law Grant Program

The second alternative requests from the legislature to provide incentives for members of the State Bar of Texas involved in pro bono organizations to submit a proposal to the REPTL Grant Program, which annually awards funding to projects that provide underserved Texans access to the civil justice system and fundamental legal.³²⁵ Significantly, REPTL gives priority to service projects focused on providing estate planning services, including the valid execution of a will for probate.³²⁶

A major drawback of this option is its reliance on the cooperation of existing pro bono organizations to submit proposals worthy of REPTL's

319. *Infra* Part V.B.1–2.

320. *Infra* Part V.B.1.

321. *Infra* Part V.B.2.

322. *See* Leggate *supra* note 12.

323. *See id.*

324. Paul J. Gately, *Texas Study Finds Prison Defendants Not Properly Represented*, KWTX (Jan. 7, 2018), <https://www.kwtx.com/content/news/State-Bar-study-finds-prison-defendants-not-properly-represented-468236153.html> [perma.cc/2PZR-GNF7].

325. GRANT PROGRAM: REAL ESTATE, PROBATE AND TRUST LAW SECTION GRANT PROGRAM, REAL ESTATE, PROBATE & TRUST LAW SECTION OF THE STATE BAR OF TEXAS, <http://www.reptl.org/DrawCommittees.aspx?GroupCommitteeID=57&PageID=31> [perma.cc/3Y6S-3SZD] (last visited Nov. 15, 2019).

326. *Id.*

grants.³²⁷ What is more, the grant would not cover the costs of creating and operating a widespread program within the TDCJ.³²⁸ However, the grant would at least cover the expenses of a trial program limited to a single TDCJ facility rather than all TDCJ facilities throughout Texas.³²⁹ REPTL renews grants annually at their discretion, but if the program is successful during the trial period, evidence of that success could be presented for the legislature's reconsideration of the initial proposal for state funding.³³⁰

VI. CONCLUSION

Historically, legislatures across the country have neglected the rights of the incarcerated as a population without a voice, and without a vote.³³¹ However, public opinion has shifted in favor of criminal justice reform at a national level, and now it is time for the Texas Legislature to act.³³² The implementation of a program designed to grant inmates access to estate planning would cut costs for the taxpayer while lessening the social and economic disparity imposed by mass incarceration upon communities of color.³³³

The alleged crimes committed by Jeffrey Epstein did little to garner public sympathy after his suicide, and understandably so.³³⁴ Many reasonable, law-abiding citizens would be reluctant to provide convicted criminals the privilege of executing a will.³³⁵ However, those skeptical of the proposal must be mindful of a critical aspect that is often forgotten: Deceased inmates receive no quantitative value from their wills. Instead, it is the families of inmates—spouses, children, parents—receiving the benefits of a will.³³⁶ Instead of spending time and money on intestacy, families of the incarcerated accumulate the acquired financial resources for future generations.³³⁷

327. *Id.*

328. *Id.*

329. *Id.*

330. GRANT PROGRAM: REAL ESTATE, PROBATE AND TRUST LAW SECTION GRANT PROGRAM, REAL ESTATE, PROBATE & TRUST LAW SECTION OF THE STATE BAR OF TEXAS, *supra* note 324.

331. *91 Percent of Americans Support Criminal Justice Reform, ACLU Polling Finds*, AMERICAN CIVIL LIBERTIES UNION (Nov. 16, 2017) <https://www.aclu.org/press-releases/91-percent-americans-support-criminal-justice-reform-aclu-polling-finds>.

332. *Id.*

333. *Id.*

334. *See Edwards, supra* note 1.

335. *See infra* Part V.

336. *See infra* Part V.

337. *See infra* Part V.