SUCKING SUCCESS OUT OF MINOR SOCIAL MEDIA INFLUENCERS: A CALL FOR TESTAMENTARY CAPACITY RIGHTS IN TEXAS

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I. SOCIETY & MINOR SOCIAL MEDIA INFLUENCERS—AN INTRODUCTION

Fifteen-year-old Emily downloaded the brand-new social media application her friend told her about at cheer practice—TikTok.[1] Her friend told her how she could use popular songs on the app to create dance videos and edit the product to add cool effects.[2] Normally, Emily spent extra time scrolling through Instagram, an application where users post pictures as content, so this new video application seemed pretty exciting.[3] Because of her background in cheer and dance, Emily decided to make up a new dance to the pop song "Shake it Off" by Taylor Swift.[4] After putting in a week's worth of time and effort in creating her new dance and short video, Emily finally posted her new creation on the new platform, TikTok, and she went to bed.[5] The next morning, Emily got ready for school.[6] As she walked down the hallway, she received glances and heard whispers.[7] Confused, Emily finally made it to her locker, where her friend was waiting.[8] Her friend started speaking before she could get a word out, "Emily! Check your phone now. You are viral! Look how many followers you have!" [9] Emily looked down and saw she had 150,000 views on her dance and 50,000 more followers.[10] More importantly, she checked her inbox and received an invitation to represent Prada at the upcoming fashion show in Paris—she instantly realized the potential fame and financial success she could attain with this one social media application that she accessed with only her smartphone.[11]

One year later, Emily turned sixteen and had generated $3 million dollars with her TikTok account.[12] Unfortunately, shortly after obtaining her driver's license, she was involved in a car accident and sustained injuries that led to her untimely death.[13] Because Emily was a minor, she could not execute a valid will.[14] Additionally, with the current laws governing digital assets, Emily's parents could not access Emily's valuable account, leaving it subject to fraud, misuse, or expiration.[15]

Ninety-five percent (95%) of teens between the ages of thirteen and seventeen have access to a smartphone regardless of their race and ethnicity,

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gender, or socioeconomic status.[16] Because smartphone access among teens is nearly universal, increased use of internet access has grown.[17] Nearly forty-five (45%) of teens admit to using the internet "almost constantly," resulting in heightened engagement with YouTube, Instagram, Facebook, Twitter, Pinterest, and other social media sites.[18]

The term "social media" includes websites and applications that allow individuals to connect by sharing various forms of content, including pictures, videos, and short messages.[19] This connection is set up through the individual's operating social media account itself via the leading platforms (YouTube, Instagram, etc.).[20] People then use their own accounts to either subscribe or follow another person's account.[21] An account's subscriber and follower receives updates and notifications when that account posts content.[22] Then, the subscribers or followers can interact with the person through their account by "liking" the content or commenting on it.[23] Certain social media applications and internet sites specialize in displaying different types of content.[24] For example, Instagram and TikTok specialize in sharing photo and video content to a subscriber's followers, while Twitter specializes in sharing short messages.[25] The increased use of these platforms caused a major shift in business marketing methods.[26] Now, both popular businesses and small companies target social media influencers to market their products.[27]

For example, TikTok is a social media platform where users post creative videos that range from how-to's, wellness, and fun dances.[28] For instance, young Charli D'Amelio posted on TikTok for the first time in June

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16. Monica Anderson & JingJing Jiang, *Teens, Social Media & Technology 2018*, PEW RSCH. CTR. (May 31, 2018), https://www.pewresearch.org/internet/2018/05/31/teens-social-med ia-technology-2018/ [https://perma.cc/BFC6-DFX3].

17. *Id.*

18. *Id.*; *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), https://www.thebalancesmb.com /what-is-social-media-2890301 [https://perma.cc/7ZE2-T7AQ].

19. Matthew Hudson, *What Is Social Media?*, THE BALANCESMALL BUS. (June 23, 2020), https://influencermarketinghub.com/what-are-youtube-subscribers-and-how-does-it-work/ https://perma.cc/FW2Y-C9RA].

20. *Id.*

21. *Id.*

22. *What Are YouTube Subscribers and How Does It Work?*, INFLUENCER MARKETINGHUB (Apr. 29, 2019), https://www.socialmediatoday.com/news/timeline-a-brief-history-of-influencers/554377/ [https://perma.cc/WE2T-LEQ8].

23. Hudson, *supra* note 19.

24. *Id.*

25. *Id.*

26. Aaron Brooks, *[Timeline] A Brief History of Influencers*, SOCIALMEDIATODAY (May 9, 2019), https://www.socialmediatoday.com/news/timeline-a-brief-history-of-influencers/554377/ [https://perma.cc/4W5S-F796].

27. *Id.*

28. Werner Geyser, *What Is TikTok? – The Fastest Growing Social Media App Uncovered*, INFLUENCER MARKETINGHUB (Oct. 26, 2020), https://influencermarketinghub.com/what-is-tiktok/ [https://perma.cc/2FX4-XX9D].

2019.[29] Now, D'Amelio is a teen TikTok star who has generated $4 million dollars from all her posts in 2019.[30] At only sixteen years old, D'Amelio made $25,000 from each TikTok video post.[31] To generate this revenue, D'Amelio uses her TikTok account to post content sponsored by companies like EOS cosmetics, and she even documented her time in Paris during fashion week to promote Prada.[32] However, in a majority of states, D'Amelio cannot properly execute estate planning documents to protect her digital or monetary assets because she is a minor.[33]

Part II of this Comment dives into the historical background of the evolving testamentary capacity age by examining societal shifts.[34] This portion highlights that the testamentary capacity age has historically adapted to fit the surrounding societal circumstances to demonstrate that the testamentary capacity age is not fixed.[35] This section also discusses the current testamentary capacity standards as well as public policy supporting these issues.[36] By doing so, the discussion emphasizes that current safeguards could be extended to protect the interest of commercially valuable minor social media influencers (CVMSMIs).[37]

The next section of this Comment, Part III, focuses on minors' rights in other areas of the law.[38] This portion supports the argument that current laws covering minors are applied inconsistently.[39] These inconsistencies arise because minors are granted more rights in other areas of the law that are arguably more regulated than testamentary law.[40] This means that the testamentary capacity requirements arbitrarily disregard the rights of minors, due to their age, while other areas of the law recognize the importance of providing exceptions to qualifying minors.[41]

Part IV of this Comment addresses and examines the current laws regarding digital assets, and specifically, dives deeper into Texas's adopted

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29. Abram Brown, *TikTok's 7 Highest-Earning Stars: New Forbes List Led by Teen Queens Addison Rae and Charli D'Amelio*, FORBES (Aug. 6, 2020, 6:30 AM), https://www.forbes.com/sites/abrambrown/2020/08/06/tiktoks-highest-earning-stars-teen-queens-addison-rae-and-charli-damelio-rule/#343594875087 [https://perma.cc/T2RZ-MWWN].

30. Gabrielle Bernardini, *Charli D'Amelio Makes an Insane Amount per TikTok Video*, DISTRACTIFY (March 5, 2021), https://www.distractify.com/p/how-much-does-charli-make-per-tiktok-video [https://perma.cc/6VC5-W7VN].

31. *Id.*

32. Brown, *supra* note 29.

33. *See* UNIF. PROB. CODE § 2-501 (UNIF. LAW COMM'N amended 2019); TEX. EST. CODE. ANN. § 251.001; COLO. REV. STAT. § 15-11-501 (2021); TENN. CODE ANN. § 32-1-102 (2021).

34. *See* discussion *infra* Part II.

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approach.[42] This examination of the laws governing current digital asset planning calls for the Texas legislature to provide an exception to a CVMSMI to execute a valid will.[43] Without the ability to execute a valid will, minors' heirs may not be able to access their digital assets, though the account is valuable.[44]

Part V of this Comment explains the valuation of social media accounts.[45] This section addresses the problematic situation CVMSMIs are in, explaining what a social media influencer is and the impact they have on society.[46] The information discussed illustrates the need for an exception applicable to CVMSMIs in testamentary capacity law.[47] By doing so, this Comment discusses the inadequate, current options these minors have to protect their digital assets, including the compensation they receive from their digital assets.[48]

Finally, Part VI of this Comment proposes an additional safeguard of appointing a guardian *ad litem* for CVMSMIs to ensure the execution is in minors' best interest and thus specifically calls for a change to Texas legislation.[49] This Comment concludes by proposing a process that will not clog courts or result in unnecessary court costs.[50] Therefore, Texas statutes should create an exception to the testamentary capacity age to allow CVMSMIs to create an estate plan when their digital assets are of commercial value.[51]

II. HISTORY OF MINORS' TESTAMENTARY CAPACITY AGE

Because English common law is the primary basis for current testamentary law, this portion of the Comment discusses the adaptations to the age of majority that depended on societal circumstances.[52] Under early English common law, minors reached the age of majority earlier than minors of today's society.[53] For instance, minors could marry at age seven, be hanged for certain crimes committed at age eight, and become a juror at age twelve.[54] If a minor owned property, they could vote at age twelve while teenagers

42. *See* discussion *infra* Part IV.
43. *See* discussion *infra* Part IV.
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48. *See* discussion *infra* Part V.
49. *See* discussion *infra* Part VI.
50. *See* discussion *infra* Part VI.
51. *See* discussion *infra* Part VI.
52. *See* HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 10–11 (University of North Carolina Press ed. 2005).
53. *See id.* at 1.
54. *Id.*

were able to serve as a member of Parliament.[55] Minors could also agree to contracts, including a binding apprenticeship.[56] In one instance, an English court held that the age of majority was achieved at birth.[57] These early rights also included the ability to devise property in a will.[58] The analysis within this section discusses these important truths to show that laws historically governing the age of majority adapted to society, rather than determined by its function.[59] Therefore, the law should continue to adapt to the needs of society today with regard to digital assets and CVMSMIs.[60]

A. Minors' Testamentary Capacity Under Early English Common Law

Henry Swinburne, author of *A Briefe Treatise of Testaments and Last Wills*, documented that the minimum age to devise a will for a girl was age twelve and the minimum age for a boy was age fourteen.[61] Swinburne's notion is supported by modern treatise authors.[62] Thus, until the sixteenth century, girls aged twelve and boys aged fourteen fulfilled the legal capacity requirement.[63] In 1540, the Statute of Wills allowed qualified minors to devise their personal property, real property, or both.[64] However, the English Statute of Wills was later amended to set the minimum testamentary capacity age to twenty-one; nevertheless, minors were only prohibited from devising real property.[65] Therefore, minors could still devise their personal property.[66] This exception remained until the passing of the Wills Act of 1837, which prohibited minors under the age of twenty-one to devise any real or personal property.[67] Commentators believe that this new standard for the age of majority was rooted in medieval law, where knights would receive their inheritance at the age of twenty-one.[68]

Accordingly, the Wills Act of 1837 included a provision that voided all wills executed by an individual under the age of twenty-one, unless they were a soldier in active military service or at sea as a mariner (this was later clarified in 1918 by the Wills Soldiers and Sailors Act to apply to an

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55. *Id.* at 1, 40.
56. *Id.* at 1, 239.
57. T.E. James, *The Age of Majority*, 4 AM. J. LEGAL HIST. 22, 23 (1960).
58. BREWER, *supra* note 52, at 1.
59. *See* discussion *infra* Part II.
60. *See* discussion *infra* Part II.
61. *See* HENRY SWINBURNE, A BRIEFE TREATISE OF TESTAMENTS AND LAST WILLS 61 (1635) ("A boye cannot make his Testament before hee have accomplished the age of 14 yeares, nor a wench before she have accomplished the age of 12 yeares.").
62. THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 229 (2d ed. 1953) ("The civil law rule was that males of fourteen and females of twelve had the age capacity to make a will.").
63. *Id.* at 229–30.
64. *Id.* at 230.
65. *Id.*
66. *Id.*
67. *Id.*
68. *See* James, *supra* note 57, at 56.

active-duty service member or a *sailor at sea*).[69] The valid wills created through the active-duty exception were acceptable as witnessed verbal declarations or informal documents.[70] Nevertheless, English common law treated all individuals below the age of twenty-one as a minor.[71]

In 1893, exceptions under the Industrial and Provident Societies Act (IPSA) allowed minors between the ages of sixteen to twenty-one the ability to become a registered member of society.[72] This enabled these minors to nominate those whom they wished to receive their property.[73] The Friendly Societies Acts in 1896 and 1908 permitted the same exceptions as the IPSA.[74] In 1966, the Credit Union Act applied the IPSA to credit unions.[75]

Although the English common law age of majority remains twenty-one, the age allowing one to make a valid will was statutorily lowered to eighteen in 1967, not including those younger than eighteen who were married.[76] To further adapt to societal changes, the English government allowed minors under the age of eighteen to make a valid will if they were sailors at sea or soldiers in active duty after World War I in 1918.[77]

In 1870, a staple case of English testamentary law emerged: *Banks v. Goodfellow*.[78] This case set forth the test for mental capacity under the English and Wales law.[79] *Banks v. Goodfellow*, decided 150 years ago, still operates as the controlling authority for mental capacity standards in England.[80] It stands for the idea that an unsound mind is not enough to rebut the requisite mental capacity requirement for testamentary purposes if it does not affect the disposition of the will itself.[81]

B. The United States' Historical Approach to Testamentary Capacity

The age of majority for early American colonists reflected the English laws, so minors younger than twenty-one could operate as members of society.[82] In 1792, the colonies set the age for militia service at eighteen while the age to vote was twenty-one.[83] However, the legal capacity age for valid

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69. *See* ATKINSON, *supra* note 62, at 371; 7 WILL. 4 & 1 VICT., c. 26, § III (1837); 7 & 8 GEO. 5, c. 58, §§ 1, 3, 5(2) (1918) (emphasis added).
70. 7 & 8 GEO. 5, c. 58, §§ 1, 3, 5(2) (1918); ATKINSON, *supra* note 62, at 372.
71. *See* ATKINSON, *supra* note 62, at 230.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *See* Banks v. Goodfellow (1870) LR 5 QB 549 (Eng.).
79. *See id.*
80. *Id.*
81. *Id.*
82. BREWER, *supra* note 52, at 138.
83. *Id.* at 140.

wills was inconsistent in application.[84] These changes in minors' rights were also reflected in states' adaptations of the testamentary capacity age requirements: some states kept the age for legal capacity at twenty-one, others adopted an eighteen-year-old approach, and still others offered distinctions among genders.[85] For instance, most states used the common law age of twenty-one, other states used eighteen, and still, others allowed only girls at a younger age to execute valid wills.[86] Additionally, some states allowed minors under twenty-one the opportunity to bequest their personal property.[87] In the 1800s, American judiciaries began to slowly recognize the individual rights of minors and offered protection to such rights.[88] These changes are evident in America's adapted child labor laws.[89] The age of majority continued to adapt to the times as major events affected not only the nation but the world as well.[90] For example, the United States lowered the age of conscription—obligatory enlistment for military services—from twenty-one to eighteen years old during World War II to increase enlistment.[91] Subsequently, the voting age was lowered to eighteen in 1971, which resulted in the states reducing the age of majority to eighteen in corresponding areas.[92]

Currently, the testamentary capacity age requirement to make a valid will is eighteen in all but a handful of states, such as Texas and Virginia.[93] Nevertheless, the historical framework concerning the English common law age of majority has adapted to the various transitions of cultural and social norms—adjusting from the age of four, to twenty-one, to eighteen.[94] Because the age of majority directly influences the legal testamentary capacity age, the legal age to execute testamentary documents is also fluid and dependent on the surrounding societal circumstances.[95] Consequently, the present limitations on utilizing testamentary devices prevent minors that possess all

84. *See id.* at 132.

85. Thomas v. Couch, 156 S.E. 206, 209 (Ga. 1930) ("One becomes of full age on the day preceding the twenty-first anniversary of his birth, on the first moment of that day."); Bainter v. Bainter, 590 N.E.2d 1134, 1136 (Ind. Ct. App. 1992) ("[I]n 1849 a person's legal disabilities were removed the day preceding his or her twenty-first anniversary of birth." (citing Wells v. Wells, 6 Ind. 447, 448 (1855)).

86. *Thomas*, 156 S.E. at 209; *Bainter*, 590 N.E.2d at 1136.

87. Holzman v. Wager, 79 A. 205, 206 (Md. 1911) ("[T]he right of a male, of sufficient discretion, under the age of 21 years and over the age of 14 years, to dispose of his leasehold property has always been recognized and acted upon in this state. . . .").

88. Natalie M. Banta, *Minor and Digital Asset Succession*, 104 IOWA L. REV. 1699, 1721 (2019).

89. *See* 29 U.S.C. §§ 212–13.

90. Vivian E. Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 64–65 (2016) (assessing the age of majority).

91. *Id.*

92. U.S. CONST. amend. XXVI.

93. *See* FLA. STAT. ANN. § 743.07(1) (West 2021); IND. CODE ANN. § 29-1-5-1 (LexisNexis 2021); IOWA CODE ANN. § 633.264 (West 2021); TEX. EST. CODE ANN. § 251.001; VA. CODE ANN. § 16.1-333, 64.2-401 (West 2021).

94. Hamilton, *supra* note 90, at 63–65.

95. *See id.*

other requisite components from executing a valid will.[96] To continue the historical trend that recognized the change in minors' property rights, the law should continue to adapt to the surrounding societal circumstances and allow CVMSMIs the opportunity to devise their digital assets and the substantial income that comes from their technological work.[97]

C. Current Approach to Testamentary Capacity

Testamentary capacity is a requirement for executing a valid will.[98] This requirement is made up of two components: (1) mental capacity and (2) legal capacity.[99] Mental capacity requires the testator to be of "sound mind" at the time the will is executed.[100] Sound mind means that "the testator . . . must be capable of knowing and understanding in a general way [(1)] the nature and extent of his or her property, [(2)] the natural objects of his or her bounty, and [(3)] the disposition that he or she is making of that property. . . ."[101] The testator "must . . . be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property."[102] Most states presume that a testator already fulfills this level of competency.[103]

The mental capacity requirement establishes testamentary intent by reflecting the testator's wishes in a clear, organized manner and prevents irrational disinheritance of a testator's family.[104] Testators who reached the age of majority are already presumed to possess the requisite mental capacity to execute a valid will.[105] However, even if the testator fulfills the mental capacity standard, they must also fulfill the legal capacity requirement.[106]

Legal capacity requires an individual to reach a certain age before they can execute a valid will, even if they have the requisite mental capacity.[107]

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96. *Id.*

97. Banta, *supra* note 88, at 1710.

98. *Testamentary Capacity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/testamentary_capacity (last visited Jan. 14, 2021) [https://perma.cc/KCV2-23KG].

99. UNIF. PROB. CODE § 2-501 (UNIF. LAW COMM'N amended 2019).

100. *See* Smith v. Smith, 225 N.E.2d 590, 591 (Mass. 1967); Houghton v. Jones, 418 S.W.2d 32, 39 (Mo. 1967); CONN. GEN. STAT. ANN. § 45-160 (1958); IDAHO CODE § 14-301 (1948); UNIF. PROB. CODE § 2-501 (UNIF. LAW COMM'N amended 2019); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (AM. LAW INST. 2003).

101. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (AM. LAW INST. 2003).

102. *Id.*

103. *Id.*

104. *See id.* § 8.1 cmt. b ("The law of donative transfers is premised upon implementing the donor's intent. The law requires that the donor have the mental capacity to form such an intent."); Mark Glover, *Rethinking the Testamentary Capacity of Minors*, 79 MO. L. REV. 69, 70, 75 (2014).

105. M. C. Dransfield, Annotation, *Necessity of Affirmative Evidence of Testamentary Capacity to Make Prima Facie Case in Will Contest*, 110 A.L.R. 675 (1937).

106. *See, e.g.*, FLA. STAT. ANN. § 743.07(1) (West 2021); IND. CODE ANN. § 29-1-5-1 (LexisNexis 2021); IOWA CODE ANN. § 633.264 (West 2021); TEX. EST. CODE ANN. § 251.001; VA. CODE ANN. § 16.1-333, 64.2-401 (West 2021).

107. *See, e.g.*, FLA. STAT. ANN. § 743.07(1) (West 2021); Ind. Code Ann. § 29-1-5-1 (LexisNexis

Forty-eight states require an individual to be eighteen years old to obtain legal capacity.[108] Georgia allows minors who are at least fourteen years old to execute a valid will with proper mental capacity, and Louisiana allows minors who are at least sixteen to execute a valid will.[109] However, some states allow exceptions to the legal capacity requirement for minors that are either married or part of the United States military.[110] Because the majority of states require an individual to reach the age of eighteen for the purposes of legal capacity, minors that may hold the requisite mental capacity are unable to execute a valid will even if they have digital assets that generate revenue and hold value in the social media world.[111] Further, the law presents inconsistencies because disabled adults—with the same mental capacity as minors—have the ability to execute valid wills simply because they are adults.[112] This inconsistency is made apparent by *In re Estate of Teel*, where a fifty-two-year-old man "functioned at an age level of ten to twelve years old."[113] In this case, Mr. Teel gave his entire estate to his half-cousin in a will.[114] Mr. Teel's brother argued that Mr. Teel did not possess the proper mental capacity required by the testamentary capacity components.[115] The court in *In re Estate of Teel* held that Mr. Teel's will would have only been *invalid* if he were actually twelve years old.[116] This inconsistency at the very least raises a question regarding the legal capacity component.[117] The Restatement (Third) of Property provides that the legal capacity requirement of minors protects them from making an immature judgment while executing a will.[118] In turn, the legal capacity requirement inadequately provides protections for CVMSMIs' digital assets and the monetary profits they receive.[119]

2021); IOWA CODE ANN. § 633.264 (West 2021); TEX. EST. CODE ANN. § 251.001; VA. CODE ANN. § 16.1-333, 64.2-401 (West 2021).

108. Glover, *supra* note 104, at 77.

109. *Id.* at 77–78.

110. *See, e.g.*, IND. CODE ANN. § 29-1-5-1 (LexisNexis 2016) ("Any person of sound mind who is eighteen (18) years of age or older, or who is younger and a member of the armed forces, or of the merchant marine of the United States, or its allies, may make a will.").

111. Banta, *supra* note 88, at 1710.

112. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2 reporter's note 3 (AM. LAW INST. 2003).

113. *In re* Est. of Teel, 483 P.2d 603, 605 (Ariz. Ct. App. 1971).

114. *Id.*

115. *Id.* at 603–04.

116. *Id.* at 605.

117. *See id.*; Glover, *supra* note 104, at 104.

118. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.2 reporter's note 3 (AM. LAW INST.2003).

119. *See id.*

D. Safeguards for Executing Wills

To avoid confusion and unenforceable claims, executed wills are inherently voidable after execution if a new will is executed or an amendment—not a codicil—occurs before the testator passes.[120] Therefore, any will executed by a CVMSMI testator before or after they reach the age of majority would be inherently voidable.[121] Moreover, the law governing wills already includes safeguards that prevent testators from executing imprudent or unreasonable transfers.[122] These safeguards include the following: the mental capacity requirement, the formality requirements, the doctrine of fraud, the doctrine of undue influence, and the doctrine of duress.[123]

The mental capacity requirement acts as a safeguard by protecting the testator from making an improvident testamentary decision.[124] To satisfy this requirement, a testator must fulfill a minimum level of mental competency.[125] Though the level of competency is minimal, a testator must be sane and rational.[126] As previously discussed, to establish this minimal standard, the Restatement (Third) of Property provides that, "the testator . . . must be capable of knowing and understanding in a general way [(1)] the nature and extent of his or her property, [(2)] the natural objects of his or her bounty, and [(3)] the disposition that he or she is making of that property. . . ."[127] To determine whether the testator fulfilled the mental capacity requirement, a totality of the circumstances test is applied.[128] The mere fact that the testator is of old age with the tendency to forget or fail to recognize family members does not negate the testator's mental capacity.[129] For those who are elderly and experiencing physical illness or mental illness may still fulfill the mental capacity requirement, if they satisfy the minimal test.[130] On the other hand, a

120. Glover, *supra* note 104, at 83.

121. *See id.*

122. Banta, *supra* note 88, at 1731.

123. *Id.*; Glover, *supra* note 104, at 74, 83–88.

124. Glover, *supra* note 104, at 88.

125. Julian R. Kossow, *Probate Law and the Uniform Code: "One for the Money . . ."*, 61 GEO. L.J. 1357, 1358 (1973).

126. Glover, *supra* note 104, at 88.

127. RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.1(b) (AM. LAW INST. 2003).

128. *In re* Est. of Byrd, 749 So. 2d 1214, 1217–18 (Miss. Ct. App. 1999) (considering the totality of the circumstances to find that decedent's illness, paired with the effects of his medication, made his will void due to lack of capacity); *In re* Last Will & Testament of Erde, No. W2017-00551-COA-R3-CV, 2017 WL 6622817, at *10 (Tenn. Ct. App. Dec. 28, 2017) (considering totality of circumstances to determine if decedent recognized her bounty).

129. *In re* Selb's Est., 190 P.2d 277, 279 (Cal. Dist. Ct. App. 1948); *see also* Bourgeois v. Hano, 292 So. 2d 915, 917 (La. Ct. App. 1974) (holding the decedent fulfilled the requisite testamentary capacity despite her physical disability and deteriorating health); *In re* Est. of Adams, 101 P.3d 344, 348 (Okla. Civ. App. 2004) ("[A]dvanced age or physical infirmity alone do not render one incapacitated to make a will.").

130. *Bourgeois*, 292 So. 2d at 917.

testator who executed a will when they were disoriented at the time of execution because of a disease or old age does not fulfill the mental capacity requirement and thus does not execute a valid will.[131] Additionally, one policy behind the lower thresholds in testamentary law is that a testator is invariably deceased when the will becomes effective, which requires less protection for the testator.[132]

Regarding digital assets, CVMSMIs would presumably possess the requisite knowledge and understanding about the nature of their digital asset accounts because these minors grew up in the digital age.[133] Many of these minors would also understand that their family and friends could receive access or possession of their digital accounts and be able to articulate in an orderly manner the extent of that access.[134] Therefore, commercially valuable minors who would create a will containing their digital assets should be able to operate with the same presumption of testators who meet the age requirement.[135] Should a question arise as to whether the minor executed their testamentary document with the requisite mental capacity, one may look to the totality of the circumstances already in place to determine whether the will is invalid.[136] For example, if the circumstances convey that the minor was disoriented at the time of execution, then the will is invalid.[137] If circumstances prove otherwise, the minor's wishes should then be honored just like the wishes of testators who meet the age requirement.[138]

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131. *See, e.g.*, Fletcher v. DeLoach, 360 So. 2d 316, 319 (Ala. 1978) (finding that a testator with depression who was disoriented at the time of execution lacked sufficient mental capacity); *In re* Est. of Killen, 937 P.2d 1368, 1374 (Ariz. Ct. App. 1996) (finding lack of testamentary capacity because the testator had insane delusions); *In re* Succession of Keel, 442 So. 2d 691, 693 (La. Ct. App. 1983) (finding that a testator with a brain tumor lacked testamentary capacity).

132. Glover, *supra* note 104, at 87.

133. Anderson & Jiang, *supra* note 16 (reporting that forty-five percent (45%) of teens admit to using the internet "almost constantly").

134. *See id.*

135. *See* Banta, *supra* note 88, at 1716; *see generally* GEORGE E. GARDNER & WALTER T. DUNMORE, HANDBOOK OF THE LAW OF WILLS 86 (St. Paul, West Publishing Co. 2d ed. 1916); JOHN E. ALEXANDER, COMMENTARIES ON THE LAW OF WILLS § 297, at 391 (Bender-Moss 1917) ("[A]n infant under a certain age can not make a testamentary disposition of property, not because of unsoundness of mind such as insanity, rather because the law assumes that his mind has not sufficiently matured."); JOHN R. ROOD, A TREATISE ON THE LAW OF WILLS § 105, at 62 (Callaghan & Company 1904) ("The law arbitrarily fixes an age before which the infant shall be conclusively deemed not to have enough discretion to make a will.").

136. *In re* Est. of Byrd, 749 So. 2d 1214, 1217–18 (Miss. Ct. App. 1999) (considering the totality of the circumstances to find that decedent's illness, paired with the effects of his medication, made his will void due to lack of capacity); *In re* Last Will & Testament of Erde, No. W2017-00551-COA-R3-CV, 2017 WL 6622817, at *9–10 (Tenn. Ct. App. Dec. 28, 2017) (considering the totality of circumstances to determine if decedent recognized her bounty).

137. *In re* Est. of Killen, 937 P.2d 1368, 1374 (Ariz. Ct. App. 1996) (finding lack of capacity where testator had insane delusions about her family); *In re* Rounds' Will, 54 N.Y.S. 710, 713 (Sur. Ct. 1898) (finding a will to be invalid because the testator suffered for years with mental illness and there was no clear and convincing proof that the will expressed her wishes).

138. *See* Glover, *supra* note 104, at 74–75.

Testamentary law also requires that a testator comply with specific formalities in executing a valid will.[139] Thus, the will must be written and signed by the testator and witnessed by at least two individuals.[140] These formalities ensure that the will reflects a testator's intent.[141] This ritualistic process reinforces the severity of the testamentary decisions and promotes planning and deep consideration.[142] For instance, the formalities that testamentary law presently requires will also ensure that the minor would consider the severity of executing a valid will.[143] The operation of the ritual will reinforce and promote deep contemplation about the minor's decisions concerning their digital assets and profits thereof.[144] Thus, the minor's true intent, like a testator of the current requisite age, will be inferred and guarded by another technique presently used in testamentary law.[145]

Other safeguards include the doctrines of fraud, undue influence, and duress that are intended to protect against those who desire to take advantage of testators.[146] The doctrine of fraud protects testators from misrepresentations and deceit by invalidating wills that were the product of a misrepresentation.[147] Therefore, a court overturns a testator's testamentary document when it is executed due to misrepresentation.[148] Consider a testator that has three children—two boys and one girl.[149] The testator owns thirty acres of land.[150] Before he executed his will, his son told him that his daughter wanted nothing to do with the land and did not want to be a part of the will at all—contrary to the daughter's actual disposition.[151] The testator believed his son because he had not talked to his daughter after an argument three years ago.[152] This would constitute a misrepresentation and invalidate the testator's will.[153]

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139. *See* Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 153–57 (2012).

140. *See id.* at 153.

141. *See id.*

142. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 5 (1941) ("Compliance with the total combination of requirements for the execution of formal attested wills has a marked ritual value, since the general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion.").

143. *Id.*

144. *Id.*

145. *Id.*

146. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (AM. LAW INST. 2003).

147. *Id.* § 8.3(d), cmts. j–k; *see, e.g.*, McDaniel v. McDaniel, 707 S.E.2d 60, 65 (Ga. 2011) (finding a will invalid when testator altered his will based on his son's misrepresentations).

148. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(d), reporter's note 4 (AM. LAW INST. 2003).

149. Author's hypothetical.

150. Author's hypothetical.

151. Author's hypothetical.

152. Author's hypothetical.

153. Author's hypothetical.

Because minor social media influencers are becoming popular at exponential rates, their monetary value aligns with that of child stars.[154] For many child stars, greedy parents stand in the way of their earnings and well-being.[155] In most states, the money a child star makes is legally controlled by one or both of the parents.[156] Many child stars have suffered and continue to suffer from this policy.[157] For instance, Shirley Temple—one of the most prominent child stars of all time—only received $44,000 from her accounts, instead of the $3.2 million she had actually earned.[158] This discrepancy occurred because her father did not place her earnings in a trust, even though it was court-ordered.[159] Another early child star, Mimi Gibson, suffered the same fate at the hands of her mother, after appearing in thirty-five films and 100 television programs.[160] When Mimi reached the age of majority, she did not even have the money to pay for college tuition because her mother used her earnings.[161] Because there has been a significant trend of prominent minors experiencing mistreatment at the hands of their parents, it is vital that legislatures allow an exception in testamentary law to the group of minors that continue to grow in both fame and fortune through social media.[162] Such an exception would allow this group to protect their digital assets and the substantial income they receive through the use of their digital asset accounts.[163] Applying the doctrine of fraud may be one of the most important safeguards, along with the doctrine of undue influence.[164]

Distinguishable from the doctrine of fraud, material misrepresentations or omissions of material facts is not required to prove undue influence.[165] The doctrine of undue influence protects a testator by invalidating a will when the donor makes a donative transfer that they would not have made if the wrongdoer did not overcome the donor's free will.[166] There are generally four elements to undue influence: (1) the testator who is subject to the influence,

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154. Bernardini, *supra* note 30.

155. Destiny Lopez, *7 Celebs Whose Parents Decimated Their Fortunes*, MYBANKTRACKER (Apr. 2, 2014, 4:47 PM), https://www.businessinsider.com/7-celebs-whose-parents-decimated-their-fortunes-2014-4 [https://perma.cc/MSK6-XBMV].

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *See id.*

163. *See id.*

164. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(b) (AM. LAW INST. 2003).

165. *Id.*; *see* Howe v. Palmer, 956 N.E.2d 249, 253–54 (Mass. App. Ct. 2011); *In re* Est. of Raedel, 568 A.2d 331, 335 (Vt. 1989).

166. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(c) (AM. LAW INST. 2003) ("A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made.").

(2) the inclination of one to exert undue influence, (3) the prospective moment to exert the influence, and (4) the effect on the disposition indicating undue influence.[167] To establish these elements, one must look to the facts of the situation.[168] Factors that may indicate undue influence include the following: old age, lack of intellectual capacity or firmness of character, and physical impediments.[169] However, because they are factors, these components are not determinative of whether undue influence occurred.[170]

For minors, undue influence could occur at the hand of sponsors or businesses they partner with, the minor's family, and even their friends.[171] The doctrine of undue influence is a necessary component that could protect the CVMSMI as it continues to protect testators who have reached the age of majority.[172] The only change that may need to occur is adding the term "minors" to the list of factors that assist in determining whether undue influence occurred.[173]

Furthermore, the doctrine of duress invalidates wills when the testator experienced a wrongdoer's overtly coercive tactics in executing the testamentary document.[174] Threats like bringing humiliation to the family and providing false testimony may amount to duress when the individual that is subject to the threats alters their decisions or disposition.[175] Thus, the testator will not be legally bound to their testamentary documents.[176] A leading case articulated that the test to determine if duress is present depends on the person at which the duress was directed.[177] For instance, it did not matter what effect the threat had on a person of ordinary capabilities, but rather, the court considered the individual's age, sex, mental conditions, etc.[178] Therefore, this adaptable doctrine could protect minors in the same way it already protects testators that have reached the requisite legal age.[179]

Similar to the doctrine of undue influence, the doctrine of duress can protect minors as it does testators of age.[180] Sponsors and businesses with whom the minor partners with, their family, or even friends can impose duress on a minor.[181] Courts could consider the minor's age, sex, and mental

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167. 25 AM. JUR. 2d, DURESS AND UNDUE INFLUENCE § 36.
168. *See id.*
169. *See* 79 AM. JUR. 2d, WILLS § 396.
170. *Id.*
171. Lopez, *supra* note 155.
172. *See* 79 AM. JUR. 2d, WILLS § 396; Banta, *supra* note 88, at 1736.
173. *See* 79 AM. JUR. 2d, WILLS § 396; Banta, *supra* note 88, at 1736.
174. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(c) (AM. LAW INST. 2003).
175. *Id.*
176. *See* Tallmadge v. Robinson, 109 N.E.2d 496, 496 (Ohio 1952).
177. *Id.* at 499–500.
178. *Id.*
179. *See id.*
180. *See id.*; 25 AM. JUR. 2d, DURESS AND UNDUE INFLUENCE § 36.
181. Lopez, *supra* note 155.

conditions as they do already under the doctrine of duress.[182] Like the doctrine of undue influence, the doctrine of duress is a necessary component that could protect CVMSMIs as it continues to protect testators who have reached the age of majority.[183] Again, the only change that may need to occur is adding the term "minors" to the list of factors that assist in determining whether duress occurred.[184]

Because these protective measures already exist for other people, CVMSMIs could also benefit from these safeguards without creating new ones.[185] Nevertheless, minors are in a special position because of the "peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importan[ce] of the parental role in child rearing."[186] The current safeguards of mental capacity and the doctrines of succession law are used to protect the testator's intent.[187] If wrongdoing of any kind affects the testator's decisions, then these safeguards protect their property.[188] In addition, a guardian *ad litem* (discussed in further detail in Part VI) could become another safeguard.[189]

III. CURRENT RIGHTS AFFORDED TO MINORS IN OTHER AREAS OF THE LAW

Many areas of the law provide minors exceptions that are not otherwise provided under testamentary law.[190] These inconsistent applications present a gap in the law as it applies to minors in general, regardless of varied state laws.[191] For instance, general areas that allow exceptions to minors include the following: limited ability to make health care decisions, have sex, get married, issue donative gifts, enter the field of employment, and agree to contracts.[192]

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182. *See Tallmadge*, 109 N.E.2d at 500.

183. *See id.*

184. *See id.*

185. *See* Glover, *supra* note 104, at 90.

186. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

187. *See id.*; Banta, *supra* note 88, at 1731.

188. *See* Banta, *supra* note 88, at 1731.

189. *See* discussion *infra* Part VI.

190. 16 C.F.R. § 312 (2021); *Texas Child Labor Law*, TEX. WORKFORCE COMM'N, https://www.twc.texas.gov/jobseekers/texas-child-labor-law (last visited, Oct. 23, 2020) [https://perma.cc/F52N-CTSE]; Heather D. Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, GUTTMACHER INST. (Aug. 1, 2000), https://www.guttmacher.org/gpr/2000/08/minors-and-right-consent-health-care#:~:text=States%20have %20traditionally%20recognized%20the,to%20make%20fully%20informed%20decisions [https://perma.cc/LSR9-B6SD].

191. *See* 16 C.F.R. § 312 (2021); RESTATEMENT (SECOND) OF TORTS § 829A, cmt. b (AM. LAW INST. 1979); *Texas Child Labor Law*, *supra* note 190; Boonstra & Nash, *supra* note 190.

192. *See* 16 C.F.R. § 312 (2021); RESTATEMENT (SECOND) OF TORTS § 829A, cmt. b (AM. LAW INST. 1979); *Texas Child Labor Law*, *supra* note 190; Boonstra & Nash, *supra* note 190.

A. The Mature Minor Rule

Generally, minors cannot make health care decisions on their own, but some states afford exceptions to this rule for specific medical conditions.[193] These exceptions are known as the "mature minor rule."[194] With the mature minor rule, minors can consent to receive contraceptive services, prenatal care and delivery services, testing and treatment of sexually transmitted diseases, and counseling or medical care for substance abuse issues.[195] Many states that acknowledge the mature minor rule do not require parental consent or notification.[196] Some states, including Texas, do not allow minors to receive prescription contraceptives without parental consent.[197] However, these states do allow minors other privileges like receiving planning services and non-prescription contraceptives.[198]

Most states allow a minor to marry before they reach their eighteenth birthday with parental consent.[199] Under these circumstances, a minor is then considered emancipated from their parents.[200] Because they are considered emancipated by marriage, the married minor may devise property while others of the same age who are not married cannot.[201] Nevertheless, the Uniform Probate Code states that if a minor dies intestate with a spouse and no children, the surviving spouse and parents receive the minor's property.[202] However, if the minor is married and had children with their spouse, then the spouse would inherit all the property.[203] If the minor was unmarried with children, then the children inherit the deceased minor's property.[204]

Natalie Banta, a leading commentator on this issue of digital assets and child estate planning abilities, highlighted that this disconnect presents another incongruity in the law.[205] She noted that marriages and adoptions are

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193. Boonstra & Nash, *supra* note 190.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Adolescent Health: A Guide for Providers*, TEX. DEP'T STATE HEALTH SERVS. (Aug. 2016), https://www.hhs.texas.gov/sites/default/files/documents/doing-business-with-hhs/provider-portal/health-services-providers/thsteps/ths-adolescent-health-guidance.pdf [https://perma.cc/TJ4L-AJEV].

198. *Id.*

199. *See*, *e.g.*, ALASKA STAT. § 25.05.171(b) (2016) (allowing a minor to marry at fourteen years old if parents consent or if a judge finds that it is in the best interest of the minor, even if parents object).

200. Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. REV. 343, 356 (2017).

201. Glover, *supra* note 104, at 116 (providing a table of states that have codified the common law doctrine); Jackson, *supra* note 200.

202. *See* UNIF. PROB. CODE § 2-102 (UNIF. LAW COMM'N amended 2019); *see, e.g.*, Emerson v. Cutler, 31 Mass. (14 Pick.) 108, 113 (1833) (explaining how a husband took a share of his minor wife's estate); McWhorter v. Gibson, 84 S.W.2d 108, 109–10 (Tenn. Ct. App. 1935) (finding that a mother could not collect damages on behalf of a minor son because he was married).

203. *See* UNIF. PROB. CODE § 2-102(a)(1) (UNIF. LAW COMM'N amended 2019).

204. *See id.* § 2-103(c).

205. Banta, *supra* note 88, at 1719.

more difficult to overturn than wills.[206] This could lead to minors taking extreme measures to create a testamentary plan.[207] Although the chances may seem unlikely, minors could resort to marriage or having a child to obtain the ability to alter their testamentary circumstances.[208]

B. Minors' Rights to Make Donative Transfers and Major Health Care Decisions

In addition to their ability to consent to marriage and sex, minors can make donative transfers, but these *inter vivos* gifts are voidable.[209] A minor may disaffirm the donative gift before reaching the age of majority; and, once the minor reaches the age of majority, they may disaffirm the gift within a reasonable time or act to ratify the gift.[210] The policy behind allowing a minor the opportunity to disaffirm a gift is likely implemented to protect the minor from making an impulsive decision.[211]

Furthermore, some courts have allowed minors to decide whether they wish to refuse medical treatment while in a life-threatening situation.[212] While adults may execute directives or wills to refuse life-sustaining treatment, some courts allow these measures to apply to minors.[213] For instance, the Supreme Judicial Court of Maine held that a minor's statements prior to his involvement in an accident were sufficient to support his desire to refuse treatment while he was in a vegetative state.[214] The Supreme Court of Illinois also held that a mature minor could refuse a blood transfusion on the basis of her religious objections.[215] The Restatement (Second) of Torts also provides: "If the person consenting is a child or one of deficient mental

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206. *Id.* at 1718.

207. *Id.*

208. *Id.* at 1718–19.

209. *See* RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 8.2(b) (AM. LAW INST. 2003) (stating that "[a] minor does not have capacity to make a gift."); *see also* Bankers' Tr. Co. v. Bank Rockville Ctr. Tr. Co., 168 A. 733, 740 (1933) (providing that "the settled and salutary rule of law that an infant's gift is voidable"); Person v. Chase, 37 Vt. 647, 649 (Vt. 1865) ("If an infant cannot trade, nor bind himself by any contract in relationship trade. . . he cannot bind himself by a gift of property."); *see* RESTATEMENT (SECOND) OF PROP: DONATIVE TRANSFERS § 34.4(1) (AM. LAW INST. 1992) ("A minor does not have the legal capacity to make . . . a valid inter vivos donative transfer.").

210. RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 8.2(b) (AM. LAW INST. 2003); *see* RESTATEMENT (SECOND) OF PROP: DONATIVE TRANSFERS § 34.4(1)(a) (AM. LAW INST. 1992) ("[A] purported donative transfer made by a minor may be ratified by the minor when the minor attains majority, and a failure to repudiate the purported donative transfer within a reasonable time after the minor attains majority is deemed a ratification of it . . . .").

211. *See* RESTATEMENT (THIRD) OF PROP: WILLS & OTHER DONATIVE TRANSFERS § 8.2 reporter's note 3 (AM. LAW INST. 2003) ("The age requirement['s] . . . purpose [is to] assur[e] that only a person of mature judgment can execute a will.").

212. *In re* Swan, 569 A.2d 1202, 1206 (Me. 1990).

213. *Id.* at 1205–06; *see* Gregory G. Sarno, *Living Wills: Validity, Construction, and Effect*, 49 A.L.R. 4th § 1, at 812 (1986).

214. *In re* Swan, 569 A.2d at 1205.

215. *In re* E.G., 549 N.E.2d 322, 323–24 (Ill. 1989).

capacity, the consent may still be effective if he is capable of appreciating the nature, extent and probable consequences of the conduct consented to. . . ."[216]

However, some courts, in reviewing the surrounding evidence, found that minors are not mature enough to make decisions about life-sustaining procedures.[217] Similar to the mental capacity component of the testamentary capacity requirement, courts examine the issue of "whether the minor in his or her individual situation had the capacity to decide to die and refuse life-sustaining treatments."[218] Nevertheless, some states allow minors faced with these grave situations the ability to decide their fate if they understand the severity and consequences.[219] Because courts consider a minor's decision-making capabilities at the time their life is threatened, courts should also extend the same test to CVMSMIs and allow them the opportunity to execute a valid will.[220]

C. Minors and Their Right to Seek Employment

Pursuant to the federal Fair Labor Standards Act (FLSA), minors are subjects to "oppressive child labor" when they are employed under the age of sixteen and do not work for their family business or in entertainment or agricultural positions.[221] If the employer's business is not covered under the FLSA, then state law controls.[222] Nevertheless, state laws vary in their orientation towards child labor laws.[223] For instance, Texas allows minors to enter the workforce at fourteen, so long as the employed position does not compromise the health or well-being of the minor.[224] States like Texas, allowing minors to enter the workforce at an early age, add to the inconsistency in the application of laws to minors.[225]

Nevertheless, the minor's property interest rights have not changed.[226] For example, in many states, parents are allowed to use minor children's earned wages as long as they are not emancipated.[227] Parents are entitled to a minor's wages; however, they may waive this right by allowing their child to

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216. RESTATEMENT (SECOND) OF TORTS § 829A, cmt. b (AM. LAW INST. 1979).

217. *See* O.G. v. Baum, 790 S.W.2d 839 (Tex. App.—Houston [1st Dist.] 1990, no writ).

218. Banta, *supra* note 88, at 1729.

219. RESTATEMENT (SECOND) OF TORTS § 829A, cmt. b (AM. LAW INST. 1979); *In re* Swan, 569 A.2d at 1205; *In re* E.G., 549 N.E.2d at 323–24.

220. *See* RESTATEMENT (SECOND) OF TORTS § 829A, cmt. b (AM. LAW INST. 1979); *In re* Swan, 569 A.2d at 1205; *In re* E.G., 549 N.E.2d at 323–24.

221. 29 U.S.C. § 213; 29 C.F.R. § 570.2 (2021).

222. *See* 29 U.S.C. § 213; 29 C.F.R. § 570.2 (2021); *see, e.g.,* ALASKA STAT. ANN. § 23.10.050 (2021).

223. 29 U.S.C. § 213; 29 C.F.R. § 570.2 (2021), *see, e.g.*, ALASKA STAT. ANN. § 23.10.050 (2021).

224. *Texas Child Labor Law*, *supra* note 190.

225. *See id.*

226. Banta, *supra* note 88, at 1723.

227. Rohm v. Stroud, 194 N.W.2d 307, 308 (Mich. 1972); Biermann v. Biermann, 584 S.W.2d 106, 108 (Mo. Ct. App. 1979); Peot v. Ferraro, 266 N.W.2d 586, 588 (Wis. 1978).

work and assent to their keeping the money.[228] This entitlement is allowed only if the parent exercises access to the wages.[229] However, even if the minor makes a substantial amount of income, they cannot properly manage their wages unless they are emancipated.[230] Some states even allow minors to execute a valid will if they are legally emancipated from their parents or guardians.[231] Emancipation releases a minor from legal subjection and provides them with the ability to work for themself and exercise domain and control over their money, which is common for minor athletes and actors.[232] Although the percentages are low for minors achieving professional athlete or actor status, social media has allowed numerous minor influencers to thrive.[233] To reduce incentive for these CVMSMIs to detach themselves from their parents by emancipation, legislatures should provide an exception to testamentary law for those who meet the mental capacity requirement.[234]

D. Minors and Their Ability to Consent to Contracts

Another inconsistency presents itself in contract law with its application to minors and the exceptions provided.[235] Traditionally, minors may only enter into voidable contracts until the day prior to their eighteenth birthday.[236] This means that a minor may "disaffirm" or release themselves from their obligations under the contract if they are under eighteen.[237] Thus, the minor's ability to disaffirm does not extend if they act in accordance with the contract or fail to disaffirm within a reasonable time after reaching the age of

228. Lottinville v. Dwyer, 27 A.2d 305, 309 (R.I. 1942); Atkins v. Sherbino, 4 A. 703, 706 (Vt. 1886).

229. *Lottinville*, 27 A.2d at 309; *Atkins*, 4 A. at 706.

230. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 282–83 (2011).

231. CAL. PROB. CODE §§ 6100 cmt., 6220 cmt. (West 2013); IDAHO CODE § 15-2-501 (2009).

232. GROSSMAN & FRIEDMAN, *supra* note 230; *A Teenager's Guide to Emancipation*, CTLAWHELP.ORG (July 2019), https://ctlawhelp.org/en/a-teenagers-guide-to-emancipation [https://perma.cc/M58Q-6XAK].

233. Michael Simkins, *Only 2% of Actors Make a Living. How Do You Become One of Them?*, GUARDIAN (June 5, 2019, 12:15 EDT) https://www.theguardian. com/film/shortcuts/2019/jun/05/only-2-per-cent-of-actors-make-a-living-how-do-you-become-one-of-them#:~:text=A%20recent%20study%20by%20Queen,drink%20in%20the%20first%20place [https://perma.cc/X6JY-LDM4]; William J. Price, *What Are the Odds of Becoming a Professional Athlete?*, SPORT DIG., http://www.thesportdigest.com/archive/article/what-are-odds-becoming-professional-athlete (last visited Dec. 12, 2021) [https://perma.cc/J2XY-DXNQ]; GROSSMAN & FRIEDMAN, *supra* note 230.

234. Banta, *supra* note 88, at 1722.

235. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (AM. LAW INST. 1981).

236. *Id.*

237. *Id.*

majority.[238] The policy behind this law is to protect minors from adults that may take advantage of them and the minor's own bad decisions.[239]

Currently, minors are allowed the opportunity to enter into some contracts as long as their parents or guardians co-sign.[240] However, these limitations and requirements do not exist for minors who enter into online contracts (terms of service, terms of agreement, etc.).[241] Rather, social media companies—Instagram, YouTube, etc.—are merely required to have the minor verify in their terms of service that they are thirteen years or older, allowing them to agree to the terms without parents or guardians as co-signers.[242] Internet companies were afforded this opportunity in 1998 through the Children's Online Privacy Protection Act (COPPA).[243] COPPA limited information that companies could store without parental consent.[244] These provisions were subsequently revised to accommodate technological advances and increased minor engagement and use "to establish and maintain reasonable procedures to protect the confidentiality, security, and integrity of personal information collected from children."[245] With the ability to contract at age thirteen with internet businesses, Congress has created a capacity standard for minors.[246] Minors between the ages of thirteen and eighteen are able to use social media accounts and generate revenue but are unable to personally decide what happens to their commercially valuable accounts and money.[247] Congress recognizes the change in technological advances and increased use by the youth of the nation but offers no change to testamentary capacity standards.[248]

Minors can participate in making donative transfers, consent to contracts, enter into employment, and make health care decisions.[249] While participating in these areas, minors are afforded exceptions to protect them from making imprudent decisions.[250] Testamentary law also includes

238. Marx & Cline Co. v. Krienitz, 126 N.W. 50, 52 (Wis. 1910) ("[T]he contract of a minor, other than for necessaries, is either void or voidable at his option, exercised within a reasonable time after his coming of age."); *see also, e.g.*, Fletcher v. Marshall, 632 N.E.2d 1105, 1108 (Ill. App. Ct. 1994) (holding that the minor "defendant's act of moving into the apartment, living there for 1 1/2 months, and making rent payments [after reaching the age of majority] constituted . . . unequivocal ratification of the lease").

239. Kiefer v. Fred Howe Motors, Inc., 158 N.W.2d 288, 290 (Wis. 1968); *see also* Byers v. Lemay Bank & Tr. Co., 282 S.W.2d 512, 514 (Mo. 1955) ("The purpose is to shield minors against their own folly and inexperience and against unscrupulous persons. . . .").

240. Robert G. Edge, *Voidability of Minors' Contracts: A Feudal Doctrine in a Modern Economy*, 1 GA. L. REV. 205, 207 (1967).

241. *See* 16 C.F.R. § 312 (2021); Banta, *supra* note 88, at 1711.

242. Banta, *supra* note 88, at 1711.

243. *Id.* at 1712; *see also* 16 C.F.R. § 312 (2021).

244. Banta, *supra* note 88, at 1712; 15 U.S.C. § 6502(b)(1)(D).

245. 16 C.F.R. § 312.2 (2021); Banta, *supra* note 88, at 1712.

246. *See* Banta, *supra* note 88, at 1712.

247. *See id.*

248. *See id.*

249. *See* discussion *supra* Part III.

250. Glover, *supra* note 104, at 87.

safeguards that could extend the same protections to minors.[251] For instance, wills can be revoked or amended prior to the death of the testator.[252] The purpose of this opportunity provided to testators protects them from making an imprudent testamentary transfer, which is the same protective policy supporting the exceptions afforded to minors in other areas of the law.[253] Moreover, the ability to revoke and amend contracts or *inter vivos* gifts is not generally applicable, contrary to testamentary instruments.[254] Thus, the age of majority required to execute a valid will is not consistent with the allowed exceptions in other areas of the law even though testamentary law already includes adequate safeguards for protective measures.[255] Therefore, the age of majority required by testamentary laws is more restrictive to a minor's decision-making capabilities even if they possess the requisite mental capacity.[256] Further, a new form of property, known as digital assets, has recently emerged amongst technological developments that were not in existence when state legislators decided the age of majority for testamentary capacity.[257]

IV. CURRENT LAWS AND DIGITAL ASSET PLANNING

Professor Gerry Beyer, a Governor Preston E. Smith Regents Professor of Law, and his colleague, Kerri G. Nipp, categorized the waves of legislation that focused on the need to plan digital assets as three different "generations."[258] The first generation began when California mandated statutes that only addressed e-mail accounts in 2002.[259] The second generation began in 2007 when Indiana implemented a statute that covered electronically-stored records as well.[260] The third generation of legislation enacted more provisions that covered social networking sites and microblogging.[261]

Though the implementation of these statutes was important to address society's technological advances, states' legislative action differed immensely, and the "conflicting laws were compounding the issues as questions arose regarding which state's law should apply."[262] The National Conference of Commissioners on Uniform State Laws (NCCUSL)

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251. *Id.* at 83–84.
252. *Id.* at 85.
253. *Id.* at 83.
254. *Id.* at 79.
255. *See id.*; Banta, *supra* note 88, at 1708.
256. *See* Banta, *supra* note 88, at 1719.
257. *Id.* at 1709.
258. Gerry W. Beyer & Kerri G. Nipp, *Cyber Estate Planning and Administration*, 9 (Aug. 29, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2166422 [https://perma.cc/RA3Q-KPFM].
259. *Id.*; CAL. BUS. & PROF. CODE § 17538.35 (West 2021).
260. Beyer & Nipp, *supra* note 258 at 9; IND. CODE § 29-1-13-1.1 (West 2021).
261. Beyer & Nipp, *supra* note 258 at 9.
262. *Id.* at 10.

recognized these issues, which ultimately resulted in the formation of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).[263]

The focus of RUFADAA is the concept of "lawful consent" and privacy by not presuming a decedent's consent for a fiduciary's access and control of their digital assets.[264] Instead, RUFADAA provides tiers of priority in examining the consent of the user.[265] The Act's definitions are helpful to guide the reader in understanding the operations and provisions of RUFADAA.[266]

For instance, Section 2 contains definitions of the following key terms necessary to this section's discussion: "catalogue," which includes "information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person;" "content," which includes "information concerning the substance or meaning of the communication which: (A) has been sent or received by a user; (B) is in electronic storage by a custodian. . . ; and (C) is not readily accessible to the public;" a "digital asset," which means "an electronic record in which an individual has a right or interest;" "custodian," which means a person that carries, maintains, processes, receives, or stores a digital asset of a user; " and an "online tool," which means "an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person."[267]

Currently, after a user dies, access to their social media accounts may expire if the controlling terms and conditions or privacy policies of the account expressly say so.[268] Despite the "generations" of attempts by some states to address the issue of digital assets and estate planning, most state probate laws did not address digital assets until recently through the adoption of either the Uniform Law Commission's (ULC) 2014 Uniform Fiduciary Access to Digital Assets Act (UFADAA) or RUFADAA.[269] RUFADAA has been adopted by forty-five states since August 29, 2020, and it has promoted uniformity amongst states in regard to digital asset and probate law.[270]

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263. *Id.* at 11.

264. *Id.*; Michael D. Walker, *The New Uniform Digital Assets Law: Estate Planning and Administration in the Information Age*, 52 REAL PROP., TR. & EST. L.J. 51, 59 (2017).

265. Beyer & Nipp, *supra* note 258, at 13.

266. *Id.* at 11; REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2 (UNIF. LAW COMM'N 2015) § 2.

267. Beyer & Nipp, *supra* note 258, at 11–12; REVISED UNIF. FIDUCIARY ACCESS TO DIGIT. ASSETS ACT § 2 (UNIF. LAW COMM'N 2015).

268. *See Access to Digital Assets of Decedents*, NAT'L CONF. STATE LEGISLATURES (July 10, 2020), https://www.ncsl.org/research/telecommunications-and-information-technology/access -to-digital-assets-of-decedents.aspx [https://perma.cc/ETQ7-A8RL].

269. *Id.*; Natalie Banta and Naomi R. Cahn, *Digital Asset Planning for Minors*, 33 PROB. AND PROP. 44, 45 (2019).

270. Beyer & Nipp, *supra* note 258, at 11.

RUFADAA recognizes four types of fiduciaries that act as a representative on behalf of the testator in digital asset planning:

> (1) a fiduciary acting under a will or power of attorney executed before, on, or after [the effective date of this [act]]; (2) a personal representative acting for a decedent who died before, on, or after [the effective date of this [act]]; (3) a [conservatorship] proceeding commenced before, on, or after [the effective 9 date of this [act]]; and (4) a trustee acting under a trust created before, on, or after [the effective date of this [act]]. (b) This [act] applies to a custodian if the user resides in this state or resided in this state at the time of the user's death. (c) This [act] does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.[271]

In other words, a fiduciary is either: (1) appointed by will or power of attorney, (2) the appointed executor of the estate, (3) either a conservator or guardian, or (4) a trustee.[272] RUFADAA provides these fiduciaries with traditional legal authority to access a decedent's digital assets, including computer files, internet domains, and virtual currency.[273] As illustrated above, the scope of RUFADAA applies to guardians of wards and presumably conservators of minors.[274] This distinction is important for CVMSMIs who do not want their parents to become the fiduciary of their digital assets, as they may want a friend or their marketing manager to continue to control and utilize access to their accounts.[275] However, it is not likely that the guardian or conservator's position automatically grants them access to the ward's private communications.[276] The rights afforded to a guardian or conservator are provided as the following:

> (a) After an opportunity for a hearing under [state conservatorship law], the court may grant a [conservator] access to the digital assets of a [protected person]. (b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a [conservator] the catalogue of electronic communications sent or received by a [protected person] and any digital assets, other than the content of electronic communications, in which the [protected person] has a right or interest if the [conservator] gives the custodian: (1) a written request for disclosure in physical or electronic form;

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271. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 3 (UNIF. LAW COMM'N 2015).

272. *Id.*

273. *Fiduciary Access to Digital Assets Act, Revised*, UNIF. L. COMM'N, https://www. uniformlaws. org/committees/community-home?CommunityKey=f7237fc4-74c2-4728-81c6-b39a91ec df22#:~:text= The%20Revised%20Uniform%20Fiduciary%20Access,ability%20to%20manage%20the %20account.& text=Common%20types%20of%20fiduciaries%20include,under%20a%20power%20of%20attorney (last visited Oct. 20, 2020) [https://perma.cc/SQD9-J5PA].

274. Banta & Cahn, *supra* note 269.

275. *See id.*

276. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 14 (UNIF. LAW COMM'N 2015).

> (2) a [certified] copy of the court order that gives the [conservator] authority over the digital assets of the [protected person]; and (3) if requested by the custodian: (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the [protected person]; or (B) evidence linking the account to the [protected person]. (c) A [conservator] with general authority to manage the assets of a [protected person] may request a custodian of the digital assets of the [protected person] to suspend or terminate an account of the [protected person] for good cause. A request made under this section must be accompanied by a [certified] copy of the court order giving the [conservator] authority over the protected person's property.[277]

Under Section 14 of RUFADAA, a court must grant a guardian or conservator the ability to access the protected person's account, but a fiduciary may still have authority to the funds maintained in a digital asset.[278] This means that the access a guardian or conservator may receive is very limited in regard to the protected person's digital assets.[279] Additionally, the criteria for determining whether to grant power to the guardian or conservator is controlled by state law.[280] With good cause, a guardian or conservator may also request that a custodian suspend or terminate an account.[281] The policy behind this notion is to protect the privacy of the deceased's digital assets.[282] Unless the conservator or guardian provides the custodian of the digital account a court certified copy of an order, the conservator's access will remain limited, if allowed at all.[283] Generally, the court order still limits the access to the catalogue of the digital assets instead of the content-based information.[284] The fiduciary authority does not extend to management or access to a social media account unless the decedent expressly consented to access in a will, power of attorney, or by trust.[285] Because minors are not traditionally allowed the opportunity to execute wills, minors that generate commercially valuable social media accounts cannot consent to providing others access to those social media accounts in estate planning documents.[286] This leaves the valuable accounts in a static state of oblivion.[287]

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277. *Id.*
278. *Id.*
279. Walker, *supra* note 264, at 65.
280. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT § 14 (UNIF. LAW COMM'N 2015).
281. *Id.*
282. Walker, *supra* note 264, at 65.
283. *Id.*
284. *See, e.g.*, UNIF. TR. CODE § 1013 (UNIF. LAW COMM'N 2000).
285. *Fiduciary Access to Digital Assets Act, Revised*, *supra* note 273.
286. *See id*.
287. *Id.*

A. Minors and Digital Assets in Other States

Before adopting RUFADAA, Virginia enacted legislation that addressed minors' digital assets.[288] Virginia's early legislation was the product of parents who were unable to exercise dominion and access over their child's Facebook account after he fell to suicide.[289] However, Virginia has recently adopted RUFADAA and repealed the old legislation that explicitly applied to minors.[290] Now, the language of RUFADAA makes it unclear whether parents may obtain access to their deceased child's digital assets.[291]

Some other states, like Michigan, explicitly address minors and their digital assets by including them in the definition of a "protected person."[292] Tennessee also includes an explicitly applicable section for minors: "Disclosure of digital assets to guardian or conservator of a minor or person with a disability."[293] In discussing a guardian's power, North Carolina recognizes that it includes the ability to access the ward's digital assets.[294]

B. Texas's Orientation and Approach to Digital Asset Planning

Texas recently adopted the Revised Uniform Fiduciary Access to Digital Assets Act (TRUFADAA) in 2017 under Chapter 2001 of the Estates Code.[295] In Texas, adults may devise how their heirs may access their digital assets.[296] When the user passes, the user's intent of disclosure or access to their fiduciary is first determined by examining the custodian's service for such directions.[297] If there are no directions provided by the deceased user through the custodian's service, the intent is then determined by the user's instructions in their estate planning documents (i.e. will, power of attorney, or trust).[298] If there are neither directions of disclosure on the custodian's site nor a written document expressly providing instructions for access, then the custodian's terms of agreement control the fiduciary's rights.[299] Most custodians prohibit third-party access of a deceased user's digital assets.[300]

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288. Banta & Cahn, *supra* note 269, at 44.
289. *Id.*
290. *Id.* at 46.
291. *Id.*
292. MICH. COMP. LAWS ANN. § 700.1002(ee)(iii) (2018); *id.*
293. TENN. CODE ANN. § 35-8-114 (2018).
294. N.C. GEN. STAT. ANN. § 35A-1252 (2016).
295. TEX. EST. CODE § 2001.001 et. seq.
296. Gerry W. Beyer, *Digital Assets: The Basics of Cyberspace Estate Planning*, STATE BAR TEX., https://www.texasbar.com/AM/Template.cfm?Section=articles&Template=/CM/HTMLDisplay.cfm&ContentID=40094 (last visited Sept. 25, 2020) [https://perma.cc/4GBR-P74Q].
297. TEX. EST. CODE ANN. § 2001.051(a).
298. *Id.* § 2001.051(b).
299. *Id.*
300. *Id.*

The executor can obtain a court order unless the deceased user did not consent to the disclosure of the contents.[301]

V. PROBLEMS MINOR SOCIAL MEDIA INFLUENCERS FACE

In today's world, social media influencers are the celebrities of the technological age.[302] The status of being a social media influencer can be achieved by having a minimum of 1,000 to 40,000 followers or by reaching 1 million followers.[303] Social media influencers thrive on the reputation of their "brand."[304] We Are Social, a company that acts as agents for brands and social media influencers, stated in a 2019 report that approximately forty-five percent (45%) or 3.48 billion people use social media.[305] These users are either social media influencers themselves, or they look up to those who make up the social media influencer community when making a decision on purchasing a popular product, trying a new hairstyle, or choosing their next workout.[306] Social media influencers can be found on various platforms: YouTube, Instagram, Facebook, blogging sites, or podcast databases.[307] The technological metamorphosis these platforms brought forth has led Generation Z to spend the majority of their time on these platforms instead of watching traditional television.[308]

A. Texas's Current Digital Asset Provisions

Historically, the testamentary capacity age fluctuated from old English common law as the United States became settled, depending on the surrounding societal circumstances and the type of property available and owned by minors.[309] Though the surrounding societal circumstances have changed through the realm of technology as minors dominate social media, current asset provisions in Texas fail to recognize digital assets as the property of minors.[310] At the age of only thirteen, minors may enter into voidable contracts with social media custodians without parental consent.[311] These same minors entering into these online voidable contracts cannot execute a will, trust, or any testamentary instrument to devise their digital

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301. Beyer, *supra* note 296.

302. *What is an Influencer?*, INFLUENCER MARKETINGHUB, https://influencermarketinghub.com/what-is-an-influencer (last visited Oct. 22, 2020) [https://perma.cc/P6LV-E4ZJ].

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. Banta, *supra* note 88, at 1704.

310. *See* TEX. EST. CODE ANN. § 2001.171.

311. Banta & Cahn, *supra* note 269, at 46.

assets even if the account generates income, fame, or substantial interaction.[312] Accordingly, the testamentary age restrictions require individuals to be eighteen years old to devise their property.[313] However, one inconsistency exists in the application of this requirement because the testamentary mental capacity standard is a low threshold that could be met by many capable minors who have entered into the voidable online contracts with social media sites.[314]

B. CVMSMIs Need Exceptions to the Testamentary Capacity Requirement

Because of inconsistencies within the law, the Texas legislature should allow CVMSMIs to devise their commercially valuable digital assets.[315] Social media is a digital asset that allows minors to generate revenue, attention, and sponsorships.[316] The posts that social media influencers publish on their accounts are valuable.[317] Additionally, the number of followers an individual possesses aids to establish valuable credibility for the influencer themselves.[318] In fact, marketing branches determine "Influencer Marketing Value" (IMV) of an influencer before entering into a deal.[319] The Influencer Marketing Hub provides the following factors that impact the IMV:

1. The size of an influencer's online reach—what is the online awareness of the influencer?
2. The number of people engage with the influencer's posts, split into the different types of engagement. Engagement is quite a broad term. There is a vast difference between a like, a share, a click on a link, and a comment.
3. Success at redirecting people to specific landing pages.
4. The time spent on each engagement.
5. The segment of the marketplace that the influencer reaches out to.[320]

Companies use these factors to decide the types of deals they should offer to social media influencers to market their brands or products.[321] Thus,

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312. *See* 16 C.F.R. § 312.5 (2021); Glover, *supra* note 104, at 81.
313. Glover, *supra* note 104, at 81.
314. *Id.*; *see* 16 C.F.R. § 312.5 (2021).
315. *See* discussion *infra* Part VI.
316. Werner Greyser, *What Exactly is an Influencer's Media Value [Free Influencer Media Value Calculator]*, INFLUENCER MARKETINGHUB, https://influencerMarketinghub.com/influencer-media-value calculator/#:~:text=The%20value%20of%20the%20Influencer,to%20pay%20a%20particular%20influencer (last visited Oct. 22, 2020) [https://perma.cc/P6LV-E4ZJ].
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.*
321. *Id.*

social media influencer accounts are digital assets composed of more digital assets.[322] The legislative writers did not bear in mind the magnitude of property constructed by technological advancements regarding social media when drafting the testamentary capacity age requirements.[323] More importantly, minor social media influencers contribute to the social media market and should have exceptions to devise their digital assets if they have a commercially valuable account.[324]

C. The Institution of Family Is Threatened as Minors Continue to Dominate Social Media

Distinguishable from the presence of child stars and athletes, the achievable status of a CVMSMI is heavily integrated into the systems of technology, so the presence of this group is steadily growing.[325] Unlike a child star's lack of control and contribution to the management of their career, CVMSMIs control much of their content and their account itself.[326] This control and management begins when they enter the online contracts with social media sites like Instagram, Twitter, TikTok, and YouTube.[327] However, this presents another inconsistency within the law and society because many states allow the parent to control and manage the income a minor makes.[328] As a result, the institution of family becomes threatened when the minor cannot control these assets because the minor may have an incentive to emancipate through marriage or the traditional process.[329] The minor may turn to these alternatives to maintain control of their digital assets and income.[330]

The institution of family presents important roles in society.[331] Through the lens of the sociological theory of functionalism, the institution of family performs several important functions, including socializing children, practically and emotionally supporting its members, regulating sexual

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322. *Id.*

323. Banta & Cahn, *supra* note 269, at 45.

324. *See* Brown, *supra* note 29.

325. Simkins, *supra* note 233; Price, *supra* note 233.

326. *See* Sujan Patel, *9 Ways to Use Social Media to Build Your Personal Brand*, FORBES (Nov. 12, 2016, 07:07 AM), https://www.forbes.com/sites/sujanpatel/2016/11/12/9-ways-to-use-social-media-to-build-your-personal-brand/?sh=3065f63a3520 [https://perma.cc/9NTG-XYZ7]; Dhariana Lozano, *Back to Basics: How to Edit Social Media Posts After They've Been Published*, SOCIALMEDIATODAY (June 30, 2019), https://www.socialmediatoday.com/news/back-to-basics-how-to-edit-social-media-posts-after-theyve-been-published/557849/#:~:text=Navigate%20to%20your%20post,to%20your%20photo%20or%20video [https://perma.cc/DU7W-7M8T].

327. *See* 16 C.F.R. § 312.5 (2021).

328. Lottinville v. Dwyer, 27 A.2d 305, 309 (R.I. 1942); Atkins v. Sherbino, 4 A. 703, 706 (Vt. 1886).

329. Banta, *supra* note 88, at 1718–19.

330. *Id.*

331. *Sociological Perspectives on the Family*, SOCIAL SCIENCE: LIBRETEXTS (Aug. 16, 2020), https://socialsci.libretexts.org/Bookshelves/Sociology/Book%3A_Sociology_(Barkan)/11%3A_The_Family/11.03%3A_Sociological_Perspectives_on_the_Family [https://perma.cc/G3MZ-RLND].

reproduction, and providing a social identity to the family's members.[332] Through the lens of another sociological theory—conflict theory—the institution of family affects a minor's life chances by providing a social identity.[333]

The most important role for this discussion is the family's ability to socialize children, provide practical and emotional support for its members, and the development of a social identity.[334] The institution of family is "the major unit in which socialization happens."[335] Socialization refers to the "preparation of newcomers to become members of an existing group and to think, feel, and act in ways the group considers appropriate."[336] This affects how a minor will operate in society for a lifetime.[337] Thus, it is important for children to remain a part of their family unit so that they are socialized to become members of society.[338]

A family unit also provides "practical and emotional support to their members."[339] This includes the practical components of living such as food, clothing, shelter, and intangible emotional support like love and comfort.[340] As social media use becomes more frequent, it is important that a minor experiences the intangible emotional support of their family when they are faced with instances like harsh comments on their accounts.[341] For example, the sixteen-year-old influencer discussed in the introduction portion of this Comment, Charli D'Amelio, discussed harsh comments she received while creating content for her followers and the effect they have on her mental health.[342] These comments can affect the developmental social identity of minors, so it is important for the institution of family to provide emotional support.[343]

The family unit also provides a social identity to children, which affects the life chances of these minors after they reach the age of majority.[344] This comes from the formative factors affecting a child's life, such as their

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332. *Id.*

333. *Id.*

334. *See id.*

335. *Id.*

336. Caroline Hodges Persell, *Socialization*, ASANET (1990), https://www.asanet.org/sites/default/files/savvy/introtosociology/Documents/PersellSocializationReading37.htm [https://perma.cc/EBP9-SEBM].

337. *Sociological Perspectives on the Family*, *supra* note 331.

338. *See id.*

339. *Id.*

340. *Id.*

341. Rachel Ehmke, *How Using Social Media Affects Teenagers*, CHILD MIND INST., https://childmind.org/article/how-using-social-media-affects-teenagers/ (last visited, Nov. 13, 2020) [https://perma.cc/3N63-EXKT].

342. Gabrielle Chung, *TikTok Star Charli D'Amelio Reveals Her Struggles with Eating Disorder: 'Some Days Are Worse Than Others'*, PEOPLE (Sept. 10, 2020, 09:30 PM), https://people.com/health/charli-damelio-reveals-struggles-with-eating-disorder/ [https://perma.cc/D6Q3-QYRL].

343. Ehmke, *supra* note 341.

344. *Sociological Perspectives on the Family*, *supra* note 331.

parent's social class, race, ethnicity, and religion.[345] These components help develop a minor's morals, values, and understanding of their culture; they provide a path for a child to navigate through society and determine their life chances.[346] Simply put, the institution of family is important for a minor's development.[347]

The ability to become a commercially valuable minor influencer using social media is far more accessible than the ability of a minor to achieve professional athlete status or become a popular actor or actress.[348] For example, recent studies show that only two percent (2%) of actors make a living, and less than one percent (1%) of athletes become professional athletes.[349] Although the percentage of professional athletes and actors who are minors is low, social media currently allows approximately eleven percent (11%) of minors to become influencers.[350] To reduce incentive for these CVMSMIs to detach themselves from their parents by means of emancipation, courts should allow an exception for those who meet the mental capacity requirement.[351] Therefore, CVMSMIs that fulfill the mental capacity requirement should receive an exception to the legal capacity requirement.[352] In turn, this will discourage emancipation and preserve the institution of family for the betterment of society.[353]

D. Other Remedies Do Not Provide Enough Protection for Social Media Influencers

Currently, the only protections offered to CVMSMIs are to wait until they are age eighteen, emancipate from their parents, utilize the social media platforms' online documents (if any), or write down their intentions and hope their fiduciaries (their parents, guardians, or other conservators) respect their wishes.[354]

Natalie Banta and Naomi R. Cahn, commentators on the general issue of minors and digital asset planning, proposed a three-step approach for attorneys who represent parents who wish to protect their child's interests.[355]

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345. *Id.*
346. *Id.*
347. *Id.*
348. Elisa Cinelli, *86 Percent of Young People Aspire to Become a Social Media Influencer, Study Says*, MOMS (Nov. 6, 2019) https://www.moms.com/nearly-every-young-adult-aspires-to-become-a-social-media-influencer/#:~:text=According%20to%20a%20new%20study,their%20chosen%20social%20media%20platform [https://perma.cc/6ZW2-YMSZ].
349. Simkins, *supra* note 233; Price, *supra* note 233; JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA, 282–83 (2011).
350. Cinelli, *supra* note 348.
351. *See supra* notes 325–50 and accompanying text.
352. *See supra* notes 325–50 and accompanying text.
353. *See supra* notes 325–50 and accompanying text.
354. Banta & Cahn, *supra* note 269, at 47.
355. *Id.*

This approach included the following: (1) encourage the parents to talk with their children about the issues that may arise with digital assets and advise the parents to respect their child's intentions, (2) inform the parent about online documents that may be used to convey the child's wishes (e.g., Facebook's Legacy Contact option and Google's Inactive Account Manager), and (3) instruct the parents to encourage their children to complete a statement of intent that will list a fiduciary for their digital assets and instructions for how to handle the digital assets if the child passes away or becomes incapacitated.[356] Examples of the proposed statements include the following:

> 1. Digital Assets to be preserved. My parent/sibling/best friend has my permission to take control of, and have access to: (1) my computer, phone, or similar electronic devices, and anything that I have stored on them; and (2) my digital assets and accounts, including email, social media, music, photographs, and videos. My parent/sibling/best friend can do whatever they think is best with all of this. OR
> 2. Digital Assets to be deleted (check all that apply):
>   - I would like all of my digital assets to be returned to their factory condition, with any of my personal data deleted.
>   - I would like any access to my digital assets, such as any email social media, or gaming accounts, to be blocked, with no one, including my personal representative, able to access such accounts.
>   - I would like all my digital accounts deleted.[357]

However, these provisions are neither adequate nor proper as there are no reassurances provided to a minor that their commercially valuable digital assets will not fall victim to fraud, misuse, or infringement on their privacy.[358] Additionally, these steps proposed by these commentators were formatted to apply to all minors who possess a digital asset.[359] Therefore, the suggested approach may serve useful to minors that have not built a commercially valuable account because issues of fraud, misuse, and infringement are not as pressing (there is not as much to lose).[360] The only way to ensure that minors' social media accounts are managed correctly (in the event they become incapacitated or pass away) is to provide them with an exception to the testamentary capacity age requirement to devise their digital assets.[361]

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356. *Id.*
357. *Id.*
358. *See id.*
359. *Id.*
360. *See id.*
361. *See* discussion *infra* Part VI.

VI. IMPLEMENTING AN EXCEPTION TO THE TESTAMENTARY CAPACITY AGE FOR CVMSMIS

Laws governing minors are generally created to promote their best interest.[362] Thus, to promote the best interest of minors while honoring the institution of the family, courts balance various factors.[363] In considering minors' ability to devise their digital assets, the same principle should still apply.[364] If Texas continues to deny minors the opportunity to devise their digital assets, the parents benefit more from the minors' labor more than the minors do themselves.[365] Because the question of testamentary capacity arises when the testator deceases, concerns about undue influence and duress decrease when the minor reaches the age of majority.[366] Further, only a small number of minors will meet the determining threshold to legally devise their digital assets with this Comment's proposed plan.[367] Allowing this small group to devise their valuable digital assets may not change the outcome of contested probates.[368] For example, much like adults, many qualifying minors may not even petition the court to devise their digital assets.[369] The safeguards already in place under common law testamentary doctrines could protect minors' digital assets and proceeds, should any suspicious circumstances arise.[370] For instance, the doctrine of undue influence may override the commercially valuable minors' intent.[371] The added safeguards proposed below will also make it more difficult for unqualified minors to participate.[372]

A. Guardians Ad Litem *as the Gatekeepers*

"Guardians at law"—more commonly known as guardians *ad litem*—are appointed to represent a person's interest during litigation.[373] The

362. John DeGirolamo, *Benefits of a Guardian Ad Litem*, IN L. WE TR., https://inlawwetrust.com/guardian-ad-litem-divorce-attorney-for-men/ (last visited Sept. 25, 2020) [https://perma.cc/V9ZT-X5KH].

363. Bellotti v. Baird, 443 U.S. 622, 634 (1979) ("We have recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.").

364. Banta, *supra* note 88, at 1741.

365. *Id.*

366. *Id.*

367. *See* discussion *infra* Section VI.B.

368. Banta, *supra* note 88, at 1741.

369. *Id.* at 1742 (showing that only fifty percent (50%) of adults utilize their ability to execute a valid will).

370. Glover, *supra* note 104, at 74, 83–88.

371. 25 AM. JUR. 2d, DURESS AND UNDUE INFLUENCE § 36.

372. *See* discussion *infra* Section VI.B.

373. Adam Kielich, *What is a Guardian Ad Litem Under the Texas Family Code?*, KIELICH L. FIRM (Aug. 18, 2020), https://www.kielichlawfirm.com/what-is-a-guardian-ad-litem/ [https://perma.cc/Q6X4-

guardian is appointed to represent a ward, typically those who are legally incompetent or minors.[374] The period of appointment begins when the guardian *ad litem* is appointed and ends when the legal proceedings are finished.[375] Most frequently in Texas, courts appoint a guardian *ad litem* in probate and family matters to represent minors.[376] For example, guardians *ad litem* may be appointed in family law cases to promote a minor's best interest when custody issues arise.[377] However, the best interest of the minor and the wishes of the minor may not always align.[378] The duty of guardians *ad litem* is to perform in their informative role by promoting the best interest of the minors they represent even when their opinion does not align directly with the minor's wishes.[379] To form their opinions in family cases, guardians *ad litem* consult attorneys, family members, and the minor.[380] Guardians *ad litem* will also examine other documents like school records to prepare their reports for the court.[381] Therefore, a guardian *ad litem* is an independent advocate that aids in ensuring the best interests of those they are representing.[382]

To represent a minor's best interests, one must qualify to become a guardian *ad litem*.[383] Many states disagree on the qualifications that an individual must have in order to become a guardian *ad litem*.[384] The major disagreement about the qualifications of guardians *ad litem* is whether or not they should be an attorney.[385] For instance, some states, including Florida, do not require the guardian *ad litem* to be a licensed attorney.[386] However, it is generally agreed that the representing attorney and the guardian *ad litem* cannot be the same person.[387] This policy is to protect the ethical role of the guardian *ad litem* and to ensure that the absolute best interest of the child is set forth.[388] Contrary to the requirements in Florida, many states do require that the guardian *ad litem* be a licensed attorney.[389] Some commentators believe that this requirement makes it more difficult to ethically represent the minor's best interest because they believe there may be confusion as to

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374. *Id.*
375. *Id.*
376. *Id.*
377. DeGirolamo, *supra* note 362.
378. Kielich, *supra* note 373.
379. *Id.*
380. *Id.*
381. *Id.*
382. Victoria Sexton, *Wait, Who Am I Representing? The Need for States to Separate the Role of Child's Attorney and Guardian Ad Litem*, 31 GEO. J. LEGAL ETHICS 831, 834 (2018).
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*

whether the guardian *ad litem* represents the minor or their interests.[390] Therefore, some state laws governing guardians *ad litem* allow those who are not licensed attorneys to be guardians *ad litem*.[391]

Comparable to their position to protect a minor's best interest in other areas of the law, guardians *ad litem* can also operate as the gatekeepers for minors who wish to execute legal documents.[392] These gatekeepers may operate in their capacity to consult business agents that the minor may already have; they review documents showing the net worth of the minor's social media account, and they prepare a report to ensure that a minor is making a prudent decision when they execute a will.[393] This added safeguard will provide added protection to the testamentary doctrines already in place and will protect minors from those who attempt to manipulate their decisions.[394]

B. The Proposed Process

The following section provides a solution for CVMSMIs and their current inability to devise their digital assets in addition to the income flowing from their technological property.[395] CVMSMIs should be allowed to petition the court for the ability to execute estate planning documents if they fulfill the mental capacity requirement and are thirteen years old.[396] This age is necessary because minors who reach thirteen years of age are legally allowed to enter into internet contracts (terms, agreements, etc.) without parental consent.[397] Because testamentary law already includes safeguards that protect against improvident decisions, these safeguards—including the testamentary requirements and the doctrines of succession—should be extended to this specified group of minors.[398] One of these safeguards already implemented is the mental capacity requirement, which protects the testator from making an improvident testamentary decision.[399] Another safeguard that should be extended to qualified groups of minors is the specific formalities required in executing a valid will.[400] These extended requirements will ensure that a minor's intent is reflected by the will.[401] Additionally, as

390. *Id.*
391. *Id.*
392. *Id.*
393. See *id.*
394. Kielich, *supra* note 373; *see* Banta, *supra* note 88, at 1721.
395. *See, e.g.*, FLA. STAT. ANN. § 743.07(1) (West 2019); IND. CODE ANN. § 29-1-5-1 (LexisNexis 2016); IOWA CODE ANN. § 633.264 (West 2015); TEX. EST. CODE ANN. § 251.001; VA. CODE ANN. § 16.1-333, 64.2-401 (West Supp. 2018).
396. Author's proposal.
397. *See* 16 C.F.R. § 312 (2021); Banta, *supra* note 88, at 1712.
398. Author's proposal.
399. Glover, *supra* note 104, at 88.
400. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1(b) (AM. LAW INST. 2003).
401. *See* Glover, *supra* note 139, at 153–57.

previously mentioned in Section C of Part V of this Comment, this ritualistic process reinforces the severity of the testamentary decisions and promotes planning and deep consideration.[402] This will further allow the minor to understand the gravity of their choices and help them take it seriously.[403]

The other safeguards that will be extended to the group of classified minors include the doctrines of fraud, undue influence, and duress that are intended to protect against those who desire to take advantage of testators.[404] Because the doctrine of fraud protects testators from misrepresentations and deceit, minors will have further protection from those who misrepresent any information to them by invalidating wills that were the product of a misrepresentation.[405] Additionally, the doctrine of undue influence will protect a minor testator by invalidating a will when a "wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made."[406] This is important when these minors are faced with issues with their parents or other adults that may attempt to take advantage of their estate.[407]

Furthermore, the doctrine of duress will invalidate a minor's will when they experience a wrongdoer's overtly coercive tactics in executing the testamentary document.[408] With these protective measures extended to CVMSMIs, those in need of executing a testamentary document will already have necessary safeguards needed to protect them from making improper testamentary devices.[409] However, an additional safeguard may be necessary because minors may experience more hardships than adults due to the "peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[410] Therefore, the additional safeguards of a guardian *ad litem* could add necessary protections for CVMSMIs.[411]

To begin the process of executing a valid will, a minor will first need to obtain an attorney's services.[412] The guidance of an attorney will ensure that the minor is not beginning an unnecessary process, and it serves as an

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402. *See* Gulliver & Tilson, *supra* note 142, at 5 ("Compliance with the total combination of requirements for the execution of formal attested wills has a marked ritual value, since the general ceremonial precludes the possibility that the testator was acting in a casual or haphazard fashion.").

403. *See* discussion *supra* Section V.C.

404. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 (AM. LAW INST. 2003).

405. *Id.*

406. *Id.* § 8.3(e).

407. Author's commentary.

408. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(c) (AM. LAW INST. 2003).

409. Glover, *supra* note 104, at 90.

410. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

411. *See supra* notes 395–410 and accompanying text.

412. *See infra* notes 413–48.

additional safeguard.[413] Further, this will also ensure that only minors producing adequate income that satisfies the "commercially valuable" criteria begin the formal process.[414] Though this exception is intended to permit CVMSMIs an opportunity to devise their digital assets, as well as the financial income they receive from their work as an influencer, the exception will only apply to those that are thirteen years of age.[415] This requirement within the exception is intended to remain consistent with COPPA.[416] Once a minor establishes an attorney-client relationship and is thirteen years old, they must also meet the requirement of being an established commercially valuable social media influencer to execute their valid will.[417] The attorney will decide if the minor has achieved financial success through their social media account by applying the factors listed above in Section V.B. of this Comment.[418] When an attorney reviews the required information indicating the income the minor receives as a result of their social media fame, the attorney may then petition the county court on behalf of the minor and request the ability to make a valid living will.[419] This process will not result in the overflow or clogging of the court system as only eleven percent (11%) of minors *may* become commercially valuable, and attorneys are restricted from making frivolous legal claims.[420] In addition, wills are rarely disputed in court.[421]

The criteria of the filed petition will include the age of the child, the amount of revenue they receive from their account(s), and a short description of the minor's wishes.[422] At the request of the petitioner, the court will then appoint the minor a guardian *ad litem* to examine the circumstances surrounding their wishes.[423] The guardian *ad litem* is an additional safeguard that will ensure that the testamentary document reflects the best interests of the minor and that the family or friends of the minor are not pressuring them in any way.[424] The guardian *ad litem* will perform the same procedures as in other civil cases to promote the best interest of the minor, even if the minor's wishes are not synonymous with their best interest.[425] In reviewing the value of the assets received and of the account itself, the guardian *ad litem* can consider each social media account through the following factors:

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413. *See infra* notes 414–28

414. *See infra* notes 415–28

415. *See infra* notes 416–28; Banta, *supra* note 88, at 1712.

416. *See* 16 C.F.R. § 312 (2021); Banta, *supra* note 88, at 1712.

417. *See* 16 C.F.R. § 312 (2021); Banta, *supra* note 88, at 1712.

418. *See* discussion *supra* Section V.B.

419. *See* discussion *supra* Section V.B.

420. Cinelli, *supra* note 348; MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR ASS'N 2019).

421. Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests* 14 NEV. L. J. 1. (2013).

422. *Id.*

423. *Id.*

424. *See* discussion *supra* Section V.B.

425. Kielich, *supra* note 373.

1. The size of an influencer's online reach—what is the online awareness of the influencer?
2. The number of people engaging with the influencer's posts, split into the different types of engagement. Engagement is quite a broad term. There is a vast difference between a like, a share, a click on a link, and a comment.
3. Success at redirecting people to specific landing pages.
4. The time spent on each engagement.
5. The segment of the marketplace that the influencer reaches out to.[426]

However, if the minor is dissatisfied with the guardian *ad litem's* report due to its impact on the minor's ability to make certain requests in the executed will, the minor may request an amendment or revoke their will because wills are inherently voidable after execution, as long as the amendment occurs before the testator passes.[427] This ability to revoke and amend is also supported by the rights all minors possess in other areas of the law, such as a minor's ability to make donative transfers and enter into contracts.[428]

VII. CONCLUSION

Texas statutes should create an exception to the testamentary capacity age to allow CVMSMIs the ability to create an estate plan when their digital assets are of commercial value.[429] Digital assets continue to impact society as social media attracts attention.[430] Minors now have access to a form of property that the drafters of the testamentary capacity requirements never dreamed of.[431] Therefore, CVMSMIs should have the ability to devise their social media accounts, specifically minors who are at least thirteen years of age, meet the requisite mental capacity component, and understand the nature and extent of their digital assets.[432]

There are too many inconsistencies with the law because maturity doctrines do not apply evenly at hand.[433] Because there are too many inconsistencies, the law regarding the age of majority and a minor's legal capacity is met with a gap.[434] Minors have the ability to enter into and disaffirm contracts.[435] Minors also have the ability to decide whether they

426. Greyser, *supra* note 316.
427. Glover, *supra* note 104, at 104.
428. *Id.* at 70; Banta, *supra* note 88, at 1720.
429. *See* discussion *supra* Section V.B.
430. Banta, *supra* note 88, at 1746.
431. *Id.*
432. *Id.*
433. *Id.*
434. *Id.*
435. *Id.*

receive life-sustaining treatment.[436] Finally, minors can decide whether they give donative gifts and also have the ability to revoke such gifts.[437] Therefore, CVMSMIs should also be presented with an exception that grants them the ability to devise digital assets before they turn eighteen.[438] Many safeguards already included in testamentary law will provide adequate safeguards to minors, and the proposed safeguards will ensure the minor executes a prudent document.[439]

The inability for these minors to create testamentary documents is unfair and inconsistent with other laws that do not prohibit minors from owning property or contracting with these digital asset domains.[440] Furthermore, some states offer minors the limited ability to make important decisions about receiving medical treatment, entering the field of employment, having sex, or getting married.[441] Therefore, the state of Texas should at least allow CVMSMIs the ability to decide where they want their digital assets to go should they die or become incapacitated, especially because digital asset law makes it difficult for heirs to exercise access or control over the accounts of the deceased.[442] This Comment does not call for Texas to completely disregard the legal capacity age requirement.[443] It does, however, call for Texas to rely on whether a qualifying minor has the requisite mental capacity to devise digital assets and the financial value to make it worthwhile, with the traditional safeguards that will continue to protect the interests of a minor (doctrines of undue influence, fraud, and requisite formalities) and the additional safeguards proposed by this Comment.[444] Granting commercially valuable minors the right to devise their social media accounts is in their best interest and promotes protection of the institution of family, property rights, and privacy interests.[445] Texas law needs to adapt to the surrounding societal circumstances.[446] Without any opportunity to protect the commercially valuable digital assets created by minor social media influencers, people like Emily (presented in the introductory hypothetical) and real-life minor social media influencer Charli D'Amelio cannot adequately protect their valuable digital assets.[447]

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436. *Id.*
437. *Id.*
438. *See id.*
439. *See id.* at 1721.
440. *See id.*
441. *Id.* at 1721.
442. *See id.*
443. Author's commentary.
444. *Id.*
445. *See* Banta, *supra* note 88, at 1721.
446. *See id.*
447. *See id.*