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How Texas Can Better Protect Seniors from Financial Abuse and Mismanagement Associated with Alzheimer's Disease.

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**HOW TEXAS CAN BETTER PROTECT SENIORS FROM
FINANCIAL ABUSE AND MISMANAGEMENT ASSOCIATED
WITH ALZHEIMER'S DISEASE**

HAYDEN COLBY*

I. Introduction.....	484
II. Alzheimer's Disease.....	485
A. Demographics, Prevalence, & Financial Burden	485
B. Alzheimer's Disease	487
C. Loss of Financial Capacity	489
III. Protections under Current Texas Law	493
A. Contract Law	493
1. Minors	493
2. Limitations on Disaffirmance	494
3. Incapacitated Seniors	495
a. Test for Mental Incapacity	495
b. Elements of Test	496
c. Effect of the Restatement (Second) of Contracts on Seniors	497
B. Guardianship	498
C. Texas Human Resources Code	499
D. U.S. Department of Veterans Affairs.....	503
E. Criminal Law	504
F. Estate Planning	505
IV. Analysis of Existing Texas Law	508
A. Contract Law	509
1. Existing Policy	510
a. Risk to the Senior	510
b. Foreseeability of Harm.....	511
c. Likelihood of Injury	512
d. Social Utility of Actor's Conduct.....	513
e. Burden on the Parties.....	514
2. Burden on the Senior	515

* St. Mary's University School of Law, Candidate for Juris Doctor, May 2012. I offer this paper as a token of my love for my step-father, Wes Callaway Jr., and as a word of solace and support to those who may one day experience what my family went through. I would also like to thank my colleagues at *The Scholar: St. Mary's Law Review on Minority Issues* for all of their hard work and dedication.

3. Burden on the Vendor	516
B. Guardianship	520
C. Family Protective Services.....	522
V. Proposals	522
A. Need for Estate Planning	522
B. Proactive Testing & Diagnosis.....	523
C. Revisions to Contract Law	524
D. Infancy Doctrine for Confirmed AD	525
E. Mandatory Medical Reporting Requirement	525
F. Promotion of Bank Reporting Legislation.....	526
VI. Conclusion	527

“Honour thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee.”
Exodus 20:12¹

“Thou shalt rise up before the hoary head, and honour the face of the old man, and fear thy God: I am the LORD.”
Leviticus 19:32²

I. INTRODUCTION

Do you remember the aftermath of Hurricane Ike along the Texas Gulf Coast in 2008? Do you recall the news footage of the communities being ravaged by the unpredictable and unyielding force of nature that we call a hurricane? Can you imagine the heartbreak and despair of the families and loved ones who returned from evacuation only to find their homes obliterated by wind and water? The memories, the family photos, the weekends at the beach house, and the echoes of children pitter-pattering across the floor were all at once violently transformed into rubble, flood, and black mold.

This happened to me. But instead of the Gulf Coast it was my family. Instead of losing my family home, I lost my dad. Instead of a hurricane named Ike, it was a hurricane named Alzheimer’s Disease (AD) that picked up and smashed a once strong and capable lion of a man. Instead of discovering the rubble of brick and mortar, my family faced the financial aftermath of a man rudely stripped of his mental capacity and those who preyed upon him during his weakened state.

If you have not already experienced this yourself, you will soon come to appreciate that the storm that struck my family was just a drop in the bucket. Unfortunately, my story may become your story. The likelihood

1. *Exodus* 20:12 (King James).
2. *Leviticus* 19:32 (King James).

that a loved-one will lose his or her capacity to manage finances due to AD is growing with each passing year, and the result of this loss can be devastating.

The purpose of this Comment is fivefold. First, it will describe AD and explain the significance of the disease with respect to financial capacity and contract law. Second, it will inform the reader of the existing legal protection available to elderly Texans in the grips of AD. Third, it will analyze the existing law and highlight how this regime fails to benefit the vast majority of incapacitated seniors. Accordingly, I will recommend changes in policy with the hope of broadening the current shield of defense to protect those at risk for AD. Lastly, this Comment will include some of my family's personal stories so the reader may learn from our mistakes and better protect his or her loved-one(s) who find themselves in the projected path of hurricane Alzheimer's.

II. ALZHEIMER'S DISEASE

A. *Demographics, Prevalence, & Financial Burden*

The prevalence of AD is expected to grow considerably as the population of senior citizens swells.³ Worldwide the number of AD sufferers is expected to quadruple in the next four decades to 85 million souls.⁴ As of 2003, there were roughly 35.9 million American citizens over the age of sixty-five, and this number is expected to reach 71 million by the year 2030.⁵ This is an important metric for understanding the groundswell of AD because experience shows that up to twelve percent of seniors aged sixty-five or more develop AD and almost fifty percent of those over eighty-five will likely encounter the disease.⁶

3. See KEVIN KINSELLA & WAN HE, U.S. CENSUS BUREAU, AN AGING WORLD: 2008 1 (June 2009), available at <http://www.census.gov/prod/2009pubs/p95-09-1.pdf> (revealing the rapid aging trends among developed nations). The global population of persons over sixty-five will soon exceed the number of children under age five for the first time in world history. *Id.* Additionally, this group of seniors is living longer. *Id.* As a result, the population of persons over eighty years old is expected to increase by 233% by 2040. *Id.*

4. Daniel Marson, *Financial Competency and Dementia: Objective Tools to Assess Decision-Making Capacity*, UAB INSIGHT (Summer 2007), available at <http://health.uab.edu/32077>.

5. Hon. Steve M. King, *Guardianship Monitoring: A Demographic Imperative*, NAT'L COLL. OF PROBATE JUDGES, <http://www.ncpj.org/guardianship%20monitoring.htm> (last visited Jan. 18, 2011) (summarizing the growing population of seniors and the anticipated impact they will have on probate courts).

6. Matthew A. Christiansen, *Unconscionable: Financial Exploitation of Elderly Persons with Dementia*, 9 MARQ. ELDER'S ADVISOR 383, 384 (2008) (describing the prevalence of AD among seniors by age-group).

Today it is estimated that 5.3 million Americans are afflicted with AD and that another person is added to this roster every seventy seconds.⁷ This year alone another 454,000 people will be diagnosed with AD, and it is expected this rate of growth will leap to almost 1 million per year by 2050.⁸ The tipping point for the anticipated boom in AD patients is slated for 2031 when the first tranche of baby-boomers celebrate their eighty-fifth birthday.⁹ In that year our society will groan under the weight of 3.5 million persons over eighty-five diagnosed with AD.¹⁰

Texas will not escape the effects of this demographic tidal wave. In fact, Texas will shoulder a disproportionate share of this graying effect as many retiring seniors have tended to relocate to the South, Southwest, and West regions of the country.¹¹ The Alzheimer's Association projects that Texas currently has 340,000 citizens with AD.¹² This number is projected to grow by 38% and reach an expected total of 470,000 by the year 2025.¹³ This increasing burden will most certainly tax Texas's medical system.¹⁴

According to a global economic survey, the estimated medical and social cost associated with AD and related dementia diseases in 2010 approached 600 billion dollars.¹⁵ North America's slice of the pie equals roughly 213 billion dollars,¹⁶ with the United States spending about 172

7. ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 10 (2010), available at http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf. It is estimated that there are roughly 500,000 cases of AD and other forms of dementia among people under sixty-five. *Id.* Although women with AD tend to outnumber men, this is explained by the fact that females tend to outlive males. *Id.* Thus, it appears that gender is not a strong indicator of susceptibility to AD. *Id.*

8. *Id.* at 14.

9. *Id.*

10. *Id.*

11. *See id.* at 12.

12. ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 16 (2010), available at http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf.

13. *Id.* at 16.

14. *See id.* at 10 (explaining how advances in medical technology will lead to a growing population of seniors who may develop AD); *see also* D'Ann Petersen & Laila Assanie, *The Changing Face of Texas: Population Projections and Implications*, in *THE FACE OF TEXAS: JOBS, PEOPLE, BUSINESS, CHANGE* 34, 44 (2005), available at <http://www.dallasfed.org/research/pubs/fotexas/fotexas.pdf> (predicting that the aging of the Texas population will dramatically expand the role of the healthcare industry in the state's economy).

15. ALZHEIMER'S DISEASE INT'L, *WORLD ALZHEIMER REPORT 2010: THE GLOBAL ECONOMIC IMPACT OF DEMENTIA* 24 (2010), available at http://www.alz.org/documents/national/World_Alzheimer_Report_2010.pdf. This figure includes both direct medical costs and direct social costs related to the treatment of seniors with dementia. *Id.*

16. *Id.*

billion dollars on health care services for patients with AD.¹⁷ The direct cost per person with AD in North America is estimated to be 48,600 dollars per year.¹⁸ If this estimate of 48,600 dollars is applied to persons in the state of Texas, then the current AD related medical expenses in Texas may be as much as 16.5 billion dollars, and could approach 22.8 billion dollars by 2025.¹⁹ As a comparison, the Texas State Comptroller lists the state government's combined outlay of money towards medical services and specialties for 2010 at roughly 15.5 billion dollars.²⁰

B. *Alzheimer's Disease*

AD is a terminal disease.²¹ A medical definition describes the disease as a “progressive cognitive deterioration . . . characterized by senile plaques, β -amyloid deposits, and neurofibrillary tangles in the cerebral cortex and subcortical gray matter.”²² This deterioration is marked by the death of brain cells and shrinking brain mass, resulting in the brain's failure to transfer and process information.²³ An early symptom of AD is the gradually declining ability to remember new information.²⁴ This cognitive decline is distinguishable from the normal effects of aging because the symptoms of AD have a more noticeable impact on a person's ability to function in normal daily life.²⁵ Ultimately, an AD patient will likely

17. *Id.* at 34. The Alzheimer's Association reported that payments for those with AD in 2004 “were almost three times higher than average Medicare payments” for people in the same age group without AD. *Id.* For Medicaid, payments were over nine times higher. *Id.*

18. *Id.* at 24.

19. See ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 16 (2010), available at http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf (providing growth and demographic statistics and projections); ALZHEIMER'S DISEASE INT'L, WORLD ALZHEIMER REPORT 2010: THE GLOBAL ECONOMIC IMPACT OF DEMENTIA 24 (2010), available at http://www.alz.org/documents/national/World_Alzheimer_Report_2010.pdf (providing cost statistics on a per capita basis).

20. *Texas State Expenditure Information by Category and Object Code: Fiscal Year 2010—7666 Medical Services and Specialties*, TEX. COMPTROLLER OF PUBLIC ACCOUNTS, available at http://www.texasransparency.org/moneygoes/spending_category.php (Select fiscal year “2010” from drop down; then follow “Public Assistance Payments” hyperlink; then follow “7666 Medical Services and Specialties” hyperlink) (last visited Jan. 20, 2011) (detailing the combined expenditures for Texas in 2010).

21. ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 7 (2010), available at http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf.

22. MERCK, *Dementia: Delirium and Dementia*, in THE MERCK MANUAL OF DIAGNOSIS AND THERAPY ONLINE (Robert S. Porter et al. eds., 2007), available at <http://www.merck.com/mmpe/sec16/ch213/ch213c.html#sec16-ch213-ch213c-120>.

23. ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 7 (2010), available at http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf.

24. *Id.*

25. See *id.*

require full-time nursing care because he or she will lose the ability to conduct even the most basic activities.²⁶ In the end, those who suffer from AD lose the ability to resist infection and most will perish inside of a nursing home.²⁷

The primary risk factor contributing to the development of AD is age.²⁸ Considering the prevalence of AD among seniors, it is advisable for all persons to be tested for dementia as they draw near to their sixty-fifth birthday. Testing for AD requires a holistic approach²⁹ and a doctor should strive to give the patient a specific prognosis regarding capacity.³⁰

Two common tests administered by physicians to their aging patients serve as helpful indicators of mental decline and potential onset of dementia related illness. The first is the mini-mental state examination (MMSE).³¹ The MMSE is meant to be administered by a physician and tests for basic situational awareness, comprehension of basic math concepts, ability to follow instructions, and spatial reasoning.³² The second test is the “Mini-Cog” which largely consists of having the senior draw the face of a clock and illustrate correctly a particular time given by the physician.³³ Poor scores on either exam may not necessarily indicate an onset of dementia, but can aid the physician in determining whether further testing should be ordered.³⁴ If a physician thinks that the patient may demonstrate symptoms of dementia, the best course of action is to refer the patient to a specialized clinic for more determinative testing.³⁵

26. *Id.*

27. *Id.* The usual cause of death from AD-related infection is pneumonia. *Id.*

28. ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 7 (2010), available at http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf.

29. See Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 *FORDHAM L. REV.* 1177, 1181–82 (1994) (explaining the approach to diagnosing AD).

30. See Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudential Therapy Perspective*, 28 *LAW & PSYCHOL. REV.* 71, 82 (2004) (asking not whether a patient is capable, but rather, “Is he/she capable to do X in Y context?”).

31. Lenore Kulowicz & Meredith Wallace, *The Mini Mental State Examination (MMSE)*, 12 *J. PSYCHIATRIC RES.* 189–98 (1975), available at <http://www.isu.edu/nursing/opd/geriatric/MMSE.pdf>. The MMSE is “an 11-question measure that tests five areas of cognitive function: orientation, registration, attention and calculation, recall, and language. The maximum score is 30. A score of 23 or lower is indicative of cognitive impairment.” *Id.*

32. *Id.*

33. SOCIETY OF HOSPITAL MEDICINE, *THE CLOCK DRAWING TEST* (2004), http://www.hospitalmedicine.org/geriresource/toolbox/pdfs/clock_drawing_test.pdf.

34. See Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 *FORDHAM L. REV.* 1177, 1182–83 (1994) (explaining the most frequent cause of a “false positive” on an MMSE test is the limited education that some people have, since some people did not receive schooling beyond the eighth grade).

35. Telephone Interview with Dr. Marson, Professor of Neurology at University of Alabama at Birmingham (UAB) (September 24, 2010).

C. *Loss of Financial Capacity*

A critical function that is lost in the early stages of AD is the ability to manage one's finances.³⁶ "Financial capacity comprises a broad range of conceptual, pragmatic, and judgment abilities" and enables a person to maintain a checkbook, balance a budget, and make basic financial decisions.³⁷ The loss of financial capacity poses specific and grave consequences for the AD sufferer. AD patients quickly find providing for themselves to be a challenge and have difficulty maintaining their bank accounts and understanding their financial situation.³⁸

Declining financial capacity makes even the most basic daily tasks frustrating for the AD patient and eventually leads to a state of dependency. This loss of independence can have a tremendous psychological impact for both patient and loved ones. Control over one's own finances is a core component of individualism in our society, the loss of which can have dramatic consequences for the patient.³⁹ The loss of independence for those with AD will never be regained. Accompanying this new dependence is a tragic susceptibility to financial abuse.

This was especially prominent with my dad. At first it was a running joke within the family that he would forget passwords, double-pay a bill, or perhaps forget to pay an occasional invoice. It was so unlike him that we found playful humor in his becoming an "old" man. He would jest with us and comment about one day sitting in the corner of the room watching Judge Judy while drooling on himself. Now, of course, these jokes have lost their humor. Little did we realize that these events were but faint indications of the storm that was beginning to ravage his mind and eat away at his mental capacity.

Financial abuse strikes people of all ages but it more deeply impacts the elderly because they lack the ability to recuperate their losses.⁴⁰ The most common perpetrators of financial abuse against the elderly are

36. Daniel C. Marson et al., *Assessing Financial Capacity in Patients with Alzheimer's Disease*, 57 ARCH NEUROL 877, 878 (2000).

37. Daniel C. Marson et al., *Clinical Interview Assessment of Financial Capacity in Older Adults with Mild Cognitive Impairment and Alzheimer's Disease*, 57 J. AM. GERIATRICS SOC'Y 806, 806 (2009).

38. Daniel C. Marson et al., *Assessing Financial Capacity in Patients With Alzheimer's Disease: A Conceptual Model and Prototype Instrument*, 57 ARCH NEUROL 877, 877-78 (2000) (explaining that the loss of financial management abilities is often one of the first observable manifestations of dementia).

39. *Id.* at 878 (highlighting the psychological impact of the loss of financial capacity).

40. LISA NERENBERG, NAT'L CTR. ON ELDER ABUSE, FORGOTTEN VICTIMS OF ELDER FINANCIAL CRIME AND ABUSE: A REPORT AND RECOMMENDATIONS 3 (1999) (highlighting the prevalence and nature of financial abuse crimes against the elderly in the United States).

“family members, predatory individuals, and unscrupulous businesses” who take advantage of the senior’s weakness of mind in order to extract by undue influence whatever they desire.⁴¹ In the early stages of AD, even the most formerly adept financial minds may find themselves totally incompetent in business matters.⁴² The end result of financial abuse is that it tends to fleece the elderly out of their life savings precisely at the time they need to draw upon it,⁴³ shifting the financial burden of care from the individual to the government.

The timing of this loss on financial capacity presents a peculiar yet crucial challenge for seniors, their loved-ones, and the legal system. The loss of financial capacity is often not subsequent to earlier and easily identifiable events, but rather is itself a leading indicator of the onset of AD.⁴⁴ Modern neurology labels the transitional phase between the normal aging process of the mind and the onset of AD as Mild Cognitive Impairment (MCI).⁴⁵ During this period, people may notice mild impairment of

41. *Id.* at 4 (describing the primary actors and methods in the financial abuse of seniors).

42. See Jayne W. Barnard, *Deception, Decisions, and Investor Education*, 17 ELDER L.J. 201, 205–25 (2010) (describing the typical victim of financial and securities fraud victims). The most common victims of securities fraud are married men who are both well-educated and comfortable with making financial investment decisions. *Id.* at 210. A study conducted at the University of Iowa demonstrated that thirty-five percent of people over fifty-five years old possessed weakened abilities to assess risk. *Id.* at 216–17. Another study revealed that people aged fifty-five to eighty-five were less responsive to negative images than were younger participants, indicating that “they screen[] out information they [do] not want to contemplate.” *Id.* at 218 (internal quotations omitted). Thus, it is reasoned that the minds of seniors at some point begin to work against them when it comes to discernment of financial risk and investment decision-making. *Id.* at 223. Although Barnard does not directly indicate AD as a reason for the decline of financial capacity, the evidence she puts forth is strongly suggestive of the disease’s presence and fits within the generally expected range of elders who are likely to be diagnosed with AD. See *id.*; see also ALZHEIMER’S ASS’N, 2010 ALZHEIMER’S DISEASE FACTS AND FIGURES (2010), available at http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf.

43. The burdensome cost of treating people with AD indicates that every bit of their accumulated net worth will be needed to support seniors with AD. See ANDERS WIMO & MARTIN PRINCE, ALZHEIMER’S DISEASE INT’L, WORLD ALZHEIMER’S REPORT 2010: THE GLOBAL ECONOMIC IMPACT OF DEMENTIA 26 (2010), available at http://www.alz.org/documents/national/World_Alzheimer_Report_2010.pdf (detailing the per capita costs of treating dementia by country).

44. See H.R. Griffith et al., *Impaired Financial Abilities in Mild Cognitive Impairment: A Direct Assessment Approach*, 60 NEUROLOGY 449, 449 (2003) (suggesting that cognitive abilities such as financial management begin to weaken prior to a diagnosis of AD).

45. H.R. Griffith et al., *Magnetic Resonance Imaging Volume of the Angular Gyri Predicts Financial Skill Deficits in People with Amnesic Mild Cognitive Impairment*, 58 J. AM. GERIATRICS SOC’Y 265, 265 (2010) (indicating reduction in brain mass observed by MRI scans correlates to a decline in certain cognitive functions); see H.R. Griffith et al., *Impaired Financial Abilities in Mild Cognitive Impairment: A Direct Assessment Approach*,

memory, but overall the senior still retains the ability to conduct the basic chores of life and appears normal to the outside world.⁴⁶ Clinical studies have shown, however, that it is during this transitional period that financial capacity starts to decline.⁴⁷ Thus, seniors will most likely suffer impaired financial capacity before the onset of early AD and their remaining capacity will diminish rapidly thereafter.⁴⁸ For this reason, families, caregivers, and state officials must be proactive in protecting seniors from financial abuse because more often than not, significant financial damage will precede the point in time when the senior appears to be obviously incompetent.

This was true with our family. Even when my dad began to recognize his decline, by all accounts most anyone would have assumed he was fine. He could drive to the store, hold a pleasant conversation, call to see how I was doing, play with the dogs, and so on. Unless you were around him all the time, it would have been easy to assume he was normal. The only

60 *NEUROLOGY* 449, 449 (2003) (verifying a connection between MCI and the subsequent onset of AD).

46. See H.R. Griffith et al., *Impaired Financial Abilities in Mild Cognitive Impairment: A Direct Assessment Approach*, 60 *NEUROLOGY* 449, 449 (2003) (stating that MCI should be construed broadly to include impairments to mental activities such as financial capacity); see also Lois M. Brandriet & Brian L. Thorn, *Determining Capacity: Is Your Older Client Competent?*, 14 *UTAH B.J.* 21, 21 (2001) (demonstrating by analogy the difficulty in ascertaining mental capacity among seniors). As cognitive abilities decline, a person's mind will attempt to compensate for the loss by emphasizing the remaining strengths. Lois M. Brandriet & Brian L. Thorn, *Determining Capacity: Is Your Older Client Competent?*, 14 *UTAH B.J.* 21, 21 (2001). Consequently, older adults tend to focus on older memories because they may not be able to quickly recall newer ones. *Id.* Thus, it may be difficult to determine whether a senior is mentally incompetent by merely talking to the senior. *Id.*

47. H.R. Griffith et al., *Impaired Financial Abilities in Mild Cognitive Impairment: A Direct Assessment Approach*, 60 *NEUROLOGY* 449, 455 (2003) (discussing the significance of MCI and the anticipated loss of cognitive function associated with it). Seniors with MCI were generally found to understand basic financial concepts, but struggled to apply them to normal activities. *Id.* For instance, patients who understood how to use a checkbook were often unable to comprehend a bank statement of the same account. *Id.* The clinicians proposed that the cognitive loss associated with MCI would more likely affect a senior's ability to employ financial management skills as opposed to erasing knowledge altogether. *Id.*

48. Roy Martin et al., *Declining Financial Capacity in Patients with Mild Alzheimer's Disease: A One-Year Longitudinal Study*, 16:3 *AM. J. GERIATRIC PSYCHIATRY* 209, 217 (2008) (assessing the financial abilities of patients with AD over a period of one year). In this study, fifty-five individuals diagnosed with mild AD were compared with sixty-three healthy individuals of the same age group. *Id.* at 210. In order to account for the fact that each participant was likely to have different levels of financial experience, all participants were required to complete a prior financial capacity form. *Id.* at 211. This form identified financial tasks that ranged from simple to complex and if any participant indicated they lacked the capacity to complete the task when entering the study, they were eliminated from the analysis of that specific task. *Id.*

indication we had in the first few months was a slight change in his behavior and his inability to recall details of earlier conversations.

Before that terrible year was over, he had lost or perilously encumbered his entire liquid net worth for reasons not attributable to general market conditions. His entire manner of thinking changed and he lost the ability to appreciate risk. Total strangers had him running around the house trying to get my mom to sign-off on investment commitments. With just the slightest bit of puffery and suggestion, this man, who built a comfortable life for himself by conducting complex real estate development transactions, was now gushing out money on the advice of thirty-year old stock peddlers who would hang up the phone when anyone but my dad answered. And all the while, he could never explain what was happening with his money when we asked him.

The Alzheimer's Disease Center of the University of Alabama at Birmingham (UAB) is developing a useful tool to protect seniors such as my dad from financial abuse and mismanagement—an objective clinical test with the specific intent of determining both the onset of AD and financial capacity. The doctors and clinical scientists at UAB created the Financial Capacity Instrument (FCI) after several years of evaluating seniors through a program they call the “Cognitive Observation in Seniors (COINS) study.”⁴⁹ The COINS study revealed that a decline in financial management skills serves as a reliable indicator of the imminent onset of AD.⁵⁰ A product of the COINS study included the FCI which comprises a series of tests for various financial management aptitudes⁵¹ including “basic monetary skills; financial conceptual knowledge; cash transactions; checkbook management; bank statement management; and financial judgment.”⁵² To help broaden the FCI's application for public use, the UAB is currently working to standardize it in a reliable format that can be administered by any physician during a regular office visit.⁵³

49. *UAB Receives Renewed Funding to Study Financial Decision-Making Skills and Dementia*, UAB—MEDIA RELATIONS, July 27, 2010, <http://main.uab.edu/Sites/MediaRelations/articles/79001/>.

50. *Id.*

51. *Id.*

52. Daniel C. Marson et al., *Assessing Financial Capacity in Patients With Alzheimer's Disease*, 57 ARCH NEUROL 877, 878 (2000).

53. *UAB Receives Renewed Funding to Study Financial Decision-Making Skills and Dementia*, UAB—MEDIA RELATIONS, July 27, 2010, available at <http://main.uab.edu/Sites/MediaRelations/articles/79001/>.

III. PROTECTIONS UNDER CURRENT TEXAS LAW

A. *Contract Law*

Under Texas contract law, people are presumed to have sufficient capacity to understand a signed contract. Limitations are carved out of this general rule for children and the mentally insane. For those falling under either of these exceptions, contracts are generally but not always avoidable. Since contract case law tends to address cases involving children and insane persons separately, it is helpful to start with a survey of protections afforded to minors and then to distinguish them from the somewhat more limited protection afforded to the mentally incompetent.

1. Minors

Minors enjoy broad protections in the law due to a perceived mental incapacity based solely on their age.⁵⁴ In general, a contract entered into by a minor is voidable at the minor's election⁵⁵ and in some instances may be considered void from its inception.⁵⁶ If the minor selects to repudiate the contract, he or she must disaffirm the entire agreement and is not permitted to pick and choose among favorable terms therein.⁵⁷ The disaffirmance cannot be passive⁵⁸ and must generally occur after the minor reaches the age of majority and is limited to a reasonable time period

54. See TEX. FAM. CODE ANN. § 101.003 (West 2008) (stating a minor is anyone not married and under the age of eighteen who has not otherwise had their minority status removed); *Trinity Fin. Corp. v. Price*, 192 S.W.2d 464 (Tex. Civ. App.—Waco 1946, writ dismissed) (explaining the burden of proving a contract with a minor is valid rests squarely on the adult counter party); *Neill v. Pure Oil Co.*, 101 S.W.2d 402, 404 (Tex. Civ. App.—Dallas 1937, writ refused) (observing Texas courts have historically considered minors to be of unsound mind for the purpose of contracting based solely on their age).

55. See *Dairyland Cnty. Mut. Ins. Co. of Tex. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973) (finding that a minor is required to comply with the notice requirement of an automobile insurance policy); *Harris v. Musgrove*, 59 Tex. 401, 402 (1883) (explaining that the right to disaffirm is a personal right and may only be exercised by the minor or the minor's legal representative).

56. *Kargar v. Sorrentino*, 788 S.W.2d 189, 191 (Tex. Civ. App.—Houston [14th Dist.] 1990, no writ) (exemplifying one instance where a contract with a minor was void from inception). In *Kargar*, a seventeen-year-old entered into a contract to purchase a car by making monthly payments. *Id.* at 190. After making only six of the payments, the minor decided to sue the car dealer under provisions of the DTPA after discovering the car had been reconditioned and had serious mechanical problems. *Id.* Because the minor had “affirmatively repudiated the contract” and the car dealer had notice that she was a minor, the entire transaction was found to be null and void. *Id.* at 191.

57. *Dairyland Cnty Mut. Ins. Co. of Tex. v. Roman*, 498 S.W.2d 154, 158 (Tex. 1973).

58. See *Hieatt v. Dixon*, 26 S.W. 263, 264 (Tex. Civ. App.—Dallas 1894, no writ) (stating that Texas courts do not presume a minor will repudiate his or her contract upon obtaining majority).

thereafter.⁵⁹ Whether the contract is beneficial or harmful to the minor is completely irrelevant to the question of whether the contract can be disaffirmed.⁶⁰ Furthermore, the minor must restore the consideration given by the counter-party unless the consideration was wasted by the minor during his infancy.⁶¹ Upon returning the consideration still in his or her possession, the minor is entitled to the full return of the value paid under the contract.⁶²

2. Limitations on Disaffirmance

This protection of the minor from his perceived mental incapacity is not without limit, however. For instance, if the minor purposefully induces a party to enter a contract by fraudulently misrepresenting his or her age, then the law estops him or her from attempting to disaffirm it.⁶³ Also, certain contracts for goods and/or services deemed necessary for basic provisioning by courts are typically not avoidable.⁶⁴

Additional statutory provisions strip away the right of disaffirmance where the contract is for essential services in today's complex economy.⁶⁵ The Texas Finance Code allows a minor to open and maintain a checking account and protects the banks by disallowing the minor's customary right to avoid contracts for non-essentials.⁶⁶ This privilege is revocable by either the parent or legal guardian who may, by notifying the financial institution in writing, prevent the minor's sole control over the account.⁶⁷ Under the Texas Business and Commercial Code, financial institutions may continue to honor the minor's bank drafts and transactions for up to ten days after receiving notice by the parent or legal guardian.⁶⁸

59. *Clemmer v. Price*, 125 S.W. 604, 605–06 (Tex. Civ. App.—San Antonio 1910, writ *ref'd*). In this case, *Clemmer* failed to disaffirm a sale of land contract until suit was filed against him for foreclosure and recovery of unpaid promissory notes. *Id.* at 604. Because he waited until after he made his first payment on the land and after suit was already filed against him, *Clemmer* failed to disaffirm the contract within a reasonable amount of time. *Id.* at 605.

60. *Walker v. Stokes Bros. & Co.*, 262 S.W. 158, 159 (Tex. Civ. App.—Austin 1924, no writ) (noting that Texas considers all contracts entered into by minors voidable).

61. *Bullock v. Sprowls*, 54 S.W. 661, 663 (Tex. 1899).

62. *James v. Barnett*, 404 S.W.2d 886, 888 (Tex. Civ. App.—Dallas 1966, writ *ref'd n.r.e.*) (highlighting the general rule that a minor may repudiate his contract and that he is entitled to a return of his money paid thereafter even if the minor squandered whatever consideration he may have received under the contract).

63. *Cain v. Coleman*, 396 S.W.2d 251, 253 (Tex. Civ. App.—Texarkana 1965, no writ).

64. *Searcy v. Hunter*, 17 S.W. 372, 373 (Tex. 1891).

65. See TEX. FIN. CODE ANN. §§ 34.305(b), 65.101(e), 95.101(d) (West 1998); TEX. INS. CODE ANN. § 1104.003 (West 2009).

66. See TEX. FIN. CODE ANN. § 34.305(a)–(b) (West 1998).

67. *Id.* § 34.305(c).

68. See TEX. BUS. & COM. CODE § 4.405 (West 2002).

3. Incapacitated Seniors

Although similar to the protections afforded to minors,⁶⁹ Texas contract law is slower and less generous in its protections to seniors who have lost their financial capacity as a result of early-onset AD. For instance, Texas courts specifically preclude the application of a minor's legal protection to seniors based solely on their age and presume instead that an elderly person is competent to enter into a binding contract.⁷⁰ In 1998, the Texas Supreme Court explained that the rationale for this stance is based on the concern that such protection would discourage others from pursuing business with the elderly, which would consequently limit the availability of certain economic benefits normally available to adult citizens.⁷¹ More recently, a Texas Court of Appeals explained that the proper means of protecting mentally incapacitated seniors rests in: (1) voiding contracts by proving mental incompetence at the time of the transaction; and (2) commencing guardianship proceedings.⁷²

a. Test for Mental Incapacity

To avoid a contract on the grounds of mental incapacity, a senior must prove his or her incompetence at the time of the transaction by demonstrating that he or she could not appreciate "the effect of what [he or she] was doing and . . . the nature and consequences of [his or her] acts."⁷³ In

69. *Houston Land & Trust Co. v. Sheldon*, 69 S.W.2d 796, 800 (Tex. Civ. App.—Eastland 1934, writ dismissed) (noting the similarities between contract protections for minors and insane persons).

70. *See Dubree v. Blackwell*, 67 S.W.3d 286, 289 (Tex. App.—Amarillo 2001, no pet.) (explaining the elderly are presumed competent); *see also Gerlich v. Myers*, 290 S.W. 270, 273 (Tex. Civ. App.—Fort Worth 1926, no writ) (declaring all persons are considered sane by courts unless proven otherwise and that the burden of proof rests on the challenger to that general presumption); *see also* TEX. PROB. CODE ANN. § 602 (West 2003) (stating that old age alone shall not be dispositive in determining whether a senior needs guardianship protection).

71. *See Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998) (holding service providers liable for engaging in business with elderly clients would hinder elderly individuals' access to services).

72. *Dubree v. Blackwell*, 67 S.W.3d 286, 289 (Tex. App.—Amarillo 2001, no pet.).

73. *In re Estate of Robinson*, 140 S.W.3d 782, 793 (Tex. App.—Corpus Christi 2004, pet. denied); *accord Smith v. Guerre*, 175 S.W. 1093, 1096 (Tex. Civ. App.—Amarillo 1915, no writ) (holding the level of mental incapacity that is necessary to avoid a contract need not be so great as to render the person totally incompetent). *But see Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 544–45 (Tex. 1998) (suggesting that the Restatement (Second) Contracts § 15 provides a satisfactory test for incompetence). Under the Restatement standard, a contract is voidable if an individual does not reasonably understand the consequences of the transaction or acts unreasonably in the course of the transaction and the contracting party "has reason to know of [t]his condition." RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).

some limited instances, Texas courts may opt to additionally consider whether a senior's agreement to a contract was an involuntary reaction due to the senior's mental illness.⁷⁴ This additional consideration is said to apply when a party proves that he or she was compelled to agree to the contract due to an organic mental disorder and that but for the disorder he or she would not have consented.⁷⁵ Examples of when such disorders have been acknowledged by courts include manic depression⁷⁶ and insane delusion.⁷⁷

b. Elements of Test

To determine whether the senior was incompetent, courts will consider, among other things, circumstantial evidence to include: (1) outward conduct that a reasonable person might find indicative of mental incapacity; (2) any pre-existing condition tending to cause mental infirmity; and (3) prior existence of an infirmity from which the senior's capacity at the time of the contract may be inferred.⁷⁸ There are limits, however, on what kinds of circumstantial evidence that may at law indicate incapacity. For instance, "[m]ere nervous tension, anxiety or personal problems,"⁷⁹ or a belief in spiritualism⁸⁰ will not necessarily give rise to a determination of incompetence.⁸¹ Also, general weakness of mind or intelligence is by itself insufficient to demonstrate mental incompetency.⁸²

74. See *Nohra v. Evans*, 509 S.W.2d 648, 654 (Tex. Civ. App.—Austin 1974, no writ) (expanding upon the standard definition of mental incapacity in Texas); see also *Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964); *Carroll v. Mertz*, No. 03-05-00540-CV, 2007 WL 3225407, at *5 (Tex. App.—Austin Nov. 1, 2007, pet. denied) (mem. op.) (requiring that evidence of testamentary incapacity demonstrate that the mental error in question was caused by an organic brain defect).

75. *Nohra*, 509 S.W.2d at 654 (declaring when the motivation test might be applied to a contract avoidance suit).

76. See *id.* (stating person with manic-depression may lack contractual capacity under a motivational test).

77. See *Carroll v. Mertz*, No. 03-0500540-CV, 2007 WL 3225407, at *5 (Tex. App.—Austin Nov. 1, 2007, pet. denied) (mem. op.) (allowing insane delusion as a means to challenge testamentary capacity).

78. *In re Estate of Robinson*, 140 S.W.3d 782, 793 (Tex. App.—Corpus Christi 2004, pet. denied).

79. *Buddy L, Inc. v. Gen. Trailer Co.*, 672 S.W.2d 541, 548 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

80. See *Burchill v. Hermsmeyer*, 230 S.W. 809, 811 (Tex. Civ. App.—Fort Worth 1921, writ dism'd w.o.j.) (finding that precedent clearly rejects the notion that belief in spiritualism renders a person incompetent).

81. *But see Lindley v. Lindley*, 384 S.W.2d 676, 679 (Tex. 1964) (commenting that an otherwise competent person may be rendered incompetent by an insane delusion that influences the terms of a will).

82. *Turner v. Robertson*, 224 S.W. 252, 253 (Tex. Civ. App.—Fort Worth 1920, no writ) (failing to uphold Plaintiff's assertion of mental incompetence and terminate a con-

This general weakness of mind preclusion seems contrary to the argument that general senior forgetfulness might warrant the right of contract avoidance.⁸³ One court stated, “That a person makes an improvident bargain, or many improvident bargains; that he is generally unthrifty in his business, or unsuccessful in one or many enterprises, does not, per se, prove him to be” mentally incompetent in the eyes of contract law.⁸⁴ In Texas, determining the required level of intelligence for incapacity purposes is a question of fact.⁸⁵ Furthermore, courts state that in order for an individual to avoid a contract, some other external influence is required beyond just weakness of mind.⁸⁶

c. Effect of the Restatement (Second) of Contracts on Seniors

In suits alleging mental incapacity, the Texas Supreme Court appears inclined to follow the Restatement (Second) of Contracts⁸⁷ which prevents a mentally impaired senior from avoiding a contract due solely to incompetence if a court finds that the contract was fair and that the counter-party had no knowledge of mental defect.⁸⁸ While a minor may

tractual obligation). Capacity is not a high threshold to overcome for contract purposes because all that is needed is a basic understanding of the nature and consequences of the contract. *Id.* Only when an individual does not possess this minimal comprehension will a contract be considered void for mental incapacity. *Id.*

83. See Wendy Chung Rossiter, *No Protection for the Elderly: The Inadequacy of the Capacity Doctrine in Avoiding Unfair Contracts Involving Seniors*, 78 OR. L. REV. 807, 821–22 (1999), for an example applying the infancy doctrine to seniors based on generalized mental weakness. In deeming the capacity doctrine insufficient to protect seniors, the author of this article proposes a burden shifting approach that would require the non-claiming party to prove capacity of a senior. *Id.* at 221. This mechanism is analogous to protections for minors where the other party assumes the risk when entering the contract. *Id.* at 222.

84. *Gerlich v. Myers*, 290 S.W. 270, 272 (Tex. Civ. App.—Fort Worth 1926, no writ) (citing *In re Carmichael*, 36 Ala. 514, 522 (Ala. 1860)).

85. *Fox v. Lewis*, 344 S.W.2d 731, 739 (Tex. Civ. App.—Austin 1961, writ ref’d n.r.e) (commenting that the required level of intelligence or capacity to enter into a valid contract is a question of law).

86. *Cottle v. Knapper*, 571 S.W.2d 59, 63 (Tex. Civ. App.—Tyler 1978, no writ) (quoting *Klindworth v. O’Connor*, 240 S.W.2d 470, 475 (Tex. Civ. App.—Dallas 1951, writ ref’d n.r.e)).

87. *Compare Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 544–45 (Tex. 1998) (stating § 15 of the Second Restatement of Contracts provides sufficient protection for incompetents), *with Smith v. Christley*, 755 S.W.2d 525, 532–33 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (looking to § 15 of the Second Restatement of Contracts for guidance on whether the grantor of a deed of trust was mentally competent).

88. See RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981). Comment (d) provides that executor contracts of the mentally incapacitated are treated similarly to those entered into by a minor. *Id.* § 15 cmt. d (1981). However, comment (e) states that where there is at least partial performance, avoidance is only allowed on equitable terms. *Id.* § 15 cmt. e (1981). When viewing equitable avoidance, consideration should be given to the benefits

avoid a contract for almost any reason, Texas seniors must first prove they are incompetent and then clear the additional hurdle of the Restatement. Therefore, it seems that guardianship may be the only sure-fire means by which seniors with AD can obtain the same contract protections that Texas affords to minors.

B. *Guardianship*

A guardianship proceeding is a formal means of publically determining and adjudicating the incompetency of a mentally infirmed person.⁸⁹ To the extent determined by the probate court, a ward placed under a guardian “has no capacity to incur contractual duties . . . by reason of an adjudication of mental illness or defect.”⁹⁰ The effect of a guardianship ruling formally removes from the ward the ability to contract for the duration of the guardianship.⁹¹ As with a minor, it is irrelevant in Texas whether or not the other party was aware of the ward’s status.⁹²

A suit for guardianship may commence when a county court⁹³ with jurisdiction over the proposed ward⁹⁴ has probable cause to initiate a hear-

each party received, and the extent that the ability to avoid a contract might somehow lessen the desire of the mentally incompetent to shy away from improvident contracts. *Id.* § 15 cmt. f (1981).

89. Statutory provisions for guardianship are found in TEX. PROB. CODE ANN. ch. XIII (West 2003).

90. *Breaux v. Allied Bank of Tex.*, 699 S.W.2d 599, 602 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981)). The probate court has broad powers to limit certain rights of the ward based on its findings of incompetency. TEX. PROB. CODE ANN. § 693 (West 2003). Those rights not specifically removed are retained by the ward. *Id.* § 675.

91. *Compare Elston v. Jasper*, 45 Tex. 409, 413 (1876) (explaining that while a deed or contract entered into by an insane person is voidable, when entered into by an insane person placed under guardianship, the transaction is void), *with Bolton v. Stewart*, 191 S.W.2d 798, 802 (Tex. Civ. App.—Forth Worth 1945, no writ) (extending an insane person’s power to void a deed to an insane person under guardianship).

92. *See Bolton v. Stewart*, 191 S.W.2d 798, 802 (Tex. Civ. App.—Fort Worth 1945, no writ) (stating that contracts entered into by incompetent individuals are voidable); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 13 (1981) (“A person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect.”). Comment (a) indicates that the guardianship proceedings provide public notice as to the ward’s capacity. *Id.* § 13 cmt. a. No further notice is required to be given by the guardian. *Id.* However, the law may enforce a contract for necessities against the ward. *Id.* § 13 cmt. b.

93. TEX. PROB. CODE ANN. § 605 (West 2003).

94. *Id.* § 610(a) (requiring guardianship proceedings to take place in the resident county of the ward). In addition to the ward’s county of residence, the statute further provides that venue is proper in the county where the ward’s principal estate is located. *Id.*

ing.⁹⁵ During the guardianship hearing, the court will determine the ability of the proposed ward to care and provide for himself or herself, as well as the qualifications and capabilities of the proposed guardian.⁹⁶ In order to establish guardianship, the court must find by “clear and convincing evidence” that the person is truly incompetent and the loss of right to contract is “in the best interest” of the ward.⁹⁷

Once guardianship is established, it is presumed that the guardian can and will enter into binding contracts on behalf of the ward so long as doing so conforms to the nature of the guardianship.⁹⁸ Authorization of the guardian comes in the form of a “Letter of Guardianship.”⁹⁹ Each letter will last for one year and four months, and no renewal may be granted unless the guardian submits an accounting of the ward’s estate to the probate judge for approval.¹⁰⁰ So long as the probate court continues to approve of the guardian’s administration, the guardian will generally remain in place until the estate of the ward is closed or the ward is determined to have regained competency.¹⁰¹

C. *Texas Human Resources Code*

In addition to contract law and guardianship, Texas provides additional statutory protections against the mistreatment of enfeebled seniors by predators. An especially robust system for protecting the elderly from

95. *Id.* § 683 (noting that probable cause is established by either an information letter provided to the court or a written letter from a licensed physician); *see, e.g., id.* § 602 (prohibiting the court from using age as the sole determinant for guardianship with an exception for minors).

96. *Id.* § 685(c) (listing factors the court will examine during a guardianship hearing). The proposed ward may request a jury trial. *Id.* § 685(b). In addition, the proposed ward is required to be present at the hearing unless the court makes a determination either on the record or in the order that the proposed ward’s presence is not necessary. *Id.* § 685(a). The court may order a closed hearing upon request of the proposed ward. *Id.*

97. *Id.* § 684(a) (listing the requirements that must be met before the court will appoint a guardian). In addition, the statute provides that the court must find by a preponderance of the evidence that the proposed ward is unable to care for him or herself and that the individual that is appointed is eligible to act as a guardian. *Id.* § 684(b).

98. TEX. PROB. CODE ANN. § 662 (West 2003) (defining the rights of third parties who contract with guardians).

99. *See id.* § 659(a) (stating that a certificate will be issued by the probate court clerk once a person is appointed guardian).

100. *Id.* § 659 (b)–(c) (describing the process by which letters of guardianship are administered). In order to renew the guardianship, the court must receive and approve the guardian’s annual accounting and annual report. *Id.* § 659(c). If the court approves the required documents, then the clerk may renew the letter of guardianship. *Id.*

101. *See id.* § 694(a)–(b) (describing the duration of guardianship). In the event that the ward dies and the surviving spouse qualifies as a survivor, the guardianship will be closed. *Id.* § 694(b)(1). In addition, the statute also states that the guardianship of a minor is closed when the minor reaches the age of majority. *Id.* § 694(b)(3).

abuse comes from the Texas Human Resources Code (HRC). The HRC defines an elderly person to be sixty-five or over.¹⁰² It then defines the exploitation of seniors as the taking of the senior's resources for one's personal benefit.¹⁰³ The Human Resources Code provides the laws used by the Department of Family Protective Services (FPS) to help implement and monitor protective measures for Texas seniors.¹⁰⁴

The FPS is tasked with investigating “the abuse, neglect, or exploitation of an elderly or disabled person” and providing “protective services to that person.”¹⁰⁵ To encourage the reporting of suspected elder abuse, the HRC requires that *all* persons in Texas report their suspicions to the FPS.¹⁰⁶ The failure to report suspected exploitation of a senior is made a Class A misdemeanor “if the person has cause to believe” that the exploitation is taking place.¹⁰⁷ As an additional incentive, the HRC provides statutory immunity to any person who files a report with FPS from civil and criminal liability arising from the report.¹⁰⁸ Furthermore, the identity of a person who files a report is treated as confidential during the investigation and there are special rules governing its release.¹⁰⁹

FPS is required by law to initiate an investigation within twenty-four hours after receipt of a report.¹¹⁰ During the investigation, FPS is authorized by law to visit with the elderly person and to interview any person it believes knows something about the situation.¹¹¹ A case manager with the San Antonio FPS acknowledged that they can “get in a family's business” in an effort to determine whether abuse is occurring and to protect the elderly person as needed.¹¹² She further explained that the investigation process will be largely driven by the particular scenario.¹¹³

For instance, if the report is of suspected elder exploitation from within the family, the investigation will hinge almost entirely on the cooperation

102. TEX. HUM. RES. CODE ANN. § 48.002 (West 2001).

103. *Id.* § 48.002(a)(3).

104. *See id.* § 48.001.

105. *Id.*

106. *Id.* § 48.051.

107. TEX. HUM. RES. CODE ANN. § 48.052 (West 2001) (making failure to report a misdemeanor). It is also a crime under the HRC to knowingly make a false report to the FPS. *Id.* § 48.053.

108. *Id.* § 48.054.

109. *Id.* § 48.101.

110. *Id.* § 48.151 (requiring that FPS investigate all reports unless it suspects one to lack merit).

111. *Id.* § 48.152.

112. Telephone Interview with Susan Smart, San Antonio Dep't of Family Protective Servs. (Oct. 8, 2010).

113. *Id.*

of the senior.¹¹⁴ The case manager explained that in most cases, seniors are slow to reveal exploitation or abuse by family members and that the exploitations often cannot be verified and acted upon as a result.¹¹⁵ In the event the case manager does have reason to believe exploitation is occurring, the FPS is required to notify the appropriate law enforcement authority and to provide a copy of the investigation report.¹¹⁶

In addition to involving a law enforcement agency, the FPS agents also have a wide array of tools to help prevent further financial exploitation.¹¹⁷ In some cases, FPS might take control of a bank account and administer a sufficient allowance to the exploited senior for basic provisioning per his or her needs.¹¹⁸ If this money continues to be misappropriated by family members, the agent may also administer a type of debit card to prevent the transfer of cash from the senior to the predator(s).¹¹⁹ If this is deemed insufficient, the agent may go so far as to physically shop for the senior, if necessary, to protect him or her from further exploitation.¹²⁰

With each report of suspected mental incapacity, FPS investigators must do their best to determine whether the senior needs the assistance of guardianship.¹²¹ A diagnosis of incapacity from a licensed physician is the most important item needed by the investigator.¹²² Upon arriving at the senior's residence, the investigator is authorized to peer through any available medical records the senior has in order to find such a diagnosis.¹²³ The investigator may take steps toward arranging some form of satisfactory monitoring and assistance for the senior if a diagnosis is uncovered.¹²⁴ If a diagnosis of incapacity cannot be found, then the FPS agent must attempt to resolve the matter in the least obtrusive manner.¹²⁵

114. *Id.*

115. *Id.*

116. TEX. HUM. RES. CODE ANN. § 48.1522 (West 2001) (detailing the reporting procedures of suspected abuse by FPS to law enforcement personnel).

117. Telephone Interview with Susan Smart, San Antonio Dep't of Family Protective Servs. (Oct. 8, 2010).

118. *Id.*

119. *Id.*

120. *Id.*

121. See TEX. HUM. RES. CODE ANN. § 48.151(a) (West 2001) (providing that a department shall "initiate a prompt and thorough investigation as needed to evaluate the accuracy of the report and to assess the need for protective services" within 24 hours of receiving a report of alleged abuse, neglect, or exploitation).

122. Telephone Interview with Susan Smart, San Antonio Dep't of Family Protective Servs. (Oct. 8, 2010).

123. *Id.*

124. *Id.*

125. *Id.*

In all situations concerning suspected incapacity, FPS investigators will take the “least restrictive alternatives” when it comes to providing protective services.¹²⁶ At any time, the senior may be provided with voluntary protective service so long as he or she personally requests or agrees to FPS assistance.¹²⁷ To the extent agency funds are available, FPS has the discretion to directly provide for the needs of seniors under its care, even if FPS must contract with outside parties to do so.¹²⁸ FPS is entitled to a reasonable reimbursement for the services it provides if the senior has the financial resources to contribute towards his or her care.¹²⁹

In the event the senior has not been diagnosed with AD and does not volunteer for direct supervision, but the agent nevertheless feels that it is necessary to protect the senior, FPS is given broad powers to work with the local probate courts to establish an involuntary guardianship.¹³⁰ To do this, the investigator may arrange to have the senior medically examined.¹³¹ FPS contracts directly with licensed physicians who are authorized to evaluate the senior for capacity. That physician may then diagnose the senior as being incompetent, which will generally suffice for the requirement of probable cause needed to initiate a guardianship proceeding.¹³²

If suitable arrangements for supervision cannot be made directly with the incapacitated senior’s family, friends, or caregivers, then FPS is authorized to initiate a guardianship hearing.¹³³ The overriding principle for FPS case managers during this type of situation is always to utilize the least restrictive means necessary to protect the senior and to exhaust alternative solutions to guardianship prior to initiating suit.¹³⁴ That being said, the FPS agents may determine that no suitable alternative is availa-

126. TEX. HUM. RES. CODE ANN. § 48.203 (c) (West 2001) (describing the availability of voluntary protective services).

127. *Id.* § 48.203 (a).

128. *Id.* § 48.205 (a).

129. *Id.* § 48.206.

130. *See id.* § 48.204 (providing a protective services agency with power to provide protective services to an elderly individual, with or without the senior’s consent, as permitted by the chapter).

131. *See* TEX. HUM. RES. CODE ANN. § 48.208 (West 2001) (detailing the procedure for an emergency protective order for protective services).

132. *See* TEX. PROB. CODE ANN. §§ 683 (b)(2), 687(a) (West Supp. 2010) (explaining the probable cause requirements for a court to initiate guardianship proceedings and describing the procedure and considerations for examinations and reports).

133. TEX. HUM. RES. CODE ANN. § 48.209(b) (West 2001) (describing the guardianship trial referral procedure for FPS).

134. *See id.* § 48.209(a)–(b) (providing guidance for case managers during a referral for guardianship).

ble in which case they must refer the case to the Texas Department of Aging and Disability Services (TDA).¹³⁵

The TDA is generally tasked with advising the legislature and state agencies on issues affecting Texas seniors and strengthening and promoting programs to provide and preserve services for the elderly.¹³⁶ Part of its mission is also to cooperate with FPS investigations and initiate guardianship proceedings on behalf of incapacitated seniors, if necessary.¹³⁷ Upon request by the FPS, the TDA is obligated to review a case file and determine whether guardianship is appropriate for the senior under the circumstances.¹³⁸ Just like the FPS agents, the TDA must seek to employ the least restrictive means available and avoid guardianship altogether if an alternative is feasible.¹³⁹ If the TDA finds guardianship necessary, it is tasked with filing suit for guardianship with the proper county probate court.¹⁴⁰ The TDA may accept an appointment for guardianship over an incapacitated senior on either a temporary or permanent basis,¹⁴¹ but may also assign this responsibility to another party.¹⁴²

D. *U.S. Department of Veterans Affairs*

A similar guardianship program is available to Texas veterans under federal law. The Secretary of the Department of Veterans Affairs (VA) is authorized to initiate several types of guardianship protection for veterans.¹⁴³ First, the Secretary has the unilateral ability to direct an incompetent veteran's pension benefits to a fiduciary of the Secretary's selection, if deemed necessary to protect the veteran.¹⁴⁴ Second, the Secretary, or

135. *See id.* § 48.209(b) (describing conditions under which the department would be appointed guardianship).

136. *See id.* § 101.022(a)–(d) (detailing the basic responsibilities of the TDA).

137. *See id.* § 161.101(a) (prescribing when the department shall file guardianship proceedings).

138. *See* TEX. HUM. RES. CODE ANN. § 161.101(b) (West Supp. 2010) (listing the factors considered when determining whether guardianship is the appropriate action or whether a less restrictive option exists and is available for the individual).

139. *Id.* § 161.101(c)(2).

140. *Id.* § 161.101(a).

141. *Id.* § 161.101(d) (mandating that permanent guardianship is only created when the department expressly applies or agrees for the guardianship to be permanent).

142. *See id.* § 161.102(a) (stating that upon notice of an option, other than TDA guardianship, the department shall refer the individual to “a guardianship program, private professional guardian, or other person willing and able to provide the guardianship services”).

143. *See generally* 38 U.S.C. § 5502 (2006) (providing broad discretion for the Secretary of the VA to protect the interests of veterans).

144. *Id.* § 5502(a)(1) (stating that the Secretary may take action to preserve a veteran's VA benefits “[w]here it appears . . . that the interest of the beneficiary would be served thereby”).

his designated attorney, has a statutory right to receive notice and to participate in guardianship proceedings concerning a veteran in Texas probate courts.¹⁴⁵ Further, the Secretary has the right to demand an accounting from a court-appointed guardian and may decide to withhold pension payments if he suspects the veteran is being exploited.¹⁴⁶

E. *Criminal Law*

The Texas Penal Code (TPC) creates specific offenses and punishments in order to prohibit elder abuse. The TPC defines an “elderly individual” as a person aged sixty-five years or older.¹⁴⁷ It then provides for two basic protections for Texas seniors. First, §22.04 of the TPC makes it a crime for any person who, by act or omission, causes an elderly or disabled person to experience bodily or mental injury.¹⁴⁸ Under this section an actor who is (1) affiliated with a special care facility for incapacitated persons, (2) has a statutory obligation to act, or (3) “has assumed [the] care, custody, or control of a child, elderly individual, or a disabled individual” may also be guilty of either an act or omission that results in financial exploitation of the victim.¹⁴⁹

A second protection for seniors is provided by an anti-theft statute. The TPC makes it a crime to intentionally appropriate another person’s property without his consent.¹⁵⁰ Punishment for the offense is elevated one degree if the victim is an elderly person.¹⁵¹ Although § 22.04 seems to better address many of the common financial exploitation of seniors

145. *See id.* § 5502(b) (allowing the Secretary to intervene in court proceedings if he thinks a veteran is being exploited).

146. 38 U.S.C. § 5502(b) (2006) (stating that the Secretary may suspend benefit payments after giving reasonable notice to a guardian that he must provide the Secretary with an accounting of the ward’s estate); TEX. PROB. CODE ANN. § 636 (West 2003) (requiring notice of guardianship proceedings to be provided to the VA).

147. TEX. PENAL CODE ANN. § 22.04(c)(2) (West Supp. 2010) (defining terms used by the Texas Penal Code).

148. *Id.* § 22.04(a) (providing act and mens rea requirements for injury to an elder). The mens rea requirement for an act includes intentional, knowing, reckless, or criminally negligent behavior. *Id.* Injury inflicted by omission is made criminal if either committed intentionally, knowingly, or recklessly. *Id.* Punishment for such injury by act or omission ranges from a third-degree felony to a first-degree felony depending on severity and mens rea. *Id.* at § (e)–(f).

149. *Id.* § 22.04(a-1), (b) (carving out special protection for seniors under special care relationships, ostensibly due to their dependence on the care providers).

150. *Id.* § 31.03(a).

151. *Id.* § 1.03(f)(3)(A); *see also id.* § 22.04(e)–(f) (detailing the degree of felony for offenses).

scenarios,¹⁵² prosecutors seem to prefer using the anti-theft provision instead.¹⁵³

F. Estate Planning

Texas citizens have numerous measures available to prepare for their future incapacity. By proper implementation of various estate planning tools, the need for guardianship in the event of mental incapacity may be avoided. The first such tool is the durable power of attorney. A durable power of attorney is a written instrument signed by a competent adult principal who authorizes another person to act as a designated agent or attorney in fact.¹⁵⁴ Typically, the durable power of attorney is designed to become effective upon the incapacity of the principal¹⁵⁵ and can last indefinitely.¹⁵⁶

Another type of power of attorney can be created specifically for medical needs. A medical power of attorney allows an agent to make medical treatment decisions for the principal in the event the principal is incapaci-

152. TEX. PENAL CODE ANN. § 22.04(b) (West Supp. 2010) (making it an offense to cause by omission the exploitation of a senior by a person who either has a statutory duty of care or has assumed a position of care-giver).

153. See *Jacks v. State*, No. 12-04-00355-CR, 2006 WL 629036, at *1 (Tex. App.—Tyler Mar. 15, 2006, no pet.) (mem. op.) (denying appeal of caregiver who misappropriated money from an elderly client). The defendant was a hired caregiver for a recently incapacitated woman. *Id.* The defendant and her mother misappropriated funds from the senior during her employment. *Id.* at *2. Adult Protective Services was notified by a family member of the senior and verified that financial abuse was taking place. *Id.* Although the case facts fit § 22.04(b)(2) almost perfectly, the court still utilized § 31.03. See *id.* at *1 n.1; see also *Latham v. State*, No. 12-04-00357-CR, 2006 WL 1119221, at *1 (Tex. App.—Tyler Apr. 28, 2006, no pet.) (mem. op.). The facts are identical to those of *Jacks v. State*, where co-defendants were mother and daughter. See *Jacks*, 2006 WL 629036, at *2; see also *Latham*, 2006 WL 1119221, at *1.

154. TEX. PROB. CODE ANN. § 482 (West 2003) (defining “a durable power of attorney” and prescribing specific language necessary to make the appointment binding at law).

155. *Id.* § 482(3) (highlighting that the principal may elect either to have the power of attorney effective immediately or spring from incapacity at a later date).

156. *Id.* § 483 (stating that duration is often indefinite unless the principal limits it to a specific time period). *But see id.* §§ 485, 485A (requiring that a durable power of attorney terminate if a probate court appoints a guardian over the principal and requiring termination of a spouse as designated attorney-in-fact under a durable power of attorney if the couple is divorced before the principal becomes incapacitated). The attorney in fact must give the appointed guardian all the ward’s assets the attorney has in his possession. *Id.* § 485(a). In addition, the attorney in fact must account to the appointed guardian, as if the guardian was the principal. *Id.* The court can appoint a temporary guardian and postpone the attorney in fact’s power until the duration of the temporary guardian is over. *Id.* § 485(b).

tated.¹⁵⁷ It is created through the acknowledgement of two qualified witnesses, a notary public, or another person¹⁵⁸ and takes effect only when the principal is declared incompetent.¹⁵⁹

The medical power of attorney can be further supported by the principal filling out a medical directive to physicians.¹⁶⁰ The Texas legislature has promulgated a standard form for medical directives by which a principal may make known his or her wishes in the event he or she is incapacitated and faces a potential irreversible medical condition.¹⁶¹ Although the medical directive can suffice for some medical conditions, it is best that it accompany a medical power of attorney in the event the principal is incapacitated when he or she arrives to the medical care facility and is unable to create or produce an executed directive for the attending physicians.

A second option to help plan for future incapacity is for seniors to designate their guardians in advance. A person may indicate in writing whom he or she prefers to have (or prefers not to have) appointed as a future guardian.¹⁶² Texas probate courts are obliged to try to accommodate the senior's preference for guardian,¹⁶³ but they are not required to select that person's candidate.¹⁶⁴

A third tool is the creation of a trust to provide for future management of an estate. Seniors may create trusts in which their estate may be transferred by law to a trustee who owns legal title and manages the trust for the benefit of the senior or another appointed beneficiary who holds eq-

157. TEX. HEALTH & SAFETY CODE ANN. § 166.152(a) (West 2010) (explaining the scope and duration of a medical power of attorney).

158. *Id.* § 166.154 (delineating the requirements for creating a valid medical power of attorney).

159. *Id.* § 166.152(b) (limiting the authority of the attorney-in-fact to circumstances where a doctor certifies the principal is incompetent).

160. *Id.* § 166.032(d).

161. *Id.* § 166.033 (displaying the standard form medical directive to physicians for Texas).

162. TEX. PROB. CODE ANN. § 679(a)–(b) (West Supp. 2010). Only one person may serve as guardian of either the person or the estate, but separate individuals may perform each function if the court deems it beneficial for the ward. *Id.* § 690. For example, a married couple, joint managing conservators, joint guardians, and parents of an incapacitated adult may serve as guardians. *Id.* at § 690(1)–(4).

163. *Id.* § 689.

164. *Id.* § 681 (listing certain persons who by law are prohibited from serving as court-appointed guardians). Examples include: a minor, a person with a reputation for misconduct, and an incapacitated person. *Id.* § 681(1)–(3). Moreover, a person who is involved in a lawsuit that affects the incapacitated person in question is also disqualified from acting as guardian with certain exceptions allowed by the court. *Id.* § 681(4)(A)–(B). Disqualification can also hinge on an inability to reasonably carry out the functions of a guardian. *Id.* § 681(7).

uitable title in the trust estate.¹⁶⁵ The trust provides great flexibility for a settlor¹⁶⁶ to prepare for future incapacity. For instance, the settlor may revoke, modify, or amend the trust over time,¹⁶⁷ provide for the care of an animal,¹⁶⁸ add to the contents of the trust,¹⁶⁹ determine how the trust will be disposed of in the future,¹⁷⁰ and name successive trustees.¹⁷¹

A final method of proactive planning for incompetency is the creation of multiple-party accounts. The Texas Probate Code describes a multi-party account as “a joint account, a convenience account, a P.O.D. account, or a trust account”¹⁷² which provides for “beneficial ownership as

165. TEX. PROP. CODE ANN. §§ 112.001, 112.003–112.004 (West 2007) (listing the ways a trust can be created in Texas); *see also* *Burns v. Miller, et. al.*, 948 S.W.2d 317, 322 (Tex. App.—Dallas 1997, writ denied) (explaining the legal significance of a trust). While the trustee has legal title to the trust estate and a right of possession to it, the beneficiary is treated as the “real owner of the property.” *Burns* at 322.; *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 735 (Tex. App.—Corpus Christi 1994, writ denied) (discussing the relationship that exists between trustee and beneficiary). The relationship between trustee and beneficiary is fiduciary in nature. *Herschbach* at 735; The trustee is obligated to treat the beneficiary in “good faith, fair dealing” and with “loyalty and fidelity.” *Id.* Furthermore, the trustee must exercise “skill and prudence” in managing the trust estate on behalf of the beneficiary. *Id.*

166. TEX. PROP. CODE ANN. § 111.004(14) (West Supp. 2010) (defining a “settlor” as any “person who creates a trust or contributes property to a trustee of a trust”). The term “settlor” shares the same meaning as “grantor” or “trustor” and the position can consist of one individual or several persons, with each person being the “settlor” of the property he or she contributed to that particular trust. *Id.*

167. *Id.* § 112.051(a)–(b).

168. *Id.* § 112.037. Such a trust will terminate when the animal dies. *Id.* § 112.037(a). Excess property in the trust for an animal may be put to other uses if a court determines that the total intended amount is more than what is necessary to provide for a pet. *Id.* § 112.037(d).

169. *Id.* § 112.006. “Property may be added to an existing trust from any source in any manner unless the addition is prohibited by the terms of the trust or the property is unacceptable to the trustee.” *Id.*

170. *Id.* § 112.053.

171. TEX. PROP. CODE ANN. § 112.009(c) (West 2007) (prescribing a transfer of power to an alternate trustee appointed by the settlor in the event the primary trustee is no longer able to fulfill the duties of trustee).

172. TEX. PROB. CODE ANN. § 436 (West 2003) (defining key terms for multiple party accounts). “Joint account” refers to an account that is payable to at least two parties even in the absence of a right of survivorship. *Id.* § 436(4). “P.O.D. account” indicates the type of account that will remain payable to a single individual for the course of his or her lifetime, but becomes payable to one or more other payees upon that person’s death. *Id.* § 436(10). Finally, “[t]rust account” bears a meaning similar to standard usage, defined as “an account in the name of one or more parties as trustee for one or more beneficiaries,” but remains distinct from “a regular trust account under a testamentary trust” or other trust agreements with clearly separate significance. *Id.* § 436(14).

between parties.”¹⁷³ The effect of making a multi-party account is two-fold. It can create joint ownership of an account allowing for continued access to funds in the event the primary account holder becomes incapacitated.¹⁷⁴ These accounts can also help circumvent probate so long as there is a written manifestation of intent for right-of-survivorship.¹⁷⁵

IV. ANALYSIS OF EXISTING TEXAS LAW

In fairness, it should be noted that Texas has a fairly robust support system in place to help protect seniors with AD from financial abuse. The mandatory reporting requirement,¹⁷⁶ heightened criminal punishment of abusers,¹⁷⁷ the proactive cadre of FPS workers, and the flexible guardianship courts¹⁷⁸ offer valuable assistance to those from whom AD has stripped financial capacity. However, there remains a significant gap in protection coverage.

This gap is directly attributable to the nature of AD and Texas law. On one hand, modern medicine shows financial capacity is among the very first mental skills to vanish with AD,¹⁷⁹ yet, for clearly stated policy rea-

173. *Id.* § 437 (describing the potential relationships of parties to multi-party accounts). Section 437 explicitly states that the relevant provisions in the code relate solely to controversies between potential parties and are not related to any parties' or beneficiaries' potential power to make withdrawals on the accounts. *Id.*

174. *See id.* § 438(a)–(b) (outlining ownership characteristics of the various types of multi-party accounts). Joint ownership, described in subsection (a), will maintain access to an account for a joint owner if the other joint owner becomes incapacitated, but a standard P.O.D. account will not. *Id.* A P.O.D. account remains accessible only by the original payee for his or her lifetime, only vesting to a survivor upon the death of the primary account owner. *Id.*

175. *See id.* § 439. A joint account requires specific language demonstrating that there is a right-of-survivorship. *Id.* § 439(a). Without this language, courts will not assume a joint-account is meant to have right of survivorship. *Id.* P.O.D. accounts and trust accounts normally have such written manifestation of intent built-in. *Id.* § 439(b)–(c).

176. TEX. HUM. RES. CODE ANN. § 48.051 (West 2001) (requiring anyone with “cause to believe” an elderly person is being abused to report that abuse either to FPS, or, if the person is in a care facility, to the appropriate state agency for that facility).

177. TEX. PENAL CODE ANN. § 31.03(f)(3)(A) (West Supp. 2010) (increasing the punishment for theft if perpetrated against specific types of victims, including elderly individuals).

178. TEX. PROB. CODE ANN. § 675 (West 2003) (authorizing a flexible standard of determining rights for incapacitated persons—any rights not specifically granted to a guardian are retained by the ward).

179. *UAB Receives Renewed Funding to Study Financial Decision-Making Skills and Dementia*, UAB—MEDIA RELATIONS (July 27, 2010), <http://main.uab.edu/Sites/MediaRelations/articles/79001/> (announcing the furtherance of the university's COINS study intended to identify changes in financial capacity as a clear precursor to AD).

sons,¹⁸⁰ Texas refuses to take proactive steps to mitigate financial loss of the senior until the damage is already done. Statistical analysis of demographic trends¹⁸¹ reveals a need so immense that urgent and high-level consideration should be given to loosening our coverage restrictions to help preserve the wealth and dignity of our seniors at risk for developing AD.

A. *Contract Law*

The most prominent gap in legal protection for seniors with AD is found in Texas contract law. As stated above, when it comes to mental incapacity of seniors, Texas does not allow old age to control a determination of capacity.¹⁸² Instead, it follows the Restatement (Second) of Contracts and prefers incapacitated seniors to either bring civil suit for avoidance of an improvident contract or seek the protection of guardianship.¹⁸³ This hesitation to confer the contract protection normally afforded to minors stems from a fear that such protection would limit the

180. *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 545 (Tex. 1998) (declaring that a policy protecting elderly persons on account of their age would also deny them fair access to services).

181. See ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 12, 16 (2010), http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf (estimating that the percentage of the over-sixty-five population with AD will reach 74% percent by the year 2025).

182. See TEX. PROB. CODE ANN. § 602 (West 2003) (stating that mere old age shall not be dispositive of whether a senior needs guardianship protection); *Dubree v. Blackwell*, 67 S.W.3d 286, 289 (Tex. App.—Amarillo 2001, no pet.) (noting that the elderly are presumed competent); *Gerlich v. Myers*, 290 S.W. 270, 273 (Tex. Civ. App.—Fort Worth 1926, no writ) (declaring that all persons are considered sane by courts unless proven otherwise and that the burden of proof rests on the challenger to the general presumption).

183. See *Edward D. Jones & Co. v. Fletcher*, 975 S.W.2d 539, 544–45 (Tex. 1998) (commenting that the Restatement (Second) of Contracts § 15 provides sufficient protection for incompetents); *Smith v. Christley*, 755 S.W.2d 525, 532 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (looking to the Restatement (Second) of Contracts § 15 for guidance on whether the elderly grantor of a deed of trust was mentally competent). In *Smith*, the court upheld two contracts entered into by the elderly father's guardian son, who retained a durable power of attorney. *Smith*, 755 S.W.2d at 527, 532; RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981) (contracts entered into by incompetent individuals are voidable at best). Section 15 further states that a party, unaware of the other party's incompetency, is protected by virtue of that ignorance and to the extent the contract is formed on "fair terms," the incompetent party may even lose whatever advantage voidability could have granted them. RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981).

availability of basic economic freedoms,¹⁸⁴ which has been shown to be a key component of personal individuality and independence.¹⁸⁵

1. Existing Policy

The Texas Supreme Court provided its reasoning for not making the contracts of seniors automatically voidable in *Edward D. Jones v. Fletcher*.¹⁸⁶ The court explained that its disapproval of an age-based trigger for mental incapacity in contract law is based on “several interrelated factors, including the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant.”¹⁸⁷ In light of what we are learning through advanced clinical studies about AD and its impact on and prevalence among Texas seniors, the Court’s logic may actually support a different outcome.

a. Risk to the Senior

First, we can consider the risk of harm to the senior with AD. According to a recent survey, seniors between the ages of sixty-five and seventy-four have a household median net worth of roughly \$214,000 and financial assets of \$80,000.¹⁸⁸ Considering that the cost per year associated with AD can reach as high as \$48,000,¹⁸⁹ it is clear that the effect of mon-

184. See *Edward D. Jones & Co.*, 975 S.W.2d at 544 (balancing the risk that an elderly person is unable to comprehend a financial transaction with the utility of treating elderly and younger customers equally).

185. See Daniel Marson et al., *Assessing Financial Capacity in Patients With Alzheimer Disease*, 57 ARCH NEUROL 877, 878 (2000) (explaining the great burdens that Alzheimer’s patients and their families experience when the patient loses capacity to perform daily tasks, including management of finances).

186. 975 S.W.2d 539 (Tex. 1998).

187. *Id.* at 544 (quoting *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990)) (holding that no legal duty existed for a broker to determine investor’s mental capability based on her advanced age). The court frowned upon the idea of presuming a person mentally incompetent to make contract decisions based solely on his or her age. *Id.* at 545. If providers are liable for dealing with the elderly only because of the customers’ age, the elderly could suffer from reduced access to services. *Id.*

188. Stephanie Armour, *Mortgage Crisis Robbing Seniors of Golden Years*, USA TODAY, Jun. 5, 2009, www.usatoday.com/money/economy/housing/2009-06-04-foreclose-mortgage-seniors_N.htm?loc=interstitialskip (detailing the change in net worth for seniors from 2004 to 2009).

189. ALZHEIMER’S DISEASE INT’L, *WORLD ALZHEIMER’S REPORT 2010: THE GLOBAL ECONOMIC IMPACT OF DEMENTIA* 24 (2010), available at http://www.alz.org/documents/national/World_Alzheimer_Report_2010.pdf.

etary loss for seniors stripped of financial capacity can be quite dire.¹⁹⁰ And since seniors with AD will likely have limited access to employment, the probability of replacing their lost nest egg is practically impossible.¹⁹¹ Therefore, the risk of financial loss for seniors resulting from a lack of financial capacity would be extremely high.

b. Foreseeability of Harm

Second, we can discuss the foreseeability factor as it relates to the prevalence of AD among seniors. A hallmark symptom of AD is the loss of higher order mental capacity, and financial management fits squarely within that description.¹⁹² Clinical studies are now evaluating the progress of AD through the deterioration of financial management capacity¹⁹³ and demonstrating that a sharp decline in financial management skills is characteristic of mild AD.¹⁹⁴

With this in mind, an application of the ratio of seniors with AD to the general population estimates of seniors residing in Texas very quickly sheds light on a large and swelling pool of at-risk persons. The fact that up to twelve percent of seniors over the age of sixty-five will likely encounter AD should caution us against glibly adhering to the status quo. But what about seniors approaching eighty-five years? Since fifty percent of them will develop AD or some related form of dementia, will that be sufficient to elicit a helping hand from Texas courts? Assuming Texas does in fact have 340,000 seniors with AD¹⁹⁵ by definition of the disease, then one can logically conclude that there are 340,000 seniors living in Texas with significantly diminished or no capacity to evaluate financial decisions. How many of them must get fleeced before Texas acts?

190. Telephone Interview with Susan Smart, San Antonio Dep't of Family Protective Servs. (Oct. 8, 2010). Ms. Smart recounted the story of one man Protective Services was trying to help who had been reduced from a net worth of two million dollars to roughly \$5,000. *Id.*

191. LISA NERENBERG, THE NAT'L. CTR. ON ELDER ABUSE, *Forgotten Victims of Elder Financial Crime and Abuse: A Report and Recommendations* 3 (1999), available at http://www.ncea.aoa.gov/NCEAroot/Main_Site/pdf/publication/fvefca.pdf.

192. Daniel Marson et al., *Assessing Financial Capacity in Patients With Alzheimer Disease*, 57 ARCH NEUROL 877, 877 (2000).

193. Roy Martin et al., *Declining Financial Capacity in Patients with Mild Alzheimer's Disease: A One-Year Longitudinal Study*, 16:3 AM. J. GERIATRIC PSYCHIATRY 209, 210 (2008) (asserting that financial capacity is an effective means of predicting and understanding the onset of AD).

194. Daniel Marson et al., *Assessing Financial Capacity in Patients With Alzheimer Disease*, 57 ARCH NEUROL 877, 877, 883 (2000).

195. See ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES 16 (2010), http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf.

c. Likelihood of Injury

Third, we must consider the likelihood of injury to the infirmed senior. One national statistic suggests approximately five million cases of financial abuse of the elderly occur every year.¹⁹⁶ Other reports estimate that sixty percent of all annual losses resulting from fraud are perpetrated against seniors and these consumer frauds are increasing by twelve percent each year.¹⁹⁷ The many examples of financial abuse targeting seniors is beyond the scope of this Comment,¹⁹⁸ but available evidence

196. NAT'L CTR. ON ELDER ABUSE, ELDER ABUSE PREVALENCE AND INCIDENCE (2005), http://www.ncea.aoa.gov/NCEARoot/main_site/pdf/publication/FinalStatistics050331.pdf.

197. Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 517 (2004) (detailing the proportion of financial frauds that are perpetrated against the elderly). Seniors are considered to be easy targets for financial abuse. *Id.* Their vulnerability is said to be due to their accessibility and receptiveness to solicitations. *Id.* at 518.

198. See Jane A. Black, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws Are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 289–91 (2008) (highlighting the many forms of exploitation that seniors suffer in America). The elderly are often left at the mercy of hired caregivers or family members. *Id.* at 290. Because nearly 90% of reported instances of abuse occur within the home, and the fact that the most common perpetrators are family members, the results are magnified. *Id.* Sadly, these victims of elder abuse are thought to die sooner than those not victimized. *Id.* at 290–91; Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 206–16 (2000) (defining financial abuse and comparing it to other similar crimes). Typical types of financial abuse are fraud, theft, breach of fiduciary duty, and negligence. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 206 (2000). Seniors appear to be particularly vulnerable to financial crimes due to their reduced mental capacity. *Id.* at 207. Instances of financial abuse are often difficult to prove. *Id.* at 216; Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 268–79 (2003) (discussing various definitions of financial abuse). The states have not been able to offer a common definition of financial abuse for the purpose of crafting protective statutes. Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 270 (2003). The root definition of financial abuse should focus on one party misusing the assets of another. *Id.* at 269. A workable definition should focus on the victim in order to further legislative efforts on protecting him or her. *Id.* at 278. Financial abuse is difficult to prosecute because the elderly victims are slow to report the crimes. Shelby A.D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 SAN DIEGO L. REV. 505, 519 (2004). They may not report the crimes for fear of being adjudicated defenseless and stripped of autonomy. *Id.* at 519–20. They also often make fallible witnesses due to mental incapacity. *Id.* at 520. Three of the most common types of fraud against the elderly involve telemarketing, health care fraud, and home repair scams. Richard A. Starnes, *Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties*, 4 ELDER L.J. 201, 206 (1996). Telemarketing schemes often involve fake investment schemes that feed upon seniors' retirement finance concerns. *Id.* Health care fraud plays upon both the imminent mortality concerns of seniors and also uses the elderly to generate false or inflated insurance and Medicare claims. *Id.* at 208.

suggests that financial exploitation of the elderly might describe itself as “Legion; for we are many.”¹⁹⁹

d. Social Utility of Actor’s Conduct

Fourth, we must consider the social utility of elderly people having the power to contract. From a purely economic viewpoint, Texas clearly needs the engagement of seniors. Persons aged fifty-five and up control the lion’s share of the state’s yearly median earnings and to effectively freeze them out of the marketplace might very well be disastrous.²⁰⁰ That being said, the need to pay for the mounting healthcare cost of providing medical services to the elderly population just might be sufficient to offset the loss potential in the marketplace.²⁰¹ The Centers for Disease Control and Prevention reported that: (1) persons over the age of sixty-five can expect annual medical costs of 12,100 dollars, (2) the looming cost of nursing care for America’s elderly weighed in at a whopping 132 billion dollars per year in 2001, and (3) that this cost is expected to increase by roughly twenty percent in the future.²⁰² Even after factoring in the purported savings under the 2010 federal health care reform legislation, senior couples retiring this year will likely have to budget \$250,000 to cover their post-retirement medical expenses.²⁰³ Additionally, figures released by the Congressional Budget Office in 2007 suggested that our nation will likely have to cut federal spending on Medicare and Medicaid which would effectively shift medical costs from the federal government onto

Home repair scams typically include contractors who overcharge, perform shoddy work, or outright abscond with down payments. *Id.* at 209–10.

199. *Mark* 5:9 (New American Standard Version) (proclaiming that although one person stood before Jesus Christ, he was in fact occupied by many demons). Jesus was accosted by a man possessed. *Id.* at 5:2. The man was uncontrollable and unrestrainable. *Id.* at 5:3–5. When Jesus asked for the man’s name, this infamous reply was given. *Id.* at 5:9–10.

200. YVONNE J. GIST & LISA I. HEZEL, U.S. DEP’T OF COMMERCE, *WE THE PEOPLE: AGING IN THE UNITED STATES*, U.S. CENSUS BUREAU 7 (2004), available at <http://www.census.gov/prod/2004pubs/censr-19.pdf> (noting that men aged sixty-five to seventy-four have the highest median salary in the national workforce).

201. Centers for Disease Control and Prevention, *Public Health and Aging: Trends in Aging—United States and Worldwide*, MORBIDITY AND MORTALITY WKLY. REP., Feb. 14, 2003, at 101, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5206a2.htm> (commenting on U.S. aging trends and associated medical issues). Eighty percent of all persons over the age of sixty-five have one or more chronic diseases. *Id.* At least half of them have more than two. *Id.* Diabetes affects roughly 20% of seniors, which leads to excess morbidity and higher medical costs. *Id.*

202. *Id.*

203. Mark Jewell, *Study Finds Average Retired Couple Will Need \$250,000 to Cover Medical Costs*, BOS. GLOBE, Mar. 26, 2010, www.boston.com/business/personalfinance/articles/2010/03/26/study_finds_average_retired_couple_will_need_250000_to_cover_medical_costs/.

the states and private individuals.²⁰⁴ Recent trends in Texas tend to confirm that Medicare and Medicaid patients in the state will probably have to pay out of pocket for continued quality medical care.²⁰⁵ Thus, it may be wise to help Texas seniors preserve their nest eggs in order to help shoulder the financial burden their advancing age will place on society.

With respect to the impact on the marketplace due to the potential treatment of seniors as or like minors in the eyes of contract law, evidence seems to suggest that the impact might not be as large as feared. The characteristic of minority has not excluded young people from engaging the commercial world. In fact, minors are known to be significant players in the emerging computer and internet age.²⁰⁶ Many segments of the economy actively seek and benefit from the participation of minors.²⁰⁷ Thus, it remains unclear whether the court's stated fear of lost economic opportunities for seniors rests soundly on fact.

e. Burden on the Parties

The remaining two considerations of the court deal primarily with what American jurisprudence contends to be a major premise of contract law.

204. Michael E. Chernew et al., *The Specter of Financial Armageddon—Health Care and Federal Debt in the United States*, 362 *NEW ENGL. J. MED.* 1166, 1166 (2010), available at <http://www.nejm.org/doi/pdf/10.1056/NEJMp1002873?ssource=hrc>.

205. See Todd Ackerman, *Texas Doctors Opting Out of Medicare at Alarming Rate*, *HOUS. CHRON.*, May 17, 2010, www.chron.com/dispatch/story.mpl/metropolitan/7009807.html; Ben Philpott, *Texas Nursing Homes Brace for Medicaid Cuts*, *TEX. TRIB.*, Feb. 1, 2011, www.texastribune.org/texas-taxes/2011-budget-shortfall/texas-nursing-homes-brace-for-medicaid-cuts/ (explaining that proposed cuts to the state Medicaid budget would force nursing homes to find additional sources of revenue in order to stay in business); Robert Garrett, *Medicaid a 'No-Win Dilemma' for Texas State Study Finds*, *DALL. MORNING NEWS*, Dec. 4, 2010, www.dallasnews.com/news/politics/texas-legislature/headlines/20101204-medicaid-a-no-win-dilemma_for-texas-state-study-finds.ece (discussing the budgetary strain under the current Medicare system and the possibility that Texas legislators may propose opting out of the program).

206. Juanda Lowder Daniel, *Virtually Mature: Examining the Policy of Minor's Incapacity to Contract Through the Cyperscope*, 43 *GONZ. L. REV.* 239, 241 (2008) (suggesting that minors have demonstrated through their involvement in e-commerce that they no longer require the protection of the infancy doctrine). Major industries target minors as both present and future customers. *Id.* at 240. Young children grow up with computers and children are becoming internet shopping experts. *Id.* at 241. In fact, it is now infants-at-law who seem to be preying upon adult merchants in the online world. *Id.*

207. See, e.g., *Discount Card Courts Teens*, *IN-STORE MKTG.*, Mar. 1, 2004, available at 2004 WL 21958167 (stating that multiple retailers have launched a discount card system for use among teenagers for marketing purposes). Retailers note that ninety-eight percent of teenagers responded favorably to a discount card concept. *Id.* The discount card would provide discounts to teenagers at participating retailers who in turn benefit by being able to update records on youth spending habits. *Id.* Retailers hope to expand the number of participating businesses to make the cards more attractive for teens. *Id.*

Early English contract law held that the formation of a binding contract required a free and intelligent consent between two parties, and that mentally incompetent persons were incapable of meeting that requirement.²⁰⁸ Over time, this belief gave way to today's more objective theory, which requires only a mutual manifestation of intent among parties in order to form a binding agreement.²⁰⁹ Clearly an attempt to avoid a contract would potentially create a hardship for a good faith party to the agreement. The court, therefore, rightly considers the ability of either party to prevent or mitigate the breach or avoidance of a contract in order to determine a fair outcome.

2. Burden on the Senior

The court looks first to the burden of protecting an elderly person from an ill-advised contract. In 1924, the Supreme Court of Oklahoma noted that there is a duty placed on family and relatives of a mentally incapacitated person to have him or her adjudicated incompetent so that other parties in good faith would have public notice against entering into an agreement with that person, and thereby avoid potential financial hardship from the avoidance of an agreement.²¹⁰ At a first glance, this seems to be an entirely reasonable suggestion, especially considering the ability to conduct estate planning and to file for guardianship. There are a few problems with it, however.

A significant number of American seniors live alone and do not enjoy the luxury of a watchful family around to protect them.²¹¹ Also, it has been reported that up to fifty-seven percent of Americans do not have a will,²¹² let alone other estate planning documents in contemplation of in-

208. Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554, 555 (1943) (providing background for the development of English contract law).

209. *Wiley v. Bertelsen*, 770 S.W.2d 878, 882–83 (Tex. App.—Texarkana 1989, no pet.) (listing the requirements of a binding contract in Texas). The courts will look to objective criteria such as the communications and acts between the parties under the circumstances. *Id.* at 882. The intent of the parties must be demonstrated in a manner a court is capable of understanding. *Id.* There should be no reasonable doubt that both parties were aware of the terms of and agreed to the contract. *Id.* at 882–83; *Copeland v. Alsobrook*, 3 S.W.3d 598, 605 (Tex. App.—San Antonio 1999, no pet.) (stating that a reasonable inference of a promise from the other party makes the promise binding at law).

210. *Edwards v. Miller*, 228 P. 1105, 1107 (Okla. 1924).

211. *Sixty-five Plus in the United States*, U.S. CENSUS BUREAU (1995), <http://www.census.gov/population/socdemo/statbriefs/agebrief.html>. (citing elderly demographic statistics as of 1995). Thirty-two to fifty-seven percent of female seniors over the age of sixty-five live alone. *Id.* Males tend to be half as likely to live alone as their female counterparts. *Id.*

212. Claudia Buck, *Make a Will to Codify Your Wishes*, WICHITA EAGLE, Feb. 3, 2008, available at 2008 WLNR 2025589 (citing reasons for creating a will).

competency. Lastly, financial capacity is one of the first skill-sets to erode—and a person does not normally leap from competent to incompetent overnight. It cannot be overlooked that a senior with AD is likely to lose his or her financial management capacity prior to manifesting other more recognizable traits of diminishing capability. Thus, it seems that the burden on Texas seniors to protect themselves may very well be great indeed.

The burden was indeed heavy on our family. Our family was initially uncertain as to what we should do as we watched my dad squander everything he built-up over the course of his life. Do we jump in and stop him? Was that selfish on our part to deprive him of something he seemingly wanted to do with his own money? In our case, we consistently deferred to his will because, after all, his money was his to squander. The problem, though, was that we knew him *before* AD set in, and understood that his former self would have been horrified at his current behavior. By the time we had convinced him to consider placing our mom as a mandatory co-signer for bank transactions, a *substantial* slice of his disposable net worth had evaporated into thin air.

3. Burden on the Vendor

The last consideration listed by the Texas Supreme Court is the burden on the party doing business with the senior. Texas requires that the party have no knowledge of the senior's incapacity and that the subject terms are fair under the circumstances.²¹³ Barring manifest behavior of incapacity, the law imports a presumption of competence so long as the other party has no other form of notice.²¹⁴ Of course, if the party either had or reasonably should have known of a senior's incapacity, then equity would not strive to protect the transaction.²¹⁵

Alternatively, if a senior's age is allowed to be suggestive of capacity, then the burden of obtaining notice for a vendor would be minimal. It has been said that determining the age of a minor is relatively simple and poses no burden on a vendor.²¹⁶ Likewise, a determination of age when it comes to seniors would be all the easier considering the ubiquitous nature of driver's licenses and other identification cards. Thus, when one factors in the prevalence and symptoms of AD, a vendor could very easily

213. RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (1981).

214. *Id.* § 15 cmt. b.

215. *Id.* § 15 cmt. f.

216. Milton D. Green, *The Operative Effect of Mental Incompetency on Agreements and Wills*, 21 TEX. L. REV. 554, 565 (1943) (noting the small burden of ascertaining a person's age in the marketplace). A trained adult can normally estimate a minor's age to within a few years. *Id.* The proliferation of birth certificates and other forms of state identification make confirmation of age relatively simple. *Id.*

be made aware of a twelve to fifty percent likelihood that a customer or client would be incompetent at making financial decisions based on an quick determination of age.²¹⁷ With this in mind, one could argue that the probability of actual incapacity based on an assessment of age is perhaps more predictable in the case of seniors as opposed to the accepted infancy doctrine which applies to those who have not yet blown out eighteen candles.²¹⁸

The Restatement's additional requirement of fairness as it might apply to a burden on the party doing business with an incapacitated senior is difficult to define. A dictionary defines "fair" as "treating people equally" and "just or appropriate in the circumstances."²¹⁹ Even in light of the dictionary definition, a standard legal test for fairness is difficult to ascertain, leading one to surmise that an "I know it when I see it" test may apply.²²⁰ A fair contract is perhaps best described as any agreement that stops just short of being unconscionable.²²¹ Texas courts follow a well-established principle that "what the parties agree upon is valid, the parties are bound by the agreement they have made, and the fact that a bargain is a hard one does not entitle a party to be relieved therefrom if

217. Matthew A. Christiansen, *Unconscionable: Financial Exploitation of Elderly Persons with Dementia*, 9 MARQ. ELDER'S ADVISOR 383, 384 (2008) (describing the prevalence of AD among seniors by age-group); see also ALZHEIMER'S ASS'N, 2010 ALZHEIMER'S DISEASE FACTS AND FIGURES (2010), http://www.alz.org/documents_custom/report_alzfactsfigures2010.pdf.

218. See Juanda L. Daniel, *Virtually Mature: Examining the Policy of Minor's Incapacity to Contract Through the Cyperscope*, 43 GONZ. L. REV. 239, 253 (2008) (citing to a legal reasoning capability study that demonstrated adolescents meet the mental requirements of the legal definition of competence). The study stated that children obtain sufficient legal reasoning skills between the ages of twelve and fourteen. *Id.* It has also been suggested that a person's intelligence level peaks by the age of sixteen. *Id.* Thus, statistics indicate that minors, absent some other physical infirmity, should be considered roughly equal to adults so far as the legal description of mental capacity is concerned. *Id.*; Walter D. Navin, *The Contracts of Minors Viewed From the Perspective of Fair Exchange*, 50 N.C. L. REV. 517 (1972) (recounting a claim by education specialists that adolescents aged fourteen and above are mentally competent).

219. THE CONCISE OXFORD ENGLISH DICTIONARY, 510 (10th ed., Judy Pearsall ed. 2002).

220. See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 198 (1964) (Stewart, J., concurring) (offering a subjective definition of hard-core pornography in lieu of a satisfactory legal definition). The Supreme Court reversed an Ohio criminal conviction of a movie theater manager who presented a movie with a lewd sex scene. *Id.* at 187. The Court upheld the definition of obscenity to be based on what an average person would reasonably conclude in light of prevailing local standards. *Id.* at 191. In his famous quote, Justice Stewart acknowledged the vagueness of the obscenity standard, yet he supported its application to the case at bar. *Id.* at 197 (Stewart, J., concurring).

221. See *Standard Oil Co. of Tex. v. Lopeno Gas Co.*, 240 F.2d 504, 509 (5th Cir. 1957) (describing when a court might not provide a remedy of specific performance in a contract dispute).

he assumed it fairly and voluntarily.”²²² Under this principle, a contract appears generally to be considered fair unless it is deemed to be unconscionable.

Unconscionability is determined by a court based on the “parties’ general commercial background and the . . . needs of the particular . . . case.”²²³ Courts can also consider both substantive and procedural unconscionability to render an agreement invalid.²²⁴ The Texas Supreme Court describes an unconscionable contract to be “so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.”²²⁵ The aim of this doctrine is to “prevent oppression and surprise” and relevant factors to consider “include weaknesses in the contracting process . . . contractual capacity, fraud, and other invalidating causes.”²²⁶

It has been asserted that the doctrine of unconscionability should extend like an umbrella over presumed weak parties in contract law in order to balance the law’s concern of protecting the weak with the desire to honor the reasonable expectations of a commercial agreement.²²⁷ Under the shadow of this umbrella, a party to a contract with a senior would be well advised not to impose unconscionable terms on an agreement with a senior; or else the party runs the risk of the contract not being enforced.

222. *In re Big 8 Food Stores, Ltd.*, 166 S.W.3d 869, 878 (Tex.App.—El Paso 2005, no pet.) (stating the difference between a fair contract and an unconscionable contract).

223. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008) (quoting *In re FirstMerit Bank*, 52 S.W.3d 749, 757 (Tex. 2001)) (providing how to determine the unconscionability of a contract). A party who signs an agreement is presumed at law to have read and understood the terms. See *In re Big 8 Food Stores, Ltd.*, 166 S.W.3d at 878 (holding that one cannot rely on the inability to read to get out of a contract). If a party knowingly agrees to an improvident contract, the law will generally not extend protection against the onerous terms. See *id.* at 877. Absent a mistake, fraud, or undue influence, Texas courts should not try to police the fairness of terms willingly agreed to by willing participants. See *id.* at 877–78; see also TEX. BUS. & COMM. CODE ANN. § 2.302 (West 2009); *Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 328 (5th Cir. 1982) (indicating the standard for determining unconscionability under the Texas Business and Commerce Code).

224. *In re Halliburton Co.*, 80 S.W.3d 566, 571 (Tex. 2002) (listing the requirements for a finding of unconscionability under Texas law). Substantive unconscionability speaks to whether a particular contract term is fair. *Id.* Procedural unconscionability refers to some potential chicanery surrounding the execution of the agreement. *Id.* The court clarified that both are considerations in determining unconscionability. *Id.* at 572.

225. *In re Poly-America, L.P.*, 262 S.W.3d at 348 (defining what makes a contract unconscionable under Texas law).

226. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1979)).

227. See Walter D. Navin, Jr., *The Contracts of Minors Viewed From the Perspective of Fair Exchange*, 50 N.C. L. REV. 517, 544 (1972) (proposing that unconscionability remedies be available to minors as opposed to a right of avoidance).

So long as parties deal in good faith and fairness with the senior, the odds of avoidance appear to be slim.

Given the large size of the elderly demographic and the existence of the robust youth marketing industry, we can logically presume that businesses will not turn their backs on senior patrons under an incapacity regime. It is true that businesses might face an increased risk of contract avoidance if the Restatement applied to seniors based on age or mental infirmity, but this risk should not be presumed to exceed either the risk associated with transacting with minors,²²⁸ or the risk of financial abuse leveled against seniors.

Businesses engaging seniors under a shadow of mental infirmity already possess tools to deal with risk. For instance, insurance products cover almost any economic risk. Professionals such as doctors and lawyers have access to malpractice insurance which can cover any missteps they might make in the course of their work.²²⁹ Home mortgage lenders can likewise offset default risk by having borrowers obtain private mortgage insurance. Insurance can even be obtained by married couples as a means of paying for legal bills in the event of a divorce.²³⁰

Following the example of insurance practices and basic principles of risk management, persons doing business with incapacitated seniors could adjust prices and accounting practices to plan for and mitigate the cost of potential contract avoidance suits. The cost of insuring against loss under a new legal scheme can be spread among the prices by which goods are sold. Also, many vendors already track risk through warranty accounting. A company offering product warranty for a specific period of time will create a warranty liability on its balance sheet based on the management's assumption as to the risk of warranty costs.²³¹ Given the public

228. Minors do not need to show that a contract is unfair in order to avoid a contract, whereas a senior would be encumbered by the Restatement's requirement of unfairness. Compare RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981) (indicating that minors can only incur "voidable contractual duties" until they reach eighteen years of age), with RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981) (indicating that persons with defects can contract under certain conditions).

229. Even medical students have access to malpractice insurance. See *Professional Liability—Student Coverage Through HPSO: "Protects Your Academic Career and Your Future"*, HEALTH PROVIDERS SERV. ORG., <http://www.hpso.com/professional-liability-insurance/student-coverage-description.jsp> (last visited Jan. 28, 2011) (discussing the benefits of medical student malpractice coverage).

230. Jennifer Saranow Schultz, *Divorce Insurance (Yes, Divorce Insurance)*, NY-TIMES.COM, (Aug. 6, 2010, 9:35 AM), <http://bucks.blogs.nytimes.com/2010/08/06/divorce-insurance-yes-divorce-insurance/?src=busln>.

231. See Michael Sack Elmaleh, *Accounting for Product Warranties*, UNDERSTANDING-ACCOUNTING.COM, <http://www.understand-accounting.net/AccountingforProductWarranties.html> (last visited January 29, 2011). Notwithstanding the common usage of warranty accounting, due to variables that are hard to predict, estimated warranty costs can

nature of lawsuits and the four year statute of limitations to bring suit for breach of contract,²³² any actuarial concern and/or business person should be able to estimate risk from the point of sale to when the statute of limitations applies and therefore have enough information to make reasonable modifications to a business plan. Clearly, businesses already take these considerations to heart in dealing with minors. Thus, there is no reason to postulate that an excessive burden on vendors might result in seniors being closed out of the marketplace if they receive mental infirmity protection.

B. *Guardianship*

Texas courts point out the weakness of protection available to seniors under contract law can be offset by guardianship proceedings. While guardianship can be an effective tool, it is not without problems. The requirements for guardianship proceedings can discourage participation and the establishment of guardianship for a ward does not necessarily protect the ward from abuse.²³³ Also, the effect of a public adjudication of guardianship can have a profoundly negative psychological impact on seniors.

The cost of guardianship hearings can be prohibitive to most seniors and their families.²³⁴ The ward's estate is generally obligated to pay the compensation and reimburse fees generated by the appointed guardians.²³⁵ The senior's estate must also pay for the cost of the guardianship proceeding including costs associated with the appointment of guardians or attorneys ad litem.²³⁶ Although the costs associated with guardianship may be shouldered by the county in some instances, the perceived high-

be completely inaccurate. *Id.* These incorrect estimates can also be the result of the lack of available data because every product or change in a product is different and the predictability from one may not transfer to the next. *See id.*

232. *Smith Intern., Inc. v. Egle Group*, 490 F.3d 380, 386 (5th Cir. 2007).

233. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS 7-27* (2010), available at <http://www.gao.gov/new.items/d101046.pdf> (detailing several instances of abuse of wards under guardianship); Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 *ELDER L.J.* 75, 78-83 (1997) (highlighting some of the problems nationwide with guardianship). *But see* U.S. GOV'T ACCOUNTABILITY OFFICE, *GUARDIANSHIPS: LITTLE PROGRESS IN ENSURING PROTECTION FOR INCAPACITATED ELDERLY PEOPLE 2* (2006), available at <http://www.gao.gov/new.items/d061086t.pdf> (noting how Texas has adopted guardianship legislation aimed at strengthening protection for wards).

234. Daniel C. Marson et al., *Assessing Financial Capacity in Patients With Alzheimer's Disease*, 57 *ARCH NEUROL* 877, 878 (2000).

235. *TEX. PROB. CODE ANN.* §§ 665, 665A, 666 (West 2003).

236. *Id.* § 669.

cost of court fees may cause resistance among many seniors who might otherwise need financial supervision.

The bond requirement for the qualification of a guardian also presents an obstacle. The value of the bond must generally equal the value of assets and liabilities owned by the senior.²³⁷ As previously noted, seniors control the lion's share of the nation's net worth, thus the ability in some instances for potential guardians to satisfy the bond requirement can be an undesirable challenge. Although the court is certainly justified in seeking indicia of appropriate management skills among guardians, this hurdle can nevertheless discourage participation.

Perhaps the most significant obstacle to guardianship, however, comes from common perceptions of guardianship itself. For many seniors, the apprehension of being placed under guardianship probably ranks as high as the fear of being put in a nursing home.²³⁸ A commonly held perception is that guardianship is "the most intrusive, non-interest serving, impersonal legal device known and available to us and as such, one which minimizes personal autonomy and respect for the individual" and that "it is a device to be studiously avoided."²³⁹

Another issue with guardianship concerns timing. Since financial capacity is often one of the first capacities to be lost by the senior, it is likely that the effectiveness of guardianship trials will be too late. The effect of guardianship commences at the issuance of a court order.²⁴⁰ The establishment of guardianship is not necessarily retroactive and does not automatically help undue former bad decisions of the incapacitated senior. Although the guardian may sue to avoid contracts entered into by the ward prior to establishment of the guardianship, the same challenges previously discussed under contract law apply against the ward.

From my family's perspective, the idea of a guardianship was anathema to our way of thinking. As much as we wanted to help my dad, there was no way guardianship was going to happen without a fight. We never brought it up to him, knowing the tempest that might set off—and rightfully so. Who on earth wants to be adjudicated mentally incompetent for the whole world to know? This is especially true when only your financial management skills and short-term cognitive abilities have disappeared.

237. *Id.* §§ 703, 709.

238. *Senior Citizens Fear Nursing Home, Loss of Independence More than Death*, SENIORJOURNAL.COM, (Oct. 25, 2007), available at <http://www.seniorjournal.com/NEWS/Features/2007/7-10-25-SenCitFearNursingHome.htm>.

239. Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 284 (2003) (quoting a congressional panelist's candid thoughts on guardianship).

240. TEX. PROB. CODE ANN. § 693 (West 2003).

Losing a little bit of oneself does not mean that one would necessarily want to give up independent living altogether.

C. *Family Protective Services*

FPS provides a great model for how seniors with AD should be protected. The FPS agents have the authority to ensure those who need assistance can get it. Notwithstanding the laudable effort of FPS personnel, FPS listed only 136 confirmed cases of exploitation for the year 2009 and this number is not even specific to seniors with AD.²⁴¹ It is difficult to pinpoint why this might be the case and more information is clearly needed. One might surmise that there is perhaps a general recoil among seniors from admitting state bureaucrats to wade knee-deep into their private affairs. Other suggestions might be a lack of understanding of the services FPS provides and just how effective it can be.

V. PROPOSALS

Despite the noble efforts of probate courts and other state agencies, a vast number of Texas seniors with AD or a similar disease are left virtually unprotected against financial abuse and mismanagement concerns. The key problem preventing greater protection for these seniors is the gap that exists in the law from the time when loss of financial capacity normally sets in to when legal protection is normally extended. For this reason, we should actively contemplate proactive methods to protect these seniors. Although guardianship and family protective services are available, they simply are not able to cast a wide enough net to pull all the needy into a safe harbor. In contemplation of the looming cost of medical services awaiting the Texas state budget and Texans' personal budgets, there should be a renewed interest in finding a way to keep seniors off the public dole by helping preserve their private wealth.

A. *Need for Estate Planning*

The first line of defense should most certainly rest with Texas seniors and their families. It will be those who interact on a daily basis with the seniors that will observe the tell-tale signs of financial incapacity. The individual is in the best position to protect him or herself by seeking medical attention and crafting responsible estate planning devices. Prior to celebrating their sixty-fifth birthdays, Texans need to sit down with both their primary care physician and attorneys to both test for and prepare

241. TEX. DEP'T OF FAM. AND PROT. SERVS., ANNUAL REPORT AND DATA BOOK 2009 23, http://www.dfps.state.tx.us/documents/about/Data_Books_and_Annual_Reports/2009/2009combined.pdf (providing statistics for confirmed FPS case activity in 2009).

for future incapacity. Although people like Warren Buffet reveal to us that seniority certainly does not necessarily incapacitate a person, the hard facts of AD demonstrates to us that an enormous population of the elderly have a real need for oversight if they are to be protected both from themselves and those who would prey upon them.

B. *Proactive Testing & Diagnosis*

A person approaching sixty-five should request, and a state physician should insist upon administering, a basic cognitive test for potential signs of dementia. This test should be repeated periodically in order to account for deterioration over time. If a test such as the MMSE or Mini-Cog suggests possible cognitive decline, the physician should refer that person to a specialized clinic who can test for AD and other specific mental diseases. By participating in a clinical test such as those performed by Dr. Marson at the University of Alabama at Birmingham's Alzheimer's Institute, seniors may come to know with certainty what they can and cannot do. This knowledge can help seniors and their loved ones take the necessary estate planning steps to maintain the integrity of the senior while simultaneously conserving the estate. This would allow families to avoid involving FPS officials or probate judges into their lives and to better protect the sense of dignity so essential in our contemporary culture.

Texas physicians and courts should carefully consider the work being performed by Dr. Marson and his colleagues in crafting a specific and useful test for financial capacity. The Financial Capacity Instrument could serve as the model for determining financial capacity and prove helpful in determining when estate planning or guardianship protective provisions kick in. Since the test is entirely objective and not capable of being manipulated by the patient, the FCI could be an invaluable device for helping break through the natural reluctance of seniors to acknowledge and accept their own mortality. It could also help provide families with hard evidence to the senior that something needs to be done.

This would have been helpful for our family. My dad refused to believe, perhaps out of fear, that he was losing his capacity. Only after being reminded repeatedly and after being shown the financial damage he had done to himself, did he even consider seeing a doctor. The doctors he visited did not evaluate him using something like the FCI and relied instead on unrelated and somewhat subjective testing. It was incredibly frustrating for all of us when he came home with a clean bill of health. During my visit with Dr. Marson, he alluded to the gross inadequacy of tests such as the MMSE in determining financial capacity.²⁴² He sug-

242. Telephone Interview with Dr. Daniel Marson, Dir. of the Clinical Neuropsychology Lab., Memory Disorders Clinic and Alzheimer's Disease Ctr. (Aug. 24, 2010).

gested that had my dad been referred to his clinic, that the FCI would reveal the exact extent of decline.²⁴³ He further commented that most patients, after a long day of testing at his clinic, generally acquiesce when confronted by “two lab-coats” who calmly yet authoritatively explain the extent of damage wrought by AD.²⁴⁴ In those instances, he said most people come around to reason and agree to make necessary estate planning changes to protect themselves.²⁴⁵

C. *Revisions to Contract Law*

My first proposal to Texas lawmakers for contract law would be to provide a blanket statutory shield to all Texas seniors over the age of seventy under a modified version of the Restatement’s current form of protecting the mentally incompetent. The modification would involve shifting the burden of proof of incapacity away from the senior and instead onto the counter-party to demonstrate fair-dealing.²⁴⁶ This would create a rebuttable presumption at law of unfairness by means of financial incapacity that could be overcome by sufficient production of evidence to convince the fact-finder that the transaction was in good faith and under fair terms. This would strike a new, yet justified balance between the desire to protect the reasonable interests of parties to a contract while simultaneously providing an equitable defense to Texas seniors who suffer a high-rate of financial incapacity due to AD and other related dementias. It would serve to treat any contract as valid so long as the other party could show that it reasonably had no knowledge of the senior’s incapacity and that the contract was fair. This does not seem to be an unreasonable burden. The law would simply warn merchants and investment promoters against intentionally targeting Texas seniors.

Another option would be to apply AD to the small list of organic mental diseases referred to in the *Nohra v. Evans* volition approach to mental incapacity.²⁴⁷ As stated earlier, the volition or motivational approach considers whether a person’s contracts were “merely uncontrolled reactions to their mental illness” in addition to the more common understanding test.²⁴⁸ This particular court indicated a willingness to adopt the

243. *Id.*

244. *Id.*

245. *Id.*

246. For a detailed discussion on the general capacity of seniors and merits for burden shifting, see Wendy Chung Rossiter, Comment, *No Protection for the Elderly: The Inadequacy of the Capacity Doctrine in Avoiding Unfair Contracts Involving Seniors*, 78 OR. L. REV. 807, 821–22 (1999) (suggesting that seniority alone might warrant comparable treatment as an infant).

247. *Nohra v. Evans*, 509 S.W.2d 648, 655 (Tex. Civ. App.—Austin 1974, no writ).

248. *Id.*

standard that “a person incurs only voidable contractual duties by entering into a transaction . . . by mental illness or defect” and mentions nothing of our current fairness hurdle.²⁴⁹ An application of this ruling to seniors with AD might even be more attractive than a modification of the Restatement (Second). Seniors with AD or a related dementia could be pigeonholed under *Nohra*, whereas normal contract suits invoking mental infirmity could remain under the current view of the Texas Supreme Court.²⁵⁰

D. *Infancy Doctrine for Confirmed AD*

In light of what we now know about the relationship between AD and financial incapacity, I would further recommend that a senior who could present a diagnosis of AD or a similar dementia from a licensed Texas physician should be protected under the infancy doctrine. As unfair as this may sound, we should consider the evidence that minors over the age of fourteen are considered to possess adult or near adult mental capacity, while we now know that seniors with AD do not. In the event of a senior presenting a diagnosis of AD, a much stronger probability of financial incompetence exists and a greater public interest in defending the helpless arises.

E. *Mandatory Medical Reporting Requirement*

To balance the equity in the above scenario, it would be helpful to create a mandatory reporting requirement between licensed physicians and FPS.²⁵¹ The report would trigger a visit by FPS who could then determine whether the senior has sufficient protective measures in place within the family or support network to guard the elder’s interests. The same report could prompt a “guardianship-lite” hearing whereby, depending upon the recommendation of FPS and the requests of the senior,

249. *Id.* at 654 (adopting a standard that pre-dated the current Restatement (Second) of Contracts).

250. *See* Edward D. Jones & Co. v. Fletcher, 975 S.W.2d 539, 545 (Tex. 1998).

251. *C.f.* TEX. FAM. CODE ANN. § 91.003 (West 2008) (mandating that doctors give certain information to persons whom they suspect are victims of family violence); TEX. HEALTH & SAFETY CODE ANN. § 161.041 (West 2001) (ordering doctors to report gunshot wounds to law enforcement officials); TEX. HUM. RES. CODE ANN. § 48.051 (West 2001) (requiring all persons to report suspected abuse of the elderly); Elizabeth K. Tulloch, *What Shall We Do About Miss Daisy’s Driving: Background For the Elder Law Attorney*, 27-Oct. COLORADO LAWYER 81, 82 (1998) (describing a statutory right by the Colorado DMV to request and act upon medical opinion if it suspected a senior driver was incompetent); Kanoelani M. Kane, Comment, *Driving Into the Sunset: A Proposal for Mandatory Reporting to the DMV by Physicians Treating Unsafe Elderly Drivers*, 25 U. HAW. L. REV. 59, 81–82 (2002) (calling for a mandatory reporting statute in Hawaii for doctors who diagnose an elder with dementia).

the court could agree to automatically adjudicate the senior as having limited financial capacity without taking further action. This hearing could respect the privacy of the senior and potentially dispense with the need to post bond or appoint a guardian.²⁵² The main effect would be to adjudicate the person financially incompetent without necessarily imposing a guardian so long as the judge concurred with FPS's recommendation and the senior's stated wish. This seems to comply with the Texas Probate Code's requirement that a "person . . . retains all legal and civil rights and powers except those designated by court order as legal disabilities."²⁵³ This quick assessment following a diagnosis of AD could serve as effective notice without having to subject the senior to an embarrassing trial or assignment of unwanted guardianship. FPS could periodically monitor the financial status and well-being of the senior and verify that estate administrative measures are functioning properly. If FPS finds the senior to be at risk, then it could call for a normal guardianship trial seeking more robust protection.

Something like this would have been more palatable for our family. So long as problems can be resolved *within* the family, I argue people would be more likely to accept the perceived interference of FPS or some county judge getting in their private business. Had we known that we could have used either the FPS or the courts merely to force him to let us help him without publicly emasculating him, we would likely have done it. Additionally, it would have been helpful to have a mandatory medical reporting requirement in the event of a diagnosis of AD. Any way to relieve the pressure felt by loved-ones in the reporting process would serve to make the otherwise unpalatable decision to bring an aging loved one before the court much easier to deal with.

F. *Promotion of Bank Reporting Legislation*

One protective measure being coordinated by FPS that should prove helpful in protecting incapacitated seniors is the development of a bank reporting program. As mentioned earlier, Texas has a blanket-reporting requirement that applies to all persons in the state who suspect cases of abuse. Some states have designed and rolled-out bank reporting statutes which seek participation by banks in helping to monitor for indicia of financial abuse or mismanagement.²⁵⁴ This makes sense given the direct

252. See TEX. PROB. CODE ANN. § 883 (West 2003).

253. *Id.* § 675.

254. See SANDRA L. HUGHES, AMER. BAR ASS'N, CAN BANK TELLERS TELL?—LEGAL ISSUES RELATING TO BANKS REPORTING FINANCIAL ABUSE OF THE ELDERLY (2003), available at http://www.ncea.aoa.gov/NCEARoot/Main_Site/pdf/publication/bank_reporting_long_final_52703.pdf (evaluating the attempts by states to create effective bank reporting programs to help prevent financial abuse against seniors); Charles Pratt, *Banks' Effective-*

interaction bank tellers and other bank staff members have with seniors on a daily basis. The general idea is that with bank participation, FPS or other concerned persons can learn of potential abuse and thus investigate the matter and take proactive steps to prevent future problems.

Although there is no specific statutory requirement to coordinate a state-wide bank reporting program, FPS has nevertheless been able to persuade some banks into participating. For instance, the FPS in San Antonio receives direct support from USAA, Frost Bank, and Compass Bank, who have agreed to monitor for signs of elder financial abuse.²⁵⁵ With the help of one bank, FPS officials were able to obtain video footage of a young man forcing a senior family member to withdrawal cash.²⁵⁶ The larger national banks have thus far been less inclined to help, but it seems as though progress is being made towards greater participation. An FPS official stated that to really be effective, there needs to be a federal uniform federal bank reporting statute to ensure a coordinated national effort.²⁵⁷

VI. CONCLUSION

A massive graying effect is sweeping our nation as the baby-boomer generation begins to turn sixty-five. Medical studies reveal that along with age comes AD or a related dementia, which quickly erodes a person's financial capacity. When considering the swelling cost of providing for retirement living and medical care, it is tragic that state law is failing to provide significant refuge to these seniors from poor decisions arising from their disease. Unless Texas policymakers agree to rethink the merits of denying seniors contract avoidance rights based on age or of providing a more publicly accepted form of guardianship, a super-majority of seniors with AD will continue to be unprotected against an entirely certain and predictable symptom of their disease. There is sufficient medical evidence to support an exception to the preclusion of legal incapacity based on seniority and such an exception should be crafted before the wave crests over Texas.

ness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California, 40 CAL. W. L. REV. 195 (2003) (evaluating the effectiveness of California's attempts at fostering a bank reporting system).

255. Telephone Interview with Susan Smart, San Antonio Dep't of Family Protective Servs. (Oct. 8, 2010).

256. *Id.*

257. *Id.*