

BRIDGING THE GAP BETWEEN MENTAL ILLNESS AND FIREARMS IN PROBATE COURTS

Comment

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I. INTRODUCTION

Joe and his wife Sandy were the parents of a young daughter, Kelly. That day's events pour through both their minds repeatedly. Waking Kelly up—she hated waking up for school; dropping her off at school—the traffic was always terrible dropping her off; going to work—once enjoyable, but now trivial. Finally, a call no parent ever wants to receive. Things blurred after that. Hours, weeks, months passed as Joe and Sandy lived in a fog. Why did the shooter do what he did? Why did he choose the school? Why did he have a gun? Why did he choose Kelly? Finally, Joe and Sandy attend the trial to get some closure. Today was not going to be that day, though. The young man who took their Kelly away sits across the room. The trial unfolds, increasing Joe and Sandy's anger by the minute. He was pleading mental illness? Had he been committed numerous times and let out? Had he gotten the gun from his parents because they had passed away last year? Why did the law allow someone with a mental illness to own a gun? Why is there not a law to prevent him from owning a firearm so easily? While the situation of Joe and Sandy is a hypothetical situation, estate planners should not overlook the issue of probating weapons and mental illness.¹

The news and social media highly publicized Las Vegas, Sutherland Springs, Sandy Hook, Columbine, Orlando, Fort Hood, South Carolina, Virginia Tech, Aurora, and the Fort Lauderdale shootings, but there are many more everyday occurrences where the issues of mental health and gun rights intersect.² The hypothetical was loosely based on the Sandy Hook shooting, but the hypothetical could have been a real life tragedy given the current laws in Texas, and around the United States, about probating firearms.³ Mental illnesses affect one in five adults every year.⁴ “Nearly [10 million] adults in America live with a serious mental illness.”⁵ Mental illness is present in 90% of suicide victims, and is “the tenth leading cause of death in the [United States].”⁶ Of those with a mental illness, almost 60% did not receive treatment last year.⁷ Due to the rising concerns associated with mental illness, Congress found sufficient reason to restrict firearm ownership and

1. See *infra* Section IV.E.

2. See *infra* Section II.F.

3. See Bruce A. Courtade, *Choosing Helpful Over Hopeless*, 92-FEB MICH. B.J. 14, 14–15 (Feb. 2013).

4. *Mental Health by the Numbers*, NATIONAL ALLIANCE ON MENTAL ILLNESS, <http://www.nami.org/Learn-More/Mental-Health-By-the-Numbers> (last visited Jan. 26, 2017).

5. *Id.*

6. *Id.*

7. *Id.*

possession from those suffering from mental illnesses in the Gun Control Act.⁸ The Fort Lauderdale shooting in late 2016 spurred concerns over the mentally ill having ownership in Alaska; a representative introduced a bill to allow family and police to temporarily prevent ownership by those deemed to be a danger to themselves or others.⁹ Legislatures have struggled with how best to protect the public and the mentally ill as advances to understand mental health and violence continue.¹⁰

However, the legislatures overlook one of the potentially unchecked areas of gun ownership—the probate system.¹¹ The probate courts currently permit the mentally ill to inherit a firearm.¹² Texas should enact legislation that would prevent the mentally ill from inheriting a firearm when they could not legally purchase a firearm.¹³ Currently, the state regulations completely disregard the issue of passing firearms through an estate as an asset.¹⁴ In fact, the Texas Estates Code currently only mentions firearms once, and it pertains to a ward of a guardian getting a firearm disability removed.¹⁵ Since Texas has not adopted the Uniform Probate Code, a comparison to the Uniform Probate Code reflects the same disregard for firearms in probate.¹⁶ Additionally, other states also neglect the issue when talking about probate assets.¹⁷ This comment proposes a law that focuses on filling the gap in the Texas Estates Code.¹⁸ The proposed laws would create a judicial check on the passing of weapons through an estate or intestate succession.¹⁹

This comment will begin by looking at the pertinent background information and Texas' current procedures for guns in probate.²⁰ Next, this comment will address the current constitutional standard to pass for a state to regulate the Second Amendment.²¹ This comment will next mention the

8. See *infra* Section II.D.

9. See Becky Bohrer, *Alaska Democrat Proposes Gun Bill After Airport Shooting*, ASSOCIATED PRESS (Jan. 24, 2017, 7:46 PM), http://hosted.ap.org/dynamic/stories/U/US_ALASKA_GUNS_MENTAL_HEALTH?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT (explaining how the Alaskan bill reflects the growing concerns of the correlation between mental illnesses and gun violence).

10. See *id.*

11. See *infra* Section II.B.

12. See *infra* Section II.B; see also Frank O. Brown, Jr., *Special Considerations Regarding Firearms in an Estate*, VA. PRAC. PROB. HANDBOOK § 14:36 (2016) (warning of potential liability to estate representatives for the identification and distribution of firearms).

13. See *infra* Section IV.

14. See *infra* Section II.B.

15. See TEX. EST. CODE ANN. § 1202.201 (West 2016).

16. See generally UNIF. PROBATE CODE (amended 2010) (searching the uniform act does not produce any mention of firearms).

17. See *infra* Section III.

18. See *infra* Section IV.

19. See *infra* Section IV (since the law would apply to beneficiaries and heirs of an estate, the term beneficiary will be used interchangeably to define both situations).

20. See *infra* Section II.A–B.

21. See *infra* Section II.C.

gun laws that would be relevant to the statute.²² This comment examines relevant standards of mental illness and the incapacity to own a gun.²³ Afterwards, this comment will mention how other states may address the issue in probate.²⁴ With the relevant background material mentioned, this comment will propose the law, and applicable amendments, to add to the Texas Estates Code.²⁵ This comment will propose another amendment that would address possible resolutions if an heir is found to not have capacity.²⁶ Additionally, this comment will cover any weaknesses or hurdles to passing the law.²⁷ Lastly, this comment will conclude by summarizing the importance of the rule to the Texas probate system and the Texas Estates Code.²⁸

The courts should possess the power to determine the capacity of a beneficiary to inherit firearms before turning the firearm assets over.²⁹ While there are several reasons people may be found incapacitated for the purpose of owning a firearm, this court will focus on those involving mental illness.³⁰ Congress has found a valid governmental interest in regulating the ownership and possession of firearms of the mentally ill.³¹ Statistics reflect that mental illness is still misunderstood, mistreated, and a growing problem nationwide.³² Likewise, Texas has incorporated the restriction into its laws.³³ The proposed procedure would help prevent probate courts from creating an illegal ownership by an heir with a mental illness, like the hypothetical.³⁴

II. BACKGROUND

Before analyzing the proposed law, this comment must explore relevant background information.³⁵ The proper definition of firearms addresses the specific weapons that the law would reference.³⁶ With that understanding, the current laws and standards for regulating firearm ownership will be better

22. See *infra* Section II.D–E.

23. See *infra* Section II.F.

24. See *infra* Section III.

25. See *infra* Section IV.

26. See *infra* Section IV.C.

27. See *infra* Section IV.F.

28. See *infra* Section V.

29. See *infra* Section IV.

30. See *infra* Section II.F (the hearing could apply to felons or minors if the Texas Legislature chose to address them simultaneously).

31. See *infra* Section II.D.

32. See *supra* notes 4–7 and accompanying text.

33. See *infra* Section II.E.

34. See *infra* Section IV.

35. See *infra* Section II.

36. See *infra* Section II.A.

understood.³⁷ Addressing aspects of mental health and other laws will help frame the proposed law's purpose and limits.³⁸

A. Firearms Definition

The Federal Gun Control Act defines the term “firearm” as any weapon that shoots a projectile by an explosion, the frame of any weapon, silencers, or any explosive, incendiary, or poison gas.³⁹ However, the Federal Gun Control Act exempts antique firearms made before 1898.⁴⁰ The Federal Gun Control Act does not distinguish between the firearms that the mentally ill can own.⁴¹ For the use of this comment, all handguns, shotguns, rifles, explosives, and explosives with gunpowder will be included when the term firearm is used.⁴² The proposed law will not distinguish between semi-automatic and automatic firearms because the Federal Gun Control Act does not differentiate.⁴³ The proposed law will not prohibit the inheritance of antique weapons.⁴⁴ Federal and state laws regulating firearms disregard any regulations on the transferability of firearms.⁴⁵

B. Current Rules in the Texas Estates Code

What is the current disposition of firearms in the Texas probate system? Currently, the Texas Estates Code does not contain any regulations to define any procedures for the inheritance of firearms.⁴⁶ Texas Estates Code § 309.051 does not mention the possibility or requirement of firearms listed in the inventory as personal property of the estate.⁴⁷ The Texas Estates Code's only reference to firearms details the removal of a firearm disability after a court-created guardianship of a ward was terminated.⁴⁸ The old Texas Probate Code (repealed in 2014 and reenacted as the Texas Estates Code in 2015) did not even mention “firearm” or “gun.”⁴⁹ The Texas Legislature

37. See *infra* Sections II.B–E.

38. See *infra* Section II.E.

39. See 18 U.S.C. §§ 921–22 (2016).

40. See 18 U.S.C. § 921(a)(16) (2016).

41. See *infra* Section II.A, D.

42. See *infra* Section II.D (since the Gun Control Act is the basis for the mentally ill not being able to possess firearms, the definition for firearm it gives will be the one used for the comment).

43. See *supra* note 39.

44. See *supra* note 40.

45. See *infra* Section II.B–D.

46. See generally TEX. EST. CODE ANN. (West 2016) (searching for the term “firearm” does not produce any results dealing with inheriting firearms).

47. See TEX. EST. CODE ANN. § 309.051 (West 2016) (failing in the statute and notes of decisions to deal with firearms or guns as assets of the estate).

48. See TEX. EST. CODE ANN. § 1202.201 (West 2016).

49. See generally TEX. PROB. CODE ANN. (West 2014) (searching the code does not produce any results).

thought the only important addition to the Code was § 1202.201, covering a ward removing a firearm disability.⁵⁰ Considering the recent pattern of mass shootings, Texas should reevaluate certain laws to prevent the shootings, but to not infringe on Second Amendment rights.⁵¹

Texas needs to address the dangers of weapons in probate that are inherited without judicial checks on the prevention of illegal inheritances.⁵² For example, in the case of a will bequeathing a firearm, the ownership of the firearm vests immediately to a beneficiary, regardless of whether the beneficiary could purchase or own it legally.⁵³ The Federal Gun Control Act has strict regulations towards certain groups of people owning or possessing firearms, such as the mentally ill or felons. This scenario creates illegal ownership by the beneficiary if the ownership or possession was in violation of the Federal Gun Control Act.⁵⁴ A prosecutor could then convict the beneficiary under the Federal Gun Control Act for owning the firearm.⁵⁵ A conviction under the Federal Gun Control Act would carry a minimum ten to sixteen-month sentence.⁵⁶ The only restriction on inheritance in the Texas Estates Code is for the beneficiary that owes liabilities to the decedent's estate.⁵⁷ The same would happen for heirs under intestate succession.⁵⁸ Currently, the Texas Estates Code does not allow for the estate's representative to modify the will should a beneficiary not be able to own a firearm legally.⁵⁹ Absent laws to this effect, the court will not be able to prevent situations like the hypothetical from occurring.⁶⁰

Since the courts do not look at the legality of inheriting firearms, beneficiaries and heirs inherit ownership of firearms, even if they are not allowed to own or possess the firearms.⁶¹ A rule that creates checks on

50. See generally TEX. EST. CODE ANN. § 1202.201 (West 2016) (failing to reference firearm elsewhere in the Texas Estates Code).

51. See *supra* Section I.

52. See *infra* notes 53–56.

53. See TEX. EST. CODE ANN. § 101.001 (West 2016) (vesting property to beneficiaries immediately when bequeathed personal property in a will).

54. See *infra* Section II.D.

55. See *infra* Section II.D.

56. See *Sentencing Guidelines* § 2K2.1, UNITED STATES SENTENCING COMMISSION, <http://www.ussc.gov/guidelines/2016-guidelines-manual/2016-chapter-2-e-k#NaN> (last visited Feb. 7, 2017); see *Sentencing Table*, UNITED STATES SENTENCING COMMISSION, http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2016/Sentencing_Table.pdf (last visited Feb. 7, 2017); see also *U.S. v. Jones*, 352 F. Supp. 2d 22 (D. Maine 2005) (detailing the sentencing for a man with a history of mental illness, but no criminal history).

57. See TEX. EST. CODE ANN. § 101.051 (West 2016) (stating that beneficiaries that owe the estate or child support payments are not vested immediately, until the amount is paid up).

58. See TEX. EST. CODE ANN. §§ 101.001, .051 (West 2016) (heirs are vested with personal property upon the decedent passing).

59. See TEX. EST. CODE ANN. § 255.451 (West 2016).

60. See *supra* Section I.

61. See *supra* Section I.

inheritance would give courts the power to enforce Federal Regulations.⁶² Gun trusts would be a distinct and separate issue not addressed by the proposed law in this comment.⁶³ The law would only apply to the inheritance via a will or intestate succession.⁶⁴ Since Texas does not address the dangers of unchecked inheritance of firearms, practitioners should address the issues of mental health and firearms with clients when forming an estate plan.⁶⁵

C. Constitutional Standard to Justify Law

The Second Amendment states, “[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁶⁶ In *McDonald v. City of Chicago*, the Supreme Court incorporated this restriction to become binding on the states.⁶⁷ The city of Chicago tried to enforce a law that banned the possession of handguns in the home through a law that required a registration certificate, while also restricting most handguns from registration.⁶⁸ The Supreme Court struck down the law as a violation of a fundamental right.⁶⁹ The right to self-defense was considered fundamental by being so “deeply rooted in this Nation’s history and traditions.”⁷⁰ While a fundamental right to bear arms exists, reasonable limitations to the fundamental right have been held to be constitutional.⁷¹

The Supreme Court, in *District of Columbia v. Heller* and *McDonald v. City of Chicago*, struck down laws that restricted the ownership and possession of handguns, but the cases were not meant to create an unlimited Second Amendment right for all.⁷² The Second Amendment does not protect possession “by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and governmental buildings” because there are longstanding prohibitions.⁷³ Likewise, under the Second Amendment, the government may restrict certain types of weapons deemed

62. See *infra* Section IV.

63. See *infra* Section IV.

64. See *infra* Section IV.

65. See *infra* Section V; see also Gerry W. Beyer, *Target Best Practices for Guns Included in an Estate*, EST. PLAN. 2–3 (2016) (“Estate planners should be familiar with transfer limitations to plan for the distribution of firearms upon a client’s death or incapacity.”).

66. U.S. CONST. amend. II.

67. See *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010).

68. See *id.* at 750.

69. See *id.* at 767–91.

70. *Id.* at 745.

71. See *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008).

72. See *id.* (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill.”); see *McDonald*, 561 U.S. at 786 (“We repeat those assurances here.”).

73. *Heller*, 554 U.S. at 626.

to be dangerous and unusual, or not in common use at the time of the Amendment.⁷⁴ In *Hollis v. Lynch*, the Court affirmed the restrictions of dangerous and unusual weapons, like the M-16 machine gun.⁷⁵ The Supreme Court decisions provide a general framework, but the Fifth Circuit has further clarified the framework standard for Second Amendment restrictions.⁷⁶

The Fifth Circuit adopted a two-step framework to evaluate the constitutionality of a law potentially infringing on the Second Amendment.⁷⁷ The court first evaluated “whether the law regulates conduct that falls within the scope of the Second Amendment [right]” and second, if the law passed either strict or intermediate scrutiny based on the burden of the protected right.⁷⁸ Laws based on *Heller*’s longstanding prohibitions “would likely fall outside the ambit of the Second Amendment” and be presumptively valid, or the laws would be upheld under intermediate scrutiny.⁷⁹ To prevent challenges, Texas should not rely only on the presumptive validity of laws based on mental illness.⁸⁰ Since Texas is in the Fifth Circuit, the minimum Texas would have to satisfy is the intermediate scrutiny standard, but should try to satisfy strict scrutiny to survive any claims of unconstitutionality best.⁸¹ Since Congress has found sufficient connections between mental illness and violence, Texas will not have to reach too far for a compelling governmental interest.⁸² Additionally, the Federal Government has passed a law preventing firearm ownership by the mentally ill.⁸³

D. Federal Gun Laws Prevent Mentally Ill from Ownership or Possession of Firearms

In recent years, the United States has become increasingly aware of dangers the mentally ill could pose to the public.⁸⁴ The shooters in several recent high profile shootings possessed or claimed a mental illness and most

74. See *id.* at 626–27; see *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016).

75. See *Hollis*, 827 F.3d at 451.

76. See *infra* notes 77–82.

77. See *Nat’l Rifle Ass’n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185, 194, 197 (5th Cir. 2012).

78. *Id.* at 194–95.

79. *Id.* at 195–96 (“reasonable fit between the challenged regulation and an important government objective”).

80. See *id.* at 194–95.

81. See *id.* at 195 (“severe burden on the core Second Amendment right . . . should require a strong justification”).

82. See *infra* Section II.D.

83. See *infra* Section II.D.

84. See Vernick et. al., *Mental Health Emergency Detentions and Access to Firearms*, 43 J.L. MED. & ETHICS 76 (2015), <http://onlinelibrary.wiley.com/doi/10.1111/jlme.12222/pdf>.

plead insanity as a defense.⁸⁵ The Federal Gun Control Act makes it a crime for the mentally ill to own or possess a firearm.⁸⁶

It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.⁸⁷

The statute does not define the exact meaning of “mental defective” or “committed to mental institution.”⁸⁸ The Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) attempted to define the terms for the Federal Gun Control Act in the Code of Federal Regulations.⁸⁹ The ATF defined “adjudicated as a mental defective” as:

A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: [sic] Is a danger to himself or to others; or [sic] Lacks the mental capacity to contract or manage his own affairs. [sic] The term shall include—a finding of insanity by a court in a criminal case; and those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility.⁹⁰

ATF Form 4473 question 11f contains the restrictions for licensed dealers to transfer firearms.⁹¹ The instructions to question 11f further define the criteria from the Code of Federal Regulations.⁹² The form defined “commitments to a mental institution” as:

85. See Nicole Palermo, *The Fiend Whom I Had Let Loose Among Them: Should Parents be Liable for Their Children's Atrocities?*, 47 CONN. L. REV. 1491, 1503–05 (July 2015) (describing Sandy Hook shooter's mental illness history); see *Jury Finds Eddie Ray Routh Guilty in 'American Sniper' Case*, CNN (Feb. 25, 2015 12:30 PM), <http://www.cnn.com/2015/02/24/us/american-sniper-chris-kyle-trial/index.html>.

86. See 18 U.S.C. § 922(g)(4) (2016).

87. *Id.*

88. See 18 U.S.C. §§ 921, 922(g)(4) (2016).

89. See 27 C.F.R. § 478.11 (2016).

90. *Id.*

91. See *ATF Form 4473*, ATF, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (last visited Feb. 7, 2017); see *ATF Form 4473*, ATF, <https://www.atf.gov/firearms/qa/atf-form-4473-required-when-unlicensed-person-sells-or-disposes-firearm> (last visited Feb. 7, 2017) (requiring a Form 4473 when a licensed dealer transfers a firearm to someone).

92. See *ATF Form 4473*, ATF, <https://www.atf.gov/firearms/docs/4473-part-1-firearms-transaction-record-over-counter-atf-form-53009/download> (last visited Feb. 7, 2017).

A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitment for other reason, such as for drug use.⁹³

While seemingly overbroad, the Form 4473 also prevents the application to those merely visiting for observation or voluntarily admitted.⁹⁴ The Federal Gun Control Act protects the interests of the mentally ill by requiring the satisfaction of difficult standards.⁹⁵ Congress found sufficient reason to regulate the possession of firearms to the mentally ill without violating their Second Amendment right to arms.⁹⁶

However, the restriction on ownership by the Federal Gun Control Act does not appear to be a permanent ban on ownership.⁹⁷ In *Keyes v. Lynch*, the court held that the restriction on gun ownership was unconstitutional; the court committed the plaintiff as a minor for a period of eight days, but he later was a soldier and a police officer that was trained in the use of guns and explosives without incident.⁹⁸ Although the restriction would have prevented him from owning a firearm, the officer proved facts and circumstances that he was not a danger to himself or others.⁹⁹ Not subject to the law, the court removed the restriction from the police officer.¹⁰⁰ Other laws, like Texas's Health & Safety Code, also permit ways to remove the restriction.¹⁰¹

While some dispute the effectiveness of the Federal Gun Control Act from preventing mass shootings and the stigmatization of the mentally ill, Congress has found the reasoning for the restriction compelling since enacting the Federal Gun Control Act in 1968.¹⁰² However, the proposed legislation prevents the concerns raised.¹⁰³ In light of the ability to remove the restriction, Congress has not created an unconstitutional restriction of ownership by the mentally ill, but a temporary restriction.¹⁰⁴ Despite the regulations on purchasing firearms, the probate proceedings, however, do not

93. *Id.*

94. *See id.*

95. *See supra* notes 86–94.

96. *See D.C. v. Heller*, 554 U.S. 570, 626 (2008).

97. *See Keyes v. Lynch*, 195 F. Supp. 3d 702,722 (M.D. Pa. 2016).

98. *See id.* at 706–07.

99. *See id.* at 720–22.

100. *See id.*; *see also* *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 681–99 (6th Cir. 2016) (permitting a challenge to the restriction for man committed twenty-eight years ago for a month following a divorce, but had no other evidence of mental deficiency).

101. *See infra* Section II.F.

102. *See* 18 U.S.C. § 922 (2016); *see* Norko & Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONN. L. REV. 1609, 1629–31 (May 2014) (critiquing the effectiveness of Connecticut's laws regulating firearm ownership by the mentally ill).

103. *See infra* Section IV.E.

104. *See supra* Section II.D.

require any judicial check on the inheriting of firearms by the mentally ill.¹⁰⁵ In the presented hypothetical, the shooter would have to prove the existence of facts that would prove he was no longer a danger to himself or others prior to ever receiving the guns.¹⁰⁶

E. Current Texas Gun Laws

While the federal law restricts the sale to anyone mentally ill, Texas has not directly limited the possession and ownership from the mentally ill.¹⁰⁷ However, Texas applies the Federal Gun Control Act to ownership and possession of firearms.¹⁰⁸ Texas incorporates the Federal Gun Control Act by requiring applicants for a handgun license to be capable of sound judgment and satisfying federal laws.¹⁰⁹ The Texas Code of Criminal Procedure also addresses firearm possession by a person with mental illness.¹¹⁰ The law outlines the procedure for a law enforcement officer to handle and return a firearm after confiscation from someone with mental illness.¹¹¹ So while Texas has not directly addressed the issue in its own laws, it has applied the Federal Gun Control Act in applicable laws.¹¹² Texas should further apply the Federal Gun Control Act in the probate setting to prevent the bypassing of federal regulations.¹¹³

F. Mental Illness

Misunderstanding mental health leaves the real victims, the mentally ill, helpless and stigmatized.¹¹⁴ Mental illnesses are prevalent and undertreated in the U.S.¹¹⁵ Accordingly, legislation should take great care to protect the rights of the mentally ill, but also to balance public interests through research, care, and enforcement of applicable laws.¹¹⁶ Congress found the potential danger of violence to be a compelling interest to restrict the Second

105. See *supra* Section II.B.

106. See *infra* Section IV.E.

107. See TEX. PENAL CODE ANN. § 46.04 (West 2016) (prohibiting unlawful possession for felons and those convicted of domestic assault).

108. See TEX. GOV'T. CODE ANN. § 411.172 (West 2016) (requiring Texas applicants for handgun license to be capable of sound judgment and qualify under federal and state laws).

109. See *id.*

110. See TEX. CODE OF CRIM. PROC. ANN. art. 18.191 (West 2016) (applying to officers that confiscate a weapon from suspected mentally ill person, but not if the weapon was involved in a violent crime).

111. See *id.*

112. See *supra* Section II.E.

113. See *supra* Section I.

114. See Vernick et. al., *Mental Health Emergency Detentions and Access to Firearms*, 43 J.L. MED. & ETHICS 76 (2015), <http://onlinelibrary.wiley.com/doi/10.1111/jlme.12222/pdf>.

115. See *supra* notes 4–7.

116. See Vernick, *supra* note 114.

Amendment to those suffering from mental illness in certain settings.¹¹⁷ The ATF restricts individuals involuntarily committed, guilty by reason of insanity, or unable to stand trial by reason of mental defect from owning or possessing firearms.¹¹⁸ The ATF does not restrict ownership to everyone that has suffered from mental illness, especially not those that have been able to treat the mental illness through medication or coping.¹¹⁹ Despite criticism of the Federal Gun Control Act's effectiveness, the mental health system needs further exploration and reformation to best protect interests.¹²⁰

1. Standards for Civil Commitments

There are two prevalent standards for a civil commitment: an "overt act" or the reasonable belief of danger.¹²¹ The book, *Crazy*, exhibits the first standard—an overt act.¹²² The author describes the aftermath of his son breaking into a home due to mental illness.¹²³ The police officer told the Author to claim that his son had threatened to kill him; otherwise, the son would go to prison without treatment.¹²⁴ Similarly, Georgia has adopted a statute with the overt act requirement:

"Inpatient" means a person who is mentally ill and: who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons.¹²⁵

This overt act standard requires more than other states' standards, but still frustrates those trying to protect loved ones struggling with mental illness.¹²⁶ For states that follow the overt act standard, the threshold will be higher to prove mental illness.¹²⁷ While the heightened standard makes it easier to protect Second Amendment rights, the standard also makes it harder for the mentally ill to receive needed medical aid.¹²⁸ The overt act requirement is

117. See 18 U.S.C. § 922(g)(4) (2016).

118. See *supra* Section II.D.

119. See *supra* Section II.D.

120. See *supra* Section II.F.

121. See GA. CODE ANN. § 37-3-1 (West 2016); see TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2016).

122. See Pete Earley, *Crazy* 22 (2006).

123. See *id.*

124. See *id.* (even after breaking into a house and destroying property, Georgia law would not treat the son for a mental illness against his will unless he had threatened someone).

125. GA. CODE ANN. § 37-3-1 (West 2016).

126. See Earley, *supra* note 122.

127. See *id.*

128. See *id.*

directly contrasted by the reasonable belief of danger standard used by other states.¹²⁹

Texas applies the reasonable belief of danger standard.¹³⁰ Texas has declined to require any overt act to commit a mentally ill individual, although an overt act would meet the threshold for commitment.¹³¹ Instead, Texas requires a judicial finding of:

[C]lear and convincing evidence, that: the proposed patient is a person with mental illness; and as a result of that mental illness the proposed patient: is likely to cause serious harm to the proposed patient; is likely to cause serious harm to others; or is: suffering severe and abnormal mental, emotional, or physical distress; experiencing substantial mental or physical deterioration of the proposed patient's ability to function independently, which is exhibited by the proposed patient's inability, except for reasons of indigence, to provide for the proposed patient's basic needs, including, food, clothing, health, or safety; and unable to make a rational and informed decision as to whether or not to submit to treatment.¹³²

Since the burden requires clear and convincing evidence, the court requires “expert testimony and, unless waived, evidence of a recent overt act or a continuing pattern of behavior.”¹³³ The judge will not justify a commitment only by a diagnosis of an expert.¹³⁴ Under this standard, the defendant could defend the allegations in an adverse hearing prior to court ordered mental health services.¹³⁵ While some legislatures prefer the overt requirement, the reasonable belief of danger standard best suits the proposed law.¹³⁶ The standard gives the estate representatives the ability to bring claims of mental incapacity during a period of grief.¹³⁷ In the hypothetical, if the court had to evaluate the shooter's mental capacity before releasing the firearms, the shooter likely would not have been able to prove otherwise.¹³⁸

129. See TEX. HEALTH & SAFETY CODE ANN. § 574.034 (West 2016).

130. See *id.*

131. See *id.*

132. *Id.*

133. *Id.*

134. See *State for the Best Interest and Protection of N.D.*, 2015 WL 1004310, 4 (Tex. App.—San Antonio 2015, no pet.) (citing *In re Breedon*, 4 S.W.3d 782, 784 (Tex. App.—San Antonio 1999, no pet.).

135. See *id.*

136. See *infra* Section IV.

137. See *infra* Section IV.

138. See *infra* Section IV.E.

2. *Insanity Defense and Unable to Stand Trial*

A defendant may use the insanity defense to avoid prosecution in Texas.¹³⁹ The defense negates the *mens rea* for those who committed a crime due to a mental disease or defect.¹⁴⁰ The defendant bears the burden of proof in the trial to produce evidence and persuade the jury.¹⁴¹ The ATF has found that if the defendant has successfully proven the insanity defense, the defendant falls under the “adjudicated mentally defective” restriction on ownership.¹⁴² The evidence heard by a jury finding mental deficiency and a court committing someone for a mental illness are essentially the same.¹⁴³ The court should prevent the defendant from denying the jury’s judgment by collateral estoppel.¹⁴⁴ However, if the defendant proves otherwise, the court can rehear the issue of mental deficiency.¹⁴⁵

The ATF also restricts ownership by those deemed incompetent to stand trial.¹⁴⁶ Texas has defined someone to be incompetent if the person is unable to consult and rationally understand his or her lawyer or is unable to understand the nature of the judicial proceedings.¹⁴⁷ After an initial hearing, the court requires an examination of mental capacity by an expert.¹⁴⁸ The expert will examine the ability to comprehend the nature of the lawsuit, as well as history of mental illness and the effects it may have on the trial.¹⁴⁹ After proving the inability to stand trial, the court will also not rehear the issue of mental disability without sufficient evidence to support ignoring collateral estoppel.¹⁵⁰ The proposed law would permit the beneficiary to have equal opportunity to present evidence that the mental incapacity no longer exists during the probate hearing.¹⁵¹

3. *Capacity Standard Is Not Permanent*

Mental illness is not a permanent restriction on firearm ownership.¹⁵² A judicial proceeding must clear an individual in Texas deemed to have a

139. See TEX. PENAL CODE ANN. § 8.01 (West 2016).

140. See *id.*

141. See *McAfee v. Texas*, 467 S.W.3d 622, 636 (Tex. App.—Houston [1st. Dist.] 2015, pet. ref’d).

142. See *supra* Section II.D.

143. See *supra* Section II.D.

144. See *Tex. Dep’t of Pub. Safety v. Petta*, 44 S.W.3d 575, 578–79 (Tex. 2001) (explaining doctrine of collateral estoppel elements and policy reasons).

145. See *supra* Section II.F.

146. See *supra* Section II.D.

147. See TEX. CODE CRIM. PROC. ANN. art. 46B.003 (West 2016).

148. See TEX. CODE CRIM. PROC. ANN. art. 46B.005, 46B.024 (West 2016).

149. See TEX. CODE CRIM. PROC. ANN. art. 46B.024 (West 2016).

150. See *supra* notes 144–45.

151. See *infra* Part IV.

152. See *Keyes v. Lynch*, 195 F. Supp. 3d 702,722 (M.D. Pa. 2016).

mental illness, prior to removing the firearm disability.¹⁵³ Texas has adopted the judicial standard that courts must find that the person is no longer likely to act in a manner dangerous to public safety and that removing the person's disability to purchase a firearm is in the public interest before removing a firearm disability.¹⁵⁴ The court must find the opposite of the civil commitment standards to remove the restriction.¹⁵⁵ However, Texas has also permitted a challenge to the restriction because of evidence that a "discharge[] from all mandatory treatment, supervision, or monitoring" by an administrator prior to the end of the individual's court mandated term because of misdiagnosis.¹⁵⁶ Considering both challenges to remove the firearm disability, Texas has adopted the approach that mental illness is only a temporary restriction on ownership.¹⁵⁷ The proposed law will use aspects of the Health & Safety Code § 574.088 in the hearing to evaluate the continued firearm disability.¹⁵⁸

4. Critiques of Mental Health System

With every mass shooting, America reels from the impact.¹⁵⁹ The most notable occurrence in recent memory was the Sandy Hook massacre of twenty elementary students and six faculty members by an individual that suffered from mental illness.¹⁶⁰ The shooter had evidence of mental illness but had not displayed any warning signs of dangers to society.¹⁶¹ In the aftermath of the shooting, advocates of mental health reform advocated for the legal and political communities to increase recognition and treatments for the mentally ill.¹⁶² For example, court systems contained persistent problems of repeat offenders being fined or jailed without receiving treatment for the underlying mental illness.¹⁶³ Michigan and Florida are just examples of the

153. See TEX. HEALTH & SAFETY CODE ANN. § 574.088 (West 2016).

154. *Id.*

155. See *supra* notes 132, 154.

156. Tex. Dep. Of Public Safety v. Randolph, No. 02-13-00025-CV, 2014 WL 1875826, *6 (Fort Worth—June 2015) (overturning restriction for patient dismissed prior to term because misdiagnosis of autoimmune disorder as mental illness).

157. See *supra* notes 153-56.

158. See *infra* Section IV.C (handling mental health proceedings in some probate courts, the judges will be familiar with the standards and evidence of the Health & Safety Code).

159. See Courtade, *supra* note 3 (advocating steps to prevent future mass shootings in the aftermath of the Sandy Hook Elementary disaster).

160. See *id.*

161. See *id.*; Norko & Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONN. L. REV. 1609, 1622-23 (May 2014) (critiquing the effectiveness of Connecticut's laws regulating firearm ownership by the mentally ill).

162. See Courtade, *supra* note 3.

163. See *id.*, see Pete Earley, *Crazy* 50, 52-54, 56-57 (2006) (patients were "regulars" and only received an average of 12.7 seconds with the doctor).

condition the mental health system and law is in.¹⁶⁴ Symptoms of a larger problem, mental health law requires further research to balance the protections of society and the mentally ill.¹⁶⁵

III. HOW OTHER STATES DEAL WITH FIREARMS AND MENTAL ILLNESS IN PROBATE SETTINGS

A perusal of other state statutes does not offer alternate solutions.¹⁶⁶ The Federal Regulations do not address probate matters except for taxation.¹⁶⁷ Maryland and Connecticut's laws most closely related to firearms in probate also do not provide realistic solutions for Texas to adopt.¹⁶⁸ The proposed law will need to develop a novel application because of the failure of other states to provide workable solutions.¹⁶⁹

A. Federal Regulations

The Federal Regulations do not specifically address matters of probate and firearms.¹⁷⁰ The only occurrence in the Federal Regulations covers the transfer tax of weapons.¹⁷¹ Even then, the act only mentions transfer taxes of certain firearms and does not address any checks on beneficiaries inheriting firearms.¹⁷² ATF Form 5 only regulates the transfers of short-barreled firearms that can fire high-powered shotgun or rifle ammunitions.¹⁷³ The Federal Regulations could address the issue, but the federal courts generally leave probate procedures to the states.¹⁷⁴ Because of the public filing of forms in the probate court, Texas citizens and Second Amendment supporters would not prefer a similar system listing firearms on forms because of the disclosure requirements.¹⁷⁵

164. See *supra* notes 162–63.

165. See *infra* Part IV.

166. See *infra* Part III.

167. See *infra* Section III.A.

168. See *infra* Section III.B–C.

169. See *infra* Part IV.

170. See generally C.F.R. (2016) (searching the Federal Regulations does not produce any results on the transferability of firearms in probate).

171. See 27 C.F.R. § 479.90a (2016); see *ATF Form 5* (5320.5), ATF, <https://www.atf.gov/firearms/docs/form/form-5-application-tax-exempt-transfer-and-registration-firearm-atf-form-53205/download> (last visited Feb. 7, 2017).

172. See 27 C.F.R. § 479.90a; see *ATF Form 5* (5320.5), *supra* note 171.

173. See *ATF Form 5* (5320.5), *supra* note 171; see I.R.C. § 5845(e) (2016).

174. See *Comparing Federal & State Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Jan. 27, 2017).

175. See *infra* Section IV.F; see also N.Y. Surr. Ct. Proc. Act § 2509 (McKinney 2016) (requiring a detailed inventory of firearms as part of an estate, but Texas has lower regulations of firearms and would not desire a judicial paper trail of firearms).

B. Maryland

A proposed statute similar to the Maryland regulation could correct the hole in the Texas Estates Code.¹⁷⁶ The regulation specifically applies to the transfer of firearms by an inheritance.¹⁷⁷ The procedure requires an application to the Secretary of State Police.¹⁷⁸ The regulation allows transfer of firearms to a minor but requires the estate to maintain possession until the minor is twenty-one years old.¹⁷⁹ The application process would require cross-referencing a list of those suffering from mental illness to effectively prevent the inheritance by those with mental illness.¹⁸⁰ While certainly a possibility to fix the issue in the Texas Estates Code for those with a mental illness, the solution would likely not be an appealing solution to Texas citizens and Second Amendment supporters because it would require disclosure of exact firearms in court documents.¹⁸¹

C. Connecticut

Connecticut has not addressed the specific subject of firearms in the probate courts and procedure besides the removal of the federal firearms disability from the mentally ill.¹⁸² However, Connecticut relies heavily on the National Instant Criminal Background Check System (NICS) for checking before transferring ownership of firearms.¹⁸³ Like Texas, Connecticut also has adopted the Federal Gun Control Act's restriction to the mentally ill.¹⁸⁴ However, Connecticut's stringent restrictions on the ownership of firearms far exceeds the restrictions Texas currently has in place.¹⁸⁵ Connecticut requires a check of the NICS database to clear the purchase of firearms.¹⁸⁶ Connecticut could apply the NICS check to the probate courts to search the database prior to transferring a firearm to a

176. See MD. CODE REGS. 29.03.01.10 (West 2016) (outlining the procedure for the transfer of weapons after probate).

177. See *id.*

178. See MD. CODE REGS. 29.01.05.01, 03.01.10 (West 2016).

179. See *id.*

180. See MD. CODE REGS. 29.01.05.01, 03.01.10 (West 2016).

181. See *infra* Section IV.F.

182. See *generally* CONN. GEN. STAT. § 45a (West 2016) (searching the Connecticut General Statutes only produces one mention of firearms in probate).

183. See CONN. GEN. STAT. § 29-36l (West 2016) (requiring database to include those prevented by criminal or mental illness from purchasing firearms).

184. See CONN. GEN. STAT. § 53a-217(a)(7) (West 2016) (making it a criminal offense to own or possess a firearm if in violation of Federal Gun Control Act).

185. See CONN. GEN. STAT. §§ 29-33, 29-37a (West 2016); see TEX. PENAL CODE ANN. § 46.02 (West 2016).

186. See CONN. GEN. STAT. § 29-36l (West 2016) (requiring database to include those prevented by criminal or mental illness from purchasing firearms).

beneficiary of an estate.¹⁸⁷ While a seemingly easy solution, relying solely on the NICS database prevents heirs from contesting the continuing restriction and prevents judges from deciding how best to dispose of the firearm if immediate inheritance is illegal.¹⁸⁸ Texas will have to adopt a law that would pave the way for similar laws in other states.¹⁸⁹

IV. PROPOSED REGULATION

This section will address the proposed legislation that would create a hearing in the probate courts after the inventory hearing before permitting a firearm asset to transfer to a beneficiary with a history of mental illness.¹⁹⁰ The simple application of the NICS database to the probate setting would not permit a beneficiary to contest the prior disability.¹⁹¹ Likewise, Maryland's inheritance transfer applications would not help because the firearm owners will not want the public to know what firearms they own.¹⁹² Since no other solution exists for Texas' system, Texas will have to solve the problem with novel applications of health laws to the probate system.¹⁹³

A. Inventory Requirement

The best prospective place to require disclosure of firearms and history of mental illness would be in the inventory filing and the inventory hearing.¹⁹⁴ Currently, the Texas Estates Code requires "the representative [to] prepare and file with the court clerk a single written instrument that contains a verified, full, and detailed inventory of all estate property that has come into the representative's possession or of which the representative has knowledge."¹⁹⁵ The representative has already detailed, valued, and identified the estate's personal property as separate or community property; requiring the disclosure of firearms passing to someone with a mental illness would not burden the representative.¹⁹⁶ The legislature would add the proposed legislation to Texas Estates Code § 309.501(b)(3).¹⁹⁷ Because the Federal Gun Control Act restricts ownership of all firearms for the mentally

187. *See id.*

188. *See infra* Section IV.C, F.

189. *See infra* Part IV.

190. *See infra* Part IV.

191. *See supra* note 188.

192. *See infra* Section IV.F.

193. *See supra* Part IV.

194. *See infra* Section IV.A.

195. TEX. EST. CODE ANN. § 309.051 (West 2016); *see also* Appendix B (West's Texas Forms for Inventory, Appraisal, and List of Claims. The underlined part has been added as an example for the proposed inventory amendment.).

196. *See* TEX. EST. CODE ANN. § 309.051.

197. *See* Appendix A.

ill, the exact make, model, and descriptions would not appear in court documents or the inventory.¹⁹⁸ If the executor of the estate exercising due diligence does not find firearms or beneficiaries with a history of mental illness, the inventory should state so and bypass the proposed hearing.¹⁹⁹ Once notified of a beneficiary with a history of mental illness, the court has the responsibility to ensure the beneficiary could legally inherit the firearm.²⁰⁰

In the alternative that a prior court, or lawful authority, has not determined that the beneficiary has a mental illness before the probate action, but the estate representative believes one exists, the proposed law allows flexibility for the representative to delay the hearing requirement until a civil commitment matter is resolved.²⁰¹ The Texas Legislature could decide to permit an estate representative to initiate a civil commitment action through this hearing requirement.²⁰² The Legislature would also have to amend the civil commitment requirements to permit applications occurring within the probate setting.²⁰³ For example, “. . . in courts that also handle probate matters, the estate’s representative may file an application for court-ordered mental health services for beneficiaries that have a mental illness.”²⁰⁴ This would work best in courts that also handle mental health matters, in addition to probate matters.²⁰⁵ Once a court has initiated the hearing, the court would evaluate the beneficiary for mental illness and the best possible resolution for the hearing.²⁰⁶

B. Amending the Circumstances for Will Modification

Currently, the Texas Estates Code does not permit a judicial modification of a will to prevent illegal ownership by a beneficiary.²⁰⁷ To fix this, the Texas Legislature should amend Texas Estates Code § 255.451 to add a section (4).²⁰⁸ This would permit the court to judicially modify the will when the beneficiary cannot prove the mental capacity to own the firearm during the hearing.²⁰⁹ Without it, the court may encounter difficulties

198. See *supra* Section II.A, D.

199. See Appendix B (example of proposed inventory requirement added to West’s Texas Forms for Inventory).

200. See *infra* Section IV.C.

201. See *infra* note 204.

202. See *infra* note 204.

203. See TEX. HEALTH & SAFETY CODE ANN. § 574.001 (West 2016).

204. See TEX. HEALTH & SAFETY CODE ANN. § 574.001 (West 2016) (amending language example).

205. See *infra* note 212.

206. See *infra* Section IV.C, D.

207. See *supra* note 59.

208. See Appendix D.

209. See *infra* Section IV.D.

finding a way to justify amending the will during the hearing.²¹⁰ The additional rule would also apply if the legislature desired to apply this rule in other circumstances in which the beneficiary may not legally own or possess the firearm.²¹¹

C. *Passing Law to Describe the Hearing and Standards*

The simple application of the Texas Health & Safety Code to the probate hearing would be a relatively easy process.²¹² The Texas Legislature would need to cross-reference the amendment in the Texas Estates Code to the Texas Health & Safety Code § 574.034, Texas Health & Safety Code § 574.088, Federal Gun Control Act, and ATF regulations.²¹³ Cross-referencing the amendment provides the necessary flexibility the law requires to adjust based on updates to the mental health laws.²¹⁴ Under this formulation, the beneficiary can defend against a claim of mental illness by the representative.²¹⁵ The estate's representative would have the burden of proof to demonstrate that a court has deemed the beneficiary to be mentally deficient to the point that the beneficiary cannot own a firearm.²¹⁶ The beneficiary can contest the evidence of the plaintiff or provide evidence that the restriction based on mental illness no longer applies.²¹⁷ In addition to protecting a beneficiary's rights in owning assets, the court would decide the best resolution on a case-by-case basis.²¹⁸

D. *Possible Resolutions If the Heir Cannot Satisfy Standard*

If the heir cannot prove legal inheritance at the time of probate, the judge would determine the best resolution for the beneficiary and society.²¹⁹ The Texas Legislature should pass a law to guide the possible resolutions that a judge can make.²²⁰ The three possible remedies would prevent the court from deviating from the testator's intent to gift to a beneficiary, but would also

210. See TEX. EST. CODE ANN. § 255.451 (West 2016).

211. See *supra* Section II.F..

212. See *Bexar County Probate Courts*, BEXAR COUNTY, <http://home.bexar.org/pcourt/index.html> (last visited Jan.27, 2017) (larger counties, like Bexar County, may have specialized probate courts that cover both Probate and Mental Health proceedings meaning judges will already be familiar with mental health standards).

213. See *supra* Sections II.D, F.

214. *Id.*

215. See *supra* note 134.

216. See Appendix D.

217. See Appendix D.

218. See *infra* Section IV.D.

219. See Appendix E.

220. See Appendix E.

prevent the unlimited passing of firearms.²²¹ The law would require courts to proceed systematically through possible heirs to attempt to keep the firearm “within the family.”²²² The heir would still receive compensation for not being able to inherit the firearm.²²³ This would reassure gun owners and heirs that have family heirlooms or firearms with intrinsic value.²²⁴ If none of the beneficiaries or family members want the firearm, the court would then have the freedom to permit the estate representative to sell the firearm in accordance with Texas Estates Code § 356.101–105.²²⁵ The Texas Legislature should amend the sale of personal property statutes to permit the estate representative to sell a firearm because the beneficiary cannot inherit and other close family members do not want to inherit the firearm.²²⁶ Written this way, the judge would have the freedom to execute the wishes of the decedent, but would still protect society from those that Congress views as unsafe to own firearms.²²⁷

E. Legal Analysis of Proposed Statutes

Had the proposed laws been in place during the earlier hypothetical, the shooter never would have inherited the firearms after his parents passed away.²²⁸ The estate’s representative would have noticed the history of mental illness and prior commitments, causing the court to have the mental capacity hearing.²²⁹ The court would have found the evidence overwhelming for the shooter’s mental illnesses.²³⁰ The court would require the shooter to present evidence that he was no longer a danger to himself or others to inherit the weapons.²³¹ After the shooter’s inability to convince the court, the court would enable different family members to accept them or conduct a judicial sale.²³² Joe and Sandy would still have Kelly.²³³ The proposed law would have prevented the whole hypothetical from happening.²³⁴

221. See Appendix E (or an heir’s vested interest in the asset).

222. See Appendix E.

223. See Appendix E.

224. See Appendix E.

225. See Appendix E.

226. See Appendix F.

227. See Appendix E.

228. See *supra* Section I.

229. See *supra* Section IV.A.

230. See *supra* Section IV.C.

231. See *supra* Section IV.C.

232. See *supra* Section IV.D.

233. See *supra* Section I.

234. See *supra* Section I.

F. Possible Weaknesses

The proposed law may have weaknesses and face hurdles to acceptance.²³⁵ Texas gun owners will likely not favor or pass any law that would require disclosure of firearm ownership to the public records of the courts.²³⁶ For example, The Journal News received severe backlash from Second Amendment supporters for disclosing the homes of handgun owners in several counties.²³⁷ However, because the ban on ownership is a blanket ban and the amended inventory requirement would not require specific disclosures of firearms, Second Amendment supporters should not worry.²³⁸ The Texas Legislature needs to craft language that would ensure the law would not be a regulation of firearm ownership, but instead a barrier to the mentally ill who can not legally purchase firearms or own firearms from owning one.²³⁹

For some groups, restricting the mentally ill from owning firearms is viewed as stigmatization of the mentally ill.²⁴⁰ Due to incidents that restrict access to treatment, the mentally ill suffer and hurtful labels are placed on this group, blaming them for tragic, violent acts.²⁴¹ Contrary to concerns, the proposed law would apply only to those who have become eligible for commitment due to causing danger to either themselves or others or those individuals who have already committed a crime and plead guilty because of insanity.²⁴² Stigmatization is a valid concern; however, a better understanding of mental illness and treatments cure the stigmatization of the mentally ill, rather than ignoring possible laws that could protect the mentally ill and the public.²⁴³

While the United States Government restricts both the ownership of firearms and the mentally ill, the House of Representatives voted to get rid of a law that prevented Social Security disability beneficiaries flagged in the background check system from purchasing firearms.²⁴⁴ As a response to the

235. See *infra* Section IV.F.

236. See Rebecca Shapiro, *New York Journal News Publishes Gun Owners' Names in Westchester, Rockland Counties*, HUFFINGTON POST, (Dec. 25, 2012, 11:46 AM), http://www.huffingtonpost.com/2012/12/25/new-york-journal-news-gun-owners-westchester-rockland-counties_n_2362530.html.

237. See *id.*

238. See *supra* Section IV.A.

239. See *supra* Section IV.

240. See Michael A. Norko & Madelon Baranoski, *Gun Control Legislation in Connecticut: Effects on Persons with Mental Illness*, 46 CONN. L. REV. 1609, 1629–31 (2014), (critiquing the effectiveness of Connecticut's laws regulating firearm ownership by the mentally ill).

241. See *supra* note 102, 46 CONN. L. REV. 1609, 1629–31 (2014).

242. See *supra* Section II.E, IV.A.

243. See *supra* note 102

244. See *House Votes to Scrap Rule Meant to Keep Guns from Severely Mentally Ill*, CBSNEWS (Feb. 3, 2017, 11:40 AM), <http://www.cbsnews.com/news/house-votes-to-scrap-rule-meant-to-keep-guns-from-severely-mentally-ill>.

2012 Sandy Hook school shooting, the House of Representatives voted to repeal the law because the system prevented beneficiaries from purchasing firearms without an adequate appeal process.²⁴⁵ The law contained an appeal process, but took so long that it had the effect of revoking Second Amendment rights.²⁴⁶ The proposed law, however, would prevent the concerns surrounding the Social Security law by requiring a hearing within a short amount of time.²⁴⁷ The court would not prevent inheritance unless the estate representative proved a mental illness that the beneficiary cannot rebut.²⁴⁸ The problems the House had with the Social Security law would not apply to the proposed law.²⁴⁹ While Second Amendment rights are vital to Americans, carefully crafted legislation, like this proposed law, would balance the interests of gun ownership with society's public interests.²⁵⁰ In the meantime, society needs to explore further, develop, and refine the mental health system and mental health law; legislatures can revise laws to better balance interests of the mentally ill and the public.²⁵¹

V. CONCLUSION

In conclusion, the law proposed would prevent individuals with a history of mental illness from inheriting firearms without judicial approval.²⁵² The proper exploration of mental health would help strengthen the law and applications to prevent unchecked firearm possession and judicial overreach into the Second Amendment.²⁵³ The law would likely not suffer a constitutional challenge because of current Second Amendment caselaw.²⁵⁴ Even then, the Texas Legislature should perform research to justify the law for any constitutional challenges.²⁵⁵ Society has experienced an increase in awareness of mass shootings, the potential dangers of mental health, and importance of responsible gun ownership.²⁵⁶ While the Second Amendment protects firearm ownership, the courts have upheld the restriction of mental health ownership on several occasions.²⁵⁷ Practitioners should be aware of the dangers of firearms in probate when preparing clients' estate plans; however, this law would also help those unprepared for death by giving

245. *See id.*

246. *See id.*

247. *See supra* Section IV.

248. *See supra* Section IV.

249. *See* Section IV.

250. *See supra* Section IV.

251. *See supra* note 3, at 16.

252. *See supra* Section IV.

253. *See supra* note 251.

254. *See supra* Section II.C.

255. *See supra* Section II.C.

256. *See supra* Section I.

257. *See supra* Section II.D.

courts the ability to adjust based on the needs of every estate, prepared or not.²⁵⁸ Passage of the proposed law would not only pave the way for future laws, but would also prevent the Joe, Sandy, and Kelly hypothetical from ever happening.²⁵⁹ Therefore, due to the criticism of the current laws and updated mental health research, the Texas Legislature needs to carefully critique its laws and adjust them accordingly.²⁶⁰

258. *See supra* note 65; *see supra* Section IV.D.

259. *See supra* Section IV.E.

260. *See supra* note 3, at 16.

APPENDIX

Appendix A

(a) Except as provided by Subsection (c) or Section 309.056 or unless a longer period is granted by the court, before the 91st day after the date the personal representative qualifies, the representative shall prepare and file with the court clerk a single written instrument that contains a verified, full, and detailed inventory of all estate property that has come into the representative's possession or of which the representative has knowledge. The inventory must:

(1) include:

(A) all estate real property located in this state; and

(B) all estate personal property regardless of where the property is located; and

(2) specify which portion of the property, if any, is separate property and which, if any, is community property.

(b) The personal representative shall:

(1) set out in the inventory the representative's appraisal of the fair market value on the date of the decedent's death of each item in the inventory; or

(2) if the court has appointed one or more appraisers for the estate:

(A) determine the fair market value of each item in the inventory with the assistance of the appraiser or appraisers; and

(B) set out that appraisal in the inventory.

(3) identify whether the estate has firearms that are designated to a beneficiary that has:

(A) been determined by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: [sic] Is a danger to himself or to others; or [sic] Lacks the mental capacity to contract or manage his own affairs;

(B) or been involuntarily committed to a mental institution;

(C) in the process of determining the beneficiary's mental capacity through a lawful authority.²⁶¹

261. TEX. EST. CODE ANN. § 309.051 (West 2016) (proposing amendment to require the estate's representative to investigate beneficiaries for a history of mental illness is underlined).

*Appendix B*ESTATE OF [NAME
OF DECEDENT]No. [docket number
of case]In Probate Court No.
[designation of
probate court]

[Name of representative] the [executor/administrator] of the Estate of [name of decedent], deceased, having collected the estate within the time required by law, [OPTIONAL: with the assistance of a majority of the appraisers appointed by the court,] makes and represents and shows to the court that this is a full, complete, true and correct inventory and appraisal of all the property, both real and personal, of such estate which has come to [his/her] knowledge, specifying what property is community property and property owned by the estate in common with others; the appraised value of each article of such property is stated opposite such article in the inventory, viz:

Real Property

<i>[Identification of separate property of decedent]</i>	<i>\$ [dollar amount of property value]</i>
<i>[Identification of community property of decedent and spouse]</i>	<i>\$ [dollar amount of property value]</i>

Personal Property

<i>[Identification of separate property of decedent]</i>	<i>\$ [dollar amount of property value]</i>
<i>[Identification of community property of decedent and spouse]</i>	<i>\$ [dollar amount of property value]</i>

Firearms

The estate, does/does not contain firearms as an asset of the estate. The beneficiary does/does not have a history of mental illness that may disqualify him/her from inheriting the firearm. The court does/does not need to hold a hearing on the capacity of the beneficiary to legally inherit the firearm.

We, the undersigned appraisers, solemnly swear that the appraisal shown above is a full and fair appraisal of the property of the estate of [name of decedent] produced before us by [name of personal representative], the [official designation of representative] of such estate.

[Name of beneficiary 1]

[Name of beneficiary 2]

[Name of beneficiary 3]
[Jurat]

List of Claims

This personal representative makes and represents and shows to the court that this is a full, complete, true and correct list of all claims due or owing to such estate, together with specification of the items of information in relation thereto required by statute, viz:

<u>Debtor</u>	<u>Address</u>	<u>Nature of Debt</u>	<u>Date</u>	<u>Due Date</u>	<u>Amount</u>	<u>Interest</u>	<u>Separate or Community</u>
[Name of debtor]	[Address of debtor]	[Description of debt]	[Date of debt accrual]	[Due date of debt payoff]	\$ [Dollar amount of total debt]	[Percentage rate of interest]%	[Separate/Community]

I [name of representative], do solemnly swear that the above [number of pages] pages shown as inventory and list of claims, and made by me as [title of personal representative] of such estate, are a true, correct, full, and complete statement of the property and claims of the estate that have come to my knowledge [OPTIONAL: and that the appraisal therein shown is the appraisal by the appraisers who have made the above affidavit as appraisers].

[Administrator/Executor]
[Jurat]

This personal representative prays that such inventory and appraisal, and list of claims be approved.

[[Name of administrator]/[Name of executor]]

[Administrator/Executor]
of the Estate of [name of decedent], Deceased.
_____ *[Name of attorney]*²⁶²

262. See *supra* Section IV.A (Adapted from Leopold & Beyer, § 15:5.Inventory, Appraisalment, and List of Claims, West's Texas Forms (West 2016) (additions underlined)).

Appendix C

(a) On the petition of a personal representative, a court may order that the terms of the will be modified or reformed, that the personal representative be directed or permitted to perform acts that are not authorized or that are prohibited by the terms of the will, or that the personal representative be prohibited from performing acts that are required by the terms of the will, if:

(1) modification of administrative, nondispositive terms of the will is necessary or appropriate to prevent waste or impairment of the estate's administration;

(2) the order is necessary or appropriate to achieve the testator's tax objectives or to qualify a distributee for government benefits and is not contrary to the testator's intent; or

(3) the order is necessary to correct a scrivener's error in the terms of the will, even if unambiguous, to conform with the testator's intent;

(4) the beneficiary of the will is not legally permitted to own or possess the object of inheritance at the time of probation.

(b) An order described in Subsection (a)(3) may be issued only if the testator's intent is established by clear and convincing evidence.²⁶³

263. TEX. EST. CODE ANN. § 255.451 (West 2016) (addition underlined).

Appendix D

(a) Upon the affirmative representation in the Inventory by the representative of the estate, the court will hold a hearing within 30 days of the inventory hearing to determine if the heir of a firearm has previously determined to suffer from a mental illness under:

(1) USCA § 922(g)(4),

(2) 27 C.F.R. § 478.11, or

(3) TEX. HEALTH & SAFETY CODE § 574.034.

(b) If the beneficiary has suffered from a mental illness, the court should prevent inheriting the firearm until the beneficiary can prove that the restriction should no longer apply.

(c) The burden of proof will be on the estate's representative to affirmatively prove that the beneficiary has a mental illness.

(d) If there is a mental illness restriction, the court should proceed under (amendment proposed in Section IV.E.) to determine the proper resolution of the firearm.²⁶⁴

264. Proposed Amendment for hearing that would incorporate the Texas Health & Safety Code to evaluate beneficiaries.

Appendix E

- (a) Should the heir not be able to legally inherit a firearm upon the probate proceedings of the estate, the judge should decide from several possible remedies on a case-by-case basis.
- (b) The court should determine if the heir could possibly prove the mental deficiency no longer exists in the foreseeable future.
- (c) If so, the court should permit the estate or another trustee to take care of the firearm until the heir has removed the firearm disability.
- (d) If the court cannot determine whether the heir will ever be competent to own a firearm, the judge should determine whether another heir of the estate, beneficiary of the estate, or closest of kin could inherit the firearm.
- (e) If so, the individual receiving the firearm should compensate the heir for the value of the firearm.
- (f) If the court can find no suitable heir for the weapon, the last possible remedy is to have a judicial sale in accordance with Texas Estates Code §§ 356.101–105; the proceeds going to the original heir of the firearm.²⁶⁵

265. Proposed Amendment that would detail the process a judge is to follow when a beneficiary deemed unable to inherit a firearm from an estate due to a mental illness outlined in TEX. EST. CODE ANN. § 309.051 (West 2016) and Appendix D.

Appendix F

An application may be made to the court for an order to sell estate property if the sale appears necessary or advisable to:

- (1) pay:
 - (A) expenses of administration;
 - (B) the decedent's funeral expenses;
 - (C) expenses of the decedent's last illness;
 - (D) allowances; and
 - (E) claims against the estate; or
- (2) after exhausting all possible remedies prior to judicial sale, an estate representative must sell to prevent a beneficiary with a long history of mental illness from inheriting a firearm that could not legally be purchased; or
- (3) dispose of an interest in estate real property if selling the interest is considered in the estate's best interest.²⁶⁶

266. TEX. EST. CODE ANN. § 356.251 (West 2016) (added language underlined) (TEX. EST. CODE ANN. § 356.102 requires sale of personal property to conform to the application and order for the sale of real estate).