



10-1-2022

Collateral Consequences of an Incarcerated Beneficiary: Preserving Testamentary Intent and Protecting a Testator's Estate from Falling Victim to a Beneficiary's Unreasonable Criminal Justice Debt

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**COLLATERAL CONSEQUENCES OF AN INCARCERATED
BENEFICIARY: PRESERVING TESTAMENTARY INTENT
AND PROTECTING A TESTATOR’S ESTATE FROM
FALLING VICTIM TO A BENEFICIARY’S
UNREASONABLE CRIMINAL JUSTICE DEBT**

Torra Hausmann*

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I. INTRODUCTION

John Filippi was a troubled young man, enduring several stints in prison for crimes ranging from disorderly conduct and disturbing the peace to narcotics possession and assault.¹ His troubles started much earlier in life, however, when he served five years for the theft of a woman's purse.² After this extended sentence in prison, John Filippi's grandfather died and, through his extensive estate planning, left him a sizeable inheritance in the amount of \$134,000.³ Due to his incarceration, Filippi's inheritance was barely disbursed before the State of Connecticut sued him for the rights to the inheritance to cover the cost of his five-year prison stay.⁴

The practice of garnishing inmate property to pay for the cost of incarceration is fairly common throughout the United States.⁵ While a prison can, with few exceptions, garnish just about any property belonging to an inmate,⁶ placing a lien on an inmate's inheritance is one common mechanism prisons use to satisfy these reimbursement

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1. Jason Siedzik, *After Double Taser Shots In 2010 Incident, Winsted Man with Multiple Probation Violations Has Case Continued*, NEW HAVEN REG. (May 1, 2012), <https://www.nhregister.com/news/article/After-double-Taser-shots-in-2010-incident-11497637.php> [<https://perma.cc/9TDT-2WRQ>].
2. Colin McEnroe, *Couldn't Keep It for Themselves*, HARTFORD COURANT (Apr. 18, 2004), <https://www.courant.com/news/connecticut/hc-xpm-2004-04-18-0404180898-story.html> [<https://perma.cc/TAT3-3F2U>].
3. Gary Hunter, *Prison Writers Punished for Success in Connecticut and Texas*, PRISON LEGAL NEWS (Dec. 15, 2003), <https://www.prisonlegalnews.org/news/2003/dec/15/prison-writers-punished-for-success-in-connecticut-and-texas/> [<https://perma.cc/PAU5-MQ4T>]. Connecticut Probate Court records indicate the inheritance was likely passed through a trust rather than a will.
4. See Martineau, *supra* note 3; see also Hunter, *supra* note 3.
5. Jessica Lussenhop, *The US Inmates Charged Per Night in Jail*, BBC (Nov. 9, 2015), <https://www.bbc.com/news/magazine-34705968> [<https://perma.cc/JW3S-KTWX>].
6. See *infra* notes 62–67 and accompanying text.

schemes.⁷ In 2005 alone, the State of Missouri used its reimbursement scheme to seize a total of \$748,682 from inmates, including two brothers' inheritance from their father totaling just over \$34,000, and another inmate's inheritance totaling just over \$20,000.⁸

Some may question why this practice is worth a second glance—after all, why should an inmate not be required to contribute in some way to the cost of incarceration? But deeper issues of racism, poverty, and due process contribute to this problematic practice.⁹ Simpler issues like fairness, testamentary intent, and preserving family wealth further complicate the issue when considering specifically the use of inmate inheritance to reimburse prisons.

In Part II, this comment will address the current state of Estates and Trusts law, including the feasibility of reform and current limits on intestacy laws.¹⁰ Part III will give a brief overview of inmate property rights, focused primarily on an inmate's right to have and inherit property.¹¹ Part IV will give a brief overview of the States' right to reach an inmate's inheritance, including selected case law involving inmate inheritance and pay-your-stay statutes.¹² Finally, Part V will offer potential solutions to the issues involving the incarcerated beneficiary, including evaluating potential statutory changes, offering model language for will or trust drafting, as well as exploring the potential for a non-profit solution modeled after special needs trusts.¹³

7. See, e.g., Rich Scinto, *Windfalls of Former Inmates Targeted By Connecticut*, NEW HAVEN REG. (Aug. 2, 2014) <https://www.nhregister.com/connecticut/article/Windfalls-of-former-inmates-targeted-by-11384579.php> [<https://perma.cc/HU9M-FKEM>].

8. *Missouri Seizes Prisoner Assets Worth \$748,682 in 2005*, 17 PRISON LEGAL NEWS, no. 7, July 2006, at 29, <https://www.prisonlegalnews.org/news/2006/jul/15/missouri-seizes-prisoner-assets-worth-748682-in-2005/> [<https://perma.cc/G9ZW-JQYC>].

9. See Ebony Slaughter-Johnson, *How the U.S. Criminal Justice System Operates as a Debt-Based System of Racial Control*, INST. FOR POL'Y STUD. (Oct. 14, 2015) <https://ips-dc.org/the-american-criminal-justice-system-a-debt-based-system-of-racial-control/> [<https://perma.cc/3EUR-NXZ5>].

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra* Part V.

II. MODERN TRENDS AND STANDARDS IN ESTATES AND TRUSTS LAW

The act of passing on an inheritance to a beneficiary is generally treated similarly to gift giving, where transfer to title is given with no consideration required.¹⁴ Protecting these types of transfers from creditors typically requires the help of careful estate planning and usually involves executing a spendthrift trust.¹⁵ Without a carefully drafted spendthrift trust, a creditor may attach to a beneficiary's interest and compel distribution for satisfaction of the claim.¹⁶ Criminal justice debt is similar enough to other types of debt that an individual seeking to protect assets from an incarcerated beneficiary's criminal justice debt must use the same estate planning tools used by individuals concerned with other beneficiary creditors.¹⁷

The most common mechanism the criminal justice system uses to reach an inmate's inheritance involves statutes that authorize reimbursement for incarceration costs.¹⁸ Although fines, surcharges, and restitution are nearly universal to all fifty states, cost of care reimbursement statutes are not universal and vary dramatically between jurisdictions.¹⁹ Because these statutes apply at variable times during an inmate's contact with the system, inheritance received during incarceration is uniquely vulnerable to potential surrender.²⁰ This comment will evaluate the nature of these statutes as applied to the incarcerated beneficiary²¹ and what a testator can do during her lifetime with careful estate planning to provide for the testator's incarcerated beneficiary.²²

14. Alex M. Johnson, Jr., *Contracts and the Requirement of Consideration: Positing a Unified Normative Theory of Contracts, Inter Vivos and Testamentary Gift Transfers*, 91 N.D.L. REV. 547, 571–81 (2015).

15. See Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 290–92 (2002).

16. See *id.*

17. See *supra* notes 78–82 and accompanying text.

18. E.g., CONN. GEN. STAT. ANN. § 18-85b (West 2022) (authorizing the state to seize an inmate's inheritance when named as a legatee or beneficiary).

19. Lauren-Brooke Eisen, *Paying for Your Time: How Charging Inmates Fees Behind Bars May Violate the Excessive Fines Clause*, BRENNAN CTR. FOR JUST. (July 31, 2014), <https://www.brennancenter.org/our-work/research-reports/paying-your-time-how-charging-inmates-fees-behind-bars-may-violate> [<https://perma.cc/7UJN-PYWP>].

20. See discussion *infra* Section IV.C.

21. See *infra* notes 105–122 and accompanying text.

22. See *infra* Part V.

A. The Slow Reform of Estates and Trusts Laws

Laws governing estates and trusts are notoriously stable and slow to reform.²³ This stability offers positives, like predictability and reliability in how the law is written and applied, but it also creates potential for critical pitfalls, like outdated laws that are slow to address new or emerging issues.²⁴ Same-sex couples, for instance, were barred from marriage and spousal property benefits, forcing many to utilize unique legal loopholes in the otherwise unforgiving statutory schemes to provide for partners after death.²⁵ Many states went decades without laws recognizing that stepchildren²⁶ or children born out of wedlock had legitimate claims to inheritance, particularly children born out of wedlock who were not acknowledged by a deceased father.²⁷ As society recognizes more non-traditional family units, the risk that issues may arise after the death of a family member also increases.²⁸ This slow trickle of probate reform leaves many families at the mercy of the traditional values of lawmakers who drafted probate codes decades earlier.²⁹

Proper estate planning can help an individual avoid many of these pitfalls, but what about a person who dies without careful estate planning? This individual would have his estate distributed according

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23. Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in The Law of Will Substitutes*, 48 DRAKE L. REV. 769, 770, 772–73 (2000).
 24. See John H. Martin, *Reconfiguring Estate Settlement*, 94 MINN. L. REV. 42, 70 (2009). Legal scholars drafted the Uniform Probate Code as a response to critics of the current probate system, simplifying and unifying the various probate codes into one doctrine. *Id.* For a thorough explanation of the inadequacy of probate codes before the UPC was drafted, see Martin L. Fried, *The Uniform Probate Code: Intestate Succession and Related Matters*, 55 ALB. L. REV. 927, 927–28 (1992).
 25. See Robert Keefe, *Sweet Child O' Mine: Adult Adoption and Same-Sex Marriage in the Post-Obergefell Era*, 69 FLA. L. REV. 1477, 1477 (2017).
 26. Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 918 (1989).
 27. William N. Faller, *The Illegitimate's Right to Benefits Accruing Upon the Death of His Parents*, 28 LA. L. REV. 110, 110–11, 114 (1967).
 28. See Irene D. Johnson, *A Suggested Solution to the Problem of Intestate Succession in Nontraditional Family Arrangements: Taking the "Adoption" (and the Inequity) out of the Doctrine of "Equitable Adoption,"* 54 ST. LOUIS U. L.J. 271, 271–72, 279–80 (2009).
 29. *But see* David Horton & Reid Kress Weisbord, *COVID-19 and Formal Wills*, 73 STAN. L. REV. ONLINE 18, 18–19, 22 (2020). Probate codes are slow to reform, but the challenges of COVID-19 have shown legislatures are open to expedited reform under some circumstances. *Id.*

to statutes governing intestate succession.³⁰ Intestacy laws are generally created to mimic what a testator would want if she had executed a valid will; the legal presumption being that testators would want their estate to pass to their spouse or children.³¹ Although states are beginning to reform intestacy laws in the ways outlined above, these laws are also stable and slow to reform, even as a testator's intent becomes less predictable in modern society.³²

B. *Current Limitations in Wills and Intestate Succession*

The most common limitation involves the slayer doctrine, which automatically disinherits a beneficiary who is responsible for the unlawful death of a decedent.³³ Other common statutory limitations include disinheriting parents who failed to provide support for the decedent as a minor,³⁴ forced heirship when a parent wishes to disinherit a certain class of heirs,³⁵ and disinheriting an heir for misconduct such as elder abuse or financial exploitation.³⁶ In the last few decades, probate courts have continued to rule on issues that were previously never contemplated by probate codes, such as how to treat posthumously conceived children³⁷ or new types of digital assets.³⁸ Expedited change is not unprecedented—courts were quick to accept electronic signature reforms and remote document execution during the COVID-19 pandemic—but widescale change remains the rare exception.³⁹

III. A BRIEF HISTORY OF INMATE INHERITANCE ISSUES

Jurisprudence related to property rights upon conviction of a felony has a long history in the United States, dating back to times when American law was still heavily influenced by the British Crown and

30. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.1 (AM. L. INST. 1999).

31. Fried, *supra* note 24, at 928–29.

32. See Johnson, *supra* note 28, at 273.

33. See David Horton & Reid Kress Weisbord, *Inheritance Crimes*, 96 WASH. L. REV. 561, 578 (2021).

34. Theresa Louise Davis, *Not Just For Kids: Why Georgia's Statutory Disinheritance Of Deadbeat Parents Should Extend To Intestate Adults*, 43 GA. L. REV. 867, 871 (2009).

35. Katherine Shaw Spaht et al., *The New Forced Heirship Legislation: A Regrettable "Revolution,"* 50 LA. L. REV. 409, 412 (1990).

36. Horton & Weisbord, *supra* note 33, at 566.

37. See *Woodward v. Comm'r Soc. Sec.*, 760 N.E.2d 257, 259 (Mass. 2002).

38. See Laura McCarthy, *Digital Assets and Intestacy*, 21 B.U.J. SCI. & TECH. L. 384, 385 (2015).

39. Compare Horton & Weisbord, *supra* note 29, at 27, with Keefe, *supra* note 25.

its legal precedents.⁴⁰ In the early days of American legal history, a felony conviction came with the punishment of life imprisonment and the added penalty of complete civil death.⁴¹ Under this state of civil death, a person serving a life sentence was deemed legally dead and his entire estate would pass to his heirs.⁴² The civil death law included a provision that allowed an inmate to execute a Last Will and Testament within six months of his felony conviction.⁴³ Even at the time, judges acknowledged that this civil death statute created a potentially problematic legal fiction: if an individual was convicted of a felony and sentenced to life in prison without a Last Will and Testament, the life inmate could execute a will within six months of the felony conviction and frustrate the distribution of his estate from beyond the civil death grave.⁴⁴

Perhaps unsurprisingly, most states eventually rejected this civil death doctrine, opting instead for targeted civil disability statutes that limit individual rights like the right to vote or hold public office.⁴⁵ In general, an inmate does not forfeit property rights upon conviction of a crime, even when convicted of a felony.⁴⁶

A. *An Inmate's Right to Property*⁴⁷

An inmate may maintain, take, hold, transfer, convey, or dispose of property, both personal and real, regardless of the degree of his criminal conviction.⁴⁸ An inmate does not forfeit his property rights upon conviction of any crime.⁴⁹ In *Turner v. Safley*, the Supreme Court held that these constitutional protections may be validly

40. See *Avery v. Everett*, 18 N.E. 148, 150–53 (N.Y. 1888) (tracing the history of civil death statutes in American legal history).

41. *Id.* at 150.

42. *Troup v. Wood*, 4 Johns. Ch. 228, 247–48 (N.Y. Ch. 1820).

43. *Id.*

44. See *Holmes v. King*, 113 So. 274, 276 (Ala. 1927); See also *Avery*, 18 N.E. at 154 (discussing the legal fiction of civil death and that civil death is not the legal equivalent of natural death).

45. *Avery*, 18 N.E. at 154; *Cole v. Campbell*, 968 S.W.2d 274, 276 (Tenn. 1998).

46. *Avery*, 18 N.E. at 150. Civil death was imposed when a person was convicted of a felony and sentenced to life in prison. *Id.* Under civil death, the person is dead in the eyes of the law. *Id.*

47. Because of the nature of inheritance, the focus is primarily on an inmate's right to real property and money. Although an individual will also typically inherit some personal effects, this is largely inapplicable to inmates due to limitations on personal property in prison. See *infra* text accompanying notes 48–56.

48. *Haynes v. Peterson*, 100 S.E. 471, 472 (Va. 1919).

49. *Avery*, 18 N.E. at 151, 155.

limited to meet legitimate penological interests.⁵⁰ The holding in *Turner* gave discretion to prison administrators to pass restrictive regulations as long as the restrictions advance the prison's interests in security and order.⁵¹

Applying *Turner* in subsequent rulings, the Supreme Court has continuously recognized a prison's right to limit an inmate's ability to have, hold, or use cash currency while incarcerated; the Court has determined an inmate with currency may be subject to attack by other prisoners, or may use the funds to escape or bribe other individuals in the prison.⁵² Real property held outside of the prison's authority is not affected by incarceration; a life inmate may hold, dispose, or acquire real property.⁵³

B. *An Inmate's Right to Inherit Property*

Although probate codes do not address inmate property rights regarding inheritance, under common law, an inmate has the ability, the right, and the capacity to receive an inheritance.⁵⁴ Likewise, no statute currently mandates that an inmate shall lose his right to pass on his estate should he die while incarcerated.⁵⁵ Some states have passed statutes giving claims from corrections facilities higher priority over claims from other creditors against the estate of an incarcerated decedent.⁵⁶

The universal exception to an inmate's right to inherit is the slayer doctrine, which disinherits any heir or legatee that is responsible for the unlawful death of a decedent.⁵⁷ This exception typically does not

50. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

51. *Id.* Under the *Turner* test, the court stated any prison regulation that limited constitutional protections must be evaluated under the following factors: (1) whether there is a valid, rational connection between the regulation and the penological interest, (2) whether there are alternative means of exercising the inmate's right, (3) the regulation's impact on guards, other inmates, and prison resources generally; and (4) whether there are ready alternatives for furthering the penological interest. *Id.* at 89–90.

52. *See Sell v. Parratt*, 548 F.2d 753, 756 (8th Cir. 1977). At least one case has dealt with this issue in the context of inmate inheritance specifically, where one inmate hatched a fake escape plan in order to extort another inmate of an inheritance he had recently received. *See Rhodes v. True*, No. 96-3490, 1999 WL 65660, at *1 (D. Kan. Jan. 14, 1999), *aff'd* 198 F.3d 258 (10th Cir. 1999).

53. *Avery*, 18 N.E. at 151.

54. *Id.*

55. *Contra* CAL. PENAL CODE § 5061(a) (West 2022).

56. *E.g.*, CONN. GEN. STAT. ANN. § 18-85c (West 2022).

57. *See Horton & Weisbord*, *supra* note 33, at 577–78. The slayer doctrine is typically enforced by statutes known as “slayer statutes.” *Id.*

require a murder conviction.⁵⁸ In fact, no conviction is required at all if an executor brings civil action to disinherit a beneficiary for causing the death of the decedent.⁵⁹ In certain circumstances, the slayer statute will disinherit more than just the heir or legatee responsible for the decedent's death, as some slayer statutes also disinherit an heir's issue.⁶⁰ Beneficiary wrongdoing is the most common reason an inmate may be disinherited, but the wrongdoing typically must fall within a certain category like elder abuse, elder financial exploitation, or abusive behavior against the decedent testator.⁶¹

IV. THE STATE'S RIGHT TO AN INMATE'S INHERITANCE

Mass incarceration has come under increased scrutiny in the last decade.⁶² Across the country, an estimated 45,000 laws regulate the estimated 600,000 people leaving prison each year.⁶³ A system of mass incarceration has spawned a complex set of monetary obligations placed on those individuals who make contact with the criminal justice system for crimes as benign as traffic violations to crimes as serious as felonies.⁶⁴ When an individual is unable to satisfy a penal debt, the system imposes additional legal consequences, such as late penalties, interest, and other common debt collection sanctions.⁶⁵ In some extreme cases, unpaid penal debt can result in individuals being reincarcerated.⁶⁶ Legal advocacy groups often accuse this system of imposing poverty penalties or creating poverty traps because the financial penalties result in harsh effects on some of the poorest individuals, leading to ballooning debt in a

58. *Id.* at 579.

59. *Id.*

60. *E.g.*, *Cook v. Grierson*, 845 A.2d 1231–32 (Md. 2004).

61. *See Horton & Weisbord*, *supra* note 33, at 561.

62. *See Punitive Excess Series*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/series/punitive-excess> [<https://perma.cc/2FWA-QG5N>] (last visited Nov. 3, 2022).

63. Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. FOR JUST. (June 21, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/collateral-consequences-and-enduring-nature-punishment> [<https://perma.cc/SEN4-5M4F>].

64. Alexis Harris, *Monetary Sanctions as a Pound of Flesh*, BRENNAN CTR. FOR JUST. (July 26, 2021), <https://www.brennancenter.org/our-work/analysis-opinion/monetary-sanctions-pound-flesh> [<https://perma.cc/8F75-G8CL>].

65. *Id.*

66. *Id.*

system that denies them access to things such as drivers' licenses, social welfare services, and jobs.⁶⁷

A. *Types of Obligations Prisons Use to Justify Taking Inheritance*

Financial obligations are often difficult to categorize because terms are used interchangeably between jurisdictions,⁶⁸ but the common types of obligations include mandatory and non-mandatory fines, fees, and restitution.⁶⁹ When a financial obligation is imposed by statute, a trial court has no discretion to evaluate whether a defendant has the ability to pay the obligation.⁷⁰ The actual dollar amount for these mandatory debts ranges greatly, from a few dollars to thousands of dollars, but even small mandatory debts can quickly add up to a large sum of criminal justice debt.⁷¹ Non-mandatory debts are derived from statutes that direct a trial court to determine a defendant's ability to pay before imposing any penalty.⁷²

Fines are monetary penalties that are statutorily authorized and offense-specific.⁷³ Fees are the monetary obligations imposed as a means of recovering the costs of the defendant's contact with the criminal justice system.⁷⁴ Fees may be based on a statutory fee schedule or on the actual cost of the service.⁷⁵ Examples of fees include prosecution costs, general court costs, jury fees, expert witness costs, evidence testing costs, incarceration costs, or public defender costs.⁷⁶ Collection costs are associated with collection of criminal justice debt, including interest payment plan fees, or late penalties.⁷⁷ Restitution is statutorily imposed, depending on the type of crime committed, and directed at compensating victims directly.⁷⁸

67. *50-State Criminal Justice Debt Reform Builder*, CRIM. JUST. POL'Y PROGRAM AT HARV. L. SCH. [hereinafter *Criminal Justice Debt Survey*], <https://cjdebtreform.org> [<https://perma.cc/G9Y2-M95X>] (last visited Nov. 3, 2022).

68. See R. Barry Ruback, *The Benefits and Costs of Economic Sanctions: Considering the Victim, the Offender, and Society*, 99 MINN. L. REV. 1779, 1803–04 (2015).

69. ABBY SHAFROTH ET. AL., NAT'L CONSUMER L. CTR., CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR LITIGATION 23 (2016), <https://www.nclc.org/images/pdf/criminal-justice/confronting-criminal-justice-debt-2.pdf> [<https://perma.cc/6BQ4-RKAU>].

70. *Id.* at 24.

71. *Id.*

72. *Id.* at 25–26.

73. *Id.* at 4.

74. *Id.* Because these fines are statute based, they are most often mandatory in nature. See *id.*

75. See *id.*

76. *Id.*

77. *Id.* at 4–5.

78. *Id.* at 5. Restitution is beyond the scope of this comment, but it does have the ability to reliably reach inheritance.

Some of the most unregulated and inconsistent penalties come from statutes that require inmates to pay the costs associated with incarceration, including medical and dental costs.⁷⁹

B. Methods of Collection Prisons Use to Take Inheritance

Criminal justice debt can be collected through typical debt collection mechanisms, such as property liens, civil judgments, and garnishments.⁸⁰ A default on criminal justice debt may come with additional penalties including incarceration in lieu of payment, probation extension, or drivers' license suspension.⁸¹ Unique to convicted defendants' criminal justice debt, some jurisdictions combine many of the collection mechanisms outlined above into supplementary proceedings prior to or after release from incarceration.⁸² These proceedings are typically held under the guise of evaluating an individual's ability to pay criminal justice debt but can include requirements like mandatory financial reporting of assets under the penalty of perjury.⁸³ Individuals petitioning for a hearing to evaluate ability to pay are not guaranteed the right to counsel.⁸⁴ Because inheritance is usually disbursed in the form of cash or real property, nearly any of these means can be used to reach inheritance.

C. State Application of Incarceration Cost Reimbursements

Twenty-eight states have statutes that authorize the state to seek reimbursement from inmates for costs associated with incarceration.⁸⁵ Eight states explicitly authorize reimbursement for medical and travel costs.⁸⁶ Four states have passed robust legislation

79. See generally *Is Charging Inmates to Stay in Prison Smart Policy?*, BRENNAN CTR. FOR JUSTICE, <https://www.brennancenter.org/our-work/research-reports/charging-inmates-stay-prison-smart-policy> [<https://perma.cc/Y6ND-L2AM>] (last visited Nov. 3, 2022) (outlining current pay-your-stay statutes by state). In Maryland, for example, correctional facilities are limited to charging \$4 per visit for medical or dental costs, but in Texas, correctional facilities can charge as much as \$100 per visit. *Id.* See also *infra* Section IV.C.

80. SHAFROTH ET AL., *supra* note 69, at 15, 66, 86–103.

81. *Id.* at 6, 53–54.

82. *Id.* at 20–21, 74.

83. *See id.*

84. *Id.* at 7, 17, 27, 33–34, 57, 59–60.

85. See statutes cited *infra* notes 94, 97.

86. GA. CODE ANN. § 42-4-51 (West 2022); KAN. STAT. ANN. § 19-1910 (West 2022); LA. STAT. ANN. § 15:705 (West 2022); ME. REV. STAT. ANN. tit. 30-A, § 1561 (West 2022); W. VA. CODE ANN. § 7-8-2 (West 2022) (medical care and clothing); S.C.

governing the collection of cost-of-care reimbursement from inmates.⁸⁷ Other states may have less structured statutory schemes, but the requirements, limitations, and procedures set forth are equally as detailed.⁸⁸ Three other states allow reimbursement for costs to be paid from prison labor wages or work release only.⁸⁹ These various collection schemes can be categorized into roughly three groups based on time of imposition: at sentencing,⁹⁰ during incarceration, and after incarceration.⁹¹ Only Florida conditions parole on evaluation of an inmate's assets and subsequent determination of his ability to pay for his cost of incarceration.⁹²

1. Collection and Imposition at Sentencing⁹³

Eleven states currently authorize collection and reimbursement of the cost of incarceration at the time of sentencing.⁹⁴ Under these types of statutory schemes, the judge ordinarily imposes a judgment

CODE ANN. § 24-13-80 (West 2022); UTAH CODE ANN. § 76-3-201 (West 2022) (medical and travel costs).

87. See ARK. CODE ANN. § 12-29-501 (West 2022) (“State Prison Inmate Care and Custody Reimbursement Act”); MO. ANN. STAT. § 217.825 (West 2022) (“Missouri Incarceration Reimbursement Act”). Tennessee and Michigan have both passed two separate acts to authorize reimbursement for state facilities and county facilities. See TENN. CODE ANN. § 41-21-901 (West 2022) (“Inmate Financial Responsibility Act of 1998”); *id.* § 41-11-101 (“Inmate Reimbursement to the County Act of 1995”); MICH. COMP. LAWS ANN. § 800.401 (West 2022) (“State Correctional Facility Reimbursement Act”); *id.* § 801.81 (“Prisoner Reimbursement to the County Act”).
88. Compare COLO. REV. STAT. ANN. § 17-10-103 (utilizing a single code section), *with* TENN. CODE ANN. §§ 41-21-901 to -911 (West 2022) (utilizing eleven sections to outline the same).
89. ALASKA STAT. ANN. § 33.30.201 (West 2022); 12 R.I. GEN. LAWS ANN. § 12-19-2 (West 2022); MINN. STAT. ANN. § 243.23 (West 2022).
90. See *infra* notes 93–96 and accompanying text.
91. See *infra* notes 97–107 and accompanying text.
92. FLA. STAT. ANN. § 944.485(1)(a) (West 2022). California had similar requirements, but the statute was repealed as of January 1, 2022. CAL. PENAL CODE § 1203.1c (West 2022) (repealed 2022).
93. This type of statutory scheme is not relevant for the purposes of this comment. Because these statutory requirements are imposed at the time of sentencing, inheritance would not be subject to this type of scheme unless the inheritance was already received. In other words, the reimbursement would be imposed whether an inmate received an inheritance or not.
94. ALA. CODE § 14-6-22 (West 2022) (misdemeanors only); IDAHO CODE ANN. § 20-607 (West 2022) (\$500 maximum); IND. CODE ANN. § 35-50-5-4 (West 2022); LA. STAT. ANN. § 15:705 (West 2022); MONT. CODE ANN. § 46-18-232 (West 2021); OKLA. STAT. ANN. tit. 22, § 979a (West 2022); S.D. CODIFIED LAWS § 24-2-28 (West 2022); TEX. CODE CRIM. PROC. ANN. art. 42.038 (West 2021) (misdemeanors only); UTAH CODE ANN. § 76-3-201 (West 2022); W. VA. CODE ANN. § 7-8-14 (West 2022) (30-day maximum); WYO. STAT. ANN. § 7-13-109 (West 2022).

against a defendant, estimating the cost of incarceration on a per diem basis based on how many days the individual will be incarcerated.⁹⁵ Typically, these costs are fixed by the court, but a hearing may be required in order to determine an inmate's financial resources before the inmate becomes responsible for any costs.⁹⁶

2. Collection and Imposition During or After Incarceration

Eighteen states currently authorize the collection of the cost of inmate care during or after incarceration on an ad hoc basis.⁹⁷ Three states allow reimbursement for costs to be paid from prison labor wages or work release only.⁹⁸ At least two states require the Attorney General's office to maintain financial records on each inmate's financial resources at all times during incarceration,⁹⁹ while other states give abundant discretion in when, how, and under what circumstances the Attorney General's office will file a civil action against an inmate to conduct an investigation of the inmate's finances,¹⁰⁰ or to compel the inmate to provide a detailed list of his current assets.¹⁰¹ Most statutes authorize a claim to begin at any time

95. *E.g.*, WYO. STAT. ANN. § 7-13-109(a), (b) (West 2022).

96. *E.g.*, *id.* § 7-13-109(a)(i)–(ii).

97. ARIZ. REV. STAT. ANN. § 31-238(A) (West 2022); ARK. CODE ANN. § 12-29-504(c)(2)(a) (West 2022); COLO. REV. STAT. ANN. § 17-10-103(1) (West 2022); CONN. GEN. STAT. ANN. § 18-85A(a) (West 2022); DEL. CODE ANN. tit. 29 § 8913(a) (West 2022); FLA. STAT. ANN. § 944.485(1) (West 2022); IOWA CODE ANN. § 356.7(1) (West 2022); KAN. STAT. ANN. § 19-1930(a) (West 2022); KY. REV. STAT. ANN. § 534.045(1) (West 2022); MICH. COMP. LAWS ANN. § 801.83(1) (West 2022); MO. ANN. STAT. § 217.831(1) (West 2022); NEV. REV. STAT. ANN. § 211.2415(1) (West 2021); OHIO REV. CODE ANN. § 5120.56(B) (West 2022); OR. REV. STAT. ANN. § 179.620(1) (West 2022); TENN. CODE ANN. § 41-11-103 (West 2022); VA. CODE ANN. § 53.1-131.3 (West 2022); WASH. REV. CODE ANN. § 72.09.480(1)(a) (West 2022); WIS. STAT. ANN. § 302.372(2)(a)(1) (West 2022).

98. ALASKA STAT. ANN. § 33.30.201(c)(2) (West 2022); 12 R.I. GEN. LAWS ANN. § 12-19-2(e) (West 2022); MINN. STAT. ANN. § 243.23(3)(6) (West 2022).

99. ARK. CODE ANN. § 12-29-503(b) (West 2022); TENN. CODE ANN. § 41-11-109 (West 2022).

100. COLO. REV. STAT. ANN. § 17-10-104(1)(a)–(c) (West 2022); CONN. GEN. STAT. ANN. § 18-85a(b) (West 2022); DEL. CODE ANN. tit. 29, § 8913(e) (West 2022); IOWA CODE ANN. § 356.7(4) (West 2022); MICH. COMP. LAWS ANN. § 801.83(2) (West 2022); MO. ANN. STAT. § 217.831(3) (West 2022); NEV. REV. STAT. ANN. § 211.242(1) (West 2021).

101. FLA. STAT. ANN. § 944.485(1)(a) (West 2022). Although Florida is the only state that requires an inmate to provide a list of assets prior to parole, other states explicitly require the inmate to comply with any investigation. *See, e.g.*, NEV. REV. STAT. ANN. § 211.242(2)(c) (West 2021).

during incarceration,¹⁰² but three states allow an action to commence for a period after incarceration ceases and parole begins.¹⁰³ At least two states go a step further and impose the financial investigation of an inmate's assets as a condition of parole.¹⁰⁴ Several states have statutes that explicitly address inheritance in unique ways, such as a statute that specifically identifies inheritance as an asset that is not exempt¹⁰⁵ or a statute that imposes a legal duty on estates and trusts attorneys to report an inmate inheritance to the state restitution committee.¹⁰⁶ Several states extend liability for incarceration costs to the inmate's estate if the inmate dies while in custody.¹⁰⁷

D. Selected Case Law Application of a Prison Reaching Inheritance

The application of these statutes are not often reported in case law, partially because inmates often end up litigating pro se¹⁰⁸ and partially because litigation does not extend beyond an initial trial court ruling.¹⁰⁹ In general, courts do not show any leniency with regards to restitution reaching inheritance.¹¹⁰ Invariably, restitution

102. See *supra* notes 98–102 and accompanying text.

103. COLO. REV. STAT. ANN. § 17-10-104(1)(c) (West 2022) (up to two years after parole); CONN. GEN. STAT. ANN. § 18-85b(b) (West 2022) (up to twenty years after parole); MO. ANN. STAT. § 217.831(4) (West 2022) (up to five years after parole); NEV. REV. STAT. ANN. § 211.242 (West 2021) (any time after conviction).

104. FLA. STAT. ANN. § 944.485(1)(a) (West 2022); CAL. PENAL CODE § 1203.1c (West 2022) (repealed Jan. 1, 2022).

105. See FLA. STAT. ANN. § 944.485(1) (West 2022); CONN. GEN. STAT. ANN. § 18-85b(b) (West 2022).

106. See CAL. PROB. CODE § 216(b)(1)–(2) (West 2022).

107. See OR. REV. STAT. ANN. § 179.620 (West 2022); CONN. GEN. STAT. ANN. § 18-85c (West 2022); TEX. GOV'T CODE ANN. § 501.017 (West 2021); WIS. STAT. ANN. § 301.325 (West 2022).

108. See SHAFROTH ET AL., *supra* note 69, at 13–14. Counsel is not guaranteed for this type of proceeding. *Id.*

109. See discussion *supra* Section IV.D.

110. See *United States v. Huard*, No. 06-CR-117-1, 2017 WL 4876480, at *1 (D.N.H. Oct. 13, 2017) (holding nothing barring restitution because defendant did not have valid claim against restitution because he was incarcerated, not supporting a family or on supervised release); *United States v. Adams*, No. 11-CR-0187, 2015 WL 4864943, at *1 (N.D. Okla. July 28, 2015) (holding that inheritance could be taken in lieu of restitution payments when misappropriated funds during commission of crime were lost); *United States v. Holcomb*, No. 08-20003, 2012 WL 5306257, at *3 (D. Kan. Oct. 26, 2012) (holding inheritance could be garnished for restitution because “crime doesn’t pay”); *United States v. Norby*, 789 F. App’x 96, 96 (10th Cir. 2019) (per curiam) (holding inmate’s timely payments on a payment plan for restitution did not bar the state from reaching inheritance because plan could be modified at any time); *United States v. Cooper*, No. 02-40069, 2006 WL 3512936, at *3 (D. Kan. Nov. 1, 2006) (holding the same as *Holcomb*); *United States v. Stewart*, No. 98-40097-01,

orders hold high priority over any other claim an inmate may make to an inheritance, including an inmate's claim that he has dependent children or family to support.¹¹¹

Reaching inheritance for the purposes of paying for incarceration costs has been challenged on numerous grounds, including unconstitutional taking, procedural due process, and equal protection.¹¹² In an Arkansas case, an inmate received a \$6,000 inheritance from his father, and the State immediately filed a claim against the inmate and his inheritance in the amount of \$55,888.76 for reimbursement of costs associated with incarceration.¹¹³ The inmate plaintiff argued the judgment was unconstitutional under due process and equal protection, but the court ultimately dismissed the challenge and found for the State, ordering the plaintiff inmate to surrender his inheritance.¹¹⁴

Several Arkansas cases followed, including a case addressing monies given to an inmate by his wife for "sustenance"¹¹⁵ and monies gifted to an inmate by his mother;¹¹⁶ but in both cases, the court found any money from any source was reachable by prison officials under the state's incarceration cost reimbursement statute.¹¹⁷ Not all courts agree that a monetary gift is reachable by these statutes.¹¹⁸ In a Missouri case, the court held that attachment to a monetary gift in an inmate's account was invalid unless officials could prove the gift was worth at least ten percent of the cost of the inmate's incarceration.¹¹⁹

2019 U.S. Dist. LEXIS 203191, at *2 (D. Kan. Nov. 22, 2019); *United States v. Brewer*, 699 F. App'x 318, 319 (5th Cir. 2017) (per curiam) (holding inmate having dependent children did not defeat government's claim to inheritance to satisfy restitution).

111. *See Brewer*, 699 F. App'x at 319; *Huard*, 2017 WL 4876480, at *2-3.

112. *Alexander v. Comm'r of Admin. Servs.*, 862 A.2d 851, 854 (Conn. App. Ct. 2004).

113. *Burns v. State*, 793 S.W.2d 779, 780 (Ark. 1990). The case does not make it clear why the judgment was so high, but the court agreed the amount was excessive and lowered the total. *Id.* The lower judgment still took the full amount in the inmate's account. *Id.*

114. *Id.*

115. *Barker v. State*, 448 S.W.3d 197, 199 (Ark. 2014) (per curiam).

116. *MacKool v. State*, 423 S.W.3d 28, 30 (Ark. 2012) (per curiam).

117. *See id.*; *Barker*, 448 S.W.3d at 199.

118. *See State ex rel. Nixon v. Worthy*, 247 S.W.3d 8, 12 (Mo. Ct. App. 2008).

119. *Id.* at 12-13. This scenario is statute-specific, but the language from the case would imply that a small monetary inheritance would also avoid pay-your-stay statutes, as long as it represented less than ten percent of the total cost of incarceration. *Id.*

Under the same Missouri statute, several cases have addressed the proceeds of a trust distributed to an incarcerated beneficiary.¹²⁰ In *State ex rel. Nixon v. Turpin*, an inmate was the beneficiary of a trust with a provision that authorized the trustee to withhold payment to a beneficiary if he was under a “legal disability” or unable to use the funds to his “own best advantage.”¹²¹ The prison filed a claim against the inmate, compelling ninety percent of his interest in the trust be used to pay the cost of incarceration.¹²² The inmate argued that the trust was a discretionary trust, and he had no right to any part of the trust whatsoever; however, the State challenged this argument and argued that distribution from the trust was mandatory because the trust instrument specifically provided that the trustee could only withhold an amount that would “exceed the amount necessary” to provide for the beneficiary’s care.¹²³ The court sided with the State and agreed that the trust was mandatory in nature and did not allow for trustee discretion for items that fell within the category of “necessaries.”¹²⁴ The court ultimately found the cost of incarceration fell within the category of necessities.¹²⁵

V. SOLUTIONS TO THE ISSUE

The issue covered in this comment is not easily summarized, but in its simplest terms, an incarcerated beneficiary faces unique legal perils that leave a potential inheritance open to claims from a unique class of creditors.¹²⁶ While there are public policy reasons that support either side of the argument,¹²⁷ this comment argues that inheritance is a unique type of asset that should not be susceptible to

120. *See State ex rel. Nixon v. Turpin*, 994 S.W.2d 53, 54 (Mo. Ct. App. 1999); *see also State v. Christian*, 182 S.W.3d 240, 242 (Mo. Ct. App. 2005). The arguments in *Christian* are largely a repetition of the plaintiff’s arguments in *Turpin*. *Id.* The only new argument involved an argument that he used the income from the trust as a way to support his family, but the court held this factor was irrelevant and ordered that all past and future distributions from the trust that benefitted the inmate would be directed to the prison to reimburse cost of incarceration. *Id.*

121. *Turpin*, 994 S.W.2d at 56.

122. *Id.*

123. *Id.* at 55–56.

124. *Id.* at 55, 58–59. The spendthrift provision in the trust was acknowledged, but ultimately the court found that any disbursements from the trust to the inmate was property of the inmate and subject to the statute. *Id.* at 59.

125. *Id.* (holding that the trust funds must be used to cover the inmate’s cost of incarceration).

126. *See discussion supra* Sections IV.A–C.

127. *See generally* FRAMEWORKS INSTITUTE, FRAMING ADVOCACY ON FINES AND FEES REFORM 1–3 (2018), <https://www.frameworksinstitute.org/wp-content/uploads/2020/03/fines-and-fees-reform-framebrief-2018.pdf> [<https://perma.cc/BXS9-8DA8>].

criminal justice debt.¹²⁸ By reaching into an incarcerated beneficiary's inheritance, these criminal justice debt statutes affect a decedent's estate in a way that would likely be contrary to the testator's intent.¹²⁹ This comment will explore solutions including statutory changes,¹³⁰ model language for wills and trusts,¹³¹ and a unique type of trust, modeled from special needs trusts,¹³² drafted to protect the testamentary intent of individuals planning for an incarcerated beneficiary.

A. *Statutory Changes*¹³³

Statutory limitations are not unprecedented as a solution to address issues related to inheritance and a beneficiary's wrongdoing.¹³⁴ These types of statutory limitations are typically limited to addressing wrongdoing by beneficiaries, such as elder abuse, intentional and felonious killing, financial crimes against the decedent, and criminal undue influence.¹³⁵ None of these statutes offer a perfect mirror or solution to the issue raised by the incarcerated beneficiary. Unless the incarcerated beneficiary was incarcerated for abusing or killing the decedent, this proposed statutory limitation would be brand new and potentially unconstitutional.¹³⁶ An inmate has a constitutionally

128. Compare *United States v. Holcomb*, No. 08-20003, 2012 WL 5306257, at *3 (D. Kan. Oct. 26, 2012) (holding that inheritance should be used toward criminal justice debt because "crime doesn't pay"), with *Criminal Justice Debt Survey*, *supra* note 67 (explaining public policy reasons to reform criminal justice debt system).

129. See generally Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 303–05 (2017) (describing the role of imperfect information in estate planning and creditors reaching a decedent's estate as a result).

130. See generally *id.* at 310–18; see also discussion *infra* Section V.A.

131. See discussion *infra* Section V.B.

132. See discussion *infra* Section V.C.

133. Many states have begun to repeal their pay-your-stay statutes requiring incarcerated individuals to pay for their prison stay. See N.H. REV. STAT. ANN. § 622:58 (West 2022) (repealed 2019); 730 ILL. COMP. STAT. ANN. § 5/5-7-6(a) (West 2022); CAL. PENAL CODE § 1203.1c. (West 2022) (repealed Jan. 1, 2022). Even advocates in other states continue to lobby for similar changes. See Daniel Tepfer, *Bridgeport, New Haven Legislators Want End to Billing of Former Inmates*, CTPOST (Feb. 17, 2022) <https://www.ctpost.com/news/article/Bridgeport-New-Haven-legislators-want-end-to-16927632.php> [<https://perma.cc/HP8J-XL5A>].

134. See Horton & Weisbord, *supra* note 33, at 564–65.

135. See *id.* at 563–65.

136. See *id.* at 612 (concluding that, along with the benefits of the various statutes in place regarding inheritance, these laws can be unconstitutional and fail to meet the decedent's intent).

protected right to receive and hold property, including inheritance,¹³⁷ so any potential statutory limitation would likely run afoul of these constitutional protections. Disinheriting an incarcerated beneficiary simply because he is incarcerated is dangerously close to legitimizing bills of attainder, which have been abolished by most state constitutions.¹³⁸ If an inmate has the protected right to receive property, including inheritance, then any statutory change would be imperfect and insufficient to address the issue covered here.¹³⁹ Changing the probate laws would not adequately protect testamentary intent or the incarcerated beneficiary's interest.

B. Support to Raise Awareness about Estate Planning

The simplest, albeit most expensive, means of addressing this issue would involve raising awareness about the issue. State Bar Associations could provide more information to estate planning lawyers about the unique issues that affect clients with incarcerated relatives.¹⁴⁰ This outreach would help inform estate planning attorneys, but simple continuing education courses will likely not close the gap unless awareness is raised in the communities most affected by these issues: the families of incarcerated individuals and the incarcerated individuals themselves.¹⁴¹ Attorneys could provide pro bono support and education to inmates and the families of inmates.¹⁴² Outreach, if done correctly, could raise awareness about the importance of estate planning while helping to protect intergenerational family wealth in underserved segments of the population.¹⁴³

Unfortunately, this solution alone would likely do little to change the immediate reality for many inmates and their families.¹⁴⁴ The population most in need of this type of support—thanks in part to

137. See *supra* notes 40–61 and accompanying text.

138. See text accompanying *supra* notes 45–46; see Horton & Weisbord, *supra* note 33, at 566.

139. See *supra* notes 40–61 and accompanying text.

140. See generally Zayne Saadi, *Born Sinners Versus Born Winners: The Need for Estate Planning Inside Texas Prisons* 12 TEX. TECH. U. EST. PLAN. & CMTY. PROP. L.J. 471, 503 (2020) (advocating for a similar solution to address issues in Texas prisons).

141. *Id.*

142. *Id.*

143. See Astrid Andre, *Can Estate Planning Be Used to Help Preserve Economic Assets in Low-Income Communities?*, SHELTERFORCE (Mar. 1, 2019) <https://shelterforce.org/2019/03/01/can-estate-planning-preserve-economic-assets-in-low-income-communities/> [<https://perma.cc/GGL7-9UKY>].

144. See Saadi, *supra* note 140, at 473–74 (discussing the intersection between incarceration and estate planning).

over policing and mass incarceration—is too large to be adequately served with outreach and person-to-person support alone.¹⁴⁵ Although outreach and awareness are likely key components of addressing this issue,¹⁴⁶ the efforts of individual lawyers would need to be supported by greater efforts by the legal community as a whole.

1. Model Language for Trusts and Wills

Simple advocacy is not enough to address the unique circumstances of an incarcerated beneficiary.¹⁴⁷ Because incarcerated heirs and legatees face unique issues in receiving property in many states,¹⁴⁸ an estate planning attorney should give special attention to ensuring that pay-your-stay statutes and other similar criminal justice debt schemes do not consume inheritance completely. Much legal scholarship has been dedicated to the idea that a testator is not likely to want a significant portion of her estate to go to a legatee's creditors.¹⁴⁹ As is often the case, many individuals prepare their estate plan with imperfect information about what the future holds.¹⁵⁰ An individual may create an estate plan that does not contemplate the potential for a child to be incarcerated or to be subject to complicated debt collecting schemes, especially in the case of single-child families.¹⁵¹

If a testator executes estate planning documents with an alternate beneficiary, the presumption is that the testator would prefer a gift to go to the alternate beneficiary rather than the incarcerated beneficiary, who may have significant criminal justice debt.¹⁵² One

145. *End Mass Incarceration*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/end-mass-incarceration> [<https://perma.cc/A3CE-NZMR>] (last visited Nov. 3, 2022) (“The United States has less than 5 percent of the world’s population, yet nearly 25 percent of its prisoners.”). Over two million people are incarcerated in the United States, which is the world leader in total incarcerated people. *See* Highest to Lowest - Prison Population Total, WORLD PRISON BRIEF, https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All [<https://perma.cc/9GKM-2ZK7>] (last visited Nov. 3, 2022).

146. *See* Saadi, *supra* note 140, at 503–04.

147. *See supra* notes 1–4 and accompanying text. In the case of John Filippi, estate planning was not enough to protect the inheritance his grandfather left for him. *Id.*

148. *See supra* Section IV.B.

149. *See* Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 632 (1989); Glover, *supra* note 129, at 303; Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31, 31 (1993).

150. *See* Glover, *supra* note 129, at 304.

151. *Id.*

152. *Id.*

limited alternative to including an alternate beneficiary would involve disclaimers or renunciations, where a potential heir or legatee formally refuses to take an interest in the estate.¹⁵³ In this scenario, an incarcerated beneficiary would renounce or disclaim his interest in the decedent's estate, allowing his interest to pass to the next beneficiary. Across all jurisdictions, courts have viewed disclaimers and renunciations with some skepticism, especially on occasions when the issue involves an insolvent heir or legatee.¹⁵⁴

This is the backdrop on which the following provisions are discussed: estate planning performed with imperfect information about a beneficiary's incarceration status could lead to all or most of an individual testator's savings being consumed by the criminal justice debt of her beneficiary. Although the implications are heavily dependent on the jurisdiction where the testator dies and, to a lesser degree, where an incarcerated beneficiary is incarcerated,¹⁵⁵ the following sections will suggest some potential solutions to address the issue in typical estate planning documents.

a. *Will Provisions*

Generally speaking, executing a will is not a sufficient means of protecting an incarcerated beneficiary's inheritance from creditors or fellow beneficiaries.¹⁵⁶ From the time the inheritance is legally titled to the incarcerated beneficiary, this money is susceptible to being reached by creditors, including creditors collecting criminal justice debt.¹⁵⁷ If the testator intends to protect an incarcerated beneficiary's inheritance, she must protect the inheritance from the various types

153. See generally Hirsch, *supra* note 149, at 596–601 (discussing the historical origins of renunciations and disclaimers as a legal concept). When an heir renounces, he refuses to accept an inheritance received by intestacy; when a legatee disclaims, he refuses to accept an inheritance received by operation of a will. *Id.* at 591 n.16.

154. See generally *id.* at 596–601 (discussing the various statutory schemes across jurisdictions). Whether an insolvent heir or legatee is able to disclaim an interest in order to avoid his own creditors depends heavily on jurisdiction. *Id.*

155. See *supra* Section IV.C.

156. See *Wilcots v. Wiggins*, 306 S.W.3d 947, 948–49 (Tex. App. 2010) (illustrating the inferiority of a will in protecting inmate inheritance). In that case, an inmate received an inheritance and executed a power of attorney (POA) authorizing his sister to act on his behalf to manage his inheritance. *Id.* at 948. After executing the POA, his sister deposited the funds into the designated account and promptly withdrew the funds for her own use. *Id.* The court ultimately entered judgment for the sister, holding that the POA gave her the authority to take the actions she took. *Id.* at 949; see also *Smith v. Debose*, No. 2:05CV25KS, 2005 WL 1668417, at *1 (S.D. Miss. July 18, 2005) (cousin depriving inmate of rightful inheritance from the inmate's mother's estate).

157. See *State ex rel. Nixon v. Turpin*, 994 S.W.2d 53, 59 (Mo. Ct. App. 1999).

of potential seizure, whether it be from actions by creditors like the prison or the state,¹⁵⁸ or from actions by other beneficiaries acting against the wishes of the testator.¹⁵⁹ The best alternative would be a to execute a testamentary trust wherein the inheritance due to the incarcerated beneficiary would pass to a trust rather than the incarcerated beneficiary himself.¹⁶⁰ If this is the best option for an individual testator, the testator should execute a trust according to the model language outlined in the following sections about trust language.¹⁶¹

b. Trust Provisions

An individual may employ several different types of trusts in the pursuit of estate planning, including discretionary trusts, spendthrift trusts, and special needs trusts.¹⁶² When an individual places assets in a trust for the benefit of a beneficiary and requires that a trustee distribute certain amounts of income at regular intervals, these assets are typically accessible by a beneficiary's creditors.¹⁶³ A settlor may place certain restrictions on a creditor's ability to reach a beneficiary's interest by adding a spendthrift provision which guards against a creditor's ability to attach a judgment to or compel distribution of the beneficiary's trust interest.¹⁶⁴

A second option, the discretionary spendthrift trust, would likely provide better protection. Under a discretionary trust, a settlor leaves the principal and income of the trust for the benefit of the beneficiaries but reserves all discretion on distribution of the trust to a chosen trustee.¹⁶⁵ With a discretionary trust, a creditor may attach to the beneficiary's interest in the trust, but because the interest is subject to the sole discretion of the trustee, the creditor's claim can effectively be ignored if the trustee determines that distributions are not warranted.¹⁶⁶

Some limited case law exists to suggest that courts favor enforcing a creditor's claim against a trust with an incarcerated beneficiary if

158. See *supra* notes 105–21 and accompanying text.

159. See *Wilcots*, 306 S.W.3d at 948.

160. See RESTATEMENT (THIRD) OF TRUSTS § 17 (AM. L. INST. 2022).

161. See *supra* notes 157–60, 162–72 and accompanying text.

162. Danforth, *supra* note 15, at 290–92.

163. *Id.* at 292.

164. *Id.* A spendthrift clause is generally not applicable in cases of child support, alimony, or trusts whose primary beneficiary is the settlor. *Id.*

165. *Id.*; see also RESTATEMENT (THIRD) OF TRUSTS § 50 (AM. L. INST. 2022).

166. Danforth, *supra* note 15, at 292.

the language is ambiguous regarding whether the trust is truly discretionary.¹⁶⁷ Because inmate funds are typically handled in inmate trust accounts, the issue of trusts has been litigated with some frequency, ranging from issues about an inmate's legal competency to execute a trust¹⁶⁸ to the validity of a testamentary trust for the benefit of an incarcerated beneficiary.¹⁶⁹

In one case, a Michigan court upheld an inmate's discretionary trust as barring the state treasurer from reaching the trust principal for purposes of reimbursing the cost of incarceration.¹⁷⁰ The state treasurer of Michigan filed a claim against an inmate in order to invade the trust, but the inmate appealed and won in the Oakland Probate Court and the Wayne Circuit Court.¹⁷¹ The court of appeals affirmed the discretionary language of the trust, confirming the following passage established "absolute, unfettered discretion" in the trustee:

The Trustee may distribute such amounts of the income and principal from the trust property and estate as the Trustee, in its sole and uncontrolled discretion may deem to be in the best interest of the beneficiary, for his support, maintenance, education, or in the event of any emergency such as illness or financial distress.¹⁷²

The Treasurer argued that, while the discretionary language of the trust was valid, a later provision invalidated this argument, because the inmate would receive the proceeds of the trust when he reached the age of thirty-five.¹⁷³ The court, once again, rejected this argument explaining that the Treasurer ignored an even later provision in the trust that reaffirmed the discretionary quality of the trust: "However, if THOMAS MARTIN should be incarcerated during the time of his

167. *State ex rel.*, Nixon v. Turpin, 994 S.W.2d 53, 58–59 (Mo. Ct. App. 1999); *State ex rel.*, Nixon v. Mahmud, 11 S.W.3d 718, 720 (Mo. Ct. App. 1999); *State v. Christian*, 182 S.W.3d 240, 243 (Mo. Ct. App. 2005); *State ex rel. Koster v. Bailey*, 493 S.W.3d 423, 431 (Mo. Ct. App. 2016).

168. *Hillman v. Stults*, 70 Cal. Rptr. 296, 309, 311 (Cal. Ct. App. 1968).

169. *See generally* Martin v. Wayne Cty. Nat'l Bank Tr. & Inv., No. 5:03 CV 1211, 2003 U.S. Dist. LEXIS 29157, at *1–2 (N.D. Ohio Aug. 12, 2003). The pro se litigant challenged the trust's validity under various arguments at least seventeen times over many years. *Martin v. PNC Capital Inv. Advisors*, No. 1:16 CV 1828, 2016 WL 4679724, at *2 (N.D. Ohio Sep. 7, 2016).

170. *See In re Estate of Skaff*, Nos. 291306, 294071, 2011 WL 17514, at *1–2 (Mich. Ct. App. Jan. 4, 2011).

171. *Id.* at *1.

172. *Id.*

173. *Id.* at *2.

right to withdraw from the trust, his right to withdraw shall be suspended until he is no longer incarcerated and no longer on probation.”¹⁷⁴ The court affirmed the lower courts decisions, stating that Thomas Martin had “no more than the possibility of receiving discretionary payments from the Trustee” because he was still incarcerated.¹⁷⁵

To protect an incarcerated individual’s inheritance, a settlor should execute any trust instrument as fully discretionary with no mandatory distribution provisions; the beneficiary should retain no ability to compel the trustee to make distributions, which would likewise bar a creditor from compelling distribution of the trust.¹⁷⁶ To avoid claims that the incarcerated beneficiary has the right to compel distribution, the trust instrument should be written similar to the instrument in *In re Estate of Skaff*, wherein the settlor included a spendthrift provision and suspended all rights of the beneficiary until he was no longer incarcerated or on probation.¹⁷⁷ This comment provides the following language as a potential model for distribution provisions under a trust agreement designed for these purposes:

The Trustee may distribute such amounts of the income and principal from the trust property and estate as the Trustee, in its sole and uncontrolled discretion may deem to be in the best interest of BENEFICIARY, for his/her support, maintenance, education, or in the event of any emergency such as illness or financial distress.

However, if BENEFICIARY should be incarcerated during the time of BENEFICIARY’S right to withdraw from the trust, BENEFICIARY’S right to withdraw shall be suspended until BENEFICIARY is no longer incarcerated and no longer on probation.¹⁷⁸

In lieu of the model language, any discretionary trust should be clearly drafted in a way that the trustee retains sole discretion in

174. *Id.*

175. *Id.* at *6 n.5.

176. *See supra* notes 156–57 and accompanying text.

177. *See Skaff*, 2011 WL 17514, at *1–2.

178. Model language created based on the favorable judicial treatment it received in *In re Estate of Skaff*. *See id.* Through evaluation of numerous cases on point, this case remains one of the only cases of a trust withstanding judicial scrutiny upon challenge. For cases where the trust did not withstand the scrutiny, see cases cited *supra* notes 115–21.

distributions, while revoking all powers from the incarcerated beneficiary.¹⁷⁹

*C. Nonprofit Modeled After First Maryland Disability Trust*¹⁸⁰

A closely related “cousin” of the discretionary trust is the supplemental needs trust, often referred to as a special needs trust.¹⁸¹ A supplemental needs trust is usually established to benefit an individual with a severe disability who must maintain eligibility for supplemental government benefits with income limitations.¹⁸² The exact definition of disability depends on whether a trust is created under state law or federal law, but the generally accepted definition includes: physical disabilities, developmental disabilities, mental retardation, traumatic brain injuries, neurological impairments that develop with age, and psychological disabilities.¹⁸³ Under a provision in the Omnibus Budget Reconciliation Act of 1993, Congress established a pooled asset trust as a kind of special needs trust administered by a nonprofit group to benefit disabled individuals.¹⁸⁴ As a provision of these trusts, any remaining assets at the time of the beneficiary’s death must either remain with the nonprofit organization or be given back to the State to repay public benefits the decedent received.¹⁸⁵

In Maryland, the First Maryland Disability Trust, Inc. (FMDT) is a nonprofit organization that serves Marylanders of all ages and all

179. In drafting any provision special consideration should be given to case law cited *supra* Section IV.D.

180. This section will only explore the potential of a nonprofit modeled after third party pooled asset trusts. It will discuss the policy reasons supporting why this solution would be favorable and compares inmates’ disabilities with individuals disabled under the meaning of law for purposes of public benefits. Developing the actual procedures of a potential nonprofit trust and exploring the legal realities of such a solution are beyond the scope of this comment. While this solution is potentially the most favorable solution advocated here, additional research and writing would be needed to develop the solution into a more concrete potential plan.

181. See Joseph A. Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 B.U. PUB. INT. L.J. 91, 92 n.7 (2000).

182. See *id.* at 93–95.

183. See *id.* at 94 n.15. The federal statute is broader than that which defines disability as being any individual that is “unable to engage in any substantial gainful activity by reason of any medically determined physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. § 1382c(a)(3)(A).

184. Rosenberg, *supra* note 181, at 132; see also 42 U.S.C. § 1396p(d)(4)(C).

185. 42 U.S.C. § 1396p(d)(4)(C).

types of disabilities.¹⁸⁶ The organization offers trustee and trust management services “designed to enhance the quality of life of [their] beneficiaries while protecting their [beneficiaries] eligibility for public benefits.”¹⁸⁷ FMDT started in 2005 as a way to supplement public benefit programs for individuals with disabilities while rejecting the needless spend down of assets in order to maintain eligibility for public benefits.¹⁸⁸

1. An Inmate’s Qualifying Disability

A recent survey determined that nearly two in five state and federal inmates have at least one disability, most often a cognitive disability, but also ambulatory and vision disabilities.¹⁸⁹ In fact, inmates were more than twice as likely to have a disability than other adults in the United States.¹⁹⁰ Another report suggests that number may be even higher, with anywhere from forty-five to sixty-five percent of inmates suffering from mental health disorders.¹⁹¹ Similarly, inmates are three to five times more likely to suffer psychological distress than individuals with no contact with the criminal justice system, and

186. FIRST MD. DISABILITY TRUST, INC., <https://www.firstmdtrust.org> [<https://perma.cc/H7S4-KBD2>] (last visited Nov. 3, 2022).

187. *Id.*

188. *About Us*, FIRST MD. DISABILITY TRUST, INC., <https://www.firstmdtrust.org/about-us/> [<https://perma.cc/HY7G-E2Y2>] (last visited Nov. 3, 2022).

189. LAURA M. MARUSCHAK ET AL., BUREAU OF JUST. STAT., NJC 252642, SURVEY OF PRISON INMATES, 2016: DISABILITIES REPORTED BY PRISONERS 1 (2021), <https://bjs.ojp.gov/library/publications/disabilities-reported-prisoners-survey-prison-inmates-2016> [<https://perma.cc/XN9C-EZA3>].

190. *Id.* at 2. Another report suggests the numbers are even starker when considering particular disabilities: Inmates are

twice as likely to have an intellectual disability, four to six times more likely to have a cognitive disability, twice as likely to have a mobility disorder, three to four times more likely to be blind or have a vision impairment, and two to three times more likely to have a hearing impairment.

U.S. COMM’N ON CIV. RTS., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 1, 21 (June 2019), <https://www.usccr.gov/files/pubs/2019/06-13-Collateral-Consequences.pdf> [<https://perma.cc/MTL9-5D5H>] [hereinafter U.S. COMMISSION ON CIVIL RIGHTS REPORT].

191. U.S. COMMISSION ON CIVIL RIGHTS REPORT, *supra* note 190, at 21.

those numbers increase after parole.¹⁹² This number is only expected to increase as prison populations age.¹⁹³

2. An Inmate's Continued Need for Supplemental Government Benefits upon Release from Custody

Achieving self-sufficiency and meeting basic needs are more difficult for people with disabilities,¹⁹⁴ but the stigma of being formerly incarcerated creates additional barriers for people who would otherwise be able to access public benefits for support during the transition period between release and achieving self-sufficiency.¹⁹⁵ While other disabled individuals may access Supplemental Nutrition Assistance Program (SNAP), public housing schemes, Temporary Assistance for Needy Families (TANF), or other basic disability benefits for support, collateral consequences often block formerly incarcerated individuals from accessing even the most basic support.¹⁹⁶ The barrier to accessing public benefits that inmates encounter upon release is same the kind of issue contemplated by the drafters of the pooled asset trust statutes.¹⁹⁷

3. The Need for a Better, More Inclusive Solution

Although the disability statistics are striking, the federal government currently defines disability benefits to an inmate whose disability resulted from the crime underlying a felony conviction.¹⁹⁸ Current regulations go a step further, severely limiting application of a qualifying disability if the disability was exacerbated by or directly resulted from incarceration.¹⁹⁹ Because Congress codified supplemental needs trusts for individuals with disabilities was passed under 42 U.S.C. § 1396p, these same restrictions on disabilities would likely apply to any attempt to establish a trust under § 1396p

192. *Id.*

193. Jamelia Morgan, *Prisoners with Physical Disabilities are Forgotten and Neglected in America*, ACLU (Jan. 12, 2017, 9:30 AM), <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/prisoners-physical-disabilities-are-forgotten-and> [<https://perma.cc/35YS-NM2W>].

194. U.S. COMMISSION ON CIVIL RIGHTS REPORT, *supra* note 190, at 35.

195. *Id.* at 77.

196. *Id.* In fact, some classes of collateral consequences bar formerly incarcerated individuals from obtaining housing with family members, if family members are already residing in public housing, leaving even less opportunity for support. *Id.* at 72.

197. *See* Rosenberg, *supra* note 181, at 132.

198. 20 C.F.R. § 404.1506(a) (2021).

199. *Id.* § 404.1506(b).

for the benefit of an incarcerated beneficiary.²⁰⁰ Nevertheless, the inmate disability statistics support the need for a better alternative that allows a decedent's estate to avoid being consumed to pay for an incarcerated beneficiary's cost of incarceration. A better solution would allow the decedent's estate to apply toward supporting goals like avoiding recidivism, supporting re-entry after parole, and achieving fuller post-incarceration self-sufficiency.²⁰¹ As discussed above, being incarcerated greatly increases the chances of developing a disability or severely exacerbating a pre-existing disability.²⁰² Why should intergenerational family wealth be barred from supporting the needs of the incarcerated beneficiary in the same way that intergenerational family wealth is allowed to support the needs of similarly disabled individuals?

For now, an individual engaged in estate planning who has an incarcerated beneficiary has limited options: disinherit the individual to avoid misuse or squandering of the inheritance while living with potential mental anguish or guilt of not providing care for the heir after death;²⁰³ establish a trust without the proper protective language that may leave the corpus vulnerable to penal debt;²⁰⁴ or leave the inheritance to another child or heir who may never provide for the incarcerated beneficiary in the way the testator may want.²⁰⁵ Perhaps most common of all, an individual with an incarcerated beneficiary may simply avoid estate planning completely, leaving the estate to be disbursed according to the laws of intestacy.²⁰⁶

A non-profit organization modeled after the Maryland Disability First would solve many of these issues: First, it would provide for better access to resources needed for raising awareness of the issue; second, it would allow a third party trustee to decide discretionary payments, taking away the possibility that a familial trustee may abuse the amount of discretion needed to protect the money from creditors; third, it would provide greater access to resources to ensure an individual is able to achieve greater self-sufficiency; and finally, it

200. *See generally* 42 U.S.C. § 1396p. If the same restrictions applied, this would effectively mean that no supplemental needs trust could be established for an incarcerated beneficiary if the disability resulted from or was exacerbated by incarceration. *See generally id.*

201. *See supra* Section V.C.2.

202. *See supra* Section V.C.1.

203. *See, e.g.,* Wilcots v. Wiggins, 306 S.W.3d 947 (Tex. App. 2010).

204. *See supra* Section V.B.1.

205. *See Wilcots*, 306 S.W.3d.

206. *See supra* notes 30–32 and accompanying text.

would signal a move away from the current system of penal debt that disproportionately impacts the poor and already vulnerable, while moving closer to the public policy goals of fairness, justice, and equality.²⁰⁷

VI. CONCLUSION

Based on the information available in the public record, John Filippi's grandfather did everything he could to protect his estate and provide for his grandson after his death.²⁰⁸ He executed a trust, a will, and a testamentary trust and left a sizeable amount of his estate for his grandson's benefit.²⁰⁹ John Filippi and the administration of his grandfather's estate shows that even with the proper planning in place, an individual's estate plan may not properly provide for an incarcerated beneficiary in a meaningful way.²¹⁰ This comment attempts to provide an alternative for a testator with an incarcerated beneficiary by outlining the property rights an inmate has while incarcerated²¹¹ and highlighting some of the most common statutes used to reach a decedent's estate or a beneficiary's inheritance.²¹² These statutes are not unique to one state and cut across every jurisdiction in the United States.²¹³ Due to the proliferation of mass incarceration and ubiquitous statutes, this issue likely affects every segment of the population.²¹⁴

This comment aims to raise awareness about the peril of criminal justice debt and the danger it poses to a decedent's estate without proper planning or consideration prior to death. Fortunately, proper planning can preserve an individual's testamentary intent and provide for an incarcerated beneficiary without falling victim to invariably applied cost of incarceration statutes.²¹⁵ Without question, executing a discretionary trust is the best means of estate planning to properly protect an incarcerated beneficiary's inheritance; however, this comment also argues that a simple discretionary trust may not go far

207. Press Release, U.S. Dep't of Just., Fact Sheet on White House and Justice Department Convening: A Cycle of Incarceration: Prison, Debt and Bail Practices (Dec. 3, 2015), <https://www.justice.gov/opa/pr/fact-sheet-white-house-and-justice-department-convening-cycle-incarceration-prison-debt-and> [<https://perma.cc/XQ7W-A438>].

208. *See supra* notes 1–4 and accompanying text.

209. *See supra* notes 1–4 and accompanying text.

210. *See supra* notes 1–4 and accompanying text.

211. *See supra* Part III.

212. *See supra* Section IV.C.

213. *See supra* Section IV.C.

214. *See supra* note 145 and accompanying text.

215. *See supra* Part V.

enough to provide for the incarcerated or formerly incarcerated, who often face many of the same struggles as the disabled.²¹⁶ Although no solution is perfect, the proliferation of mass incarceration means that this issue is not likely to go away any time soon and will require a combination of creative thinking, planning, and advocacy.

216. *See supra* notes 170–95.

