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# Preventing Identity Theft and Other Financial Abuses Perpetrated Against Vulnerable Members of Society: Keeping the Horse in the Barn Rather than Litigating over the Cause and/or Consequences of His Leaving

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# PREVENTING IDENTITY THEFT AND OTHER FINANCIAL ABUSES PERPETRATED AGAINST VULNERABLE MEMBERS OF SOCIETY: KEEPING THE HORSE IN THE BARN RATHER THAN LITIGATING OVER THE CAUSE AND/OR CONSEQUENCES OF HIS LEAVING

Irene D. Johnson\*

Scene 1: Rose, a widow in her late eighties, has come with her niece, Nancy, and her niece's husband, Herman, to the office of an attorney (which attorney was contacted and retained by Nancy who has undertaken to help Rose in her declining years) for the purpose of signing a Living Will and a Durable Power of Attorney. Both documents will name Nancy as Rose's agent for these purposes; in each, if Nancy is unable to perform her duties, Herman will then take them over. The attorney reads the documents to Rose. He then asks her whether she understands the consequences of signing these documents. Rose smiles and nods vaguely. She is then told to sign each document, which she does.

Does Rose understand what she is doing? It is quite possible that she does. On the other hand, she might not have a clue. Perhaps she is just doing what her niece told her to do. Maybe she has found that, because she is elderly—hard-of-hearing, slow to speak, infirm—people are easily annoyed with her. Possibly, she feels that it is not worth the fuss that will be created if she does not answer “yes” to the attorney's question. Moreover, she is afraid that if she does not sign these papers, whatever they are, her niece might no longer care for her. Finally, she trusts her niece and the kindly-looking attorney (of course, she also trusts anyone else who smiles at her). Rose might not be competent to sign these documents, either in general or with respect to this transaction, because she does not understand what she is signing.

Sometime in the future, this can create a problem. Maybe it will be discovered that, using the Durable Power of Attorney, Nancy has cleaned out Rose's substantial bank account, treating herself and her family to lavish vacations. This behavior is not discovered until after Rose's death when her heirs-at-law (her children)<sup>1</sup> discover that the value of Rose's estate had been reduced to zero by these transactions. At that point, the heirs will probably bring some sort of action against Nancy. Perhaps they will sue Nancy for tortious interference with their expectancy of inheritance.<sup>2</sup>

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<sup>1</sup> For example, New York law provides: “If a decedent is survived by . . . [i]ssue and no spouse, the whole to the issue . . . .” N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(3) (McKinney 1998 & Supp. 2009).

<sup>2</sup> For discussion of the tort of tortious interference with expectancy, see F. Ladson Boyle, *Tortious Interference with an Inheritance*, 2 PROB. PRAC. R. 1 (1990); Martin L. Fried, *The Disappointed Heir: Going Beyond the Probate Process to Remedy Wrongdoing or Rectify Mistake*, 39 REAL PROP. PROB. & TR. J. 357 (2004); Irene D. Johnson, *Tortious Interference with Expectancy of Inheritance or Gift—Suggestions for Resort to the Tort*, 39 U. TOL. L. REV. 769 (2008); Diane J.

If, at the time Rose signed these documents, there had been some sort of requirement that the attorney (or some impartial third person) ensure that not only was Rose competent to sign these documents at the time that she signed, but also that she understood the nature of the writing and the consequences of her signing them, it is possible that the litigation could have been avoided. If, at that time, it was established that Rose was not competent, some sort of guardian would have been appointed for her, and, even if that person was Nancy, it is likely that the guardian's financial acts would have been supervised. If, at that time, it was established that Rose was competent and understood what she was doing, the breach of fiduciary duty might still have occurred, and the litigation would have ensued. At least, however, society would be sure that Rose had done what she wanted to and had simply made an error in trusting her niece.

Scene 2: Henry, a 39-year old man, is critically injured in an automobile accident. Because Henry had not, to this point, really contemplated the possibility of death, he had not made a will. While Henry is in the intensive care unit of the hospital and while he is on a morphine drip for pain, he executes a will. His current wife, Grace, is the sole beneficiary of the will. The will was prepared by Grace's attorney, who is also present at the execution ceremony. The signing of the will is witnessed by two of Grace's friends whom she brings to the hospital for that purpose. Because of his injuries, Henry is unable to sign his name or speak. The state Statute of Wills permits a proxy signature of a testator if the testator requests that the proxy sign for him.<sup>3</sup> The state statute also requires that the Testator "publish" the will; that the Testator state that the writing he is signing is his will and that he is familiar with and pleased with its contents.<sup>4</sup> The attorney asks Henry a question that includes all of the requirements for publication. Henry nods his head affirmatively. The attorney then asks Henry whether he wants the attorney to supply a proxy signature. Again, Henry nods in agreement. The witnesses sign as attesting witnesses. A week later, Henry succumbs to his injuries. This will would probably not be denied probate on the basis of defects in execution (defects in statutory formalities).

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Klein, *A Disappointed Yankee in Connecticut (or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the First, Second, and Third Circuits*, 66 U. PITT. L. REV. 235 (2004); Diane J. Klein, *The Disappointed Heir's Revenge, Southern Style: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fifth and Eleventh Circuits*, 55 BAYLOR L. REV. 79 (2003); Diane J. Klein, *Revenge of the Disappointed Heir: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the Fourth Circuit*, 104 W. VA. L. REV. 259 (2002); Steven K. Mignogna, *On the Brink of Tortious Interference with Inheritance*, 16 PROB. & PROP. 45 (2002).

<sup>3</sup> For example, New York law provides: "Except for nuncupative and holographic wills, . . . every will must be . . . signed . . . by the testator or, in the name of the testator, by another person in his presence and by his direction . . ." N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(1) (McKinney 1998 & Supp. 2009).

<sup>4</sup> For example, New York law provides: "The testator shall . . . declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will." *Id.* § 3-2.1(a)(3).

Did Henry know what he was doing? Did he really want the will that was signed by the attorney, or did he simply nod his head in order to get these people to stop pestering him when he was *in extremis*? Moreover, did Henry really know what he was doing at all? Because of his injuries and the IV pain medication, he might have been incompetent at that time to execute a will. Again, it is possible that the will was exactly what Henry wanted and that he was competent at the time of execution. On the other hand, it is also quite possible that Henry's mind did not accompany the act of execution in his name. No one has bothered to find out which is the case, and now it is too late to do so.

When Henry's will is offered for probate by Grace, Henry's children by his first marriage, Chip and Clementine, oppose the admission to probate. They allege that the will was the product of Grace's undue influence, that the will was the product of fraud in the factum (that Grace defrauded Henry by misrepresenting the contents of the will), and that, at the time of execution, Henry lacked testamentary capacity because of his injuries and the administration of pain medication.<sup>5</sup> They hope to defeat the will. If they do so, they will inherit by intestate succession a substantial share of Henry's probate estate. In the alternative, they might charge Grace with tortious interference with their expectancy of inheritance, seeking to recover from her the amount they would have received had Henry died intestate.<sup>6</sup>

This action (or these actions) will probably drag on for years, with the distribution of Henry's probate estate being held up until a resolution (unless the parties settle the case). Valuable court time and resources will be consumed by the litigation.

Of course, some of these problems could have been avoided if there was a requirement that the competence of the person signing a will or other document while hospitalized be evaluated at the time of the signing. If, at that time, it was determined that Henry lacked capacity, then he would have died intestate. Grace would take her intestate share, the children of Henry's prior marriage would take their shares, and there would be no litigation.<sup>7</sup> If, on the other hand, it was determined, at the time of execution, that Henry not only had the appropriate capacity to execute a will, but also the clear-headed desire that this will be executed, the will would be valid and Grace would take all of Henry's probate estate. It is less likely that the children would oppose the admission of the will to

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<sup>5</sup> For a discussion of contesting wills on the basis of these allegations, see ELIAS CLARK ET AL., *CASES AND MATERIALS ON GRATUITOUS TRANSFERS—WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION* 198-262 (5th ed. 2007); JOEL C. DOBRIS ET AL., *CASES AND MATERIALS ON ESTATES AND TRUSTS* 395-460 (3d ed. 2007).

<sup>6</sup> See *supra* note 2.

<sup>7</sup> For example, New York law provides: "If a decedent is survived by . . . [a] spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue . . ." N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(a)(1).

probate. Moreover, if the evaluative procedure created a presumption of validity of the will (more about this later),<sup>8</sup> litigation would probably not ensue.

Scene 3: Tillie is a seventy-five-year-old retired person. She owns her own home, and she has a decent amount of money put aside for her old age. Since she is not planning to finance any purchase and she owns her home outright, she feels that she has no reason to review her credit reports. Moreover, she does not own a computer, have an email account, or browse the Internet. Thus, she is really not aware of the many opportunities being offered to check credit reports.

Tillie receives a telephone call from someone purporting to be a representative of her bank. The caller, Charlie Crook, tells Tillie that there is a problem with their computers caused by a recent power-outage. He goes on to say that he is very sorry, but the bank will no longer be able to process her checks unless he is able to get some information from her (the power-outage has erased certain information from the bank's data banks). He asks for the exact spelling of her name, her address, her social security number, and the number of her checking account. Tillie, an old-fashioned person, had learned from her parents to be helpful and polite. And, being a little out-of-touch with modern criminal behavior, she is not suspicious of Charlie. In fact, she sympathizes with the plight of the bank, having to retrieve all of this information. Thus, she provides Charlie with the information he seeks.

Unbeknownst to Tillie, Charlie uses this information to obtain several credit cards in her name. Because of Tillie's excellent credit record and her substantial assets, he is able to obtain cards with limits of \$50,000. He signs the applications with her name (his version of it) and, when the cards arrive, signs the cards in the same handwriting. The only information on the applications that is not Tillie's true information is the mailing address. He has opened a post office box account in Tillie's name and he has used that address on the applications. He is in business. He makes many purchases with the cards. He also obtains cash advances with the cards. When the bills arrive, he makes the minimum payment on each card (a paltry amount compared to what he has charged). He does this for a few months. When the minimum monthly payments become too large for him, he maxes out the cards, closes the post office box, and skips town.

Of course, eventually the credit card companies discover Tillie's home address and send their bills to her. She is shocked, confused, and fearful. Maybe she pays the bills because she is ashamed to admit that she has been duped. Or maybe she begins the difficult process of establishing the identity theft. Either way, Tillie is the big loser. If she pays, she might not be able to continue to live in the comfort to which she has become accustomed. If she tries to fight the bills, she will have to expend monies for lawyers and accountants. Moreover, her

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<sup>8</sup> See *infra* notes 30-41 and accompanying text.

credit is probably now ruined, and, at this point, if she has paid the charges, she might want to mortgage her house.

There are a number of ways that these losses could have been avoided. For example, Tillie might have taken a course at the local senior center about predators who financially abuse elders.<sup>9</sup> Then she would have known better than to give out her personal information. A different possibility, discussed in detail below, would be a requirement (statutory) that any signing by an elderly person of a document to be used to obtain credit would need to be witnessed by some third party who would be required to assess the signer's mental competence and who would refuse to authorize the signing if the signer was too impaired to consent. In this situation, Tillie's competence would not be an issue. However, the requirement that an elderly person (say sixty-five or older) appear and be evaluated for competency before signing such an application would put pay to many identity theft schemes. Charlie would not be able to simply forge Tillie's signature. And, if he produced an impostor of suitable age, he would run the substantial risk of detection because the impostor would have to provide proof of identity.

## I. INTRODUCTION

The above fictional accounts portray some of the situations in which one person desires to obtain and does obtain another's property. In each instance, the person seeking the property has engaged in or might have engaged in unscrupulous behavior. In Scenes 1 and 2, it is possible that the person would have obtained the property without any action. Rose might have given Nancy her money simply because she loved Nancy and Nancy had cared for her in her old age. If Henry had written a will before his accident, it is possible that the will

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<sup>9</sup> A number of recent articles have addressed the issue of the financial abuse of elders by strangers. See, e.g., John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 *ELDER L.J.* 207 (2003); Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 *IDAHO L. REV.* 203 (2000); Kurt Eggert, *Lashed to the Mast and Crying for Help: How Self-Limitation of Autonomy Can Protect Elders from Predatory Lending*, 36 *LOY. L.A. L. REV.* 693 (2003); Jeanne Finberg, *Financial Abuse of the Elderly in California*, 36 *LOY. L.A. L. REV.* 667 (2003); Arlene D. Luu & Bryan A. Liang, *Clinical Case Management: A Strategy to Coordinate Detection, Reporting, and Prosecution of Elder Abuse*, 15 *CORNELL J.L. & PUB. POL'Y* 165 (2005); Brett D. Maxfield, *Ripping Off Grandma and Grandpa Without Hurting the Banks of America: Allowing the Elderly and Other Easy Prey to Pay for the Crimes of Immoral Individuals and Institutions*, 33 *OKLA. CITY U. L. REV.* 505 (2008); Shelby A. D. Moore & Jeanette Schaefer, *Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*, 41 *SAN DIEGO L. REV.* 505 (2004); Jane A. Black, Note, *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 (2008); Eric L. Carlson, Note, *Phishing for Elderly Victims: As the Elderly Migrate to the Internet Fraudulent Schemes Targeting Them Follow*, 14 *ELDER L.J.* 423 (2006); Terrie Lewis, *Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota*, 28 *WM. MITCHELL L. REV.* 911 (2001); Denise W. Wong, Note, *Utah's Adult Protective Services Statute: Preventing the Fleecing of Grandma and Grandpa*, 6 *J.L. FAM. STUD.* 429 (2004).

would have been identical to the one that he executed while *in extremis*, devising and bequeathing all of his probate estate to his second wife Grace. In the third scene, Charlie's only goal was to defraud Tillie; he never would have gotten any money from her in the ordinary course of events.

In Scenes 1 and 2, the person signing the document in question, Rose the Durable Power of Attorney and Henry the Will, might be impaired and incapable of legally binding him or herself by his or her signature. In Scene 1, the document itself enables Nancy to obtain the money, but it takes an additional act on Nancy's part, the clearing out of Rose's bank accounts, to get the money. Nancy has the opportunity to act correctly if she wishes.

In Scene 2, by signing the will, Henry enables Grace to obtain his entire probate estate. She does not have to perform any additional act.

In Scene 3, Tillie signs nothing. She has enabled Charlie to commit the fraud by giving him information, but she has signed no document and her capacity would not be at issue.

On reflection, it appears that these scenes are quite different, but each presents troubling issues:

Scene 1: Does Rose have the capacity to sign a Durable Power of Attorney? Regardless of her capacity, can Nancy be prevented from taking Rose's assets for Nancy's own use? Is there any way to avoid litigation after Rose's death?

Scene 2: Does Henry have the capacity to sign the will? Is there any way to avoid litigation after Henry's death?

Scene 3: Is there any way to protect vulnerable adults such as Tillie from the predatory efforts of crooks such as Charlie?

In each Scene, however, some difficulties could have been prevented by a requirement, under state or federal law, that a Vulnerable Individual (e.g., an elderly person, a person who is hospitalized, a person of any age who suffers from certain impairments) sign Important Documents—wills, trusts, powers of attorney, living wills, applications for credit, banking documents, and the like—in front of a disinterested third person who would ascertain the Vulnerable Individual's capacity in general and understanding of the document to be signed in particular.<sup>10</sup>

If Rose had to demonstrate her capacity rather than simply smiling and nodding, it is possible that she would not have been found capable of agreeing to a durable power of attorney. Then, either a guardian having nothing to do with Nancy would have been appointed, or Nancy would have been appointed guardian, but her activities would have been more closely scrutinized. If Rose had been found competent, then her signing would be valid and the onus of selecting a non-trustworthy agent would have been on her and her heirs at law. By engaging in the evaluation procedure, however, litigation could largely be

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<sup>10</sup> See *infra* notes 41-50 and accompanying text.

avoided. If, as proposed below,<sup>11</sup> a presumption of validity would attach to a document signed after the evaluation procedure had been satisfied, fewer lawsuits would be filed and those that are filed could be more easily resolved because of the presumption of validity proposed below.

If Henry's testamentary capacity had to be demonstrated to a disinterested third person rather than simply relying on his nods in response to the attorney's questions, the outcome would again be simpler. If Henry were judged incompetent, his property would pass by intestacy and there would probably be no ensuing litigation.<sup>12</sup> If he were determined to be competent, the will would be presumed valid and there would be little basis for opposition of the will by his other heirs at law.<sup>13</sup>

If, as noted above, an application for a credit card made by a Vulnerable Individual would have to be signed in front of a third party witness who determined the competency of the Vulnerable Individual before authorizing the signing, Charlie would have more difficulty in proceeding with his credit card scam against the elderly. Tillie, of course, would not be signing. But Charlie could also not show up and sign. He would need to get an elderly confederate who was willing to falsely assume Tillie's identity. Moreover, he would need to obtain forged identity documents.

While there are many statutes that purport to protect the elderly (and other Vulnerable Individuals) from physical and/or financial abuse, including some that penalize those who have engaged in such abuse,<sup>14</sup> and there are opportunities in the probate area to get some sort of justice by opposing the admission to probate of writings tainted by lack of competency, fraud, and undue influence,<sup>15</sup> the thrust of this article is to propose a procedure that would actually protect Vulnerable Individuals by preventing the signing of documents by those whose capacity is insufficient. Punishing wrongdoers does have some deterrent effect. Prevention of the wrongs, however, will efficiently protect the vulnerable while avoiding many of the costs of criminal and civil proceedings.

Part II of this Article will describe two distinct problems that would be impacted, to some extent, by the author's proposal. Part III will examine situations in which certain signed writings create a "presumption of invalidity." Part IV will advance the author's proposal, examining objections which might arise and suggesting procedures to implement the proposal.

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<sup>11</sup> See *infra* notes 41-50 and accompanying text.

<sup>12</sup> In most jurisdictions, his current wife and his children from his prior marriage would share his probate estate. See *supra* note 7.

<sup>13</sup> See *infra* notes 30-41 and accompanying text.

<sup>14</sup> In a recent article, the authors have undertaken a comprehensive overview of state statutes, criminal and civil, dealing with the issue of elder abuse. Moore & Schaefer, *supra* note 9, at 557-90; see also Black, *supra* note 9, at 302-10; Arthur Meirson, Note, *Prosecuting Elder Abuse: Setting the Gold Standard in the Golden State*, 60 HASTINGS L.J. 431, 437-41 & nn.42-93 (2008).

<sup>15</sup> See *supra* note 5 and accompanying text.



## II. PROBLEMS TO BE ALLEVIATED

### A. Competency of a “Vulnerable Individual” to Execute an “Important Document”

As briefly suggested above, there are circumstances in which it is questionable whether a person who is executing a document is really competent to do so—whether the mind of the person accompanies the act of execution. An elderly person, a person who is receiving medication for relief of pain (in a hospital, in a hospice facility, or at home), or a person of any age who is mentally impaired might not really understand what he is doing or, more likely, what he is being asked to do, in signing a document. Throughout this Article, such a person will be called a “Vulnerable Individual.” Just because an individual would fit within the category of Vulnerable, however, does not mean that the person is incompetent. On the other hand, there is a stronger possibility that a Vulnerable Individual will be incompetent than will be a young adult who is not mentally impaired and who is not receiving medication that might impair the intellect.

It is frequently the case that Vulnerable Individuals are going to be expected to execute significant writings, those designated herein as “Important Documents.” One example would be an elderly person (or other person who is impaired in some manner) executing a durable power of attorney giving another person, usually a family member or trusted friend, the power to “take over” the elderly person’s financial affairs, including the power to sign checks, pay bills, sell the elderly person’s property, make withdrawals from the person’s bank account at automated teller machines, and the like.<sup>16</sup> A Vulnerable Individual such as an elderly person or a person who is hospitalized and is contemplating death often executes a will or other document intended to dispose of his or her assets. Other “Important Documents” would include a Living Will, any instrument by which property is acquired or conveyed, documents relating to banking and other financial affairs, and documents intended to enable the Vulnerable Individual to obtain credit (such as with a credit card).

In many of these situations in which a Vulnerable Individual is executing an Important Document, little is done to ensure that the person signing does have the general mental capacity to effectively execute the writing. Sometimes, an attorney is present, and it is expected that the attorney believes that the person signing is competent.<sup>17</sup> How the attorney arrives at this conclusion, however, is

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<sup>16</sup> For a discussion of powers of attorney in connection with the issue of elder abuse, see Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1 (2006); Jennifer L. Rhein, Note, *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 ELDER L.J. 165 (2009); Black, *supra* note 9.

<sup>17</sup> While it is clear that an attorney must determine that his elderly client is competent, as one commentator observes, “[t]here is virtually no legal literature on how attorneys and the elderly construct their conceptions of competence and how these play out in attorney/client interactions.”

often a mystery. If, at a later time, the signer's competency is questioned, the attorney might not be available or be able to provide any evidence of satisfaction of the factors on which he based his conclusion. The attorney has no required procedure to follow by which the competency of the signer is demonstrated to the attorney or to others observing the signing. Reliance on the smiling and nodding of the Vulnerable Individual in response to set questions posed by the attorney does not really establish that the signer is competent.

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Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 125 (1999). California is unusual in that it has in place statutory requirements for determination of an elderly person's competency.

Alameda County Superior Court in California has clearly spelled out criteria for determining the capacity of an elder's decision-making in the Due Process in Competency Determinations Act. Applying California's Probate Code, the Rules demand that an elderly person be able to fully understand and communicate his or her rights, duties, and responsibilities before entering into contracts, making medical decisions, drafting a will, or making other decisions. The same criteria are applied to determine if a conservator should be assigned for the elderly person.

Lewis, *supra* note 9, at 933 (footnotes omitted) (discussing CAL. R. ALAMEDA SUPER. CT. R. 12.19 and CAL. PROB. CODE § 812 (West 2000)). In most jurisdictions, however, an attorney must make the determination without particular guidance and in a context in which others, such as family members of the elderly client, sometimes potential financial abusers, put pressure on the attorney to find the client competent. According to one commentator:

Many conflicts may arise during a lawyer's competency evaluation that may complicate the assessment. The presence of family members during an attorney-client consultation may create a significant conflict. Relatives often accompany elderly people on visits to an attorney's office . . . . [T]he presence of family members during a client consultation could result in a conflict between the client's desires and the family members' desires.

Further complicating the issue is the need to determine which party is in fact the client. An example of such a conflict is when an adult child and a parent suffering from dementia seek legal advice on transferring property or giving power of attorney to the adult child. Determining the identity of the client in this situation is challenging but feasible. A more questionable situation arises when an adult child asks an attorney for advice on drafting his or her parent's will that would declare the child to be the will's sole beneficiary at the exclusion of the other siblings. The adult child may also ask to be informed at every step of the legal representation and may even pay the fee. This type of mixed representation scenario raises conflict-of-interest concerns if the attorney does not clarify at the start who the client is and specify the exact terms of the representation.

The involvement of a nonclient family member can also impair an attorney's ability to establish rapport and trust with the client. A lawyer must delicately balance honoring the client's relationship with the accompanying relative against maintaining the integrity of the attorney-client privilege.

Helen Y. Kim, Note, *Do I Really Understand? Cultural Concerns in Determining Diminished Competency*, 15 ELDER L.J. 265, 280-81 (2007). If a client's competency were to be determined by an agent who bore no relationship to the attorney, client, or client's family members, as suggested herein, *see infra* notes 41-50 and accompanying text, attorneys would be free from the burden of the determination and the finding of competency could easily be established, if necessary, in the future.

A related concern would be that even if the Vulnerable Individual had sufficient general mental acuity to take care of most issues that arise in his life, he might not understand the nature of the writing he is about to sign and the consequences flowing from the signing of that writing. Again, smiling and nodding (or simply nodding) when asked by the attorney whether the signer understands what he is signing is not a demonstration of understanding. If the Important Document is signed without an attorney being present, there will probably not even be a token effort to ensure that the person signing is competent generally or in regard to the specific writing to be signed.

Two concerns are raised by these situations. One is the desire to ensure that every person who signs an Important Document does so with an understanding of what he is signing and with a desire to obtain the results that will flow from the signing of the writing. While family members who have undertaken the responsibility of caring for an elderly person may feel a desperate need to have the person execute a power of attorney, for example, if the elderly person does not or cannot understand what he is doing in signing the writing, then the writing should not be executed. A guardian will have to be appointed for the elderly person. Often, the guardian is the same person who would have been the agent under the power of attorney. This ensures that the obtainment of the power cannot be questioned on the grounds of incapacity. Under this author's proposal, competency would be established, to the extent possible, before the writing could be signed. The era of coaching Grandma to smile and nod would be over, thus ending a rather humiliating fiction.

The other concern is that an unscrupulous individual would take advantage of the Vulnerable Individual by getting him to sign a writing, often a will, which favors the unscrupulous person, even though such favoring is inconsistent with what the signer desired when the signer did have competency. If there were a procedure by which the Vulnerable Individual would have to sign the writing in the presence of a disinterested third person charged with the responsibility of determining the signer's capacity and desires with respect to the will in question, as proposed by this author, the unscrupulous individual often would be stymied. The Vulnerable Individual's property would either pass to his heirs at law by intestacy (not a horrible result) or would pass according to a prior will that had been executed when the individual did have the appropriate capacity.

There are procedures to remedy some of the wrongs suggested in the prior paragraphs. A will that is the product of undue influence or fraud or that has been signed when the testator lacked testamentary capacity can be opposed when offered for probate.<sup>18</sup> Following lengthy litigation and the consumption of

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<sup>18</sup> While this author has been unable to find recent statistics on the frequency of will contests involving challenges based on lack of capacity, fraud, and undue influence, there are older sources that shed light on this issue. Professor Atkinson, in the second edition of his treatise on wills, noted, "Statistical studies indicate that less than one percent of all wills are rejected." THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING

substantial estate assets, the will might be refused admission to probate. Actions taken pursuant to a power of attorney can be questioned as abuse of the power,<sup>19</sup> or suit could be brought against the agent under the doctrine of tortious interference with expectancy of inheritance.<sup>20</sup>

Other wrongs could not be remedied because the actions taken pursuant to the writing cannot be undone. Take, for example, the situation where a family member who has been appointed as a health-care proxy under a living will decides to agree to “pull the plug” on Grandma solely for his own convenience and to preserve Grandma’s assets even though there is a good chance that Grandma will “pull through.” If Grandma was competent at the time she signed the living will and Grandma selected the agent, then, while there is outrage at the injustice of what was done, one might argue that Grandma simply made a bad choice and had to suffer the consequences of that decision. If, on the other hand, the agent was not really Grandma’s choice because Grandma did not have mental capacity at the time she signed the living will, then the injustice seems much more acute. In any case, Grandma is now dead, and any remedy available would not benefit her. (The proposed procedure for ensuring competency at the time of

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INTESTACY AND ADMINISTRATION OF DECEDENTS’ ESTATES 518 (2d ed. 1953). This statistic, however, simply demonstrates the number of successful contests. One would surmise that a percentage greater than one percent of those wills offered for probate were contested. Moreover, even one percent of all wills offered for probate is a staggering number of lawsuits. In 1978, citing a 1934 study, Professor Langbein stated:

Although we do not have comparative data directly on point [in regard to the frequency of litigation of the issue of testamentary capacity], the impression is widespread that such litigation occurs more frequently in the United States than on the Continent or in England.

John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 64 & n.7 (1978-1979). The cited study revealed that, in New York, during the period of 1921-1932 inclusive, about one quarter of one percent of wills offered for probate were contested. Edmond Nathaniel Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 518 & n.58 (1934). Of those contested, three and one half percent were rejected. *Id.* While these percentages appear minute, the number of cases that actually went to trial was 1039. *Id.* Finally, a recent survey of attorneys practicing in the area of Estates and Trusts revealed that these attorneys devoted, on the average, five percent of their practices to will contests. *Survey of the Profession II*, 15 U. MIAMI L. CTR. ESTATE PLANNING § 1501 (2000).

<sup>19</sup> One commentator notes:

Contrary to popular belief, financial power of attorney documents are not blank checks authorizing agents to do whatever they wish with the principal’s financial holdings. Despite certain language in power of attorney documents, a wide range of legal remedies exist for addressing power of attorney financial exploitation. Remedies may include an action in tort for either damages (holding the agent liable) or return of property. Remedies may also include such actions as conversion, fraud or misrepresentation, breach of contract, or an action for an accounting.

Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later Life*, 8 ELDER L.J. 297, 316-17 (2000) (footnotes omitted). According to another commentator, however, “[w]hat makes cases involving [financial] abuse of durable power of attorney . . . distressing is that . . . few cases are referred to [authorities] and only one-seventh of the small number of referred cases are actually prosecuted.” Rhein, *supra* note 16, at 179 (internal quotations omitted).

<sup>20</sup> For a discussion of this remedy in tort, see sources cited *supra* note 2.

signing will not prevent wrongs committed by persons who have been granted a power of attorney or another agency position by a Vulnerable Individual who is competent at the time of signing; it is designed to prevent the execution of writings by people who are not competent.)

Much has been written about remedies for problems created by persons who take advantage of Vulnerable Individuals.<sup>21</sup> Many statutes, both civil and criminal, have been designed to punish and remedy.<sup>22</sup> Moreover, every year the probate courts deal with will contests based on the grounds of undue influence, fraud, and lack of capacity.<sup>23</sup> Very little has been done, however, about prevention of these problems.<sup>24</sup> This author's proposal would actually prevent many of these injustices, thereby saving much suffering, time, and money currently expended on litigation. While some will view it as cumbersome and an intrusion on the autonomy of Vulnerable Individuals, the savings in terms of misery and money would be extensive. Moreover, it would provide a psychological boon in assuring society that Vulnerable Individuals, at least, really intend their actions when they sign Important Documents.

### **B. Financial Elder Abuse (or the Financial Abuse of Vulnerable Individuals)**

The above discussion covered some financial abuse concerns, such as the execution of a will by a Vulnerable Individual where the signer lacks testamentary capacity and/or is subjected to fraud and/or undue influence. The author's proposal, however, would also have a deterrent effect on other financial abuse problems that plague the elderly particularly, such as scams and identity theft.

Much has been written on the subject of financial abuse of the elderly.<sup>25</sup> As the elderly population increases and the elderly control substantial assets, the elderly have increasingly become the targets of financial abuse. Of course, there have always been situations in which an individual, usually a family member or friend, takes advantage of an elderly person who has come to rely on the

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<sup>21</sup> See, e.g., articles cited *supra* notes 9 and 16.

<sup>22</sup> For a recent survey of these statutes, see Meirson, *supra* note 14, at 437-41 & nn.42-93.

<sup>23</sup> See *supra* note 17 and accompanying text.

<sup>24</sup> One commentator notes, "[T]hese cases [of elder abuse] subtly suggest . . . [that] the law seems to punish the abuse after it occurs, instead of preventing it in the first place." Black, *supra* note 9, at 301-02. She then goes on to note statutes that provide for "enhanced penalties" for financial crimes against the elderly and special categories of criminal acts that are committed against the elderly. *Id.* at 302-04. While these statutes might have some deterrent effect, for the majority of criminals the statute operates after the wrong has already been committed and the Vulnerable Individual has suffered a loss, which might be difficult or impossible to remediate. The same commentator further notes statutes that "encourage or mandate bank personnel to report suspected financial abuse of elderly clients." *Id.* at 305. Again, however, these statutory protections would only be triggered after some measure of financial abuse had already occurred.

<sup>25</sup> See *supra* notes 9 and 16.

individual. Such situations include the misuse of powers of attorney to obtain the elderly person's property, getting the elderly person to sign a will or create a trust that benefits the individual, abusing an informal relationship of trust to acquire the elderly person's assets, and the like. Some of these situations include the execution of Important Documents like wills by persons who might be incompetent, an overlap with the above discussion.

Increasingly, however, Vulnerable Individuals, primarily the elderly, have become the targets of financial abuse by strangers—the scam or identity theft. Several recent writers have addressed this issue,<sup>26</sup> focusing on statutory remedies that would detect such schemes as early as possible (for example, by requiring bank employees to report certain suspicious circumstances in regard to a customer's bank account),<sup>27</sup> and on criminal statutes to punish those who have defrauded, in an effort to deter future perpetrators (with some statutes providing increased penalties where the victim of the fraud is an elderly person).<sup>28</sup> Sometimes, an aspect of such statutory responses is restitution to the person defrauded.<sup>29</sup>

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<sup>26</sup> See, e.g., Finberg, *supra* note 9; Black, *supra* note 9; Carlson, *supra* note 9.

<sup>27</sup> See *supra* note 24.

<sup>28</sup> See *supra* note 24.

<sup>29</sup> See, e.g., 18 U.S.C. § 2327(a) (2000) (providing that in cases of telemarketing fraud perpetrated on more than ten people over the age of fifty-five or “targeted [at] persons over the age of 55,” 18 U.S.C. §2326(2)(8) (2000), “in addition to any other civil or criminal penalty[,] . . . the court shall order restitution to all victims . . . .”); ARIZ. REV. STAT. ANN. § 46-454(G) (West 1997) (“If any person is found to be responsible for the abuse, neglect, or exploitation of a vulnerable adult in a criminal or civil action, the court may order the person to make restitution as the court deems appropriate”); CAL. PENAL CODE § 1202.4 (West 2010) (providing for restitution to victims of any crime in which the victim “incurs any economic loss as a result of the . . . crime”). On the issue of restitution in elder financial abuse cases in Minnesota, one recent commentator has observed:

A charge of financial abuse and exploitation, which results in an indictment, rarely yields restitution for the victim. First of all, most prosecutors do not ask for restitution, and judges do not usually order restitution. Even if the prosecution and judges do their part and order restitution, victims do not know what steps to take to recover the restitution owed to them. In addition, exploiters have frequently concealed or exhausted the funds or property they have misappropriated. These are not unmanageable problems.

First of all, Minnesota's public policy should be to see that elderly victims are compensated for their losses. Restitution in elderly exploitation or fraud cases should be mandatory. To help ensure restitution can take place, assets of an alleged exploiter should be immediately frozen so the misappropriated assets cannot be disposed of or concealed. The process between discovery and prosecution in elderly exploitation cases should be streamlined. The shorter the time, the less likely the victim will become incapacitated or worse yet, die. A system to support victims in recovery of their assets needs to be set up. Finally, the state needs to be creative in the methods used to see that restitution takes place.

Lewis, *supra* note 9, at 948-49. As this commentator suggests, restitution for an elderly person, while an important remedy, may be too long in coming to one who might have a limited life span and/or who might be reduced to seeking public assistance or selling other assets in order to survive

As noted above, these remedial efforts, while admirable, do little to prevent the misconduct and save the target of the scam or identity theft from suffering a loss. Punishing the guilty and attempting to restore money to the defrauded elderly person is cold comfort to a person who might not have a lot of time to wait for the return of his money and who must live in poverty in the meantime. A better result would be that the elderly person had not been deprived of his property to begin with. Society would benefit if its most Vulnerable Individuals were not, on occasion, driven into poverty by financial wrongdoing. Moreover, the savings to the public of the cost of enforcement of the penal statutes would be appreciable, freeing up tax dollars to pay for programs which would actually benefit Vulnerable Individuals.

Under the procedure proposed by this author, many Vulnerable Individuals would be saved from financial loss. If, in order to apply for a credit card or to contract to pay for products or services, a Vulnerable Individual was required to sign the writing in front of a disinterested third person who would ascertain the Vulnerable Individual's competency in general and understanding of the nature of the writing to be signed and the consequences of signing the writing in particular, fewer scams would be effective and fewer cases of identity fraud would arise. The exact nature of the proposal and its impact on this particular problem will be discussed below.

### III. THE PRESUMPTION OF INVALIDITY

In certain circumstances, when a person executes a writing by which he disposes of property and the writing is later challenged in court, the signed writing is presumed invalid.<sup>30</sup> In those situations, the person proposing that the

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financially until restitution is made. If it is possible, in some situations, as it would be under the plan proposed by this author, to prevent the losses in the first place, justice would better be served.

<sup>30</sup> See, e.g., *Wilson v. Wehunt*, 631 So. 2d 991, 993 (Ala. 1994) (“[T]he defendant had a confidential relationship with his mother and . . . proof sufficient to reasonably satisfy the court of the defendant's dominance in that relationship would create a presumption of invalidity” regarding a conveyance by mother to son); *Mercantile Bank v. Phillips*, 538 S.W.2d 277, 279 (Ark. 1976) (“[A] donee who has a fiduciary relationship to the donor has the burden of proof, by clear and convincing evidence, to overcome the presumption of invalidity of a gift when it stems from such a relationship.”); *Bourn v. Bourn*, 140 So. 518, 520 (Miss. 1932) (finding that where the “relationship between the grantor and the grantee was that of mother and son” and the son “occupied a very close fiduciary relationship to his mother . . . [t]he rules governing conveyances between parties occupying such a fiduciary relation are the same as those governing conveyances between parties occupying the conventional fiduciary relations, . . . [and w]here the relation exists . . . a presumption of invalidity arises . . .”); *Bates v. Bates*, 48 S.E.2d 612, 615-16 (S.C. 1948) (finding that where a conveyance was executed by wife to induce husband to resume marital duties, a “presumption of invalidity . . . accompanies a deed given under such circumstances”); *Gordon v. Thornton*, 584 S.W.2d 655, 658 (Tenn. Ct. App. 1979) (“It is . . . established that the presumption of invalidity extends to all dealings between persons in fiduciary and confidential relations, and embraces gifts, contracts, sales, releases, mortgages and other transactions by which the dominant party obtains a benefit from the other party.”). Many of these cases involved executions by Vulnerable Individuals; under the plan proposed by this author, competency and freedom from

writing be effective must rebut the presumption of invalidity if he is to benefit from the writing.<sup>31</sup> A comparable situation in which a presumption arises is in opposition of the admission of a will to probate where the allegation is made that the will is the product of undue influence. If the requirements<sup>32</sup> for establishing such presumption are present—(1) confidential relationship between the signer and the alleged influencer, (2) active participation by the alleged influencer in the production of the will or, in some formulations, “suspicious circumstances,” and (3) a benefit under the will to the alleged influencer—the presumption of undue influence is raised, which presumption, if not rebutted, will result in the tainted portion of the will being found invalid.<sup>33</sup> At that point, the proponent of the will (the alleged influencer) would have to establish that the dispositions in his favor were freely and willingly given.<sup>34</sup>

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undue influence and fraud would have been established, presumptively, by the proposed execution procedure. See *infra* notes 41-50 and accompanying text.

<sup>31</sup> See, e.g., *supra* note 30.

<sup>32</sup> WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* § 7.3, at 306 (3d ed. 2004).

<sup>33</sup> See, e.g., *Little v. Sugg*, 8 So. 2d 866, 881 (Ala. 1942) (stating that “in the event the jury found [that] . . . Fontaine Little was in confidential relations with decedent, with Fontaine as the dominant party, and . . . he was active in writing the will[,] . . . the burden was cast upon proponent to refute the presumption of undue influence”; finding the jury verdict that the presumption had been raised and not rebutted, the court affirmed the denial of probate of the will); *Estate of Auen*, 35 Cal. Rptr. 2d 557, 562 (Ct. App. 1994) (stating that in a contest opposing admission to probate of a will by which the elderly testator disposed of most of her estate to her attorney, the “contestants could invoke the presumption of undue influence upon a showing that (1) an attorney-client relationship existed between [the attorney and the testator] at the time the 1990 will was prepared and executed, (2) [the attorney] actively participated in the preparation of the 1990 will, and (3) [the attorney] benefited by the will”; finding the trial court’s determination that the presumption had not been rebutted, the court affirmed the refusal to admit the will to probate); *Schmidt v. Schwear*, 424 N.E.2d 401, 408 (Ill. App. Ct. 1981) (affirming a trial court determination that the presumption of undue influence was raised and not rebutted. The court stated, “[Even] if a fiduciary relationship were not present in the case at bar, the evidence is sufficient to create a presumption of undue influence[; w]here one procures the execution of a will largely benefiting himself . . . of the bounty of a testator who is infirm due to age, sickness or disease, a presumption arises that he exercised undue influence”; the will was not admitted to probate); *Croft v. Alder*, 115 So. 2d 683, 689 (Miss. 1959) (reversing a trial court finding of no undue influence). The court admitted the will to probate and noted:

The record undisputedly shows that at the time [testator] signed the will[,] . . . and for some time prior thereto, a confidential relation existed between him and . . . the principal beneficiary under his will [and, moreover, t]he record . . . reflects clearly that [the beneficiary] was actively concerned in several respects with the preparation and execution of the will[; f]or these reasons, a presumption was raised . . . that the beneficiary . . . exercised undue influence over testator in the making of the . . . will.

*Id.* If the author’s proposal were implemented, these cases would be infrequent; the Vulnerable Individual’s competency and freedom from undue influence would be presumed because of the independent evaluation of these matters that would have been undertaken. See *infra* notes 41-50 and accompanying text.

<sup>34</sup> The courts have devised a variety of standards of proof necessary to rebut the presumption of undue influence, depending, in part, on the relationship between the testator and the presumed influencer. See, e.g., *Camperi v. Chiechi*, 286 P.2d 399, 410 (Cal. Dist. Ct. App. 1955) (affirming



The existence of a confidential relationship will also lead to a presumption of invalidity in contexts other than that of the probate of a will.<sup>35</sup> Contracts, deeds, assignments, powers of attorney, and the like have been found to be presumptively invalid if the person obtaining the right or benefit was in a confidential relationship with the signer.<sup>36</sup> Such a presumption has also been raised if it is found that the person who obtains the signing and who benefits from the signing was in a position by which he would overpower the signer (not by force but by relationship) or if the signer was in a very fragile condition such as being in the hospital and under medical care.<sup>37</sup>

Many of the cases in which a presumption of invalidity is found involve the signing of an Important Document by a Vulnerable Individual.<sup>38</sup> The presumption of invalidity has been used to remedy situations in which advantage

admission of a will to probate despite the allegation of undue influence on the part of a beneficiary. The court stated, “[a]ssuming the existence of a relationship of trust and confidence between [the beneficiary and the testator] and that a presumption of invalidity attended the transaction[,] . . . such presumption may be overcome where it is manifest that the [testator] acted voluntarily and with full understanding.”); *Melson v. Melson*, 711 A.2d 783, 788 (Del. 1998) (reversing the trial court’s admission of the will to probate and remanding for further consideration of issues such as undue influence. The court stated, “[i]f that showing [to raise the presumption of undue influence] is made, the burden shifts to the proponent of the will to prove by a preponderance of the evidence . . . to show the absence of undue influence”); *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995) (resolving the issue of the standard to be applied to rebut the presumption of undue influence where testator’s children opposed admission to probate of a will in which testator made his attorney the primary beneficiary. The court stated that “[t]he dominant rule . . . is that the existence of a confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction”).

<sup>35</sup> See, e.g., *Kouri v. Fassone*, 121 N.W.2d 432, 436-37 (Mich. 1963) (affirming the trial court’s refusal to set aside a conveyance to grantor’s sister who was in a confidential relationship with grantor, noting that because “defendant was in a fiduciary relationship with deceased[, t]he burden of proof was . . . on defendant to overcome the presumption of invalidity” but finding that the presumption had been rebutted); *Thomas v. Jolly*, 170 So. 2d 16, 19 (Miss. 1964) (affirming the chancellor’s cancellation of a conveyance of real property). The court noted:

The chancellor found . . . that a fiduciary relationship existed between [one grantee] and [grantor] at the time the deed was executed, and a presumption of invalidity arose as a result of that relationship, which could be overcome only by clear evidence of good faith on the part of [grantee], and of full knowledge and independent consent and action on the part of [grantor]. [Further that, t]he chancellor found that the . . . proof offered on behalf of the defendants, was not sufficient to overcome that presumption.

*Id.*; *Richmond v. Christian*, 555 S.W.2d 105, 108 (Tenn. 1977) (concluding that cancellation of a deed was appropriate where a mother executed a deed in favor of her sons and to the detriment of her daughter. The court stated “that in this particular case proof of independent advice is essential to rebut the presumption [of invalidity since] . . . the dominated donor [the mother,] made a gift which denuded her of all her realty . . . [when] she was very old and physically debilitated . . . and was feeble to the point of needing help with virtually every personal need [and h]er son[,] the donee,]was living with her every day in her house and she . . . entrusted to him her life and all of her belongings.”).

<sup>36</sup> See, e.g., *supra* note 35.

<sup>37</sup> See, e.g., *supra* notes 30, 33 & 35.

<sup>38</sup> See, e.g., *supra* notes 30, 33 & 35.

has been taken of a Vulnerable Individual.<sup>39</sup> However, like the criminal statutes mentioned above, the remedy is applied after the fact of the wrongdoing. The will, for example, is denied probate, thereby depriving the wrongdoing of his ill-gotten gains and sending the property where it would have gone had the wrongful conduct not occurred. The cost to the litigants and society, however, is substantial. Often an estate is tied up for years because of such a contest. Moreover, the influencer can frequently force a settlement by which he benefits.<sup>40</sup> Finally, even though undue influence has occurred, one would suppose that some such wills are not opposed and the influencer gets the benefit of his wrongful conduct.

If, on the other hand, the Vulnerable Individual was required to sign any such Important Document in the presence of a disinterested third person who has ascertained the individual's competency in general, the individual's understanding of the nature of the writing he is signing and the consequences of that signing, and the individual's freedom from undue influence (in the above case), few instances of lack of capacity, undue influence, or fraud would slip by. Moreover, the Vulnerable Individual's capacity to sign would be verified by a disinterested person whose job it would be to make such determinations.

#### IV. PROPOSAL

This author's basic proposal is simply that if a Vulnerable Individual is to sign an Important Document, the signing must be done before a third person (hereinafter "the Evaluation Official") designated by the statute creating this rule. The Evaluation Official would be required to determine whether the Vulnerable

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<sup>39</sup> See, e.g., *supra* notes 30, 33 & 35.

<sup>40</sup> In the middle of the last century, Professor Atkinson noted that "[t]oo often unmeritorious contests are initiated by disgruntled relatives for their nuisance value in hope of obtaining a compromise." ATKINSON, *supra* note 18, at 518. Apparently, this is still the case. A recent commentator, proposing the abolition of the ground of undue influence as the basis for contesting a will, has argued:

The continued use of this doctrine entails significant costs. The number of contested wills is increasing, and the most common method for contesting a will is an allegation of undue influence. On the one hand, the continued existence of the doctrine encourages numerous frivolous cases, often brought by one sibling against another who cared for an aging parent and then received a larger portion of the estate . . . . Such cases waste the court's time. Second, the continued application of the doctrine creates wasteful litigation costs because heirs discontented with a will can use the threat of a will contest to force a settlement, which often distorts the decedent's intent and depletes the value of the estate.

Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 286-87 (2010) (footnote omitted). It is supposed that, rather than litigating and wasting estate money, the proponents of the contested will will settle with the opponents. In the case of a will that might be tainted by undue influence, on the other hand, certainly a case for a meritorious contest, the opponents might feel that settling with the alleged influencer would be less costly than litigating.

Individual had the requisite mental capacity, both generally and in respect of the particular Important Document to be signed, to execute the Important Document. The Evaluation Official before whom the Important Document would be signed would be designated by statute and would have no connection to the people involved in the transaction; this function could not be performed by an interested party or an attorney for an interested party. In fact, this proposal envisions that these Evaluation Officials would be individuals designated by statute to perform the evaluative role and only that role.

A Vulnerable Individual who wished to execute an Important Document, and others interested in and/or involved in the execution, would appear before the Evaluation Official. The Evaluation Official would then evaluate the competency of the Vulnerable Individual. If the Vulnerable Individual is found competent, the execution ceremony could then proceed.

Any Important Document executed by a Vulnerable Individual pursuant to these procedures should then be presumed valid.<sup>41</sup> Such a presumption would avoid much litigation since the presumed validity of the document would be established from the inception of the writing. Moreover, the standard of proof for rebutting the presumption should be a high standard such as “clear and convincing evidence.”<sup>42</sup>

If an Important Document is executed by a Vulnerable Individual without the evaluative procedure proposed herein, this author believes that the writing should be presumed, irrebuttably, to be invalid, barring exigent circumstances (such as a remote location where no Evaluation Official is available). In exigent circumstances, there would still be a presumption of invalidity, but it would be rebuttable. Again, this would avoid unnecessary litigation. Although opponents of the writing would need to bring suit to have the writing declared a nullity, proponents of the writing would have to show exigent circumstances to even get beyond the pleading stage.

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<sup>41</sup> Thus, rather than facing the issue at a time when the Vulnerable Individual often would no longer be available to be examined in respect of capacity and the like, a presumption would protect the document from many subsequent attacks.

<sup>42</sup> This is the standard often employed to rebut the presumption of invalidity of a disposition in favor of the signer's attorney. See, e.g., *Marriage of Pagano*, 537 N.E.2d 398, 405 (Ill. App. Ct. 1989) (citations omitted) (“Where a transaction is entered into between an attorney and his client . . . and the attorney benefits from the transaction, it is presumed that the attorney exercised undue influence . . . [and] the burden is upon the attorney to come forward with clear and convincing evidence that such contract was fair, equitable, just, and did not come about from undue influence”); *Matlock v. Simpson*, 902 S.W.2d 384, 386 (Tenn. 1995). *Matlock* involved the obtainment by a drafting attorney of a benefit under the decedent's will and the court found:

The dominant rule in Tennessee and elsewhere is that the existence of a confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction.

*Id.*

Evaluation Officials would need to be available to preside at executions of Important Documents in hospitals and other health-care facilities so that hospitalized individuals who would be Vulnerable Individuals could execute wills, powers of attorney, and the like. Evaluation Officials could be on staff at such facilities.

The evaluation could apply criteria such as those provided by statute in California. The California Due Process in Competency Determinations Act provides standards for establishing “incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts” as well as other circumstances in which “a person is of unsound mind or lacks the capacity to make a decision or do a certain act . . . .”<sup>43</sup> Moreover, the

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<sup>43</sup> CAL. PROB. CODE § 811 (West 2009). This provision is reproduced herein in its entirety:

§ 811. Deficits in Mental Functions

(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

- (A) Level of arousal or consciousness.
- (B) Orientation to time, place, person, and situation.
- (C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

- (A) Short- and long-term memory, including immediate recall.
- (B) Ability to understand or communicate with others, either verbally or otherwise.
- (C) Recognition of familiar objects and familiar persons.
- (D) Ability to understand and appreciate quantities.
- (E) Ability to reason using abstract concepts.
- (F) Ability to plan, organize, and carry out actions in one's own rational self-interest.
- (G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

- (A) Severely disorganized thinking.
- (B) Hallucinations.
- (C) Delusions.
- (D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

California statutes require a finding of incapacity if the person does not understand the specific consequences of the decision he is seeking to make.<sup>44</sup> Of course, it will be more difficult to establish the existence of competency as opposed to the lack thereof, but this statute can aid in the establishment of “competency guidelines.” At present, in any circumstance of execution of an Important Documents in which an attorney is involved, the attorney should ascertain that the signer is competent. The procedure proposed herein, however, would codify standards for such determinations and would impose the burden of making the determination on an independent party, the Evaluation Official.

There are many advantages to the proposed procedure. First, the issue of competency would be resolved at a point in time when the Vulnerable Individual is still alive rather than after his or her death. Much litigation would be avoided because Vulnerable Individuals adjudged incompetent could not effectively execute Important Documents. The issue would be resolved at the outset so that

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(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

<sup>44</sup> CAL. PROB. CODE § 812 (West 2009). This provision is reproduced herein in its entirety: § 812. Capacity to make decisions

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

- (a) The rights, duties, and responsibilities created by, or affected by the decision.
- (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.
- (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

writings tainted with lack of capacity would not be executed and would then not be litigated about. Thus, rather than having the invalidity of such writings determined by litigation, the writing would never come into being. For the most part, wills would also not be tainted by undue influence or fraud as those defects could be ferreted out at the evaluation stage of the proceeding. Rather than using the courts to remedy wrongs, the wrongs would never have been committed.

The suggested procedure would also reduce the incidence of financial scams and identity thefts successfully perpetrated on Vulnerable Individuals. If a Vulnerable Individual was required to be evaluated for competency before the individual signed a significant financial document, the process itself would flush out many bogus schemes. Moreover, the Vulnerable Individual would necessarily be made aware of the consequences of signing the Important Document; if unaware, the individual would not be permitted to sign.

It is also in the best interests of society in general that Vulnerable Individuals not be defrauded or bilked. A social good would be that these individuals be permitted to live out their lives in dignity, supporting themselves on their savings, retirement funds, and other assets rather than becoming charges on the public welfare as might occur if they are bilked out of their funds. While some penal statutes provide for restitution,<sup>45</sup> this will be cold comfort to an elderly person who cannot wait years for reimbursement, either in terms of longevity or in terms of the need to meet immediate bills. Moreover, everyone benefits from the psychological advantages of knowing that the Vulnerable Individuals who are executing Important Documents are competent to do so.

The proposed procedure would shift legal focus from the punishment of those who commit fraud on Vulnerable Individuals and the refusal to admit to probate executed writings of Vulnerable Individuals that are tainted by incompetency, fraud, undue influence, and duress, to the prevention of such wrongs. Analogizing to the medical field, it is certainly better to prevent a disease than to cure it.

Some will oppose this proposal on the grounds of autonomy; that Vulnerable Individuals should not be supervised in this way in the exercise of their free wills. It could be argued that young, healthy individuals will not be required to be examined before they execute Important Documents, so this procedure would discriminate unfairly against the elderly and infirm. This argument, however, does not really promote the welfare of Vulnerable Individuals. As one commentator has noted, "The American model of rugged individualists controlling their own financial affairs has left us with a breeding ground for abuse by the unscrupulous."<sup>46</sup> In terms of personal autonomy, if a

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<sup>45</sup> See *supra* note 29 and accompanying text.

<sup>46</sup> Dessin, *supra* note 9, at 214. On the other hand, Professor Eggert argues:

[P]roviding a blanket protection of elders from financial abuse has its own dangers. Limiting the kinds, scope, or substance of transactions in which the elderly can engage . . . harms the elderly by limiting their ability to chart their own financial futures and dispose of their own property . . . . Many seniors are

person is not competent, he has no real autonomy since he doesn't understand what he is doing. If a Vulnerable Individual is found to be competent, he can do what he wants, even if the result seems irresponsible or foolish. The proposed requirement of evaluation is not determining in a paternalistic way what the Vulnerable Individual can do with his money, but only that the person must be competent in order to make the decision.

The fact that a Vulnerable Individual would be required to do something extra in order to accomplish what people not in this category can do without the extra procedure has parallels in other contexts. In some states, when a person reaches a certain age, he might be required to take a driving test or be subjected to medical examination in order to be permitted to continue to operate a motor vehicle.<sup>47</sup> Moreover, if a person whose capacity is questionable or who is visually impaired or illiterate, for example, wishes to execute a will, his lawyer would be well-advised to conduct a special execution ceremony to ensure that the testator's mind accompanied the act of execution.<sup>48</sup> It is in the best interests of society that, in some circumstances, certain individuals be required to meet additional tests not imposed on the public at large; the avoidance of some measure of subsequent litigation and of some of the scams currently practiced on Vulnerable Individuals would certainly be a compelling interest of society.

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threatened by ageism, and if their independence is too constricted in an effort to protect them, seniors may be deprived of the very freedom they need to live a full and active life.

Eggert, *supra* note 9, at 694. This author does not, however, propose that the freedom of competent individuals be restricted, but rather that those whose competency would likely be questioned at a later time establish their competency as a preliminary to signing the Important Document.

<sup>47</sup> As one commentator discovered,

According to a 1992 survey conducted by the American Association of Retired Persons ("AARP"), sixteen states and the District of Columbia have varying kinds of age-based license renewal requirements. Some states, such as Arizona and Utah, require vision tests after a certain age, typically at age 60 or 65. The District of Columbia and a few states, such as Illinois, require more extensive testing, such as road and written examinations. Only six states, including Massachusetts, prohibit re-examinations based solely on age. A few states, such as Maine and Pennsylvania, require physicians to report potentially unsafe drivers, and many states, including Maryland and Indiana, grant restrictions on older drivers' licenses, allowing older persons to continue to drive under special provisions. All fifty states and the District of Columbia offer driver refresher courses.

Vasiliki L. Tripodis, Note, *Licensing Policies for Older Drivers: Balancing Public Safety with Individual Mobility*, 38 B.C. L. REV. 1051, 1059 (1997).

<sup>48</sup> Because the "worst evidence" principle of American probate law requires the testator to be dead before the court decides whether he was capable when he was alive, good planners take steps to generate and preserve favorable evidence of the testator's capacity and independence. DOBRIS ET AL., *supra* note 5, at 437. Professor Atkinson noted the need for special proof of understanding if the testator is hearing and speech impaired. ATKINSON, *supra* note 18, at 251-52. And, according to a recent practitioner, "[w]hen . . . [eccentricities and other such] facts appear, it may be necessary to take extra steps, including a medical examination, extra care with the witnesses, a more thorough investigation of the testator or other similar safeguards." Dennis W. Collins, *Avoiding a Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 14 (2000).

It is, of course, unfortunate for a person to be found to lack the competence to execute an Important Document. In the situation in which the person had desired (or, more likely, others had decided that he desired) to execute a power of attorney or a health care proxy, for example, a guardian will have to be appointed for the Vulnerable Individual.<sup>49</sup> In cases in which a person is unable to execute a will, his probate property will be disposed of according to intestacy<sup>50</sup> or according to a will that had been executed at a time when the Vulnerable Individual was not incapacitated. Not such a terrible result. Perhaps the proposed procedure would have the salutary effect of causing people to execute Important Documents at a time when they have not yet become Vulnerable Individuals.

Another argument against the proposal would be the difficulty of administering the program. Initially, Evaluation Officials would need to be hired and trained to apply the relevant standards in the evaluation determinations. Procedures for the probate of wills and the effectuation of other Important Documents would require proof of an evaluation of competency. Initially, this might create confusion. These issues would, however, be overcome in time and the benefits of the procedure would far outweigh any administrative difficulties.

An additional difficulty would be to determine at which age a person becomes a Vulnerable Individual as well as the level of impairment of a hospitalized individual or a person impaired in another way before the person is judged to be Vulnerable. A prudent attorney would, of course, err on the side of caution and include the evaluation process whenever marginally warranted.

## V. CONCLUSION

At present, Vulnerable Individuals sign Important Documents without having the general mental capacity and/or understanding of the specific document and its consequences to validly execute this document. The writing, which is sometimes the product of fraud or overreaching, will then later be challenged, with much time and money expended to determine the capacity of the Vulnerable Individual at the time of the signing. On another front, many Vulnerable Individuals are the targets of financial abuse by strangers in the form of identity theft or financial scams. While criminal statutes penalize the

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<sup>49</sup> See generally Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1 (2003); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157 (2010); Michael E. Bloom, Comment, *Asperger's Disorder, High-Functioning Autism, and Guardianship in Ohio*, 42 AKRON L. REV. 955 (2009). The efficacy of such appointments and their desirability are beyond the scope of this writing.

<sup>50</sup> If a person dies without a valid will in place, whether the person simply never attempted to execute a will or whether the person was found to be incapable of executing a valid will, that person's probate property is distributed according to state intestate succession laws. MCGOVERN & KURTZ, *supra* note 32, § 2.1.



perpetrators of these schemes, the affected Vulnerable Individuals are often left with few resources during the pendency of the prosecution and possible civil suit.

Many of these problems could be avoided by adopting the proposed plan to require that Vulnerable Individuals be evaluated for competency before they can sign an Important Document.