

ELDER ABUSE: THE CRIMINAL ASPECTS OF ESTATES & GUARDIANSHIPS, AND MENTAL COMMITMENTS

Hon. Claudia Laird and Darlene Payne Smith**

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I. INTRODUCTION

Most of us have dealt with elderly parents, grandparents, or neighbors.¹ We have all heard the stories of scams and abuses that target the oldest among us, but what remedies are available?² Statutory provisions allow law makers to enhance punishment sentences for those criminals who target elderly or disabled individuals. Uncollectible civil judgments fail to eliminate the possible financial gain that can come from conning elderly or disabled victims.³ Competent elderly adults and disabled individuals are not the only exploited victims.⁴ Even individuals who are simply isolated often fall victim to exploitation.⁵ Sadly, court-appointed guardians can also become abusers.⁶

1. *Elderly Fraud Scams: How They're Being Targeted and How to Prevent It*, ACFE, <http://www.acfe.com/fraud-examiner.aspx?id=4294997223> (last visited Mar. 27, 2018).

2. *Id.*

3. *Abuse of the Elderly and Disabled under Texas Law*, BURDETTE & RICE, PLLC (Dec. 15, 2016), <http://www.dallasprobateattorneys.com/disabled-under-texas-law/>.

4. *Id.*

5. *Id.*

6. Thomas W. McCulloch, *Guardian Abuse is a Growing Problem*, MCCULLOCH MILLER, PLLC (Nov. 18, 2015), <http://blog.houstonelderlawyer.com/2015/11/guardian-abuse-is-a-growing-problem.html>.

The Texas legal community has documented instances of lawyer appointees stealing millions from incapacitated persons under their care.⁷ With remedies lacking, one key way to help slow the frequency of persons subject to these scams is to identify the common behavioral traits of those who prey on the elderly, understand the opportune situations they seek to exploit, the tactics they employ, and be vigilant.⁸

Incapacitated adults are not only potential targets of crime, but can also become victims of the justice system when accused of a crime.⁹ In jail, incapacitated adults have very few rights and receive little treatment for the illness which landed them in jail in the first place.¹⁰ Even worse, medicated individuals often are not given medication in jail, significantly worsening their situation.¹¹ Unmedicated individuals can be dangerous.¹² The disparity of the rights and protections of an arrested incapacitated adult and rights and protections of an arrested minor is abysmal.¹³ Minor wards have numerous rights and protections, while adult wards have few.¹⁴ Yet, the definition for incapacitated includes both a minor and an incapacitated adult.¹⁵

So what happens when a minor ward is arrested?¹⁶ Our penal system has safeguards in place to protect the minor from detention through trial.¹⁷ So, even if the arrested minor is in a guardianship, the guardian can be assured that certain safeguards exist, guardianship or not.¹⁸ Now, what happens if an adjudicated incapacitated adult ward gets arrested?¹⁹ As of today, there is not even a legal requirement that the State notify the guardian of the ward's arrest.²⁰ With continued education and legislation, things are changing; however, when an adult is under a guardianship, there are few additional protections afforded in the criminal justice system.²¹ An adult under a guardianship falls under the same Texas Estates Code Section 1002.017 as the minor, and should be afforded the same protections.²²

7. *Id.*

8. *Id.*

9. Hon. Claudia Lee Laird & Darlene Payne Smith, *Criminal Aspects of Guardianship and Mental Commitment*, (Jan. 22, 2016), http://www.mctx.org/document_center/Courts/Paper%20criminal_aspects_of_guardianship.pdf.

10. *Id.*

11. *Id.* at 24.

12. *Id.*

13. *Id.*

14. *Id.* at 1.

15. TEX. EST. CODE ANN. § 1002.017 (West 2017).

16. Laird, *supra* note 9, at 1.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. TEX. EST. CODE ANN. § 1002.017 (West 2017).

Bottom line, the Texas Family Code and Texas Estates Code have worked to overlap in an adequate fashion in dealing with the juvenile offenders, but not with incapacitated adults.²³ In comparison, when you look to the Texas Penal Code, little has been done to acknowledge guardianships, require notice to guardians, or provide protection to the incapacitated if the adult is under a guardianship.²⁴ This article discusses the treatment that the elderly, minors, incapacitated persons, and the mentally ill face in the criminal justice system, as a victim or defendant.²⁵

II. EXPLOITATION AND ABUSE OF THE ELDERLY

As the baby boomers age, statistics tell us they are living longer.²⁶ Other statistics tell us that while they are living longer, they are not necessarily enjoying a better quality of life.²⁷ Some outlive both their spouse and their children and find themselves alone.²⁸ Abuse and exploitation do not affect only the mentally ill and incapacitated.²⁹ As the baby boomers become more frail and slower of thought process, they also have a heightened fear of being housed or falling alone in their homes.³⁰ They long for companionship and even have telephone calls with strangers.³¹ Many find themselves exploited before their minds comprehend the scam.³² The instances of abuse and exploitation are mounting, as are the articles warning our elderly population and advising how they may protect themselves.³³ Every day more and more of the elderly become victims of financially motivated fraud.³⁴ The elderly are particularly susceptible to these abuses because of their typically trusting nature, their secure financial situation and also because it is difficult to depend on an elderly person as a witness at trial.³⁵

23. Laird, *supra* note 9, at 1.

24. *Id.*

25. *Id.*

26. William G. Gale, *The Aging of America: Will the Baby Boom Be Ready for Retirement?*, BROOKINGS (June 1, 1997), <https://www.brookings.edu/articles/the-aging-of-america-will-the-baby-boom-be-ready-for-retirement/>.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. Laird, *supra* note 9, at 26.

33. *Id.*

34. *Id.*

35. *Id.*

A. Underutilized Statutory Protections

The Texas Penal Code protects all citizens from abuses and relies on punishment enhancement to target individuals who prey upon certain classes of people, like the elderly, children, and disabled.³⁶ The available criminal punishments are underutilized as a tool to stem the rising tide of financial crimes targeting the elderly.³⁷ While there is currently an abundance of case law regarding physical elder abuse, there are few criminal filings for financial exploitation of the elderly as real-life actions would warrant.³⁸ Those cases that have been brought show willingness on the part of the courts to protect the elderly from familial exploitation, insurance exploitation, and telemarketing scams.³⁹

III. STEPS TOWARDS IDENTIFICATION AND PREVENTION OF ABUSE & EXPLOITATION

Most of the crimes that are committed against the elderly go unreported, especially those that are financial in nature.⁴⁰ Senior citizens do not want to be a financial burden on their adult children, and they do not want those same children to believe that they no longer have the mental acuity necessary to take care of their own finances.⁴¹ Many instances of abuse will continue to go unnoticed.⁴² To protect the elderly, we must increase the awareness of situations where abuse is likely to occur in order to avoid exploitation.⁴³

A. Mental Exploitation

This concept is not easy to describe.⁴⁴ It is a little like describing pornography—you know it when you see it.⁴⁵ If an older person lives alone and far from family or has infrequent visits with family, an unscrupulous person or persons can move into their life with an agenda.⁴⁶ Little by little, there are ways these predators poison the mind of an already partially impaired or lonely person for their benefit.⁴⁷

36. *Id.* at 20.

37. *Id.*

38. *Id.* at 30.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 28.

45. *Id.*

46. *Id.*

47. *Id.*

B. Predatory Behavior

Predatory behavior can be a gradual coup, a swift takeover, or generally the obtaining of power over another who seeks physical help, social interaction, and/or emotional support.⁴⁸ Physical harm is not always present, although it can become a threat or an actual risk.⁴⁹

1. Spiritual Predator

This type of predatory behavior seems nurturing in the beginning.⁵⁰ The predator may take the person to church, have them join a Bible study, and improve the person's life.⁵¹ For example, charities are good at maintaining close ties with their donors, but the spiritual predator takes things beyond a welfare check.⁵² As the exploitation progresses, the victim cannot justify the amount of a check to a certain type of "charity."⁵³ They become defensive and do not want to discuss a total change in their "giving."⁵⁴ The predator may convince the person that his or her spiritual well-being and ultimate death depend on a continued check.⁵⁵ The victim often becomes increasingly isolated; however, there will be more interaction in the home with the predator.⁵⁶

2. Moral Predator

A different kind of predator can take the form of a distant relative, caregiver, friend, or acquaintance.⁵⁷ This type of predator feeds on behavior that a loved one or heir should be exhibiting toward the intended prey.⁵⁸ This type of predator finds an excuse to see the person more and more, sometimes daily.⁵⁹ They make their prey seem special and deserving and lament that the person's children or close relatives do not treasure them.⁶⁰ They differentiate

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

themselves from others by never disapproving or disagreeing.⁶¹ These predators manage to get on accounts to “help out” and seem never to be around when the relatives show up.⁶² They sometimes urge the victim to keep their relationship a secret so as not to upset the relatives.⁶³ They urge the victim to consider their children as not complying with the morals of a good child.⁶⁴ They compare themselves as an example of morality and caring.⁶⁵

3. Anxiety Exploitation

This type of predatory behavior is particularly cruel.⁶⁶ Everyone fears something, but the fear is usually not a mental disorder.⁶⁷ As we age, our fear may be to become crippled, to lose our mind, and/or to be placed in a nursing home and be forgotten.⁶⁸ Many elderly are paralyzed by the thought of being moved from their home.⁶⁹ They dwell on being removed to the point of sleepless nights and total anxiety.⁷⁰ This type of predator will weave a tale of woe as to what happened in their family and how no one should experience that fate.⁷¹ They prey on these anxieties and may drop subtle hints that the person’s child or relatives “seem” like they would not leave the person in their home.⁷² The predator expresses worry that if he is not there to fight for the victim, it could end badly.⁷³

61. See generally *Financial Exploitation of the Elderly Through Undue Influence*, MARTIN HAGAN’S TRUST AND ESTATES RESOURCE CENTER, http://haganlaw.net/?page_id=95#perp-identifier (last visited Jan. 28, 2018) (the predator will be friendly considerate, and helpful).

62. See generally *4 Common Steps Used by the Predator to Target Seniors*, ELDER PROTECTION CENTER, <https://elderprotectioncenter.com/4-common-steps-used-by-the-professional-predator-to-target-seniors/> (last visited Jan. 28, 2018) (predators convince the person that it’s in their best interest to be on the account or money be moved).

63. See generally Sean Cook, *Protecting Seniors from Predators: Perspectives on Elder Abuse*, GRISWOLD HOME CARE (June 30, 2014), <https://www.griswoldhomecare.com/blog/protecting-seniors-from-predators-perspectives-on-elder-abuse/> (predators will play their victim against their family).

64. *Id.*

65. *Id.*

66. See Sean Cook, *Protecting Seniors from Predators: Perspectives on Elder Abuse*, GRISWOLD HOME CARE (June 30, 2014), <https://www.griswoldhomecare.com/blog/protecting-seniors-from-predators-perspectives-on-elder-abuse/>.

67. See Derek Jones, *Seniors Fear Nursing Home More Than Death*, CLEAR CARE (July 8, 2013, 1:04 PM), <https://www.clearcareonline.com/blog/managing-a-homecare-agency/seniors-fear-nursing-home-more-than-death/>.

68. *Id.*

69. *Id.*

70. See *id.*

71. See Cook, *supra* note 66.

72. *Id.*

73. *Id.*

C. Confronting the Predator

As attorneys, we should be ever vigilant to any exploitation of our elderly or impaired clients.⁷⁴ We may notice they are more open to suggestion.⁷⁵ By telephone or in office visits, we may notice that their relatives, of whom they have always spoken fondly, are now the subject of snippy or sarcastic comments and disapproval.⁷⁶ We may hear new names interjected as special friends and copies of private documents may be requested for that person.⁷⁷ Intervening to distance the predator and shut off the abuse is crucial.⁷⁸

1. Straight Forward

Our court system needs a deeper understanding of the nuances of elder abuse cases.⁷⁹ Courts need to be prepared to see the wrongdoing when an adult, child, or another individual who, on the surface might seem innocent or genuinely concerned for the best interest of the senior, in reality, is exerting undue influence over an elder.⁸⁰ As Mickey Rooney testified, there's more to the abuse than simply misusing money.⁸¹ Dignity, health, safety, and the very basic fabric of life can deteriorate when a senior is confined against his will to circumstances that suit the caregiver or family member more than the senior.⁸² By receiving additional training and exposure to real-life examples, courts can garner a better understanding of the insidious nature of this growing problem and have a greater appreciation of the need to rule appropriately so that the victim can reclaim their dignity and life.⁸³

The “in your face” court approach may ward off exploitation, but going to a court over the perpetrator may have the opposite effect.⁸⁴ This approach may shut the door on family and anyone who speaks ill of the perpetrator.⁸⁵

74. See *infra* note 80.

75. See generally *Financial Exploitation of the Elderly Through Undue Influence*, MARTIN HAGAN'S TRUST AND ESTATES RESOURCE CENTER, http://haganlaw.net/?page_id=95#perp-identifier (last visited Jan. 28, 2018) (predators will go after victims that are vulnerable).

76. *Id.*

77. *Id.*

78. See *infra* notes 86–98.

79. See *infra* note 83.

80. See generally *Mickey Rooney's Emotional Testimony on Elder Abuse*, YOUTUBE, <https://www.youtube.com/watch?v=W9ikKP5-s5A> (last visited Jan. 27, 2018) (wherein a stepson exerted an incredible amount of influence over his stepfather).

81. See *id.*

82. *Id.*

83. *Id.*

84. See *supra* notes 76–77.

85. See *supra* notes 76–77.

This straightforward approach can lead to further isolation and an affirmation that you are the enemy.⁸⁶ It may take a long time to deal with the abuse.⁸⁷

2. Covert Maneuvers

It may be that the stealth approach works better in learning as much as possible about the predator.⁸⁸ Practitioners may want to seem genuinely excited to meet them and get to know them better.⁸⁹ Do not discuss the situation by telephone, because the predator may listen.⁹⁰ Consider showing up without notice and see what is going on in the home.⁹¹ The victim may be afraid due to threats of repercussions if the predator has not approved of the visit.⁹² Be particularly concerned if the victim feels the need to “ask permission” to deal with any particular scenario.⁹³ Practitioners may be able to persuade the victim that they have gone down the wrong path.⁹⁴ If so, you can assist in changing locks, changing cell phone numbers, and correcting bank accounts.⁹⁵ If victims acknowledge their mistake, then quickly direct their blame to the perpetrator and divert them to a positive solution.⁹⁶ Guilt and shame, coupled with possible memory or reasoning issues, are dangerous combinations.⁹⁷ Handle the conversations in a similar manner to a vicious assault, understanding how fragile and alone the victim now feels.⁹⁸

3. Financial Exploitation

Just as the Internet age is changing the way we communicate and improving the speed of communication, it is also a resource to locate widows and widowers, new inheritance, drug and alcohol abusers with money, and groups for lonely persons to join.⁹⁹ Any life-changing event to an elderly or mentally ill person can place them at peril to be financially exploited.¹⁰⁰ If the victim is internet savvy, schemes to extort money stemming from third

86. See *supra* notes 76–77.

87. See *supra* notes 76–77.

88. See generally William Henry, “Who’s there?” . . . Ask the Right Questions, to Protect Your Elderly Loved Ones From Predators, THE CAREGIVER SPACE (June 15, 2016), <https://thecaregiverspace.org/elder-exploitation/> (suggesting to confront the possible predator in order to gather information.).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. See generally *id.* (showing that predators can use the internet to reach a wide number of people).

100. *Id.*

world countries are as popular as this spring's fashion lineup.¹⁰¹ A victim does not have to be incapacitated to be exploited, just vulnerable.¹⁰²

D. Opportunity

A predator can find prey easily.¹⁰³ Predators can be a caregiver when the competent spouse dies or a distant friend who appears in time of need.¹⁰⁴ Predators can also be a family member who has been financially supported to a degree, who sees a mental decline and steps up his game.¹⁰⁵

1. Elderly

The elderly are prime targets for financial exploitation.¹⁰⁶ As their physical and mental health decline, the fear running out of money, losing their home, not being able to pay their bills, and all sorts of scenarios, some imagined and some real, can become the central issue of life.¹⁰⁷ Predators can exploit some elderly persons who are mentally and physically fit out of sheer loneliness and the desire to be needed.¹⁰⁸

2. Special Needs

Special needs individuals are usually cared for either at home or in a facility.¹⁰⁹ Some develop a degree of independence by keeping jobs and living alone.¹¹⁰ If they have governmental support coming to them they can develop "friends" who will be right there to help them spend the funds.¹¹¹ Likewise, the mentally ill are easy targets.¹¹² Once a predator learns their phobias and fears, they can prey on these fears, telling them, for example that their bank account is being monitored by the government and their funds should be hidden with a friend for safekeeping.¹¹³

101. *Id.*

102. *Id.*

103. See *Financial Exploitation of the Elderly Through Undue Influence*, MARTIN HAGAN'S TRUST AND ESTATES RESOURCE CENTER, http://haganlaw.net/?page_id=95#perp-identifier (last visited Jan. 28, 2018).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. See Joe Robertson, *Financial Predators Stalk the Mentally Ill*, THE KANSAS CITY STAR (Jan 25, 2016, 2:59 PM), <http://www.kansascity.com/news/local/article56389665.html>.

110. *Id.*

111. *Id.*

112. *Id.*

113. See *supra* notes 67–71.

3. Family Not Near

When family members are not in the same city, or when an elderly or mentally ill person is alone and away from family or has no family at all, word travels fast.¹¹⁴ For example, a neighbor talks to a hairdresser, the lonely person has a conversation with a store clerk, and someone may impart too much information.¹¹⁵ The person may have access to their address or telephone.¹¹⁶ Once the contact is established, the stage is set to move in and gain control.¹¹⁷ If the family is not involved or not nearby, it is easy to take control and take assets before anyone discovers the assets are gone.¹¹⁸

E. Methods of Exploitation

Anyone who has been through financial exploitation with a loved one expresses shock at the methods employed to get close.¹¹⁹ They may know or even have trusted the person who steals a person's life savings.¹²⁰ For as many ways as one can do good, so are there ways to do evil.¹²¹

1. Suggestion

Predators use many different tools, one of the most powerful being suggestion.¹²² After locating their target and doing research to determine the sizes of their estate, potentially through talking about charities or taxes, the predator will wait for a time when the victim has their guard down in order to call, visit, or take them to a bank.¹²³ The predator will attempt to make their suggestion have a lasting impact by suggesting they could fill the role of a mother, father, or uncle that they always wanted.¹²⁴

114. See generally Henry, *supra* note 88 (explaining the person may become involved by chance when the family lives far away).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. See generally *id.* (explaining the predator may be a friend, neighbor, or other family member).

120. *Id.*

121. *Id.*

122. Hon. Claudia Lee Laird & Darlene Payne Smith, *Criminal Aspects of Guardianship and Mental Commitment*, (Jan. 22, 2016), http://www.mctx.org/document_center/Courts/Paper%20criminal_aspects_of_guardianship.pdf.

123. *Id.*

124. *Id.*

2. *Secrecy*

Predators have become very skilled at keeping relationships secret.¹²⁵ They convince the victim that the relatives who decided to put the victim in a home would react negatively if they became aware that the victim added the predator to the victim's bank account.¹²⁶ Future cash gifts become a game of secrecy between the predator and victim in order to keep the family in the dark.¹²⁷ To conceal their existence, the predator must persuade the victim that time spent with their family is so precious for the victim that the predator would not want to intrude by being present even for one moment.¹²⁸ Predators also take great effort to remove all signs of their existence, leaving behind no card, note, gift, or even telephone number in the house that could potentially tip off the relatives that a stranger had been in the home.¹²⁹

3. *Discredit of Family*

Once the predator gains the trust of the elderly person, they look to discredit the family in many ways.¹³⁰ The predators capitalize on the implementation of secrecy, which leads to the elderly person sharing everything.¹³¹ When a predator realizes even a slight criticism of the victim's child, they can build on that and dramatize the situation.¹³² The predator then acts under the guise of truthfulness and breaks down the victim's family, shaming them for not valuing the victim as much as the predator does.¹³³ Sometimes the predator will enlist the aid of the black sheep of the family in order to discredit those members of the family who truly do care for the victim and have taken nothing from them.¹³⁴ As the relationship between the predator and victim grows, families have described a change in their loved one who had rewritten every good memory into a new history that lacks caring and is full of slights and ulterior motives.¹³⁵ The biggest win for the predator is if they can convince the person to still attend church and socialize with others, but at the same time hate their own family.¹³⁶

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

IV. PROSECUTING ABUSE OF THE ELDERLY/DISABLED VICTIM

In reviewing Texas cases and statutes regarding the elderly and disabled it is first important to understand to whom we refer when we use these terms.¹³⁷ Texas Penal Code Section 22.04 defines elderly as “a person 65 years of age or older.”¹³⁸ Texas Penal Code Section 22.04 defines a disabled individual broadly as a person with mental illness, autism spectrum disorder, a developmental disability, an intellectual disability, severe emotional disturbance, traumatic brain injury or a person “who otherwise by reason of age or physical or mental disease, defect, or injury is substantially unable to protect the person’s self from harm or to provide food, shelter, or medical care for the person’s self.”¹³⁹ This definition would include many wards subject to probate guardianships.¹⁴⁰ Other statutes in the Texas Penal Code and Code of Criminal Procedure adopt these definitions.¹⁴¹ A prosecutor, of course, has a myriad of laws under which to prosecute those harming others whether or not the victim is elderly or disabled.¹⁴² For example, Texas Penal Code Chapter 19 applies to homicide, Chapter 22 applies to assaultive offenses, and other chapters apply equally to all victims of criminal behavior.¹⁴³ Upon review of the Texas Penal Code, it is readily discoverable that certain statutes are specifically designed for use in prosecuting crimes committed against the elderly or disabled individual.¹⁴⁴

A. *Texas Penal Code Section 22.04*

The statute used most often in the prosecution of physical or mental abuse of children, and the elderly or disabled individuals is Texas Penal Code Section 22.04.¹⁴⁵ This statute is broad in form and covers just about anything one might do to physically or mentally harm an elderly or disabled individual.¹⁴⁶ In general, Texas Penal Code Section 22.04 creates a felony offense if a person “intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual: serious bodily

137. See generally TEX. PENAL CODE ANN. § 22.04 (West 2017).

138. TEX. PENAL CODE ANN. § 22.04.

139. TEX. PENAL CODE ANN. § 22.04; see also TEX. HEALTH & SAFETY CODE ANN. § 591.003 (West 2017) (defining mental illness).

140. TEX. PENAL CODE ANN. § 22.04.

141. TEX. PENAL CODE ANN. § 22.04.

142. See TEX. PENAL CODE ANN. tit 5, Refs & Annos (West 2017).

143. *Id.*

144. TEX. PENAL CODE ANN. § 22.04.

145. *Id.*

146. *Id.*

injury; serious mental deficiency, impairment, or injury; or bodily injury.”¹⁴⁷ If the defendant is an “owner, operator, or employee of a group home, nursing facility, assisted living facility, boarding home facility, intermediate care facility for persons with an intellectual or developmental disability, or other institutional care facility” the defendant can be subjected to Texas Penal Code Section 22.04 through criminal negligence by omission if the complainant is a resident of the home or facility and if the defendant has a legal or statutory duty to act; or has assumed care, custody or control of the elderly or disabled victim.¹⁴⁸ For purposes of an omission the defendant has “assumed care, custody, or control if he has by act, words, or course of conduct acted so as to cause a reasonable person to conclude that he has accepted responsibility for protection, food, shelter, and medical care for an elderly or disabled individual.”¹⁴⁹ A defendant acting in the capacity of “owner, operator, or employee of a group home or facility . . . is considered to have accepted responsibility for protection, food, shelter, and medical care for” residents of the group home or facility.¹⁵⁰

B. Texas Penal Code Section 32.53: A Lesser Utilized Alternative

In reviewing statutes that specify applicability to the elderly or disabled with regard to physical or mental harm, another statute available to prosecutors is Texas Penal Code Section 32.53.¹⁵¹ Like Texas Penal Code Section 22.04, Texas Penal Code Section 32.53 protects children, elderly, and disabled individuals.¹⁵² Texas Penal Code Section 32.53 creates a third degree felony offense if a “person intentionally, knowingly, or recklessly causes the exploitation of a child, elderly individual, or disabled individual.”¹⁵³ For purposes of the statute “[e]xploitation means the illegal or improper use of a child, elderly individual, or disabled individual or of the resources of a child, elderly individual, or disabled individual for monetary or personal benefit, profit, or gain.”¹⁵⁴ Despite hundreds of appellate cases found in association with Section 22.04 of the Texas Penal Code, at the time of the writing of this paper, there is extremely limited controlling case law on Section 32.53 of the Texas Penal Code.¹⁵⁵ One example is, *Paroline v. State*, wherein the defendant used the victim’s (a disabled individual) debit card to fill her automobile with gasoline and to make purchases and cash

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. TEX. PENAL CODE ANN. § 32.53 (West 2017).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

withdrawals from the victim's bank account by duping him into believing that she was attempting to use his card to reimburse his account.¹⁵⁶ The State argued that Paroline left the victim at a local Walmart.¹⁵⁷ Paroline was then indicted for exploitation of a disabled individual.¹⁵⁸

C. Texas Penal Code Section 25.10: Just for Guardians

Of particular interest to guardianship judges is Texas Pen. Code Section 25.10 which makes it a felony offense if a "person takes, retains, or conceals a ward when the person knows that the person's taking, retention, or concealment interferes with a possessory right with respect to the ward."¹⁵⁹ A judge considering injunctive relief for a pending guardianship wherein the non-movant resides outside Texas may be advised to enter orders of temporary guardianship pending contest in lieu of a restraining order.¹⁶⁰ If a litigant removes the proposed ward from the state, jurisdictional problems will arise with enforcing the injunctive order; however, Texas Penal Code Section 25.10 can be used to present the situation to a grand jury for criminal prosecution.¹⁶¹ Unfortunately, law enforcement officers are sometimes unfamiliar with the provisions of Texas Penal Code Section 25.10.¹⁶² A call from the judge or court investigator to supervising officers to explain guardianship and Texas Penal Code Section 25.10 will help in these situations.¹⁶³

D. Texas Human Resources Code Section 48.051: Duty to Report

Many persons do not realize that the failure to report abuse is also a crime.¹⁶⁴ It is not as serious as the actual crime, but it is still abuse.¹⁶⁵ The duty to report is found in the Texas Human Resources Code, Section 48.051 which states:

- (a) Except as prescribed by Subsection (b), a person having cause to believe that an elderly person, a person with a disability, or an individual receiving services from a provider as described by Subchapter F is in the state of abuse, neglect, or exploitation

156. Paroline v. State, 532 S.W.3d 491, 500 (Tex. App.—Texarkana 2017, pet. struck).

157. *Id.* at 493.

158. *Id.*

159. TEX. PENAL CODE ANN. § 25.10 (West 2017).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. TEX. HUM. RES. CODE ANN. § 48.051 (West 2017).

165. *Id.*

shall report the information required by Subsection (d) immediately to the department.

- (b) If a person has cause to believe that an elderly person or a person with a disability, other than an individual receiving services from a provider as described by Subchapter F has been abused, neglected, or exploited in a facility operated, licensed, certified, or registered by a state agency, the person shall report the information to the state agency that operates, licenses, certifies, or registers the facility for investigation by that agency.
- (c) The duty imposed by Subsections (a) and (b) applies without exception to a person whose knowledge concerning possible abuse, neglect, or exploitation is obtained during the scope of the person's employment or whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, employee or member of a board that licenses or certifies a professional, and mental health professional.¹⁶⁶

Many people who witness the abuse are concerned with the ramifications of reporting and fearing that the predator might come after them.¹⁶⁷ Section 48.052 discusses what happens if you have knowledge of the abuse but decide not to report the abuse, stating:

- (a) A person commits an offense if the person has cause to believe that an elderly person or person with a disability has been abused, neglected, or exploited or is in the state of abuse, neglect, or exploitation and knowingly fails to report in accordance with this chapter. An offense under this subsection is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the abused, neglected, or exploited person is a person with intellectual disability who resided in a state supported living center, the ICF-IID component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the disabled person had suffered serious bodily injury as a result of the abuse, neglect, or exploitation.
- (b) This section does not apply if the alleged abuse, neglect, or exploitation occurred in a facility licensed under Chapter

¹⁶⁶. *Id.*

¹⁶⁷. *Id.*

242, Health and Safety Code. Failure to report abuse, neglect, or exploitation that occurs in a facility licensed under that chapter is governed by that chapter.¹⁶⁸

If an attorney or individual suspects abuse or exploitation they should call Adult Protective Services at 1.800.252.5400 or use its secured website: <https://www.txabusehotline.org>.¹⁶⁹ If a facility is involved, call the abuse hotline for APS Facility Investigation at 1.800.647.7418.¹⁷⁰ Individuals can also call any of the probate courts and speak with a guardianship coordinator.¹⁷¹ The probate courts will require an “information letter” to be faxed/mailed to the court pursuant to Texas Estates Code Section 1102.003.¹⁷² This Section provides the necessary information that should be included in the letter.¹⁷³ Upon receipt of the letter, it will be assigned to a court and an investigation will commence.¹⁷⁴ The Court may then use a court investigator or appoint an ad litem to conduct a more thorough investigation.¹⁷⁵

In preparing the report to APS, you should include:

- (i) Name, age and address of the elderly or disabled;
- (ii) The name, address or any person responsible for their care;
- (iii) The nature of the person’s conditions, i.e. Dementia;
- (iv) The basis of your knowledge; and
- (v) Anything you believe relevant to assist the abused person.¹⁷⁶

Keep in mind with Health and Human Services Commission (HHSC), when calling the hotline, individuals can choose to remain anonymous to anyone but the investigating worker.¹⁷⁷ Even if the records are produced by court order, they will be redacted.¹⁷⁸

168. TEX. HUM. RES. CODE ANN. § 48.052 (West 2017).

169. *Welcome to the Texas Abuse Hotline Website*, TEXAS DEPARTMENT OF FAMILY PROTECTIVE SERVICES, <https://www.txabusehotline.org> (last visited Feb. 15, 2018).

170. *APS Provider Investigations*, TEXAS DEPARTMENT OF FAMILY PROTECTIVE SERVICES, https://www.dfps.state.tx.us/Adult_Protection/About_Adult_Protective_Services/provider_investigations.asp (last visited Feb. 15, 2018).

171. *APS Provider Investigations Handbook*, TEXAS DEPARTMENT OF FAMILY PROTECTIVE SERVICES, https://www.dfps.state.tx.us/handbooks/APS_Provider/Files/PI_pg_3000.asp/ (last visited Feb. 15, 2018).

172. TEX. EST. CODE ANN. § 1102.003 (West 2015).

173. TEX. EST. CODE ANN. § 1102.003.

174. *See* 42 TEX. JUR. 3D GUARDIANSHIP AND CONSERVATORSHIP § 106 (2018).

175. *See* 42 TEX. JUR. 3D GUARDIANSHIP AND CONSERVATORSHIP § 106 (2018).

176. TEX. HUM. RES. CODE ANN. § 48.051 (West 2015).

177. *See Frequently Asked Questions About Reporting Abuse*, TEX. DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, https://www.dfps.state.tx.us/Contact_Us/report_abuse_faqs.asp#confidential (last visited Jan 27, 2018).

178. *See How to Request Copies of Case Records*, TEX. DEPARTMENT OF FAMILY AND PROTECTIVE

Based on the foregoing it may seem that Texas law contains few statutes singling out the elderly and disabled, but a review of *punishment* provisions shows the opposite is true.¹⁷⁹

E. Enhancements

Criminal behavior is classified for punishment purposes with the most heinous crimes landing at the first degree felony or capital classification and lessor offenses landing at the misdemeanor classification.¹⁸⁰ As the level of offense increases, so too does the punishment range for the offense as illustrated below:

<u>Level of Offense</u>	<u>Punishment Range</u>
Capital Murder	Life without parole or death
First Degree Felony	5 years – 99 years/life in prison & up to \$10,000 fine
Second Degree Felony	2 years – 20 years in prison & up to \$10,000 fine
Third Degree Felony	2 years – 10 years in prison & up to \$10,000 fine
State Jail Felony	180 days – 2 years in state jail & up to \$10,000 fine
Class A Misdemeanor	Up to 180 days in county jail & up to \$4,000 fine
Class B Misdemeanor	Up to 1 year in county jail & up to \$2,000 fine
Class C Misdemeanor	Up to \$500 fine ¹⁸¹

The practical effect of enhancement language in a criminal statute is to increase the level and punishment range from one classification to a higher classification if certain criteria are met.¹⁸² For example, if a crime is a class A misdemeanor, if certain criteria are met (like the victim is an elderly or disabled) it may be bumped up to the punishment range of a state jail felony.¹⁸³

A handful of statutes in the Texas Penal Code provide for enhancement if the victim of the crime is an elderly individual.¹⁸⁴ Perpetrators of the following statutes will find their level and/or punishment range increased by one level if the victim is an elderly individual: Texas Penal Code Sections 22.04 (theft), 32.21 (forgery), 32.31 (credit/debit card abuse), 32.45 (misapplication of fiduciary property or property of a financial institution), 32.46 (securing execution of document by deception) and 32.51 (fraudulent

SERVICES, https://www.dfps.state.tx.us/policies/Case_Records/default.asp (last visited Jan 27, 2018).

179. See *infra* PART V.

180. See TEX. PENAL CODE ANN. §§ 12.21–.23, 12.31–.35 (West 2017).

181. TEX. PENAL CODE ANN. §§ 12.21–.23, 12.31–.35 (West 2017).

182. TEX. PENAL CODE ANN. § 12.47(a) (West 2017).

183. See TEX. PENAL CODE ANN. § 12.47(a) (West 2017).

184. See TEX. PENAL CODE ANN. §§ 12.04 (theft), 32.21(e-2) (forgery), 32.31(d) (credit/debit card abuse), 32.45(d) (misapplication of fiduciary property or property of a financial institution), 32.46(c-1) (securing execution of document by deception), 32.51(c-1) (fraudulent use or possession of identifying information) (West 2017).

use or possession of identifying information).¹⁸⁵ Likewise, Texas Penal Code Section 29.03 establishes that a second degree robbery is an “aggravated” first degree robbery if the victim is elderly.¹⁸⁶ An “aggravated” offense carries with it significant additional incarceration time before a defendant may be eligible for parole.¹⁸⁷

There are also enhancement provisions for criminal acts when the victim is a disabled individual.¹⁸⁸ Texas Penal Code Section 12.47 acts in concert with the Texas Code of Criminal Procedure article 42.014, which may be better recognized as part of the *hate crimes* statutes, that provide for harsher punishment if the actor is found to have “selected the person against whom the offense was committed . . . because of the defendant’s bias or prejudice against a group identified by race, color, disability, religion, national origin or ancestry, age, gender, or sexual preference. . . .”¹⁸⁹ Also providing for harsher punishment are the Texas Penal Code provisions enhancing offenses to the status of “aggravated.”¹⁹⁰ Texas Penal Code Section 22.021 adds “disabled individual” to the list of victims of sexual assaults to elevate the crime to the status of aggravated sexual assault.¹⁹¹ Likewise, Texas Penal Code Section 29.03 adds “disabled person” to the list of victims of robbery to elevate the crime to the status of aggravated robbery.¹⁹² This statute defines “disabled person” to mean “an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.”¹⁹³ This definition would include many wards under a probate guardianship.¹⁹⁴

V. A FURTHER FOCUS ON FINANCIAL CRIMES AGAINST THE ELDERLY/DISABLED

This section of the paper addresses prosecution of financial crimes which are often related to probate matters and requires a frank discussion of

185. *Id.*

186. TEX. PENAL CODE ANN. § 29.03 (West 2017).

187. *See* TEX. CODE. CRIM. PROC. art. 37.07 (West 2017) (jury form reads: “Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, the defendant will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time the defendant may earn. If the defendant is sentenced to a term of less than four years, the defendant must serve at least two years before the defendant is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.”).

188. *See* TEX. PENAL CODE ANN. § 12.47 (West 2017).

189. TEX. PENAL CODE ANN. § 12.47; TEX. CODE CRIM. PROC. art. 42.014 (West 2017).

190. *See* TEX. PENAL CODE ANN. § 22.021(a)(2)(C) (West 2017).

191. TEX. PENAL CODE ANN. § 22.021(a)(2)(C).

192. TEX. PENAL CODE ANN. § 29.03(a)(3)(B) (West 2017).

193. TEX. PENAL CODE ANN. § 29.03(c) (West 2017).

194. *See generally* TEX. EST. CODE ANN. § 1101.001 (outlining the requirements for guardianship include description of nature and degree of incapacity and assistance required).

the prosecution of white-collar cases.¹⁹⁵ When a police officer or prosecutor is dealing with a dead body, which is the result of criminal behavior, there is normally not any issue in getting at least an investigation underway.¹⁹⁶ When a police officer or prosecutor is dealing with a financial crime like a bounced check, stolen vehicle, property stolen from a home and the like there is normally not any issue in getting at least an investigation underway.¹⁹⁷ Even clear-cut complex financial schemes will garner the effort and attention of law enforcement.¹⁹⁸ As the complexity of the financial situation increases and the harm to the “victim” becomes more vague, a complainant will sometimes hear “this is a civil matter.”¹⁹⁹ In other words, go file a civil suit.²⁰⁰ Sometimes, having an estate crime where the harm was financial, and the owner of the asset is dead garners little sympathy and the least likelihood of criminal prosecution.²⁰¹ Without the most educated and persistent advocate, the only judge an estate representative will find himself before is the probate judge without the remedy of criminal punishment.²⁰² As in the realm of the living, crimes related to probate estates may be prosecuted by any number of criminal statutes including theft, forgery, credit card/debit card abuse, etc.²⁰³

A. Texas Penal Code Section 32.47: Altering Writings

A search of the penal code for provisions specifically dealing with probate or a will yields a single gem.²⁰⁴ Texas Penal Code Section 32.47 provides, “A person commits an offense if, with intent to defraud or harm another, he destroys, removes, conceals, alters, substitutes, or otherwise impairs the verity, legibility, or availability of a writing, other than a

195. See generally *Process of Prosecution of White Collar Crime*, HG.ORG LEGAL RESOURCES, <https://www.hg.org/article.asp?id=40984> (last visited Jan. 29, 2018) (explaining the likelihood of investigation does not always translate to taking case to trial).

196. *Id.*

197. *Id.*

198. See *White-Collar Crime*, FBI, <https://www.fbi.gov/investigate/white-collar-crime> (last visited Jan. 29, 2018).

199. See *Financial Investigations – Criminal Investigation*, IRS, <https://www.irs.gov/compliance/criminal-investigation/financial-investigations-criminal-investigation-ci> (last visited Jan. 29, 2018) (fraudulent financial conduct offers the possibility of both criminal and civil remedies).

200. *Id.*

201. HG.ORG LEGAL RESOURCES, *supra* note 195.

202. See generally *Town of Flower Mound v. Mockingbird Pipeline, L.P.*, 353 S.W.3d 230, 238 (Tex. App.—Fort Worth 2011, *pet. granted, judgm't vacated w.r.m.*) (legislature did not intend for probate courts to act as district courts).

203. See TEX. PENAL CODE ANN. §§ 12.04 (theft), 32.21(e-2) (forgery), 32.31(d) (credit/debit card abuse), 32.45(d) (misapplication of fiduciary property or property of a financial institution), 32.46(c-1) (securing execution of document by deception), 32.51(c-1) (fraudulent use or possession of identifying information) (West 2017).

204. TEX. PENAL CODE ANN. § 32.47 (West 2017).

governmental record.”²⁰⁵ The statute enhances the offense from a misdemeanor to a felony if the writing “is a will or codicil of another, whether or not the maker is alive or dead and whether or not it has been admitted to probate.”²⁰⁶ A review of the appellate cases indicates that attorneys use this statute for cases involving altering price tags and UPS labels, but it does not look like there is much activity against those who decide to destroy, remove, conceal, alter, substitute, or otherwise impair the verity, legibility, or availability of a will or codicil.²⁰⁷ It is up to probate attorneys to spot these situations and make the prosecuting attorney aware that there is a felony offense afoot.²⁰⁸

B. Texas Penal Code Section 32.45: Fiduciary Prosecution

If the offender holds a power of attorney, is a trustee, or is any other kind of fiduciary or in a confidential relationship, they can also be prosecuted as a fiduciary.²⁰⁹ Texas Penal Code Section 32.45 reads as follows:

§ 32.45 Misapplication of Fiduciary Property of Financial Institution

a. For purposes of this section:

A. “Fiduciary” includes:

- (A) a trustee, guardian, administrator, executor, conservator, and receiver;
- (B) an attorney in fact or agent appointed under a durable power of attorney as provided by Chapter XII, Texas Probate Code;
- (C) any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by Section 153.001, Tax Code; and
- (D) an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

(2) “Misapply” means deal with property contrary to:

- (A) an agreement under which the fiduciary holds the property; or
- (B) a law prescribing the custody or disposition of the property.

205. TEX. PENAL CODE ANN. § 32.47.

206. TEX. PENAL CODE ANN. § 32.47.

207. See *In re E.P.* 185 S.W.3d 908, 909 (Tex. App.—Austin Feb. 2, 2006, no pet. h.).

208. TEX. RULES DISCIPLINARY P. R. 1.5(e), *reprinted in* TEX. GOV’T CODE ANN., tit. 2, subtit. G, app. A (West 2013).

209. TEX. PENAL CODE ANN. § 32.45 (West 2017).

- (b) A person commits an offense if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.
- (c) An offense under this section is:
 - (1) a Class C misdemeanor if the value of the property misapplied is less than \$20;
 - (2) a Class B misdemeanor if the value of the property misapplied is \$20 or more but less than \$500;
 - (3) a Class A misdemeanor if the value of the property misapplied is \$500 or more but less than \$1,500;
 - (4) a state jail felony if the value of the property misapplied is \$1,500 or more but less than \$20,000;
 - (5) a felony of the third degree if the value of the property misapplied is \$20,000 or more but less than \$100,000;
 - (6) a felony of the second degree if the value of the property misapplied is \$100,000 or more but less than \$200,000;
 - or
 - (7) a felony of the first degree if the value of the property misapplied is \$200,000 or more.
- (d) An offense described for purposes of punishment by Subsections (c)(1)–(6) is increased to the next higher category of offense if it is shown on the trial of the offense that the offense was committed against an elderly individual as defined by Section 22.04.²¹⁰

C. Case Law

The MetLife Mature Market Institute studied the issue of elder financial abuse, and they determined that annual losses associated with elder financial abuse are somewhere in the vicinity of \$2.9 billion.²¹¹ Needless to say, those wishing to steal their assets have targeted our elderly population.²¹² The Federal Bureau of Investigation has identified several reasons criminals prey on elderly individuals, including:

210. TEX. PENAL CODE ANN. § 32.45.

211. *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders*, METLIFE MATURE MARKET INSTITUTE, June 2011, <https://www.metlife.com/assets/cao/mmi/publications/studies/2011/mmi-elder-financial-abuse.pdf>.

212. *Id.*

Senior citizens are most likely to have a “nest egg,” to own their home, and/or to have excellent credit—all of which make them attractive to con artists.²¹³

People who grew up in the 1930s, 1940s, and 1950s were generally raised to be polite and trusting.²¹⁴ Con artists exploit these traits, knowing that it is difficult or impossible for these individuals to say “no” or just hang up the telephone.²¹⁵

Older Americans are less likely to report a fraud because they don’t know who to report it to, are too ashamed at having been scammed, or don’t know they have been scammed.²¹⁶ Elderly victims may not report crimes, for example, because they are concerned that relatives may think they no longer have the mental capacity to take care of their own financial affairs.²¹⁷

When an elderly victim does report the crime, they often make poor witnesses.²¹⁸ Con artists know the effects of age on memory, and they are counting on elderly victims not being able to supply enough detailed information to investigators.²¹⁹ In addition, the victims’ realization that they have been swindled may take weeks—or more likely, months—after contact with the fraudster.²²⁰ This extended time frame makes it even more difficult to remember details from the events.²²¹

Senior citizens are more interested in and susceptible to products promising increased cognitive function, virility, physical conditioning, anti-cancer properties, and so on.²²² In a country where new cures and vaccinations for old diseases have given every American hope for a long and fruitful life, it is not so unbelievable that the con artists’ products can do what they claim.²²³

The FBI reports several types of products criminals use to commit fraud against the elderly, including healthcare/insurance, telemarketing, anti-aging products, funeral/cemetery plans, telemarketing schemes, internet schemes, reverse mortgage schemes and investment schemes.²²⁴

213. *Scams and Safety: Fraud Against Seniors*, FBI, <https://www.fbi.gov/scams-and-safety/common-fraud-schemes/seniors> (last visited Jan. 30, 2018).

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

1. Abuses by Family Members

In *Matter of Burgess*, a son who had power of attorney for his mother conducted a number of transactions from his mother's account in order pay off debt that he accrued over the years through the authority of the power of attorney.²²⁵ The son also made gifts to his business and personal accounts from the estate of his father.²²⁶ The court concluded that the power of attorney gave the son a fiduciary duty to act in the best interest of his mother and that the only way for an agent to make gifts that benefit the agent is for that to be the "very purpose of the power of attorney."²²⁷ The court also ruled that this was defalcation and as such the son was still liable for the debts he paid with his ill-gotten gains.²²⁸ This case represents a step towards protecting the elderly from the deceitful actions of those closest to them, whom they trust.²²⁹ Applying defalcation in situations like this should help to curb abuses because it eliminates the possibility of financial gain for the abuser if they are still liable for the debts they have accrued.²³⁰

2. Exploitation by Insurance Companies

In *Negrete v. Fidelity and Guaranty Life Ins.*, a class action was brought against the life insurance company on claims that they were convincing senior citizens to purchase deferred annuities; in one case, in 2004, an eighty-four-year-old man was sold an annuity which would not mature until 2018.²³¹ Around the time of that sale, the company had removed a company policy which prohibited selling such annuities to senior citizens.²³² The court concluded that evidence the company had made millions of dollars and use of deceptive practices were enough to state a claim for elder abuse as well as a breach of fiduciary duty.²³³ While the parties to this action closed it through settlement, the action represents an important step to protect the elderly from deceptive sales practices and allow claims of abuse and breach of fiduciary duty when companies attempt to exploit the elderly based on their actuarial life expectancy.²³⁴

In *Sakai v. Merrill Lynch Life Insurance Co.*, plaintiff's advisor gave her an inappropriate recommendation that caused her to suffer from tax

225. *In re Burgess*, 106 B.R. 612, 614 (Bankr. D. Neb. 1989).

226. *Id.*

227. *Id.* at 618.

228. *Id.* at 622.

229. *Id.* at 614.

230. *Id.*

231. *Negrete v. Fid. & Guar. Life Ins. Co.*, 444 F. Supp. 2d 998, 999 (C.D. Cal. 2006).

232. *Id.* at 1000.

233. *Id.* at 1003.

234. *Id.*

penalties and other financial detriment.²³⁵ The pleadings included allegations of professional negligence or a conflict of interest and this was held to be sufficient for stating a triable issue.²³⁶ Merrill Lynch argued that the plaintiffs must show egregiousness in order to succeed in an elder abuse case, but the court struck this down.²³⁷ Another key point from this case is that elderly plaintiffs must show that an officer of the company had advance notice of the wrongful conduct or authorized the conduct or was guilty himself of fraud in order for the plaintiffs to recover punitive damages.²³⁸

3. Telemarketing Scams and the Elderly

In *United States v. Scrivener*, defendants pled guilty to multiple counts of wire fraud involving a telemarketing scheme in which elderly individuals were convinced to send money to defendants believing they were with Publisher's Clearing House.²³⁹ The sentences they received were enhanced by the judge in accordance with Section 3A1.1 of the Sentencing Guidelines which applies to defendants who intentionally select their victims because of "...vulnerability due to age."²⁴⁰ The court imposes a sentence outside of the guidelines range if there is an appropriate aggravating condition.²⁴¹ Further, the court held that sentencing guidelines do not adequately respond to "the unique evils inherent in telemarketing fraud upon the elderly."²⁴² The court cites a congressional act, the SCAMS Act, which allows a court to add five more years to the sentence of someone who defrauds the elderly, and for those who defraud ten or more people over the age of fifty-five or target those over the age of fifty-five allows an additional ten years on any punishment.²⁴³

4. A Case Worth Mentioning

Capps v. State provides an interesting set of facts and should serve as a warning to attorneys.²⁴⁴ On March 10, 2005, the Commission for Lawyer Discipline brought a disciplinary action in a civil district court against attorney Capps.²⁴⁵ In its disciplinary petition, the Commission alleged that

235. Sakai v. Merrill Lynch Life Ins. Co., No. C-06-2581 MMC, 2008 WL 4193058, at *1 (N.D. Cal. Sept. 10, 2008).

236. *Id.* at *5.

237. *Id.*

238. *Id.* at *8.

239. *United States v. Scrivener*, 189 F.3d 944, 946 (9th Cir. 1999), *as amended* (Nov. 10, 1999).

240. *Id.* at 947; U.S.S.G. § 3A1.1(b).

241. *United States v. Scrivener*, 189 F.3d at 951.

242. *Id.*

243. *Id.* at 952; 18 U.S.C.A. § 2326.

244. *Capps v. State*, 265 S.W.3d 44, 46 (Tex. App.—Houston [1st Dist.] 2008, *pet ref'd*).

245. *Id.*

the victim had retained Capps to bring a lawsuit for the wrongful death of her son.²⁴⁶ After the parties settled the suit for \$750,000, Capps failed to provide the victim with a settlement statement, failed to follow the victim's directions in the scope of representation, and invested the victim's funds in the property for his own benefit.²⁴⁷ Capps stated that presumably some of the money that he allegedly misappropriated belonged to the decedent's estate and the decedent's brother who were also plaintiffs in the suit.²⁴⁸ Capps was prosecuted based on the same set of facts.²⁴⁹ Capps attempted to plead double jeopardy based on the sanctions previously rendered by the Commission.²⁵⁰ The court reminded Capps that the Texas Government Code Section 81.078 governing disciplinary proceedings against attorneys specifically contemplates "that an attorney who is subject to disciplinary actions under the Texas Disciplinary Rules of Professional Conduct may also be subjected to criminal prosecution for the same conduct."²⁵¹ The court sentenced Mr. Capps to eight years in the penitentiary.²⁵²

VI. OTHER CRIMINAL STATUTES AFFECTING THE ELDERLY/DISABLED VICTIM

To allow prosecutors more leeway in prosecuting crimes against elderly and disabled individuals, the Texas Code of Criminal Procedure provides other types of help to a person interested in prosecuting crimes against elderly or disabled individuals.²⁵³

- Texas Code of Criminal Procedure Section 17.03 prohibits a magistrate other than the judge of the presiding court from releasing a defendant accused of injury to an elderly individual on a personal recognizance bond.²⁵⁴
- Texas Code of Criminal Procedure Section 17.032 defines the offense of injury to an elderly or disabled individual as a "violent offense" releasing a magistrate from the mandate that he release certain mentally ill defendants accused of injury to an elderly or disabled individual on a personal recognizance bond.²⁵⁵

246. *Id.*

247. *Id.*

248. *Capps v. State*, 265 S.W.3d 44, n. 11 (Tex. App.—Houston [1st Dist.] 2008, *pet ref'd*).

249. *Id.* at 44.

250. *Id.* at 48.

251. *Id.* at 50; TEX. GOV'T CODE ANN. § 81.078 (West 2017).

252. *Capps v. State*, 265 S.W. 3d at 44.

253. TEX. CODE CRIM. PROC. ANN. art. §§ 17.03, 17.032, 38.071, 26.13 (West 2017).

254. TEX. CODE CRIM. PROC. ANN. art. § 17.03 (West 2017) (A defendant given a personal recognizance or PR bond is not required to post funds for bond. He must pledge funds on a promise of his appearance.).

255. TEX. CODE CRIM. PROC. ANN. art. § 17.032 (West 2017)

- Texas Code of Criminal Procedure Section 38.071 offers an opportunity for the prosecution to preserve out of court testimony of a child in specific circumstances to prosecute a defendant accused of the offense of injury to an elderly or disabled individual.²⁵⁶

Texas Code of Criminal Procedure Article 26.13 requires the court to inquire Adult Protective Services at 1.800.252.5400 or use its secured website: <https://www.txabusehotline.org>.²⁵⁷ If a facility is involved call the abuse hotline for APS Facility Investigation at 1.800.647.7418.²⁵⁸ You can also call any of the probate courts and speak with a guardianship coordinator.²⁵⁹ The probate courts will require an “information letter” to be faxed/mailed to the court pursuant to Texas Estates Code Section 1102.003.²⁶⁰ This Section provides the necessary information that should be included in the letter.²⁶¹ Upon receipt of the letter, it will be assigned to a court and an investigation will commence.²⁶² The Court may then use a court investigator or appoint an ad litem to conduct a more thorough investigation.²⁶³

In preparing the report to APS, you should include:

- (i) Name, age and address of the elderly or disabled;
- (ii) The name, age, address or any person responsible for their care;
- (iii) The nature of the person’s conditions, i.e., Dementia;
- (iv) The basis of your knowledge; and
- (v) Anything you believe relevant to assist the abused person.²⁶⁴

Keep in mind with HHSC, when you call the hotline, you can choose to remain anonymous to anyone but the investigating worker.²⁶⁵ Even if the records are produced by court order, they will be redacted.²⁶⁶

Based on the foregoing it may seem that Texas law contains few statutes singling out the elderly and disabled, a review of *punishment* provisions shows the opposite is true.²⁶⁷

256. TEX. CODE CRIM. PROC. ANN. art. § 38.071 (West 2017)

257. TEX. CODE CRIM. PROC. ANN. art. § 26.13 (West 2017)

258. DFPS, https://dfps.state.tx.us/Contact_Us/hotlines.asp (last visited Feb. 15, 2018).

259. *Id.*

260. TEX. EST. CODE ANN. § 1102.003 (West 2015).

261. *Id.*

262. *See* 42 TEX. JUR. 3D GUARDIANSHIP AND CONSERVATORSHIP § 106 (2018).

263. *Id.*

264. TEX. HUMAN RES. CODE ANN. § 48.051 (West 2015).

265. *See Frequently Asked Questions About Reporting Abuse*, TEX. DEP’T OF FAMILY AND PROTECTIVE SERVICES, https://www.dfps.state.tx.us/Contact_Us/report_abuse_faqs.asp#confidential (last visited Jan 27, 2018).

266. *See How to Request Copies of Case Records*, TEX. DEP’T OF FAMILY AND PROTECTIVE SERVICES, https://www.dfps.state.tx.us/policies/Case_Records/default.asp (last visited Jan 27, 2018).

267. *See supra* PART V.

VII. IDENTIFYING CONDITIONS WHICH MAY GIVE RISE TO PROSECUTION

We now change gears from the elderly and disabled as victims, to discuss the situation if an elderly or disabled person is the accused in a criminal proceeding.²⁶⁸

If most persons in guardianships committed criminal offenses, this article and remedial legislation would be a given.²⁶⁹ The grandmother with dementia may run away, but she is unlikely to commit a crime.²⁷⁰ She is just confused, lost, and many times, combative.²⁷¹ There are incapacities in which the guardian has extreme difficulty controlling the behavior of the ward, and garnering appropriate conduct in public becomes a daily battle.²⁷² Those wards prove to be a challenge for law enforcement, courts, and jailers.²⁷³ It is often hard to keep a guardian from resigning, especially after an encounter with law enforcement and the criminal justice system.²⁷⁴ Below is a discussion of particularly difficult incapacity issues.²⁷⁵

A. Head Injury

Head injury is a unique and unpredictable species of incapacity.²⁷⁶ The behavior of a head-injured person may be sexually inappropriate to a criminal degree, yet the person believes he or she is expressing love.²⁷⁷ They may believe they can safely drive, license or not, and steal cars and keys with no concept of the illegality of the act.²⁷⁸ A head-injured person may stay on task or program for the rehabilitation in which he or she is enrolled.²⁷⁹ Without warning, the person may snap, becoming dangerous and unpredictable.²⁸⁰ If

268. See *infra* sections A–D.

269. See *infra* sections A–D.

270. See generally M. Liljegen et al., Criminal Behavioral in Frontotemporal Dementia and Alzheimer's Disease, *JAMA NEURO* (2015) (stating that 8.5% of dementia patients exhibited criminal behaviors).

271. See generally *Wandering and Getting Lost*, ALZHEIMER'S ASSOCIATION, <https://www.alz.org/rare/alzheimers-dementia-wandering.asp> (last visited Jan. 27, 2018) (explaining the effects of alzheimers).

272. *Id.*

273. Melissa Revland, Matthew Schwarzfeld, & Laura Praper, Law Enforcement Responses to People with Mental Illnesses: A Guide to Research-Informed Policy and Practice, COUNSEL OF STATE GOV'TS JUSTICE CENTER (2012) <http://csgjusticecenter.org/wp=content/uploads/2012/12/le-research.pdf>

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*

278. See William J. Winslade, Traumatic Brain Injury and Criminal Responsibility, 10 *MED. ETHICS* 3 (2002).

279. *Id.*

280. *Id.*

the head injury is not apparent, many times drugs and/or intoxication are assumed by law enforcement.²⁸¹

B. Undiagnosed Dementia Type Symptoms

Many diseases have short-term memory aspects, aggression, outbursts, and/or hallucinations.²⁸² Otherwise normal appearing persons can turn on others in seconds over imagined scenarios or sights.²⁸³ These persons do not always appear incapacitated.²⁸⁴ For example, a person with memory impairment may become convinced that a neighbor stole from him or her.²⁸⁵ He or she may stalk, harass, and even attack the neighbor.²⁸⁶ In the incapacitated mind, the behavior is justified and the theft is real.²⁸⁷ If a weapon is added to the delusion, the incapacity becomes deadly.²⁸⁸ Below are some of the diseases that can cause such an altered mental state.²⁸⁹

1. Dementia

The disorders in the “Dementia” definition are characterized by the development of multiple cognitive deficits (including memory impairment) that are due to the direct physiological effects of a general medical condition, to the persisting effects of a substance, or to multiple etiologies (e.g., the combined effects of cerebrovascular disease and Alzheimer’s disease).²⁹⁰ The disorders share a common symptom presentation but are differentiated based on etiology.²⁹¹ The types of dementia include: Dementia of the Alzheimer’s Type, Vascular Dementia, Dementia due to HIV Disease, Dementia due to Head Trauma, Dementia due to Parkinson’s Disease, Dementia due to Huntington’s Disease, Dementia due to Pick’s Disease, Dementia due to Creutzfeldt-Jakob Disease, Dementia due to Other General

281. Jo Shackelford & Sarah Nale, *Training Law Enforcement Officers to Differentiate Traumatic Brain Injury from Alcohol Intoxication*, 43 CONTEMPORARY ISSUES IN COMMUNICATION SCIENCE AND DISORDERS 154.154 (2016).

282. American Psychiatric Association, DSM – 5, 591 (5th ed. 2013).

283. *Id.*

284. *Id.*

285. Carol Bursack, *A Dementia Patient’s Truth Vs. a Caregiver’s Reality*, AGING CARE, <https://www.agingcare.com/articles/stealing-theft-accusations-alzheimers-dementia-133383.htm> (last visited Jan. 28, 2018).

286. *Id.*

287. *Id.*

288. Marcia Lerner, *Dementia and the Loaded Gun*, PROTO MAGAZINE, protomag.com/articles/dementia-and-the-loaded-gun (last visited Jan. 30, 2018).

289. *See infra* Sections VII.B.1–4.

290. American Psychiatric Association, DSM – 5, 591 (5th ed. 2013).

291. *Id.*

Medical Conditions, Substance-Induced Persisting Dementia, and Dementia due to Multiple Etiologies.²⁹²

2. *Lewy Body Disease*

Lewy bodies are abnormal microscopic protein deposits in the brain that disrupt the brain's normal functioning causing it to slowly deteriorate.²⁹³ The effects include a degradation of cognitive functioning, similar to Alzheimer's disease, or a degradation of motor control, similar to Parkinson's disease.²⁹⁴ Lewy bodies are named after Frederick Lewy who first observed their effects.²⁹⁵ Lewy Body Dementia can start differently in people.²⁹⁶ Sometimes those with LBD initially have a movement disorder that looks like Parkinson's but later they also develop dementia symptoms.²⁹⁷

3. *Organic Brain Syndrome*

Organic brain syndrome (OBS) "is a general term used to describe decreased mental function due to a medical disease other than a psychiatric illness."²⁹⁸ It is often used synonymously (but incorrectly) with dementia."²⁹⁹

4. *Pick's Disease*

According to Arnold Pick, who first described the disease in 1892, Pick's Disease causes a decline in a person's functions, over time that is irreversible.³⁰⁰ Although it is commonly confused with the much more prevalent Alzheimer's Disease, Pick's Disease is a rare disorder that causes the frontal and temporal lobes of the brain, which control speech and personality, to slowly atrophy.³⁰¹ It is therefore classified as a frontotemporal dementia or FTD.³⁰²

292. *Id.*

293. *Id.* at 618–20.

294. *Id.*

295. *Id.* at 618.

296. *Id.*

297. *Id.* at 618–20.

298. *Neurocognitive Disorder*, MEDLINE PLUS, <https://medlineplus.gov/ency/article/001401.htm>.

299. See American Psychiatric Association, DSM – 5, 591 (5th ed. 2013).

300. *Pick's Disease*, HEALTH INFORMATION DIRECTORY (Dec. 8, 2016), www.ihealthdirectory.com/picks-disease.

301. *Id.*

302. *Id.*

These and numerous other diseases may cause behavior that could involve the criminal justice system.³⁰³ The behavior is erratic and unpredictable.³⁰⁴

C. Obsessive/Compulsive Disorders

Most Obsessive/Compulsive Disorders only hurt the suffering person.³⁰⁵ Some disorders, however, create a public nuisance and can become a violation of certain laws.³⁰⁶ Most persons with these disorders live alone as their disorder is distasteful or repugnant to their relatives.³⁰⁷ The law enforcement officers will warn the incapacitated, write citations and fines, but the person with the disorder is incapable of complying with the law.³⁰⁸ Thus, the bizarre behavior causes involvement with the criminal justice system.³⁰⁹

1. General Hoarding

There are times we go into a home and immediately realize that this person is not just messy.³¹⁰ There will be papers from decades ago, sometimes piled to the ceiling, and sometimes over a year's worth of pure garbage set in rows.³¹¹ The person cannot discard even a take-out container from a restaurant.³¹² At times their automobile looks exactly the same.³¹³ This is what is referred to as non-specific hoarding and can become a health hazard.³¹⁴ The criminal justice system can come into play through the Health Department and/or HHSC.³¹⁵ If the person lives with an elderly or impaired persons, there can be a removal proceeding and/or criminal justice intervention.³¹⁶

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. See generally Fugen Neziroglu, *Hoarding: The Basics*, ANXIETY AND DEPRESSION ASSOCIATION OF AMERICA, <https://udaa.org/understanding-anxiety/obsessive-compulsive-disorder-ocd/hoarding-basics#> (last visited Jan. 27, 2018) (discussing the aftermath of hoarding and collecting along with symptoms).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. See generally Madison Park, *Drowning in Junk: Hoarding Called a Public Health Issue*, CNN (Aug. 5, 2010), www.cnn.com/2010/HEALTH/07/29/hoarding.mental.behavior/index.html (discussing that hoarding is a public health issue in which departments are getting involved).

316. *Id.*

2. *Specific Hoarding*

A subset of non-specific hoarding is the illness of buying and hoarding new, useless items.³¹⁷ The individual, for example, may buy a pair of jeans in all sizes.³¹⁸ They may like a pair of shoes and buy twenty pairs.³¹⁹ They may see a microwave on sale and buy seven.³²⁰ The item or the reason for the purchase makes no sense, and they can place themselves in financial peril.³²¹ Any attempt to remove or sell the items is met with resistance, even violence.³²² The person must keep these items and buy more.³²³ Recently, a law firm found five riding lawnmowers, with tags on them, in a kitchen.³²⁴ The decedent had to climb on them to get to the sink, stove or refrigerator.³²⁵ All attempts by family to help had failed, and they were excluded from his life if they interfered with his continued purchases.³²⁶

3. *Animal Hoarding*

Another form of hoarding is that of hoarding animals.³²⁷ Often the intellectually disabled or elderly will be without human companionship.³²⁸ Family members may have given up out of frustration that efforts to help were unwelcome, or they are excluded by their loved one as their efforts were perceived to be meddlesome.³²⁹ The need for companionship, though, does not necessarily dissolve even though the intellectually disabled or elderly individual has isolated themselves.³³⁰ Animals can become the source of companionship when a person is isolated.³³¹ One ward referred to his hoard of cats as his “feline family” and made provisions for them in his will.³³²

317. See generally *Compulsive Hoarding (Part 1) – Signs, Causes, and Complications*, ELEMENTS BEHAVIORAL HEALTH (Sept. 7, 2012), <https://www.elementsbehavioralhealth.com/mental-health/compulsive-hoarding-signs-causes-and-complications> (discussing frequent shopping and buying large quantities).

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. See generally *A Closer Look at Animal Hoarding*, ASPCA, <https://www.aspc.org/animal-cruelty/animal-hoarding/closer-look-animal-hoarding> (last visited Jan. 27, 2018) (discussing the criteria of animal hoarding and why people hoard animals).

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

Wild birds will live and die in the home, with no removal.³³³ Their bodies will just decay.³³⁴ Twenty cats will use an unchanged litter box and then give up.³³⁵ A landowner will fill the property with livestock, then not care for them.³³⁶ Entering the house will cause a gag reflex that the occupant has ceased to notice.³³⁷ The mistreatment of animals is a crime, and can even escalate to a felony.³³⁸ Texas Penal Code Section 42.09 states as follows:

- (a) A person commits an offense if the person intentionally or knowingly:
 - (1) tortures a livestock animal;
 - (2) fails unreasonably to provide necessary food, water, or care for a livestock animal in the person's custody;
 - (3) abandons unreasonably a livestock animal in the person's custody;
 - (4) transports or confines a livestock animal in a cruel and unusual manner;
 - (5) administers poison to a livestock animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent;
 - (6) causes one livestock animal to fight with another livestock animal or with an animal as defined by Section 42.092;
 - (7) uses a live livestock animal as a lure in dog race training or in dog coursing on a racetrack;
 - (8) trips a horse; or
 - (9) seriously overworks a livestock animal.
- (b) In this section:
 - (1) "Abandon" includes abandoning an animal in the person's custody without making reasonable arrangements for assumption of custody by another person.
 - (2) "Animal" means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.
 - (3) "Cruel manner" includes a manner that causes or permits unjustified or unwarranted pain or suffering.
 - (4) "Custody" includes responsibility for the health, safety, and welfare of an animal subject to the person's care and control, regardless of ownership of the animal.
 - (5) "Depredation" has the meaning assigned by Section 71.001, Parks and Wildlife Code.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. TEX. PENAL CODE ANN. § 42.09(c) (West 2017).

- (6) “Livestock animal” has the meaning assigned by Section 42.09.
- (7) “Necessary food, water, care, or shelter” includes food, water, care, or shelter provided to the extent required to maintain the animal in a state of good health.
- (8) “Torture” includes any act that causes unjustifiable pain or suffering.
- (b) A person commits an offense if the person intentionally, knowingly, or recklessly:
 - (1) tortures an animal or in a cruel manner kills or causes serious bodily injury to an animal;
 - (2) without the owner’s effective consent, kills, administers poison to, or causes serious bodily injury to an animal;
 - (3) fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person’s custody;
 - (4) abandons unreasonably an animal in the person’s custody;
 - (5) transports or confines an animal in a cruel manner;
 - (6) without the owner’s effective consent, causes bodily injury to an animal;
 - (7) causes one animal to fight with another animal, if either animal is not a dog;
 - (8) uses a live animal as a lure in dog race training or in dog coursing on a racetrack; or
 - (9) seriously overworks an animal.
- (c) An offense under Subsection (b)(3), (4), (5), (6), or (9) is a Class A misdemeanor, except that the offense is a state jail felony if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09.
- (c-1) An offense under Subsection (b)(1) or (2) is a felony of the third degree, except that the offense is a felony of the second degree if the person has previously been convicted under Subsection (b)(1), (2), (7), or (8) or under Section 42.09.
- (c-2) An offense under Subsection (b)(7) or (8) is a state jail felony, except that the offense is a felony of the third degree if the person has previously been convicted under this section or under Section 42.09.
- (d) It is a defense to prosecution under Subsection (a)(8) that the actor tripped the horse for the purpose of identifying the ownership of the horse or giving veterinary care to the horse.
- (e) It is a defense to prosecution for an offense under this section that the actor was engaged in bona fide experimentation for scientific research.

- (f) It is an exception to the application of this section that the conduct engaged in by the actor is a generally accepted and otherwise lawful:
 - (1) form of conduct occurring solely for the purpose of or in support of:
 - (A) fishing, hunting, or trapping; or
 - (B) wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law; or
 - (2) animal husbandry or agriculture practice involving livestock animals.
- (g) This section does not create a civil cause of action for damages or enforcement of this section.³³⁹

Texas Penal Code Section 42.092 addresses non-livestock animals and their treatment.³⁴⁰ It states as follows:

- (a) In this section:
 - (1) “Abandon” includes abandoning an animal in the person’s custody without making reasonable arrangements for assumption of custody by another person.
 - (2) “Animal” means a domesticated living creature, including any stray or feral cat or dog, and a wild living creature previously captured. The term does not include an uncaptured wild living creature or a livestock animal.
 - (3) “Cruel manner” includes a manner that causes or permits unjustified or unwarranted pain or suffering.
 - (4) “Custody” includes responsibility for the health, safety, and welfare of an animal subject to the person’s care and control, regardless of ownership of the animal.
 - (5) “Depredation” has the meaning assigned by Section 71.001, Parks and Wildlife Code.
 - (6) “Livestock animal” has the meaning assigned by Section 42.09.
 - (7) “Necessary food, water, care, or shelter” includes food, water, care, or shelter provided to the extent required to maintain the animal in a state of good health.
 - (8) “Torture” includes any act that causes unjustifiable pain or suffering.
- (b) A person commits an offense if the person intentionally, knowingly, or recklessly:
 - (1) tortures an animal or in a cruel manner kills or causes serious bodily injury to an animal;

339. TEX. PENAL CODE ANN. § 42.09 (West 2007).

340. TEX. PENAL CODE ANN. § 42.092 (West 2017).

- (2) without the owner's effective consent, kills, administers poison to, or causes serious bodily injury to an animal;
 - (3) fails unreasonably to provide necessary food, water, care, or shelter for an animal in the person's custody;
 - (4) abandons unreasonably an animal in the person's custody;
 - (5) transports or confines an animal in a cruel manner;
 - (6) without the owner's effective consent, causes bodily injury to an animal;
 - (7) causes one animal to fight with another animal, if either animal is not a dog;
 - (8) uses a live animal as a lure in dog race training or in dog coursing on a racetrack; or
 - (9) seriously overworks an animal.
- (c) An offense under Subsection (b)(3), (4), (5), (6), or (9) is a Class A misdemeanor, except that the offense is a state jail felony if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09. An offense under Subsection (b)(1), (2), (7), or (8) is a state jail felony, except that the offense is a felony of the third degree if the person has previously been convicted two times under this section, two times under Section 42.09, or one time under this section and one time under Section 42.09.³⁴¹

The hoarder honestly believes they are a loving and caring pet owner.³⁴² Many times as a part of their criminal punishment, they are forbidden to own pets.³⁴³ Without treatment, the person cycles back into hoarding and animal abuse.³⁴⁴

D. Schizophrenia and Bipolar Disorders

Persons with schizophrenia and bipolar disorders are difficult to help.³⁴⁵ Schizophrenia is not a behavioral issue.³⁴⁶ It is the subject of scholarly debate whether this is a single disease entity or whether it refers to an inhomogeneous group of disorders with different causes.³⁴⁷ Experts

341. *Id.*

342. Randy Frost, Gary Patronek, & Elizabeth Rosenfield, *Comparison of Object and Animal Hoarding*, 28 DEPRESSION AND ANXIETY 885, 888 (2011).

343. *Id.* at 890; TEX. PENAL CODE ANN. § 42.092.

344. See Randy Frost, Gary Patronek, & Elizabeth Rosenfield, *Comparison of Object and Animal Hoarding*, 28 DEPRESSION AND ANXIETY 885, 890 (2011); TEX. PENAL CODE ANN. § 42.092.

345. See e.g., American Psychiatric Association, DSM-5, 100 (5th ed. 2013); see also American Psychiatric Association, DSM-5, 123 (5th ed. 2013).

346. American Psychiatric Association, DSM-5, 101 (5th ed. 2013).

347. *Id.*

characterize schizophrenia by positive and negative symptoms.³⁴⁸ Positive symptoms are those symptoms that make the patient feel or hear things that are beyond normal.³⁴⁹ Schizophrenia that is triggered by positive symptoms begins all of a sudden, and there are no superficial characters.³⁵⁰ Negative symptoms often exist for long periods of time before the dangerous symptoms finally show up.³⁵¹ About two-thirds of patients with Schizophrenia survive the negative symptoms and positive symptoms after an acute episode.³⁵² Individuals suffering from schizophrenia may or may not be incapacitated depending on the medications.³⁵³ Medication is paramount in treating schizophrenia.³⁵⁴ The trick is garnering complete and total compliance in taking them as directed.³⁵⁵ Most people with schizophrenia do not take their medications.³⁵⁶ The side effects are difficult to cope with and people describe themselves as slow or flat.³⁵⁷ Oftentimes, an individual suffering from schizophrenia will not trust the medication or the person administering it.³⁵⁸ Other times, an individual will be so successful in medical compliance that symptoms totally disappear and the person will discontinue medicine thinking they are better.³⁵⁹ While un-medicated, these people pose a true threat to law enforcement and the public as it is impossible to comprehend their reality.³⁶⁰ They can see and hear things that do not exist.³⁶¹ Everyday things become a threat or conspiracy.³⁶²

The unpredictable highs and lows of bipolar disorder are equally volatile.³⁶³ Bipolar Disorder is a mood disorder sometimes called manic-depressive illness or manic-depression that characteristically involves cycles of depression and elation or mania.³⁶⁴ Sometimes the mood switches from high to low and back again are dramatic and rapid, but more often there

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 104.

354. Annette Zygmunt, Mark Olsson, Carol Boyer, & David Mechanic, *Interventions to Improve Medication Adherence in Schizophrenia*, 159 AMERICAN JOURNAL OF PSYCHIATRY 1653, 1653 (2002).

355. *Id.*

356. *Id.*

357. *Id.* at 1661.

358. Marcia Valenstien, *Poor Antipsychotic Adherence Among Patients With Schizophrenia: Medication and Patient Factors*, 30(2) Schizophrenia Bulletin 255, 255 (2004).

359. *Id.*

360. *See id.*

361. *See id.*

362. *Id.*

363. American Psychiatric Association, DSM-5, 123 (5th ed. 2013).

364. *Id.*

are gradual and slow intervals of normal mood occurring between the manic and depressive phases of the condition.³⁶⁵

The symptoms of both the depressive and manic cycles may be severe and often lead to impaired functioning.³⁶⁶ Both phases of the disease are deleterious.³⁶⁷ Mania affects thinking, judgment, and social behavior in ways that may cause serious problems and embarrassment.³⁶⁸ For example, unwise business or financial decisions may be made when an individual is in a manic phase.³⁶⁹ Depression can affect thinking, judgment, and social behavior in ways that may cause grave problems, such as elevating the risk of suicide.³⁷⁰ The person may hibernate from life to the point of suicidal thoughts, and then reach an unbelievable high where they don't sleep for days and days.³⁷¹ Both ends of the spectrum can be dangerous.³⁷² About 5.7 million American adults, or about 2.6 percent of the population aged eighteen and older, have bipolar disorder.³⁷³

VIII. INCAPACITATED INDIVIDUALS AS THE ACCUSED IN A CRIMINAL PROSECUTION

Guardians of adult wards will likely soon become disheartened with the criminal prosecution process, as they have very little ability to helpfully participate.³⁷⁴ This section of the paper is intended to be a simple nuts and bolts conversation about the realities of participation in a *typical* criminal case.³⁷⁵

A. Miscellaneous Crimes that Can Involve Wards

Bizarre behavior that causes incapacitation is often viewed with fear and misunderstanding.³⁷⁶ Erratic behavior can be mistaken for drugs and alcohol, when in reality, a person needs medication and special protocols.³⁷⁷ Sexual acts may be the result of a belief that acts were consensual (in fact desired)

365. *Id.*

366. *Id.* at 131.

367. *Id.* at 124.

368. *Id.*

369. *Id.*

370. *Id.* at 125.

371. *Id.*

372. *Id.*

373. *Id.* at 130.

374. *See e.g., infra* Section VIII.C.

375. *See infra* Section VIII.

376. *See* Kyla King, *Experts Say Public Stigma, Ignorance Stand Between Mentally Ill and Health*, THE GRAND RAPIDS PRESS, (Jan. 23, 2011, 6:12 A.M.), http://www.mlive.com/health/index.ssf/2011/01/experts_say_public_stigma_igno.html.

377. *See id.*

due to an incapacitating psychological condition.³⁷⁸ There are numerous Texas Penal Code sections that could affect an adjudicated adult ward, but contain no provisions to deal with incapacity at the time of the commission of the crime.³⁷⁹ Some of them that wards are more frequently associated with are:

- a. § 22.011 (Sexual Assault)³⁸⁰
- b. § 15.03 (Criminal Solicitation)³⁸¹
- c. § 49.08 (Intoxication Manslaughter)³⁸²
- d. § 22.01 (Assault)³⁸³
- e. § 22.02 (Aggravated Assault)³⁸⁴
- f. § 49.04 (DWI)³⁸⁵
- g. § 49.02 (Public Intoxication)³⁸⁶

B. Arrest

The first contact the guardian may have with a criminal prosecution is at the time of the arrest of the ward.³⁸⁷ It is not advisable for the guardian to approach the police with all the normal questions upon arrest of the ward.³⁸⁸ Too many questions to police during an arrest situation can be viewed as aggression and may get the guardian arrested for interfering with a police investigation.³⁸⁹ The quicker the guardian obtains counsel for his ward the better.³⁹⁰ Counsel should immediately notify the jail, police and prosecution that the ward is represented.³⁹¹ Imagine the repercussions and admissions a ward may make if interrogated by the police alone.³⁹² If the ward does not

378. See e.g., Elizabeth Nevins-Saunders, *Incomprehensible Crimes: Defendants with Mental Retardation Charged with Statutory Rape*, 85 N.Y.U. L. REV. 1067, 1069 (2010) (discussing the case of *Garrett v. State*, 632 A.2d 797 (MD App. 1993) where the defendant was mentally disabled and did not understand statutory rape or consent).

379. See *infra* notes 387–93.

380. TEX. PENAL CODE ANN. § 22.011 (West 2017).

381. TEX. PENAL CODE ANN. § 15.03 (West 1994).

382. TEX. PENAL CODE ANN. § 49.08 (West 2007).

383. TEX. PENAL CODE ANN. § 22.01 (West 2017).

384. TEX. PENAL CODE ANN. § 22.02 (West 2009).

385. TEX. PENAL CODE ANN. § 49.04 (West 2011).

386. TEX. PENAL CODE ANN. § 42.092 (West 2007).

387. Cf. Christopher Mele, *Reporter Arrested in West Virginia After Persistently Asking Questions of Tom Price*, THE NEW YORK TIMES, (May 10, 2017), <https://www.nytimes.com/2017/05/10/business/media/reporter-arrested-tom-price.html> (Where a reporter was arrested after asking many questions and was perceived as aggressive).

388. See *id.*

389. See *id.*

390. See, e.g., Megan Cloud, George Shepherd, Alison Barkoff, & Justin Shur, *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Subjects*, 69 U. OF CHICAGO L. REV. 495, 512 (2002).

391. *Id.*

392. *Id.*

verbally invoke his right to counsel, or blurts out voluntary statements, any admissions made will likely be used against them at trial.³⁹³

C. Guardian Notification

If the guardian is unaware of the ward's arrest, the situation is even more dismal.³⁹⁴ The Texas Code of Criminal Procedure is where to look for procedures and notification to the guardian of the arrest, detention, and arraignment of an incapacitated person.³⁹⁵ Sadly, there is nothing there.³⁹⁶ This is why wards sometimes remain in jail and no one knows where they are.³⁹⁷ They sit in jail while their Texas Department of Public Safety ID is entered as a missing person by their guardian.³⁹⁸ The police do not have the ID, so the number does not cross in National Crime Information Center (NCIC) or Texas Crime Information Center (TCIC).³⁹⁹ By the time the ward is located, they may have entered a plea and served their time for minor offenses.⁴⁰⁰ This is a sad statement on our criminal justice system about the exclusion of adjudicated individuals regarding those that are protected.⁴⁰¹ Recent legislative changes discussed below may begin to resolve problems created by lack of guardian notification.⁴⁰²

D. Jail Visits

As of the initial publication of this paper, if a guardian wished to visit the ward in jail, the ward would have to place the guardian's name on his jail visit list.⁴⁰³ If the ward did not do this, no amount of wrangling or waiving letters of guardianship at the jail staff would get a guardian in to see the ward.⁴⁰⁴ This was extremely problematic because the ward may not understand that he or she has a guardian or the significance of stating he or

393. *Id.*

394. See, e.g., Mary O'Hara, *Why are the Police Failing too Many Victims of Disability Hate Crime?*, THE GUARDIAN, (June 29, 2016), <https://www.theguardian.com/society/2016/jun/29/police-failing-victims-disability-hate-crime-daniel-smith>.

395. See *supra* text accompanying notes 386–93.

396. See *supra* text accompanying notes 386–93.

397. See, e.g., Mary O'Hara, *Why are the Police Failing too Many Victims of Disability Hate Crime?*, THE GUARDIAN, (June 29, 2016), <https://www.theguardian.com/society/2016/jun/29/police-failing-victims-disability-hate-crime-daniel-smith>.

398. See *id.*

399. See *id.*

400. See *id.*

401. See *id.*

402. See *infra* text accompanying notes 413–19.

403. See, e.g., Mary O'Hara, *Why are the Police Failing too Many Victims of Disability Hate Crime?*, THE GUARDIAN, (June 29, 2016), <https://www.theguardian.com/society/2016/jun/29/police-failing-victims-disability-hate-crime-daniel-smith>.

404. See *id.*

she has a guardian and when to inform someone one of a guardian.⁴⁰⁵ Also, wards typically do not carry proof of their adjudication, rarely talk about it, and would probably not say they were incompetent.⁴⁰⁶ They will sign either no documents, or all of them, both have repercussions that may not be reversible.⁴⁰⁷

Chapter 26 of the Code of Criminal Procedure, specifically the Texas Legislature created Article 26.041 during the 84th Legislative Session, as was Section 511.009(a) of the Government Code.⁴⁰⁸ The legislation allows visitation by the guardian, regardless of whether the guardian is on the visitation list, upon production of valid letters of guardianship.⁴⁰⁹

If the ward does not bond out of jail, the ward will be brought before a magistrate within 48 hours, at which time the court will offer the right to interview for a court appointed lawyer.⁴¹⁰ Again, as of the initial publication of this paper the ward had to ask to be interviewed and complete financial paperwork proving status as indigent to be appointed an attorney.⁴¹¹ As of the 84th Legislative Session a guardian may now request court appointed counsel for a ward, and complete all paperwork necessary to establish indigence.⁴¹²

E. Medication in Jail

The guardian will encounter more obstacles if the ward requires special medical treatment or medication.⁴¹³ The jail will likely have its own pharmacy.⁴¹⁴ If the jail does not have the correct medication or the medication is expensive, they may elect not to go out of the way to find the medication.⁴¹⁵ The jail will not administer narcotics regardless of a painful situation.⁴¹⁶ The jail will often not administer anti-anxiety medications such as Xanax, because this medication is valuable to sell to other inmates (just like a street drug).⁴¹⁷ Similarly, if the jail finds any medication has become

405. *See id.*

406. *See id.*

407. *See id.*

408. TEX. CODE CRIM. PROC. ANN. art. 26.041 (West 2015); TEX. GOV'T CODE ANN. 511.009 (West 2017).

409. TEX. CODE CRIM. PROC. ANN. art. 26.041; TEX. GOV'T CODE ANN. 511.009.

410. *See, e.g.,* Mary O'Hara, *Why are the Police Failing too Many Victims of Disability Hate Crime?*, THE GUARDIAN, (June 29, 2016), <https://www.theguardian.com/society/2016/jun/29/police-failing-victims-disability-hate-crime-daniel-smith>.

411. *See id.*

412. TEX. CODE CRIM. PROC. ANN. art. 26.041.

413. Jennifer Gonzalez & Nadine Connell, *Mental Health of Prisoners: Identifying Barriers to Mental Health Treatment and Medication Continuity*, 104(12) AM. J. PUBLIC HEALTH 2328, 2329 (2014).

414. *See id.*

415. *Id.*

416. *Id.*

417. *Id.*

something popular to hide and sell amongst inmate population, the infirmary will likely not stock nor administer it.⁴¹⁸ If a drug is extremely expensive the jail will likely not stock it, nor because of budgetary restraints will the jail obtain it.⁴¹⁹ Guardians can continue to provide the jail with the medications, and the infirmary might administer them to the ward.⁴²⁰ If the ward is undergoing any extensive medical treatment, the jail will likely be unable to continue the treatment.⁴²¹ The jail will do its best, given the resources it has, to take care of the ward.⁴²² The ability of the jail infirmary to provide in-depth care is unfortunately limited.⁴²³

F. Housing

The ward most likely will be placed in the regular population.⁴²⁴ Extremely violent inmates are kept segregated from the rest of the jail population, but the ward is still exposed to anyone who is not considered to be extremely violent.⁴²⁵ If the ward makes suicide threats or acts out in a manner that causes extreme disruption amongst the population, the ward will likely be placed in restraints or placed alone in a segregated cell until calmed down.⁴²⁶

One law worth mentioning at this point is Texas Code of Criminal Procedure Section 43.10, which excludes defendants with mental disabilities from the requirement of performing manual labor at the jail.⁴²⁷

G. Pre-Trial

For the most part, the guardian cannot expect to be able to participate in pre-trial proceedings.⁴²⁸ The guardian should not expect to be able to talk to the incarcerated ward during court appearances.⁴²⁹ Bailiffs are on elevated alert during criminal dockets, because the court is full of people and they are responsible for the safety and confinement of the defendants.⁴³⁰ The attorney representing the ward should challenge all admissions made by the ward, arguing the ward does not have the capacity to meaningfully understand and

418. *See id.*

419. *Id.*

420. *See id.*

421. *Id.*

422. *See id.*

423. *See id.*

424. TEX. GOV'T CODE ANN. §§ 501.111–.113 (West).

425. TEX. GOV'T CODE ANN. § 501.112 (West).

426. TEX. GOV'T CODE ANN. § 501.113 (West).

427. TEX. CODE CRIM. PROC. ANN. § 43.10 (West).

428. TEX. CODE CRIM. PROC. ANN. § 28.01 (West).

429. *Id.*

430. *Id.*

waive his right to remain silent.⁴³¹ The attorney representing the ward should prepare to have these challenges overruled.⁴³² Similarly, the prosecuting attorney will likely be unhelpful to the guardian in this process.⁴³³ Guardians should be cautious in contacting the prosecuting attorney in the case, and should instead go through counsel for the ward.⁴³⁴ During a conversation with a prosecutor, a guardian may inadvertently make an admission that will subsequently get the guardian called as a witness against the ward.⁴³⁵ It would not be surprising if the only plea offer a ward may receive would involve incarceration.⁴³⁶ Probation carries with it responsibilities like community service and fines.⁴³⁷ A typical ward might not be able to pay fines or participate in community service, and would not be looked upon as a good potential candidate for successful probation.⁴³⁸ The guardian will not be able to contest a plea if the ward on his own decides to plead guilty.⁴³⁹

H. Post Trial

Sadly, the majority of the established laws providing protection to an intellectually disabled person who is subject to a criminal proceeding occur *after* conviction.⁴⁴⁰

Texas Code of Criminal Procedure Section 42A governs community supervision (probation).⁴⁴¹ This statute prohibits the imposition of community supervision by a judge in an injury to a disabled individual case.⁴⁴² A jury, however, does have this ability.⁴⁴³

Texas Code of Criminal Procedure Sections 42A.561 and 42A.560 respectively allow the judge, while sentencing an elderly defendant or defendant who is mentally ill or suffering with an intellectual disability convicted of a state jail felony, to release the defendant to a medical care facility or medical treatment program if the Texas Correctional Office on Offenders with Medical or Mental Impairments identifies the defendant as being elderly.⁴⁴⁴ Additionally, the judge sentencing an elderly defendant or defendant who is mentally ill or suffering with an intellectual disability

431. TEX. CONST. art. 1 § 19.

432. TEX. CODE CRIM. PROC. ANN. § 1.051 (West).

433. TEX. CODE CRIM. PROC. ANN. § 2.01 (West).

434. *Id.*

435. *Id.*

436. TEX. CODE CRIM. PROC. ANN. § 42A.054 (West).

437. *Id.*

438. *Id.*

439. TEX. CODE CRIM. PROC. ANN. § 26.13 (West).

440. TEX. CODE CRIM. PROC. ANN. § 42A (West).

441. *Id.*

442. TEX. CODE CRIM. PROC. ANN. § 42A.054 (West).

443. TEX. CODE CRIM. PROC. ANN. § 42A.055 (West).

444. TEX. CODE CRIM. PROC. ANN. §§ 42A.560–.561 (West).

convicted of a state jail felony may release the defendant identified by the Texas Correctional Office on Offenders with Medical or Mental Impairments to a medically suitable placement if the judge determines that the defendant does not constitute a threat to public safety.⁴⁴⁵

Oddly enough, Texas Code of Criminal Procedure Article 64.011 provides that a “guardian of a convicted person” may submit motions for the convicted person under 64.011 and is entitled to counsel otherwise provided to a convicted person.⁴⁴⁶ This seems odd, because no such protection is afforded to a guardian *before* conviction.⁴⁴⁷

I. Shortcomings in Existing Law & Legislative Solutions

The legislative efforts given to the protection of disabled individuals who are victims of crimes is praiseworthy, however, there is still much work to be done.⁴⁴⁸ As illustrated, there are stunningly few statutes designed to protect an adult disabled individual as a defendant in a criminal proceeding.⁴⁴⁹ The 85th Legislative Session in 2017 took large steps towards the protection of those individuals who are under a guardianship.⁴⁵⁰ SB 1096 has created several safeguards for adult wards under guardianship.⁴⁵¹ Three of these safeguards are as follows:

- The Texas Criminal Code was modified to read, “as soon as practicable, but not later than the first working day after the date a peace officer detains or arrests a person who is a ward, the peace officer or the person having custody of the ward shall notify the court having jurisdiction over the ward’s guardianship of the ward’s detention or arrest.”⁴⁵²
- A mandatory registration program for all guardianships was created, and the data housed therein will be available to law enforcement as well as criminal and other courts.⁴⁵³
- “The Department of Public Safety shall make information from the database available to law enforcement personnel through the Texas Law Enforcement Telecommunications System or a successor system of telecommunication used by law enforcement agencies

445. TEX. CODE CRIM. PROC. ANN. § 42A.560 (West).

446. TEX. CODE CRIM. PROC. ANN. § 64.011 (West).

447. *Id.*

448. TEX. CODE CRIM. PROC. ANN. § 42.014 (West).

449. *See supra* Section VIII.H.

450. S.B.1096, 85th Leg., Reg. Sess. (Tex. 2017).

451. *Id.*

452. TEX. CODE CRIM. PROC. ANN. § 14.055 (West).

453. TEX. CODE CRIM. PROC. ANN. § 155.151 (West).

and operated by the department” (so the officer can see from his vehicle computer whether a guardianship exists).⁴⁵⁴

This law is the first step towards further legislation to protect wards.⁴⁵⁵ In the past there was no practical way to implement meaningful legislative protections for the adult ward involved in a criminal prosecution, because there was no realistic way for the law enforcement community to be on notice that an individual was subject to a guardianship.⁴⁵⁶

A jail will likely be unaware that a ward needs medication, unless notified by the guardian.⁴⁵⁷ In the few cases where a jail knows an inmate needs medication, it is often administered sporadically as shown by blood tests that show highly depleted levels of the medication in the bloodstream.⁴⁵⁸ One solution is to implement an identification system which pinpoints those individuals who are prone to violence, suicide, have been in and out of mental health facilities, or for those who require medication that is not administered to the general population.⁴⁵⁹ These individuals would receive a class designation, like other groups of inmates typically do.⁴⁶⁰ The medical privacy rights of these individuals are paramount, so this information would be kept confidential and could be sourced from family members, the new guardianship database, mental health commitment centers, MHMR, or prior notations from jail records.⁴⁶¹ The designation should trigger a visit from the local mental health authority within 24 hours of being admitted into the jail.⁴⁶² It is essential that individuals who have the designation and wards have a dedicated holding area in counties with large populations, including special segregation in that holding area for those inmates prone to violence.⁴⁶³ These proposals are extensive but they are necessary in order to protect those individuals who do not have the capacity to protect themselves.⁴⁶⁴ If someone requires a guardianship or medication in their daily life, there is no reason why they would not require their guardian or medication while they are in jail.⁴⁶⁵

454. TEX. CODE CRIM. PROC. ANN. § 155.153 (West).

455. S.B.1096, 85th Leg., Reg. Sess. (Tex. 2017).

456. TEX. CODE CRIM. PROC. ANN. § 155.151 (West).

457. E. Fuller Torrey, *The Treatment of Persons with Mental Illness in Prisons and Jails: A State Survey*, TAC (Apr. 8, 2014), www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

458. Jason Meisner, *Loop Jail to Blame for Inmate's Death, Judge Rules*, CHICAGO TRIBUNE (Sept. 04, 2013), <http://articles.chicagotribune.com/2013-09-04/news/ct-met-loop-jail-death-20130904-1-judge-rules-habib-solebo-lay-medical-care>.

459. TEX. GOV'T CODE ANN. §§ 155.151–153 (West 2018).

460. TEX. GOV'T CODE ANN. § 501.112 (West 2018).

461. TEX. GOV'T CODE ANN. § 492.001 (West 2018), TEX. GOV'T CODE ANN. § 552.101 (West 2018).

462. TEX. CODE CRIM. PROC. ANN. § 14.055 (West 2018).

463. TEX. HEALTH & SAFETY CODE ANN. § 573.001 (West 2018).

464. *Id.*

465. *Id.*

It would be helpful to implement a process where courts forward the fingerprints of wards to the Department of Public Safety to be uploaded into the NCIC/TCIC database in case the ward is arrested without identification.⁴⁶⁶

A specialty court for wards facing prosecution, or mandatory admission of wards into an existing mental health specialty court is also advisable.⁴⁶⁷ Currently, there are several types of legislatively created specialty treatment courts.⁴⁶⁸ These courts are created in Title Two of the Texas Government Code and establish non-adversarial procedures in criminal prosecution for those who are alcohol/drug addicts, prostitutes, veterans suffering from various service induced psychological conditions, or individuals with mental health problems.⁴⁶⁹

IX. GUARDIANSHIP INCAPACITY VS. CRIMINAL INCOMPETENCE

One might assume that an intellectually disabled individual, who has already been through the court system resulting in the implementation of a guardianship, would not be competent to stand trial in a criminal setting.⁴⁷⁰ That assumption would be wrong.⁴⁷¹ A quick review of the legal differences between civil incapacity and criminal competence is helpful in understanding why this is the case.⁴⁷²

A. Standards for Civil Incapacity

Under Texas Estates Code Section 1002.017, the definition of incapacity is as follows:

“Incapacitated person” means:

- (1) a minor;
- (2) an adult who, because of a physical or mental condition, is substantially unable to:
 - (A) provide food, clothing, or shelter for himself or herself;
 - (B) care for the person’s own physical health; or
 - (C) manage the person’s own financial affairs; or

466. 37 TEX. ADMIN. CODE. § 27.42 (2018) (Tex. Dep’t of Pub. Safety, Criteria for Entry into the Missing Persons Online Bulletin).

467. TEX. GOV’T CODE ANN. §§ 125.001–.004 (West 2018).

468. *Id.*

469. *Id.*

470. TEX. ESTATES CODE § 1002.017 (West 2018).

471. *Id.*

472. *Id.*

- (3) a person who must have a guardian appointed for the person to receive funds due the person from a governmental source.⁴⁷³

Nothing in this definition addresses the mens rea to commit a crime.⁴⁷⁴ Also keep in mind that some crimes do not require the element of intent.⁴⁷⁵ Finally, at the time the ward is arrested, arraigned, inventoried, examined, booked and incarcerated, it is doubtful the word guardianship will ever be uttered.⁴⁷⁶ Now the ward is in jail.⁴⁷⁷ He or she may not even know how to call anyone.⁴⁷⁸ A missing person report may issue because no one knows the ward is jailed.⁴⁷⁹ Even if the guardianship is discovered, there is no interface between the guardianship court and the criminal court.⁴⁸⁰ Believe it or not, being adjudicated civilly incapacitated has little effect on a jury since the Texas Estates Code standard has no bearing in a criminal proceeding.⁴⁸¹

One of the problems with interfacing guardianships with the criminal justice system is the need to understand guardianship orders and what powers they give to the guardian, what the guardian can and cannot do, and what rights the ward retains.⁴⁸² The Texas Code of Criminal Procedure has no provisions to decipher guardianship orders to analyze the ability of a ward to meaningfully participate in a criminal proceeding.⁴⁸³

1. Powers Retained by Ward

One difficult concept in a guardianship is that the ward retains every power imaginable, except those taken away and given to the guardian.⁴⁸⁴ How does this impact the criminal justice system?⁴⁸⁵ As an example, assume the guardian is not given the power to decide the ward's placement.⁴⁸⁶ So the ward chooses to live in a place where drugs are sold.⁴⁸⁷ This is a choice left

473. TEX. EST. CODE ANN. § 1002.017 (West 2018).

474. *Id.*

475. TEX. PENAL CODE ANN. § 19.05 (West 2018) (intent is not an element of criminally negligent homicide).

476. *See supra* Section VIII.C.

477. *See supra* Section VIII.B.

478. *See supra* Section VIII.C.

479. 37 TEX. ADMIN. CODE. § 27.42 (2018) (Tex. Dep't of Pub. Safety, Criteria for Entry into the Missing Persons Online Bulletin).

480. *See supra* Section VIII.C.

481. TEX. EST. CODE ANN. § 1002.017 (West 2018).

482. TEX. EST. CODE ANN. § 1151.351 (West 2018).

483. *See generally* TEX. CODE CRIM. PROC. ANN. (West 2018) (with no current provision on ward participation in a criminal proceeding).

484. TEX. EST. CODE ANN. § 1151.001 (West 2015).

485. *Id.*

486. *Id.*

487. TEX. EST. CODE ANN. § 1151.351(9) (West 2015).

to the ward.⁴⁸⁸ In a police investigation, the ward gets caught up in the illegal acts.⁴⁸⁹ Is there competence?⁴⁹⁰ Guardianship orders are rarely crafted with future criminal mens rea addressed.⁴⁹¹ And even the smartest of attorneys that get such a probate court finding made, will be unable to use this finding in a criminal court.⁴⁹²

2. Powers Awarded to Guardian

The specific grant of powers to a guardian may be subject to interpretation.⁴⁹³ Guardianships come with laws and guidance on how to administer the guardianship, but there is no self-help book on how to force an incapacitated person to do what you ask and be where you need them to be.⁴⁹⁴ There is no assurance that an incapacitated person will not run away and stay missing while medication wears off.⁴⁹⁵ As medication fades, undesirable conduct can occur that violates the law.⁴⁹⁶ Law enforcement officials, even if they had the guardianship order and letters in hand, would most likely have no idea how to process this information in connection with detaining the ward and placing him in custody.⁴⁹⁷ If the ward cannot contract, can he waive his rights?⁴⁹⁸ If he cannot handle financial matters, can he sign an agreement stating his belongings are inventoried correctly?⁴⁹⁹ There is no section in a physician's letter on "understands criminal conduct."⁵⁰⁰ The rights given to a guardian do not make sense when trying to reconcile them with the Texas Penal Code and Texas Code of Criminal Procedure.⁵⁰¹

488. *Id.*

489. *Id.*

490. *Id.*

491. *See generally* TEX. EST. CODE ANN. § 1202.051 (West 2017) (relating to the application and order of a guardianship).

492. *See generally* TEX. EST. CODE ANN. § 1001.001 (West 2017) (outlining the policy and purpose behind creation of guardianships).

493. *See* TEX. EST. CODE ANN. § 1151.051 (West 2017) (relating to the general duties of a guardian).

494. *Id.*

495. *Id.*

496. *Id.*

497. *See generally* TEX. EST. CODE ANN. § 1160.005 (West 2014) (showing that proof of guardianship is kept under seal by the clerk of the court and not widely distributed.).

498. *Id.*

499. *See* TEX. EST. CODE ANN. § 1101.103 (West 2017) (providing the information that a physician's letter should address).

500. *Cf.* TEX. EST. CODE ANN. § 1151.051 with TEX. CODE CRIM. PROC. ANN.

501. TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2004).

B. Standards of Criminal Competence

There is a two prong test to determine whether a criminal defendant is competent to stand trial under Texas Code of Criminal Procedure art. 46B.⁵⁰² A defendant must be able to communicate with his lawyer and understand the proceeding.⁵⁰³ The first prong can be met if the defendant can simply recall and repeat to his lawyer the situation that landed him in jail.⁵⁰⁴ The second prong for a competence finding is a rational factual understanding of the proceeding.⁵⁰⁵ Simply stated, my lawyer is on my side, the prosecutor is against me and the judge runs the court.⁵⁰⁶ Keep in mind that the burden is the same for a ward under guardianship as a civilly capacitated defendant in that the accused is presumed competent to stand trial whether he has been adjudicated and has a guardian or whether he just appears incapacitated.⁵⁰⁷ The criterion is extremely low.⁵⁰⁸ For example, a ward does not need to understand that stealing stuff is wrong.⁵⁰⁹ He only needs to be able to communicate with his lawyer how he got the “stuff” and understand the roles that the judge, prosecutor, and defense play in the trial process.⁵¹⁰

X. SYSTEM OVERHAUL

The sad fact is that penitentiaries and jail facilities are overflowing with individuals with mental health disorders.⁵¹¹ The problem is illustrated better when the reader understands that the Harris County Jail is the largest housing facility in Texas for individuals with mental health disorders.⁵¹² There is no reason to believe that the mental health challenge facing the Harris County Jail is different in any other criminal justice housing facility anywhere in the state or the nation for that matter.⁵¹³ Although jails house adults with mental

502. *Id.*

503. *See* State v. Frias, 511 S.W.3d 797, 813 (Tex. Crim. App. 2016).

504. TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2004).

505. *Id.*

506. *Id.*

507. *Id.*

508. *See* Williams v. State, 191 S.W.3d 242, 249 (Tex. Crim. App. 2006) (demonstrating a case where the fact that the defendant could state the names of the people involved in the trial was enough to establish competency).

509. *Id.*

510. Mihir Zaveri, *Pilot Program Gives Hope to Inmates with Mental Health Needs*, CHRON. (Mar. 15, 2016, 8:37 PM), <http://www.chron.com/news/houston-texas/houston/article/Pilot-program-gives-hope-to-inmates-with-mental-6892205.php>.

511. *Id.*

512. *Id.*

513. *See* Paul F. Stavis, *Why Prisons are Brim-Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. CIV. RTS. L.J. 157, 157 (2000). The author points out the massive discharge of patients from psychiatric hospitals that has swelled the jail and prison

disabilities, they are not mental health care providers.⁵¹⁴ They are not equipped or funded for the problems they face in housing large populations of individuals with mental health issues.⁵¹⁵ The problem manifests not only in regrettable treatment of the inmate suffering from a mental health disorder, but can result in injury to jailers who come into contact with unmedicated and unpredictable individuals.⁵¹⁶ Numerous organizations, committees, and lawyers nationwide have been aware of and have been discussing this problem for years.⁵¹⁷ As with many government run agencies, funding is inadequate.⁵¹⁸ And let's face it; the public becomes less and less motivated to address this issue when they understand the sometimes heinous nature of the crimes committed.⁵¹⁹

With no easy fix in sight, a look towards an unlikely, but similar situated population may be helpful.⁵²⁰ What follows is an analysis of the criminal justice answer to prosecution of children.⁵²¹ Please understand, the authors of this paper are in no way indicating individuals with intellectual disabilities are children.⁵²² This comparison is helpful, because like those intellectually disabled individuals that have been adjudicated by a probate court, children subject to the criminal justice systems are wards of the state.⁵²³ Similar to the situation with the intellectually disabled, children once too were unwisely subject to the shortcomings of our criminal justice system.⁵²⁴ Maybe in understanding the way change was implemented to address injustices to our child wards, we can use that understanding as a roadmap to address injustices to our adult wards.⁵²⁵

populations, noting that this means medical attention for those with illnesses now occurs in jails despite the fact that psychiatric treatment there is sub optimal.

514. *Id.*

515. *Id.*

516. *Id.*

517. *Id.*

518. *Id.* at 163.

519. *See supra* Part I.

520. *See infra* Part XI–XIII.

521. *See infra* Part XI–XIII.

522. *See generally* Wade Askew, *Keeping Promises to Preserve Promise: The Necessity of Committing to a Rehabilitation Model in the Juvenile Justice System*, 20 GEO. J. ON POVERTY L. & POL'Y 373 (2013) (commenting generally on the need to reform the juvenile justice system).

523. *Id.*

524. *Id.*

525. *See infra* Parts XI–XIII.

XI. LAWS EXISTING FOR PROTECTION OF MINORS IN CRIMINAL PROCEEDINGS

A. Enactment of the Texas Juvenile Act

It is helpful in developing further legislation to safeguard accused adult disabled persons to evaluate protections afforded other similarly situated individuals.⁵²⁶ One area of comparison is the body of law set forth in Title Three of the Texas Family Code (Chapters 51 through 61).⁵²⁷ This law is relevant, because the idea that in a court of law a ten year old child is given greater legal protections than an adult diagnosed and under a judicially created guardianship with the mental capacity of a ten year old child, emphasizes disparity and reveals potential due process violations.⁵²⁸

It is helpful to understand the historical change that took place that produced the system we have today.⁵²⁹ Prior to 1907, juvenile offenders were handled in the “regular” criminal justice system, similar to how adult disabled persons are today.⁵³⁰ This ceased in 1907 when the Texas Legislature enacted the Texas Juvenile Act, § 2338-1, VERNON’S ANN. CIV. ST., which evolved in the 1970’s to become Title Three of the Texas Family Code.⁵³¹ Associate Justice Jack Pope of the Texas Supreme Court opined regarding the reasons for creation of the Texas Juvenile Act stating, “The Title of Article 2338-1 says that the purpose of the Act is “to change the method for handling delinquent children from the present criminal procedure to guardianship***.”⁵³² Section 1 of the Act makes children in such proceedings wards of the state.”⁵³³ Ironically the act indicated the necessity for deviation from criminal procedures with regard to children was because the act makes the children “wards of the state” and therefore procedures for their cases should be handled in a manner appropriate for guardianships.⁵³⁴ This begs the question why other wards of the state, ergo adults civilly adjudicated in probate guardianships, have been left subject to criminal procedures instead of those procedures more appropriate for guardianships.⁵³⁵ The following analysis from *In re V.R.S.* gives full

526. TEX. FAM. CODE ANN. tit. 3 §§ 51–61 (West 2018).

527. *Id.*

528. See generally Douglas A. Hager, *Does the Texas Juvenile Waiver Statute Comport with the Requirements of Due Process?*, 26 TEX. TECH L. REV. 813, 821 (1995) (giving historical context for the Texas Juvenile Act).

529. *Id.*

530. *Id.*

531. *Brenan v. Court of Civ. App., 14th Dist.*, 444 S.W.2d 290, 296 (Tex. 1968) (Pope, J., dissenting).

532. *Id.*

533. *Id.*

534. *In re V.R.S.*, 512 S.W.2d 350, 355 (Tex. Civ. App.—Amarillo 1974).

535. *Id.*

clarification to the intent of the legislature when it enacted the Texas Juvenile Act and subsequently Title Three of the Texas Family Code:

Yet, from the time Texas determined that juveniles should no longer be treated the same as adult offenders and enacted the Texas Juvenile Act, VERNON'S ANN. CIV. ST. § 2338-1, to provide for a separate beneficial treatment of children, it was the view expressed in § 13(3) of that Act, which was held to be constitutional in *Dendy v. Wilson*, 142 Tex. 460, 179 S.W.2d 269 (1944), and it continuously has been the prevailing view from that time that the child should not be charged, convicted nor classed as a criminal, and that he should not suffer, as a result of any adjudication, any disabilities ordinarily imposed by a conviction. *Dendy v. Wilson, supra*; *State v. Santana, supra*. As long as the child's constitutional rights were protected, the procedures employed were not those used in adversary criminal prosecutions, but they were those used in civil cases. *Dendy v. Wilson, supra*; *State v. Thomasson*, 154 Tex. 151, 275 S.W.2d 463 (1955); *State v. Santana, supra*; *Carrillo v. State*, 480 S.W.2d 612 (Tex. 1972); *In re Cockrell*, 493 S.W.2d 620 (Tex. Civ. App.—Amarillo 1973, writ ref'd n. r. e.).⁵³⁶

Title 3 of the current Family Code retains and emphasizes this view.⁵³⁷ One of the stated purposes of the statute, pronounced in § 51.01(2)(B), is “to remove, where appropriate, the taint of criminality from children committing certain unlawful acts.”⁵³⁸ The adjudication finding in a juvenile criminal proceeding is only “whether or not the child has engaged in delinquent conduct or conduct indicating a need for supervision.”⁵³⁹ An “order of adjudication or disposition . . . is not a conviction of crime . . . [and] does not impose any civil disability ordinarily resulting from a conviction. . .”⁵⁴⁰ Section 51.17 specifically provides that, except for conflict with another provision, “the Texas Rules of Civil Procedure govern proceedings under this title.”⁵⁴¹ Additionally, the right of appeal granted is not an appeal to the Court of Criminal Appeals which is vested with the jurisdiction over criminal appeals, but it is an appeal to the court of civil appeals with the proviso that “the case may be carried to the Texas Supreme Court by writ of error or upon certificate, as in civil cases generally.”⁵⁴² Furthermore, a child under the jurisdiction of the juvenile court may not be committed or transferred to a place used primarily for fulfilling criminal sentences.⁵⁴³

536. *Id.*

537. TEX. FAM. CODE ANN. tit 3 (West 2017).

538. TEX. FAM. CODE ANN. § 51.01(2)(B) (West 2017).

539. TEX. FAM. CODE ANN. § 54.03(f) (West 2017).

540. TEX. FAM. CODE ANN. § 51.13(a) (West 2017).

541. TEX. FAM. CODE ANN. § 51.17(a) (West 2017).

542. TEX. FAM. CODE ANN. § 56.01 (West 2017).

543. TEX. FAM. CODE ANN. § 51.13(c) (West 2017).

In brief, these writings manifest that the statutory scheme is the noncriminal treatment of the child subjected to the jurisdiction of the juvenile court through supervision (similar to adult probation), and not the fixing of criminal responsibility and punishment.⁵⁴⁴ The juvenile court's duty is to determine the rehabilitative needs of the child rather than serving as a forum for the prosecution of criminal conduct; and, if the court needs to remove the child from his family environment, the court serves not to punish, but to secure child custodial care and discipline as nearly equivalent as possible to that which his parents should have provided.⁵⁴⁵ Proceedings authorized by Title 3 of the Family Code are civil adjudications rather than criminal prosecutions even though the delinquent conduct alleged may be the violation of a penal law of felony grade, and notwithstanding that the disposition made may result in the curtailment of the child's liberty for a limited time.⁵⁴⁶

B. Texas Family Code

With a better understanding of how and why the current laws related to criminal proceedings involving minors were established, a further review of Title 3 of the Texas Family Code sheds light on those benefits available to children that are unavailable to mentally identical adult wards.⁵⁴⁷ The purpose of the code in part is "to provide for the protection of the public and public safety;" and to be "consistent with the protection of the public and public safety" while also promoting the idea of punishment for criminal conduct.⁵⁴⁸ Further, the relevant code section defines child as a person who is "ten years of age or older and under 17 years of age" or whose "conduct indicat[es] a need for supervision as a result of acts committed before becoming 17 years of age."⁵⁴⁹ This section defines custodian as "the adult with whom the child resides" and guardian as "the person who, under court order, is the guardian of the person of the child or the public or private agency with whom the child has been placed by a court."⁵⁵⁰ This definition includes probate guardians.⁵⁵¹ Finally, the definitions section of the Texas Family Code addresses the conduct it covers by defining delinquent conduct as "conduct, other than a traffic offense, that violates a penal law of this state or

544. Thomas S. Morgan & Harold C. Gaither, Jr., 29 TEX. PRACTICE SERIES, JUVENILE LAW AND PRACTICE § 1.1 (3d ed. 2018).

545. See generally Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference It Makes*, 68 B.U. L. REV. 821, 831 (1988) (discussing the role of the juvenile court system).

546. TEX. FAM. CODE ANN. tit. 3 (West 2017).

547. TEX. FAM. CODE ANN. tit. 3 (West 2017).

548. TEX. FAM. CODE ANN. § 51.01 (West 2017).

549. TEX. FAM. CODE ANN. § 51.02 (West 2017).

550. TEX. FAM. CODE ANN. § 51.02 (West 2017).

551. TEX. FAM. CODE ANN. § 51.02.

of the United States punishable by imprisonment or by confinement in jail.”⁵⁵²

1. Goals of the Juvenile Court

Chapter 55 of the Texas Family Code is meant to be procedural in nature, so it does not establish criminal offenses as the Texas Penal Code does, but instead presents an alternate framework to enforce the Texas Penal Code and other laws establishing criminal activity against a child defendant.⁵⁵³ As discussed in *State v. Thomasson*, a paramount goal of Title 3 of the Texas Family Code is to ensure that juveniles who are found guilty of delinquent behavior do not suffer the permanent consequences of a criminal conviction on their records.⁵⁵⁴ In fact, Texas Family Code Section 51.13 provides that except for enhancement purposes in punishment proceedings for future specified crimes, an order of adjudication or disposition in a proceeding under Title 3 of the Texas Family Code is not a conviction of a crime.⁵⁵⁵

Also discussed in *State v. Thomasson* is the fact that juvenile proceedings are not procedurally governed by the Texas Code of Criminal Procedure as are criminal cases for adults.⁵⁵⁶ Texas Family Code Section 51.17 establishes the procedural rules governing juvenile proceedings.⁵⁵⁷ Title 3 of the Texas Family Code even provides alternative methods of handling delinquent behavior for juveniles other than through the courts.⁵⁵⁸ Texas Family Code Section 52.03 provides for case resolution by “referral of the child to an agency other than the juvenile court; a brief conference with the child and his parent, guardian, or custodian; or referral of the child and the child’s parent, guardian, or custodian for services under Section 264.302.”⁵⁵⁹ Other provisions of Title 3 of the Texas Family Code allow for referral to court, but dismissal upon completion of a specialty program like “Teen Court” and “Teen Dating Violence Court.”⁵⁶⁰

C. Procedures in Juvenile Court

The first enumerated difference between a juvenile proceeding and criminal prosecution is the establishment of specific court(s) in each county

552. TEX. FAM. CODE ANN. § 51.03 (West 2017).

553. TEX. FAM. CODE ANN. § 55 (West 2017).

554. *State v. Thomasson*, 275 S.W.2d 463, 464 (1955).

555. TEX. FAM. CODE ANN. § 51.13 (West 2017).

556. *Thomasson*, 275 S.W.2d at 464.

557. TEX. FAM. CODE ANN. § 51.17 (West 2017).

558. TEX. FAM. CODE ANN. § 52.03(c) (West 2017).

559. *Id.*

560. TEX. FAM. CODE ANN. § 54.0325 (West 2017).

to act as juvenile courts in lieu of the criminal courts used for adult defendants.⁵⁶¹

1. Waiver of Rights

Besides its focus on the disposition of cases, the Texas Family Code provides laws that substantially protect children during prosecution.⁵⁶² Included in these is a provision which provides that a waiver of rights established by the Texas or United States Constitution may not be waived by the child unless “the waiver is made by the child *and the attorney for the child* [emphasis added]. . .the waiver is voluntary. . .and the waiver is made in writing or in court proceedings that are recorded.”⁵⁶³ Adult wards in criminal cases can waive rights without an attorney, without the waiver being in writing, or without the waiver being recorded.⁵⁶⁴ One of the most important differences between juvenile procedure and adult criminal procedure as outlined in this statute is the admissibility of statements made during an interrogation while the child is in custody or in the possession of the Department of Family and Protective Services.⁵⁶⁵ If an adult is in custody, any statements made during an interrogation after the administration of *Miranda* warnings by a police officer are admissible so long as the right to counsel has not been invoked.⁵⁶⁶ An adult’s voluntary statements which are not in response to interrogation are always admissible.⁵⁶⁷

2. Counsel for Child

Another important protection afforded to a juvenile is found in Texas Family Code Section 51.10, which mandates that a child cannot waive the right to counsel during the most significant proceedings.⁵⁶⁸ Furthermore, a judge has the ability to order a child’s parent or another person responsible for support of the child to employ an attorney to represent the child, if said individual can afford an attorney.⁵⁶⁹ If the child’s parent or other person responsible for support of the child is financially unable to employ an

561. TEX. FAM. CODE ANN. § 51.04 (West 2017).

562. TEX. FAM. CODE ANN. § 51.09 (West 2017).

563. TEX. FAM. CODE ANN. § 51.09 (providing an exception to the Texas Family Code § 51.09 is Texas Family Code § 51.095 addressing the admissibility of a statement of a child (waiver of the right to remain silent) in a juvenile proceeding).

564. TEX. CODE CRIM. PROC. ANN. § 38.21 (West 2017).

565. TEX. FAM. CODE ANN. § 51.095 (West 2017).

566. TEX. CODE CRIM. PROC. ANN. § 16.04 (West 2017).

567. TEX. CODE CRIM. PROC. ANN. § 38.21 (noting that many times those under criminal investigation will volunteer unlimited information to the police without even being questioned).

568. TEX. FAM. CODE ANN. § 51.10 (West 2017).

569. *Id.*

attorney to represent the child, the court will appoint counsel.⁵⁷⁰ An adult ward may always waive representation by counsel in the most serious of criminal prosecutions, even if the individual is wholly without the knowledge or skill to represent himself.⁵⁷¹

3. *Guardian Ad Litem*

Texas Family Code Section 51.11 provides for the appointment of a guardian ad litem (in addition to counsel) if a child appears before the juvenile court without a parent or guardian.⁵⁷² If the court determines the parent or guardian is “incapable or unwilling to make decisions in the best interest of the child with respect to proceedings under this title, the court may appoint a guardian ad litem to protect the interests of the child in the proceedings.”⁵⁷³ In furtherance of ensuring adequate support for the child, Texas Family Code Section 51.115 mandates that each parent of a child, each managing and possessory conservator of a child, each court-appointed custodian of a child, and a guardian of the person of the child shall attend each hearing affecting waiver of jurisdiction and discretionary transfer to criminal court, adjudication hearings, disposition hearings, hearings to modify disposition, and release or transfer hearings.⁵⁷⁴ In an adult criminal proceeding, not only will a guardian ad litem not be appointed, but the probate guardian is without a voice before the court and the law is completely devoid of requirements that the probate guardian is even notified of the pending criminal prosecution.⁵⁷⁵

4. *Detention*

Another interesting protection provided for children is found in Texas Family Code Section 54.01 which requires a detention hearing within two working days of a child being taken into custody.⁵⁷⁶ If the child continues to be detained after the initial hearing, then future detention hearings are mandated at short intervals thereafter (typically weekly).⁵⁷⁷ These detention hearings are held until the child is released or the allegations against the child are resolved.⁵⁷⁸ An adult would be required to petition the court for a bond

570. *Id.*

571. TEX. CODE CRIM. PROC. ANN. § 1.051(f) (West 2017).

572. TEX. FAM. CODE ANN. § 51.11 (West 2017).

573. *Id.*

574. TEX. FAM. CODE ANN. § 51.115 (West 2017).

575. TEX. CODE CRIM. PROC. ANN. § 64.02 (West 2017).

576. TEX. FAM. CODE ANN. § 54.01 (West 2017).

577. *Id.*

578. *Id.*

reduction, and this would typically only happen once or twice during the pendency of a case.⁵⁷⁹

Texas Family Code Sections 51.12, 51.125 and 51.126 govern detention facilities for juveniles.⁵⁸⁰ Provisions giving juvenile judges, juvenile boards, the Texas Juvenile Justice Department, and the Texas Juvenile Probation Commission the authority to inspect and approve detention facilities provides safeguards for juveniles who are in custody.⁵⁸¹ The facilities used and the laws governing juvenile detention centers are different than those in which an adult ward will be incarcerated.⁵⁸²

5. Notice Statutes

Many statutes created for protecting juveniles are focused on giving parents, custodians, and guardians legal notification at various stages of juvenile proceedings.⁵⁸³ Like the other protections afforded to a minor ward, the adult ward who is subject to criminal prosecution garners no benefits from these statutes.⁵⁸⁴

Texas Family Code Section 52.02 provides that “a person taking a child into custody shall promptly give notice of the person’s action and a statement of the reason for taking the child into custody, to the child’s parent, guardian, or custodian; and the office or official designated by the juvenile board.”⁵⁸⁵

Texas Family Code Section 53.01 provides:

When custody of a child is given to the office or official designated by the juvenile board, the intake officer, probation officer, or other person authorized by the board shall promptly give notice of the whereabouts of the child and a statement of the reason the child was taken into custody to the child’s parent, guardian, or custodian. . . .⁵⁸⁶

Texas Family Code Section 54.03 provides that:

At the beginning of the adjudication hearing, the juvenile court judge shall explain to the child and his parent, guardian, or guardian ad litem:

- 1) the allegations made against the child;
- 2) the nature and possible consequences of the proceedings, including the law relating to the admissibility of the

579. *Id.*

580. TEX. FAM. CODE ANN. §§ 51.12, .125, .126 (West 2017).

581. TEX. FAM. CODE ANN. § 51.12 (West 2017).

582. TEX. CODE CRIM. PROC. ANN. § 62.001 (West 2017).

583. TEX. FAM. CODE ANN. tit. 3 (West 2017).

584. TEX. CODE CRIM. PROC. ANN. tit. 1 (West 2017).

585. TEX. FAM. CODE ANN. § 52.02 (West 2017).

586. TEX. FAM. CODE ANN. § 53.01 (West 2017).

record of a juvenile court adjudication in a criminal proceeding;

- 3) the child's privilege against self-incrimination;
- 4) the child's right to trial and to confrontation of witnesses;
- 5) the child's right to representation by an attorney if he is not already represented; and
- 6) the child's right to trial by jury."

Texas Code of Criminal Procedure Article 45.0215 is particularly interesting because it governs pleas by minor defendants.⁵⁸⁷ It not only allows for a guardian to appear but requires the court to secure appearance via subpoena of the guardian (or parent or managing conservator) for the plea and all other proceedings during the case.⁵⁸⁸ Failure to appear after subpoenaed is a Class C misdemeanor.⁵⁸⁹

6. Confidentiality of Records

Further evidence of the disparity between the child ward and the incapacitated adult ward is established by the manner in which children's records are protected from public view.⁵⁹⁰ Adult wards do not enjoy any of the following protections.⁵⁹¹

Texas Family Code Section 54.08 governs closing the court to the public during juvenile proceedings.⁵⁹² While the court may be closed during a guardianship proceeding in probate court, no similar provision exists to close a criminal court during the prosecution of an adult ward.⁵⁹³

Chapter 58 of the Texas Family Code provides multiple statutes for sealing juvenile court records, restricting access to juvenile records, establishing the confidentiality of juvenile records, and destruction of juvenile records.⁵⁹⁴

Texas Code of Criminal Procedure Article 57.03 makes it an offense for a public servant if the person:

Knowingly discloses the name, address, or telephone number of the victim to any person who is not assisting in the investigation or prosecution of the offense or to any person other than the defendant, the defendant's attorney, or the

587. TEX. FAM. CODE ANN. § 54.03 (West 2017).

588. TEX. CODE CRIM. PROC. ANN. § 45.0215 (West 2017).

589. *Id.*

590. *Id.*

591. TEX. FAM. CODE ANN. § 54.08 (West 2017).

592. TEX. CODE CRIM. PROC. ANN. tit. 1 (West 2017).

593. TEX. FAM. CODE ANN. § 54.08.

594. TEX. CODE CRIM. PROC. ANN. tit. 1 (West 2017).

person specified in the order of a court of competent jurisdiction.⁵⁹⁵

Texas Code of Criminal Procedure Article 45.0217 blocks access to certain confidential criminal records of the child defendant.⁵⁹⁶

7. *Other Laws Specific to Guardians of Child Wards*

Below are a myriad of other laws providing protections for a ward who is a child, of which incapacitated adult wards and their guardians do not have the benefit.⁵⁹⁷

- Chapter 57 of the Texas Family Code provides for the guardians of child victims to be included in persons for whom victims' rights are enacted and includes the guardian of a victim.⁵⁹⁸
- Texas Code of Criminal Procedure Article 7A.01 includes a guardian in the list of persons that may apply for protective orders on behalf of individuals under 17 and 18 years of age who are victims of certain crimes.⁵⁹⁹
- Texas Code of Criminal Procedure Article 42.0191 includes a legal guardian, along with a parent, to consent to release of information for trafficking victims who are under eighteen years of age.⁶⁰⁰
- Texas Code of Criminal Procedure Article 45.052 adds guardian to the list of persons to appear for a plea in Justice of the Peace court when the defendant is a minor.⁶⁰¹
- Texas Code of Criminal Procedure Article 57B.02 adds a victim's guardian to the list of those persons who may legally release certain information pertaining to victims in criminal cases (if the victim is under 17 years of age).⁶⁰²
- Texas Code of Criminal Procedure Article 57D.02 adds the child victim's guardian to the list of persons who may view confidential information in a criminal case.⁶⁰³
- Texas Code of Criminal Procedure Article 61.075 and Texas Code of Criminal Procedure Article 61.08 specify a child's guardian, along with a parent, as those who may request a law enforcement agency to determine whether the agency has collected or is

595. TEX. FAM. CODE ANN. § 58 (West 2017).

596. TEX. CODE CRIM. PROC. ANN. § 57.03 (West 2017).

597. TEX. CODE CRIM. PROC. ANN. § 45.0217 (West 2017).

598. See TEX. FAM. CODE ANN. § 57.002 (West 2015).

599. See TEX. CODE CRIM. PROC. ANN. art. 7A.01 (West 2015).

600. See TEX. CODE CRIM. PROC. ANN. art. 42.0191 (West 2007).

601. See TEX. CODE CRIM. PROC. ANN. art. 45.052 (West 2015).

602. See TEX. CODE CRIM. PROC. ANN. art. 57B.02 (West 2007).

603. See TEX. CODE CRIM. PROC. ANN. art. 57D.02 (West 2011).

maintaining criminal information on the child and review that information.⁶⁰⁴

- Texas Code of Criminal Procedure Article 42A.105 governs community supervision and includes a legal guardian, along with a parent, to consent to release of information for an individual less than 18 years of age for victims of a sexually violent offense.⁶⁰⁵
- Texas Penal Code Section 25.08 labels children under guardianships as victims if sold by their guardians (just like a parent or conservator).⁶⁰⁶

Texas Penal Code Section 9.63 is an outlier, but worth mentioning, as it applies to guardians of incapacitated adult wards, and provides a defense in certain circumstances when a guardian uses force against a ward, just like there is a statutory defense for parents using appropriate corporal punishment against their child.⁶⁰⁷

XII. MENTAL COMMITMENT OF A MINOR

Having completed the commentary on the first two topics of this paper, we now turn to proceedings governing commitment.⁶⁰⁸ Just as there are provisions in the Code of Criminal Procedure that govern adult defendants who are unable to stand trial due to incompetency, there are similar provisions that govern children, found in Chapter 55 of the Texas Family Code, which gives the juvenile court jurisdiction over proceedings to order mental health, intellectual disability services, or for commitment of a child.⁶⁰⁹

A. Competent Minor with Mental Illness

If a child with a mental illness has a case pending in juvenile court, upon motion, the court shall determine whether probable cause exists to believe the child has a mental illness.⁶¹⁰ Texas Family Code Section 55.01 defines mental illness as:

an illness, disease, or condition, other than epilepsy, dementia, substance abuse, or intellectual disability, that: substantially impairs a person's thought, perception of

604. See TEX. CODE CRIM. PROC. ANN. art. 61.075 (West 2007); see also TEX. CODE CRIM. PROC. ANN. art. 61.08 (West 2015).

605. See TEX. CODE CRIM. PROC. ANN. art. 42A.105 (West 2017).

606. See TEX. PENAL CODE ANN. § 25.08 (West 2011).

607. See TEX. PENAL CODE ANN. § 9.63 (West 1994).

608. Compare *supra* Parts I–XI, with Part XII.

609. See generally TEX. FAM. CODE ANN. § 57 (West 2015) (permitting the juvenile court to order certain mental health and disability services for children).

610. See TEX. FAM. CODE ANN. § 55.11 (West 1999); see also TEX. HEALTH & SAFETY CODE ANN. § 571.003 (West 2015).

reality, emotional process, or judgment; or grossly impairs behavior as demonstrated by recent disturbed behavior.⁶¹¹

If the court determines that there is probable cause the child has a mental illness, the court shall order the child to be examined.⁶¹² The information obtained from the examination must include an expert opinion as to whether the child has a mental illness and whether the child meets the commitment criteria under Subtitle C of Title 7 of the Health and Safety Code.⁶¹³ If the juvenile court finds evidence to support a finding that a child has a mental illness, or that the child meets the commitment criteria under Subtitle C of Title 7 of the Health and Safety Code, the court shall initiate proceedings to order temporary or extended mental health services or for commitment of the child.⁶¹⁴ If the court does not make such a determination the juvenile proceedings continue normally.⁶¹⁵ If the juvenile court initiates proceedings for temporary or extended mental health services either party may file an application for court-ordered mental health services, and the juvenile court shall conduct a hearing in accordance with Subchapter C of Chapter 574 of the Health and Safety Code.⁶¹⁶ If the court orders mental health services for the child, the child shall be cared for, treated, and released in conformity with Subtitle C of Title 7 of the Health and Safety Code; however, a court order for mental health services for a child automatically expires on the 120th day after the date the child reaches the age of 18.⁶¹⁷

If the child is still committed on the eighteenth birthday, the child is alleged to have engaged in delinquent conduct which violates one of the following penal laws, and no adjudication concerning the alleged conduct has been made, the juvenile court shall transfer all pending charges to criminal court.⁶¹⁸

- 1) Texas Penal Code § 19.02 (murder);
- 2) Texas Penal Code § 19.03 (capital murder);
- 3) Texas Penal Code § 19.04 (manslaughter);
- 4) Texas Penal Code § 20.04 (aggravated kidnapping);
- 5) Texas Penal Code § 22.011 (sexual assault) or Texas Penal Code § 22.021 (aggravated sexual assault);
- 6) Texas Penal Code § 22.02 (aggravated assault);
- 7) Texas Penal Code § 29.03 (aggravated robbery);

611. See TEX. HEALTH & SAFETY CODE ANN. § 571.003 (West 2015).

612. See *generally* TEX. FAM. CODE ANN. § 51.20 (West 2013) (providing that the examination shall comply with the Texas Family Code).

613. See TEX. FAM. CODE ANN. § 55.11 (West 1999).

614. See TEX. FAM. CODE ANN. § 55.12 (West 1999); *see also* TEX. FAM. CODE ANN. § 55.14 (West 1999).

615. See TEX. FAM. CODE ANN. § 55.12 (West 1999); *see also* TEX. FAM. CODE ANN. § 55.14 (West 1999).

616. See TEX. FAM. CODE ANN. § 55.13 (West 1999).

617. See TEX. FAM. CODE ANN. § 55.15 (West 1999).

618. See TEX. FAM. CODE ANN. § 55.19 (West 1999).

- 8) Texas Penal Code § 22.04 (injury to a child, elderly individual, or disabled individual), if the offense is punishable as a felony, other than a state jail felony;
- 9) Texas Penal Code § 22.05(b) (felony deadly conduct involving discharging a firearm);
- 10) Subchapter D, Chapter 481, Health and Safety Code, if the conduct constitutes a felony of the first degree or an aggravated controlled substance felony (certain offenses involving controlled substances);
- 11) Texas Penal Code § 15.03 (criminal solicitation);
- 12) Texas Penal Code § 21.11(a)(1) (indecent with a child);
- 13) Texas Penal Code § 15.031 (criminal solicitation of a minor);
- 14) Texas Penal Code § 15.01 (criminal attempt), if the offense attempted was an offense under Section 19.02, Penal Code (murder), or Section 19.03, Penal Code (capital murder), or an offense listed by Section 3g(a)(1), Article 42A, Code of Criminal Procedure;
- 15) Texas Penal Code § 28.02 (arson), if bodily injury or death is suffered by any person by reason of the commission of the conduct;
- 16) Texas Penal Code § 49.08 (intoxication manslaughter); or
- 17) Texas Penal Code § 15.02 (criminal conspiracy), if the offense made the subject of the criminal conspiracy includes a violation of any of the provisions referenced in Subdivisions (1) through (16)⁶¹⁹ or
- 18) The defendant is a habitual felony offender.⁶²⁰

The criminal court shall, within ninety days of the transfer, institute proceedings to determine the defendant's competence to stand trial.⁶²¹ If those, or any subsequent proceedings, result in a determination that the defendant is competent to stand trial, the defendant may not receive a punishment for the delinquent conduct listed above that results in confinement for a period longer than the maximum period of confinement the defendant could have received if he had been adjudicated for the conduct while still a child and within the jurisdiction of the juvenile court.⁶²²

The procedures described above are available to children who are appropriate for temporary or extended mental health services or civil commitment under Subtitle C of Title 7 of the Health and Safety Code, regardless of whether that child is competent to stand trial.⁶²³ The Texas Family Code does go further to create provisions similar to adult provisions governing competency as discussed below.⁶²⁴

619. See TEX. FAM. CODE ANN. § 53.045 (West 1999).

620. See TEX. FAM. CODE ANN. § 51.031 (West 1999).

621. See TEX. FAM. CODE ANN. § 55.19 (West 1999).

622. *Id.*

623. See TEX. FAM. CODE ANN. § 55.11 (West 1999).

624. See *infra* Part XII Section B.

B. Minor with Competency Issues

A child who is the subject of juvenile proceedings, and who lacks capacity as a result of mental illness or intellectual disability, to understand the proceedings in juvenile court, or to assist in their own defense, is unfit to proceed and shall not be subjected to discretionary transfer to criminal court, adjudication, disposition, or modification of disposition as long as such incapacity endures.⁶²⁵ Upon motion, the juvenile court shall determine whether probable cause exists that the child is unfit to proceed, and upon making such a finding shall immediately order the child to be examined by an expert.⁶²⁶ If, after examination, evidence does exist to indicate that the child is unfit to proceed, the court will conduct a hearing to determine whether the child is unfit to proceed as a result of mental illness or intellectual disability.⁶²⁷ Just as with adult defendants, a trial by jury may be requested on this issue.⁶²⁸ Upon trial or hearing, if such a finding is made, the court shall “order the child placed with the Texas Department of State Health Services. . .for a period of not more than 90 days” or “order the child placed in a private psychiatric inpatient facility for a period of not more than 90 days” or “order the child to receive treatment for mental illness on an outpatient basis for a period of not more than 90 days.”⁶²⁹ If, after treatment, the treatment provider reports the child is not fit to proceed as a result of mental illness or intellectual disability, the court shall initiate commitment proceedings.⁶³⁰ If, after treatment, the court determines the child is fit to proceed, the defense may object and again request a jury trial to determine if the child is fit to proceed.⁶³¹ If the juvenile court does initiate commitment proceedings, it may order commitment or extended treatment.⁶³² Texas Family Code Section 55.44 governs the transfer of cases to the criminal court and initial procedure to be followed therein upon the child’s eighteenth birthday for children who are under civil commitment because they were found “not fit to proceed” in the same manner as described above for children under civil commitment who were not found “not fit to proceed.”⁶³³

625. See TEX. FAM. CODE ANN. § 55.31(a) (West 2015).

626. See TEX. FAM. CODE ANN. § 55.31(c) (West 2015).

627. See TEX. FAM. CODE ANN. § 55.32 (West 2015).

628. See TEX. FAM. CODE ANN. § 55.32(c) (West 2015).

629. See TEX. FAM. CODE ANN. § 55.33 (West 2015).

630. See TEX. FAM. CODE ANN. § 55.37 (West 1999), TEX. FAM. CODE ANN. § 55.40 (West 2015).

631. See TEX. FAM. CODE ANN. § 55.36 (West 1999).

632. See TEX. FAM. CODE ANN. § 55.38 (West 1999), TEX. FAM. CODE ANN. § 55.41 (West 2015).

633. See TEX. FAM. CODE ANN. § 55.44 (West 2015).

C. Minor Mental Health Defense

The final portion of Texas Family Code Chapter 55, Subchapter D, governs when a child should not be held responsible for their actions, because at the time the child suffered from mental illness or intellectual disability, therefore lacking substantial capacity either to appreciate the wrongfulness of the conduct or to conform the conduct to the requirements of law.⁶³⁴ Upon motion the court shall order an examination by an expert.⁶³⁵ The issue of whether the child is not responsible for their own conduct as a result of mental illness or intellectual disability shall be tried to the court or jury in the adjudication hearing.⁶³⁶ If the court or jury finds that a child is not responsible for their own conduct as a result of mental illness or intellectual disability, the court shall “order the child placed with the Texas Department of State Health Services for a period of not more than 90 days” or “order the child placed in a private psychiatric inpatient facility for a period of not more than 90 days” or “order the child to receive treatment for mental illness on an outpatient basis for a period of not more than 90 days.”⁶³⁷ If, after treatment, the treatment provider reports the child has mental illness or intellectual disability, the court shall initiate commitment proceedings.⁶³⁸ If, after treatment, the treatment provider reports that the child does not have a mental illness or intellectual disability the juvenile court shall discharge the child unless an adjudication hearing was conducted concerning conduct in violation of a penal law listed above, the grand jury has accepted the case, and the prosecution timely objects.⁶³⁹ Upon objection, the juvenile court shall hold a hearing without a jury to determine whether the child has a mental illness or intellectual disability and whether the child meets the commitment criteria for civil commitment under Subtitle C or D of Title 7 of the Health and Safety Code.⁶⁴⁰ If, after a hearing, the court finds that the child does not have a mental illness or intellectual disability and that the child does not meet the commitment criteria under Subtitle C or D of Title 7 of the Health and Safety Code, the court shall discharge the child.⁶⁴¹ If, after a hearing, the court finds that the child has a mental illness or intellectual disability and that the child meets the commitment criteria under Subtitle C or D of Title 7 of the Health and Safety Code, the court shall issue an appropriate commitment order.⁶⁴²

634. See TEX. FAM. CODE ANN. § 55.51(a) (West 2015).

635. See TEX. FAM. CODE ANN. § 55.51(b) (West 2015).

636. See TEX. FAM. CODE ANN. § 55.51(c) (West 2015).

637. See TEX. FAM. CODE ANN. § 55.52 (West 2015).

638. See TEX. FAM. CODE ANN. § 55.56 (West 1999), TEX. FAM. CODE ANN. § 55.59 (West 2015).

639. See TEX. FAM. CODE ANN. § 55.55(a)(2) (West 2015).

640. See TEX. FAM. CODE ANN. § 55.55(b) (West 2015).

641. See TEX. FAM. CODE ANN. § 55.55(d) (West 2015).

642. See TEX. FAM. CODE ANN. § 55.55(e) (West 2015).

XIII. MENTAL COMMITMENT OF AN ADULT

If an incapacitated person fails to take his or her medication, or has a mental disease that is untreated or undiagnosed, he or she can become a danger to themselves or others.⁶⁴³ This is the standard for mental commitment.⁶⁴⁴ Commitment is a temporary fix and is not an adjudication of incapacity.⁶⁴⁵ It is a band aid on an emergency situation and can be the beginning of a treatment program, but it is rarely a solution.⁶⁴⁶

A. Criminal Charges Pending

It is not uncommon to bail a person out of jail and realize they are a danger.⁶⁴⁷ In these situations, a concerned person or family member often commits their loved one to a mental facility.⁶⁴⁸ The problem is that the crime charged and the mental commitment is incompatible.⁶⁴⁹ Texas Health & Safety Code Section 74.034 states, “[a] judge may not issue an order for temporary inpatient or outpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person.”⁶⁵⁰

As to extended mental health services, Texas Health & Safety Code states, “[a] judge may not issue an order for extended inpatient or outpatient mental health services for a proposed patient who is charged with a criminal offense that involves an act, attempt, or threat of serious bodily injury to another person.”⁶⁵¹

If charges are pending, a defendant’s attorney may be able to negotiate with the prosecuting attorney depending on the nature of the crime.⁶⁵² The

643. See TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2017), TEX. HEALTH & SAFETY CODE ANN. § 574.035 (West 2015).

644. See TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2017), TEX. HEALTH & SAFETY CODE ANN. § 574.035 (West 2015).

645. See TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2017).

646. See *Putting a Band-Aid on Mental Health*, HEALTH TRANSFORMER, <https://healthtransformer.co/putting-a-band-aid-on-mental-health-8c04110cc096> (last visited Jan. 29, 2018).

647. See *Denying Bail for a Dangerous Defendant*, LAWYERS.COM, <https://www.lawyers.com/legal-info/criminal/criminal-law-basics/denying-bail-for-a-dangerous-defendant.html> (last visited Jan. 29, 2018).

648. See Robert Kaplan, *A Guide to Mental Illness and the Criminal Justice System: A Systems Guide for Families and Consumers*, NATIONAL ALLIANCE ON MENTAL ILLNESS DEPARTMENT OF POLICY AND LEGAL AFFAIRS, 17–19, http://www.pacenterofexcellence.pitt.edu/documents/Guide_to_Mental_Illness_and_the_Criminal_Justice_System_NAMI.pdf (last visited Jan 29, 2018).

649. See TEX. HEALTH & SAFETY CODE ANN. § 574.034(h) (West 2017).

650. See TEX. HEALTH & SAFETY CODE ANN. § 574.034(h).

651. See TEX. HEALTH & SAFETY CODE ANN. § 574.035 (West 2015).

652. See Robert Kaplan, *A Guide to Mental Illness and the Criminal Justice System: A Systems Guide for Families and Consumers*, NATIONAL ALLIANCE ON MENTAL ILLNESS DEPARTMENT OF POLICY AND

prosecuting attorney may see the benefit of extended care, as opposed to time in jail.⁶⁵³ On the other hand, if charges are pending and the defendant does not show up to court (because the defendant is in a treatment facility), the defendant risks having their bond revoked just to be arrested upon completion of treatment.⁶⁵⁴ A bond revocation can also be cause for additional bail jumping charges.⁶⁵⁵ Defendants and their attorneys should proceed with caution⁶⁵⁶

B. Drug Abuse Issues Alone

When a person falls victim to drug or alcohol addiction, his or her loved ones often try anything to help the person stay sober.⁶⁵⁷ Many resort to mental commitment out of desperation.⁶⁵⁸ Due to budgetary limitations, however, mental facilities usually restrict admissions to patients suffering from Axis I illnesses.⁶⁵⁹ Such policies effectively eliminate the possibility of admitting patients for purely drug-or-alcohol-related illnesses.⁶⁶⁰ Therefore, patients and their attorneys should emphasize mental, rather than drug and alcohol, issues.⁶⁶¹

C. The Mental Commitment Process

The process of mental commitment is comprised of five steps:

- a. Application with affidavit;
- b. Detention and warrant;
- c. Two physicians' exams;
- d. Probable cause hearing, and, if held;
- e. Final hearing⁶⁶²

LEGAL AFFAIRS, 13–14, http://www.pacenterofexcellence.pitt.edu/documents/Guide_to_Mental_Illness_and_the_Criminal_Justice_System_NAMI.pdf (last visited Jan 29, 2018).

653. *Id.*

654. *Bail Jumping—or Failing to Appear After Bailing Out*, NOLO, <https://www.nolo.com/legal-encyclopedia/bail-jumping-failing-appear-after-bailing-out.html> (last visited Jan. 29, 2018).

655. *Id.*

656. *Id.*

657. Hon. Claudia L. Laird & Darlene P. Smith, *Criminal Aspects of Guardianship and Mental Commitment*, (Jan. 22, 2016), http://www.mctx.org/document_center/Courts/Paper%20criminal_aspects_of_guardianship.pdf.

658. *Id.*

659. *Id.*

660. *Id.*

661. *Id.*

662. *Id.*

1. *By a Peace Officer*

Section 573.001 of the Texas Health & Safety Code permits a peace officer to take a person into custody, without a warrant, if the officer has reason to believe that the person is mentally ill and therefore poses a substantial risk of serious harm to themselves or others unless immediately restrained.⁶⁶³ In doing so, the officer must additionally believe that there is insufficient time to obtain a warrant before securing the person into custody.⁶⁶⁴ In determining whether the person satisfies the above criteria, the officer may either rely on representations from a credible person or may form his own opinions based upon the person's conduct or the circumstances in which the person is found.⁶⁶⁵ Once apprehended, the peace officer must transport the person to either: the nearest appropriate inpatient mental health facility; a mental health facility deemed suitable by the local mental health authority, if an appropriate mental health facility is unavailable; or, in extreme emergencies, to jail.⁶⁶⁶

Once the person is secured in a facility, the officer must prepare a notification of detention.⁶⁶⁷ The notification of detention must state that the officer has reason to believe and actually believes that: the person evidences mental illness; the person evidences "substantial risk of serious harm" to themselves or others; and such risk of harm is imminent unless the person is restrained immediately.⁶⁶⁸ The notification must additionally contain:

- 1) a specific description of the risk of harm;
- 2) a statement that the officer's beliefs are derived from [the person's] specific recent behavior, overt acts, attempts, or threats that were either observed or reliably reported to the officer;
- 3) a detailed description of the specific behavior, acts, attempts, or threats; and
- 4) the name and relationship to the apprehended person of any person who reported or observed the behavior, acts, attempts or threats.⁶⁶⁹

2. *With a Warrant*

Any adult may file an application for the emergency detention of another person if he reasonably believes the person is mentally ill and, as a result, poses a substantial risk of harm to themselves or others unless

663. TEX. HEALTH & SAFETY CODE ANN. § 573.001 (West 2017).

664. TEX. HEALTH & SAFETY CODE ANN. § 573.001(a) (West 2017).

665. TEX. HEALTH & SAFETY CODE ANN. § 573.001(b) (West 2017).

666. TEX. HEALTH & SAFETY CODE ANN. § 573.001 (West 2017).

667. TEX. HEALTH & SAFETY CODE ANN. § 573.002 (West 2017).

668. TEX. HEALTH & SAFETY CODE ANN. § 573.002.

669. TEX. HEALTH & SAFETY CODE ANN. § 573.002 (West 2017).

immediately restrained.⁶⁷⁰ An application for emergency detention must further provide essentially the same information required in a peace officer's notification for detention.⁶⁷¹ A judge or magistrate then evaluates the application, specifically considering whether the person seeking detention is credible and whether the application satisfies the necessary criteria.⁶⁷² It is therefore critical that the applicant swears to personal knowledge of specific observations or conversations with the person that would be detained.⁶⁷³ No warrant will issue absent personal observation and speaking or listening to the person.⁶⁷⁴ Simply reiterating another's concerns or observations is insufficient.⁶⁷⁵

Although far from common, falsified applications for emergency detention filed for less than virtuous reasons come as no surprise to the courts.⁶⁷⁶ For example, mental commitments have formerly been misused as leverage in custody battles.⁶⁷⁷ Submitting a false application, however, constitutes aggravated perjury, a third-degree felony.⁶⁷⁸

D. Forced Medication

Every effort is made to conduct inpatient counseling about the necessity of complying with medications.⁶⁷⁹ Despite this, patients sometimes cannot comprehend or are so delusional that non-compliance makes more sense to them.⁶⁸⁰ In situations where no amount of counseling will achieve compliance, forced medication may be the only solution.⁶⁸¹

1. When Appropriate

Even where a patient is subject to court-ordered inpatient mental health services, medication may not be administered against that person's will, unless:

670. See TEX. HEALTH & SAFETY CODE ANN. § 573.011 (West 2017).

671. Compare *id.* with TEX. HEALTH & SAFETY CODE ANN. § 573.002 (West 2017).

672. Hon. Claudia L. Laird & Darlene P. Smith, *Criminal Aspects of Guardianship and Mental Commitment*, (Jan. 22, 2016), http://www.mctx.org/document_center/Courts/Paper%20criminal_aspects_of_guardianship.pdf.

673. *Id.*

674. *Id.*

675. *Id.*

676. *Id.*

677. *Id.*

678. See TEX. PENAL CODE ANN. § 37.03 (West 2017).

679. Hon. Claudia L. Laird & Darlene P. Smith, *Criminal Aspects of Guardianship and Mental Commitment*, (Jan. 22, 2016), http://www.mctx.org/document_center/Courts/Paper%20criminal_aspects_of_guardianship.pdf.

680. *Id.*

681. *Id.*

- 1) the patient is having a medication-related emergency;
- 2) the patient is under an order [authorizing psychoactive medication] regardless of the patient's refusal; or
- 3) the patient is a ward who is 18 years of age or older and the [ward's] guardian . . . consents to the administration of psychoactive medication regardless of the ward's expressed preferences regarding treatment. . . .⁶⁸²

2. *The Forced Medication Process*

Regardless of a patient's refusal, a treating physician, on behalf of the state, may file an application for an order to authorize the administration of psychoactive medication if:

- 1) the physician believes that the patient lacks the capacity to make a decision regarding the administration of the psychoactive medication;
- 2) the physician determines that the medication is the proper course of treatment for the patient;
- 3) the patient is under an order for inpatient mental health services . . . or an application for court-ordered mental health services . . . has been filed for the patient; and
- 4) the patient, verbally or by other indication, refuses to take the medication voluntarily.⁶⁸³

The application must comply with the requirements of the Texas Mental Health Code and state:

- 1) that the physician believes that the patient lacks the capacity to make a decision regarding administration of psychoactive medication and the reasons for that belief;
- 2) each medication the physician wants the court to compel the patient to take;
- 3) whether an application for court-ordered mental health services . . . has been filed;
- 4) whether a court order for inpatient mental health services for the patient has been issued and, if so, under what authority it was issued;
- 5) the physician's diagnosis of the patient; and
- 6) the proposed method for administering the medication and, if the method is not customary, an explanation justifying the departure from the customary methods.⁶⁸⁴

682. TEX. HEALTH & SAFETY CODE ANN. § 574.103 (West 2015).

683. TEX. HEALTH & SAFETY CODE ANN. § 574.104 (West 2005).

684. *Id.*

3. Hearing

Before the court may conduct a hearing on the petition for an order to administer psychoactive medication, the patient must be:

- 1) under a court order to receive inpatient mental health services; or
- 2) in custody awaiting trial in a criminal proceeding and . . . ordered to receive inpatient mental health services in the six months preceding [the] hearing . . .⁶⁸⁵

The court may authorize the administration of psychoactive medication if the court, after the hearing, finds by clear and convincing evidence “that the patient lacks the capacity to make a decision regarding the administration of the proposed medication and treatment with the proposed medication is in the best interest of the patient.”⁶⁸⁶ In determining whether treatment with the proposed medication is in the patient’s best interest, the court must consider:

- 1) the patient’s expressed preferences regarding treatment with psychoactive medication;
- 2) the patient’s religious beliefs;
- 3) the risks and benefits, from the perspective of the patient, of taking psychoactive medication;
- 4) the consequences to the patient if the psychoactive medication is not administered;
- 5) the prognosis for the patient if the patient is treated with psychoactive medication;
- 6) alternative, less intrusive treatments that are less likely to produce the same results as treatment with psychoactive medication; and
- 7) less intrusive treatments likely to secure the patient’s agreement to take the psychoactive medication.⁶⁸⁷

Mental commitment and forced medication both have their advantages, as they present an avenue for providing treatment.⁶⁸⁸ However, each course of action is best thought of as a band aid to a dangerous situation.⁶⁸⁹ The facility will help to establish a treatment plan if one is recommended, but it is the individual or their guardian’s responsibility to implement that plan.⁶⁹⁰

685. TEX. HEALTH & SAFETY CODE ANN. § 574.106 (West 2009).

686. *Id.*

687. *Id.*

688. Hon. Claudia L. Laird & Darlene P. Smith, *Criminal Aspects of Guardianship and Mental Commitment*, (Jan. 22, 2016), http://www.mctx.org/document_center/Courts/Paper%20criminal_aspects_of_guardianship.pdf.

689. *Id.*

690. *Id.*

All too often, incapacitated persons are repeatedly cycled through the mental commitment process.⁶⁹¹

XIV. CONCLUSIONS

The justice system's current methods of handling the elderly and intellectually disabled can be substantially improved.⁶⁹² There are adequate laws available to prosecutors addressing abuses of the elderly and probate estates.⁶⁹³ While prosecution is easily prompted under these statutes for typical assaultive or theft behaviors, situations like white collar theft from an estate are likely to be "civil" matter less attractive for criminal prosecution.⁶⁹⁴ A person's best course of action is to be aware of the types of predators in the hopes of identifying and disrupting predatory behavior before a crime is committed.⁶⁹⁵ After a crime is committed, an attorney should familiarize himself or herself with applicable penal codes available for prosecution.⁶⁹⁶ In doing so, the attorney might educate those in law enforcement and prosecution about the criminal conduct involved.⁶⁹⁷ Additionally, a few suggestions regarding adult disabled individuals are:

1. Amend statutes criminalizing behaviors so that those aggravated regarding minor disabled individual victims are similarly aggravated for adult victims.⁶⁹⁸
2. Create a specialty court for incapacitated adult defendants and adult defendants deemed competent to stand trial but that has a court finding he is a disabled or incapacitated individual.⁶⁹⁹
3. Enact extensive legislation for incapacitated and any adult defendant competent that obtains a court finding he is a disabled individual, similar to the legislation contained in Title 3 of the Texas Family Code.⁷⁰⁰
4. Impose a mandatory segregation between the general prison or jail population and disabled inmates.⁷⁰¹

691. *Id.*

692. *Supra* Part II.

693. *Supra* Part II.A.

694. *Supra* Part II.

695. *Supra* Part II.

696. *Supra* Part III.

697. *Supra* Part III.

698. *Supra* Part IV.

699. *Supra* Part XIII.

700. *Supra* Part XIII.

701. *Supra* Part X.

5. Enact legislation requiring education and appointment of a jail liaison, who will interact with incapacitated individuals and their guardians.⁷⁰²
6. Establish a method for identifying adjudicated incapacitated persons who are found or arrested and whose identity is otherwise unknown.⁷⁰³
7. Establish a method for identifying individuals within jail systems who are prone to violence or suicide, or are mental health “frequent flyers” that frequently cycle in and out of mental health facilities, and modify jail protocols accordingly.⁷⁰⁴
8. Establish a method for ensuring that those in prison or jail are administered mental health medication quickly and accurately, allowing medications to continue if a valid prescription exists.⁷⁰⁵

702. *Supra* Part X.

703. *Supra* Part X.

704. *Supra* Part XII.C.

705. *Supra* Part XII.D.

APPENDIX

HELPFUL ORGANIZATIONS AND CONTACTS

Social Security	1.800.772.1213
National Do Not Call List	1.888.382.1222
Credit Reporting Agencies:	
Experian	1.888.397.3745
Trans Union	1.800.680.7289
Equifax	1.888.766.0008
Adult Protective Agency	1.800.252.5400
Attorney General's Consumer Protection Hotline	1.800.621.0508
TX Dept. of Aging, Disability, Consumer Rights	1.800.458.9858
Mental Health-Intellectual Disability (statewide)	1.800.252.8154
Alzheimer's Association	1.800.272.3900
American Assoc. of Retired Persons (AARP)	1.800.424.2277
TX Dept. of Aging & Disability Services	1.800.252.9240
Dept. of Veteran's Affairs Hotline	1.800.827.1000