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THE SLAYER RULE AND ITS EFFECT ON
FAMILY MEMBERS OF THE SLAIN DECEDENT:
MAXIMIZING CLOSURE AND MINIMIZING TRAUMA

*Josh Noles**

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I. INTRODUCTION

The slayer rule prevents murderers from inheriting from their victims.¹ The rule first came into being in the United States in 1889 in *Riggs v. Palmer*, a case in which a boy murdered his grandfather to receive his inheritance.² The court barred the boy from inheriting on the public policy grounds that nobody should benefit from wrongdoing.³ Since then, all states and the District of Columbia have adopted the slayer rule, either through common law⁴ or by statute.⁵

A number of rationales—including the public policy rationale proffered in *Riggs*—support the slayer rule.⁶ For instance, the rule effectuates the victim’s likely change of intent.⁷ Victims would probably disinherit their murderers if given the opportunity, but because they are dead, they are unable to do so. Additionally, the rule prevents disruption of “the normal disposition of property.”⁸ By killing the victim, the murderer potentially changes the natural order of deaths and thus the

1. See *Riggs v. Palmer*, 22 N.E. 188, 190 (N.Y. 1889).

2. *Id.* at 189–90.

3. See *id.* at 189–92.

4. *Perry v. Strawbridge*, 108 S.W. 641 (Mo. 1908); *Kelley v. State*, 105 N.H. 240 (1963); *Riggs*, 115 N.Y. 506 (1889); *Bounds v. Caudle*, 560 S.W.2d 925 (Tex. 1977).

5. ALA. CODE. § 43-8-253 (2022); ALASKA STAT. ANN. § 13.12.803 (West 2021); ARIZ. REV. STAT. ANN. § 14-2803 (2022); ARK. CODE ANN. § 18-4-204 (West 2022); CAL. PROB. CODE § 250 (West 2022); COLO. REV. STAT. ANN. § 15-11-803 (West 2022); CONN. GEN. STAT. § 45a-447 (2022); DEL. CODE ANN. tit 12 § 2322 (West 2022); D.C. CODE ANN. § 19-320 (2022 West); FLA. STAT. § 732.802 (2022); GA. CODE ANN. § 53-1-5 (West 2022); HAW. REV. STAT. § 560:2-803 (2022); IDAHO CODE ANN. § 15-2-803 (West 2022); 755 ILL. COMP. STAT. 5/2-6 (2021); IND. CODE § 29-1-2-12.1 (2022); IOWA CODE § 633.535 (2022); KAN. STAT. ANN. § 59-513 (West 2021); KY. REV. STAT. ANN. § 381.280 (West 2022); LA. CIV. CODE ANN. art. 941 (2021); ME. REV. STAT. ANN. tit. 18-C § 2-802 (West 2021); MD. CODE ANN., EST. & TRUSTS § 11-112 (West 2022); MASS. GEN. LAWS ch. 190B, § 2-803 (2022); MICH. COMP LAWS § 700.2803 (2022); MINN. STAT. § 524.2-803 (2022); MISS. CODE ANN. § 91-1-25 (West 2022); MONT. CODE ANN. § 72-2-813 (2021); NEB. REV. STAT. § 30-2354 (2022); NEV. REV. STAT. § 41B.300 (2021); N.J. REV. STAT. § 3B:7-1.1 (2022); N.M. STAT. ANN. § 45-2-803 (West 2022); N.C. GEN. STAT. ANN. § 31A-4 (West 2021); N.D. CENT. CODE ANN. § 30.1-10-03 (West 2021); OHIO REV. CODE ANN. 2105.19 (West 2022); OKLA. STAT. tit. 84 § 231 (2022); OR. REV. STAT § 112.465 (2022); 20 PA. STAT. AND CONS. STAT. Ann. § 2106 (West 2022); 33 R.I. GEN. LAWS ANN. § 33-1.1-2 (West 2022); S.C. CODE ANN. § 62-2-803 (2022); S.D. CODIFIED LAWS § 29A-2-803 (2022); TENN. CODE ANN. § 31-1-106 (West 2022); UTAH CODE ANN. § 75-2-803 (West 2021); Vt. Stat. Ann. tit. 14 § 322 (West 2022); Va. Code Ann. § 64.2-2501 (West 2022); WASH. REV. CODE § 11.84.020 (2022); W. VA. CODE § 42-4-2 (2022); WIS. STAT. § 854.14 (2022); WYO. STAT. ANN. § 2-14-101 (West 2022).

6. *E.g.*, Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 522 (1986); *Riggs*, 22 N.E. at 190 (“No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.”).

7. Fellows, *supra* note 6, at 522.

8. *Id.* at 493–94.

disposition of the property.⁹ One rationale that has not received much attention is that the rule provides justice and additional support for the victim's innocent family members. Thanks to the slayer rule, the innocent family members of the victim do not have to watch as the murderer inherits from their loved one.

The focal point of this note is to provide support for the critical slayer rule rationale that the rule benefits innocent family members. Specifically, this note analyzes the different types of slayer rules and their effects on the victim's innocent family members. Some of the laws require a conviction to disinherit the killer.¹⁰ In some states a criminal conviction precipitates application of the slayer rule, but even without a conviction the killer may be disinherited if it is proven by a preponderance of the evidence that he murdered the victim.¹¹ In other states, a civil trial may be necessary even if there is already a criminal conviction.¹² There are also states that provide that even if the alleged killer is proven guilty, he may still be allowed to inherit if the victim opted out of the rule.¹³ And on the opposite extreme, other states apply the slayer rule in cases where the "killer" is not a killer at all but was merely neglectful in caring for the decedent.¹⁴

As this note will illustrate, the nuances of these different laws impact the victim's innocent family members in drastically different ways. The subsequent sections of this note will analyze the positive and negative effects of different types of slayer rules on the victim's innocent family members. For instance, some laws may provide the family a better opportunity to gain closure by getting justice for their loved one. Other laws may unnecessarily force the family to relive their trauma or create new trauma by unfairly punishing innocent people. Still other provisions may create incentives for dangerous and traumatic situations such as mercy killings and fraudulent elder abuse. The second section of this note will cover variations in the ways that the slaying may be proven. This section will start by analyzing slayer rule statutes that automatically apply the rule in the event of a criminal conviction, but also use civil trials to determine whether the rule should apply absent a conviction. Then it will cover laws that require a criminal conviction, with no provision for a civil trial. Finally, it will address a rule that requires a civil trial even in the event of a guilty plea. The third section will cover variations in terms of the scope of the slayer rule. For example, some jurisdictions narrow the application of the rule by allowing the victim to opt out of the rule. Some jurisdictions expand the scope of the slayer rule by including crimes less than killings as triggering offenses,

9. *Id.*

10. *E.g.*, KAN. STAT. ANN. § 59-513 (West 2021).

11. *E.g.*, ARIZ. REV. STAT. ANN. § 14-2803 (2021).

12. *E.g.*, *In re Estates of Swanson*, 187 P.3d 631, 632–38 (Mont. 2008).

13. *E.g.*, WIS. STAT. ANN. § 854.14 (West 2021).

14. *E.g.*, CAL. PROB. CODE § 259 (West 2022).

such as larceny and abuse.¹⁵ The final section will conclude with a model statute and discussion explaining how the statute maximizes welfare for the innocent family members.

II. VARIATIONS IN HOW THE “SLAYING” MAY BE PROVEN

A. Jurisdictions that Use Civil Trials to Determine if the Slayer Rule Should Apply

Some jurisdictions, such as Arizona, apply the slayer rule if the slayer is criminally convicted of a killing, but even in the absence of a conviction, the rule may still apply if it is proven by a preponderance of the evidence in a civil trial that the person killed the victim.¹⁶ Thus, in cases where there is not enough evidence to charge a person with murder, that person may still be disinherited if the fact-finder determines it is more than fifty percent likely that the defendant committed the murder.¹⁷

Castro v. Ballesteros-Suarez illustrates how this type of slayer rule works.¹⁸ In *Castro*, the victim’s wife was the suspected killer.¹⁹ There was no direct evidence, but, in the view of the Arizona Court of Appeals, the circumstantial evidence was telling.²⁰ The wife’s son took the victim out drinking in the evening and then returned home.²¹ Then, a person entered the victim’s house without using force and shot and killed the victim and another man.²² According to the detective who worked the case, the wife called the house at 11:25 p.m. and at 11:30 p.m. and returned home shortly after.²³ Someone called 911 in response to the shooting at 11:47 p.m.²⁴ At trial, both the wife and her son invoked their Fifth Amendment right against self-incrimination.²⁵

15. *E.g.*, CAL. PROB. CODE § 259 (West 2022); CONN. GEN. STAT. ANN. § 45a-447 (West 2021); CONN. GEN. STAT. ANN. § 53a-320 (West 2021).

16. *E.g.*, ARIZ. REV. STAT. ANN. § 14-2803(A), (F) (2021).

17. *Preponderance of the Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Nov. 23, 2021).

18. *Castro v. Ballesteros-Suarez*, 213 P.3d 197 (Ariz. Ct. App. 2009).

19. *Id.* at 199–200.

20. *Id.* at 203.

21. *Id.* at 202.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 200.

The victim had two life insurance policies.²⁶ For one of these policies, the wife was found to have forged a beneficiary change form and was barred from receiving any benefit as a result.²⁷ The other policy was the subject of the civil case—if the slayer rule applied, the proceeds of this policy would go entirely to the victim’s mother instead of the wife.²⁸

Based on the evidence, it was impossible to convict the wife; in fact, there was not even probable cause to make an arrest.²⁹ The killer could have been the wife, the son, or it could have been an assassin that the wife hired. While the fact that nothing was missing from the house³⁰ suggests the killer was not a burglar, the killer still could have been somebody with no connection to the wife whatsoever. Thus, this is not enough to say that the wife was either a killer or accomplice beyond a reasonable doubt, hence the lack of a criminal conviction.³¹ Even so, the court found that, based on the evidence and the presumption in favor of guilt based on her invoking the Fifth Amendment, it was more than fifty percent likely that the wife murdered the husband or was an accomplice to the murder.³² This was enough to satisfy the Arizona slayer rule’s preponderance requirement.³³

If the wife in *Castro* was actually the killer or an accomplice to the killer, then, as applied, the Arizona slayer law performed perfectly because it protected the innocent family members involved. The criminal justice system was unable to punish the killer. But thanks to the slayer rule, the victim’s mother was able to gain some sense of retribution, since the wife was barred from enjoying the fruits of her plot. At the very least, the victim’s mother did not have to live with the fact that the wife’s scheme succeeded. Also, the mother gained financially from the application of the slayer rule.³⁴ Hopefully, these benefits softened the blow of losing her son by giving the mother closure.

Closure is a concept that “has been enthusiastically embraced not only as a legitimate psychological state but as one that the legal system ought to help victims and survivors to attain.”³⁵ Closure represents an array of emotions including “peace,

26. *Id.* at 204.

27. *Id.* at 206–07.

28. *Id.* at 199.

29. *Id.* at 204.

30. *Id.* at 202.

31. *See id.* at 203.

32. *Id.*

33. *Id.* at 206–07.

34. *Id.* at 200.

35. Susan A. Bandes, *Victims, “Closure,” and the Sociology of Emotion 2* (Univ. of Chicago Pub. L. & Legal Theory, Working Paper No. 208, 2008),

relief, a sense of justice, [and] the ability to move on.”³⁶ The application of the slayer rule in *Castro* provided the mother with relief in the form of increased financial compensation;³⁷ it likely helped her to move on because the plot against her son had failed and the wife essentially received a form of punishment. While it is impossible to know for certain, it is likely that the application of the slayer rule in *Castro* provided some form of closure for the victim’s mother.

On the other hand, if we assume that the wife did not have anything to do with the killing, then the result in *Castro* was a disaster from the perspective of protecting an innocent family member. Despite her attempted fraud regarding the beneficiary change form and her proximity to the crime,³⁸ it is still possible that she was completely innocent. If this is the case, then instead of providing closure for the innocent family members, the Arizona slayer rule took a bad situation and made it worse; it unjustly punished a woman who just lost her husband and pitted surviving family members against each other. This would almost certainly worsen the trauma for all of the victim’s surviving family.³⁹

Additionally, the fact that the wife was found to liable for murdering the husband in the civil proceeding likely cast a dark shadow over her reputation, jeopardizing her ability to find future employment.⁴⁰ The damage to her reputation

https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1002&context=public_law_and_1egal_theory.

36. *Id.* at 3.

37. *Castro*, 213 P.3d at 200.

38. *Id.* at 202, 206–07.

39. Family members of murder victims rely on the court system to get answers about how their loved ones died, and they expect to feel better once the case is successfully resolved. See NATIONAL COALITION TO ABOLISH THE DEATH PENALTY, THE IMPACT OF HOMICIDE ON FAMILIES OF MURDER VICTIMS 4 (2010), https://b3cdn.net/ncadp/0345dbc8bb192096d8_w6m6bh8oz.pdf [hereinafter THE IMPACT OF HOMICIDE ON FAMILIES] (stating that the “single most important” thing family members of murder victims say they need from a trial is information about the killing). Thus, in a scenario where an innocent family member is wrongly found to have committed the murder in a civil trial, all of the family members are given incorrect information about the death. Also, for the family member who is wrongly punished, the lost inheritance is another blow on top of the loss of the loved one.

40. Analysis from 2018 showed that the unemployment rate for formerly incarcerated persons was twenty-seven percent, which is even higher than the unemployment rate for the general population during the Great Depression. Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>. Being found liable for murder in a civil trial does not necessarily mean that a person will be convicted of a crime or incarcerated. But the distinction between a civil and criminal judgment might not matter to employers. A business that hires somebody who a court proclaimed a murderer might lose money by angering the public. See, e.g. Lynn Kawano, *Convicted Murderer’s Hiring in Child Welfare Services Exposes Background Check Gaps*, HAWAII NEWS NOW, (June 7, 2021, 10:35 PM), <https://www.hawaiinewsnow.com/2021/06/08/convicted-murderers-hiring-child-welfare-services-exposes-gaps-background-check-polices/> (describing how

and employability would be especially harmful because she lost the life insurance payout. It is unclear how wealthy the wife was before her husband's murder, but it is reasonable to imagine that she had trouble providing for herself afterward due to these factors. The stress of being wrongly punished and losing her earning potential would likely compound the trauma of losing her husband to a violent homicide, creating an unbearable emotional toll.⁴¹

The *Castro* court found that it is more than fifty percent likely that the wife was responsible for her husband's death.⁴² Based on this finding, denying the wife the life insurance payout was more than fifty percent likely to be the right result. But considering the disastrous consequences of an incorrect finding of responsibility for murder, is a slightly more than fifty percent chance of being correct good enough? If the criminal justice system is unable to find a person guilty, it seems like a bad idea to deprive that person of the inheritance (or, in the case of the wife in *Castro*, the insurance proceeds). The Innocence Project estimates that between two and five percent of people in prison were wrongfully convicted.⁴³ If the criminal justice system, with its higher burdens of proof⁴⁴ and higher levels of experience in dealing with crimes, makes false convictions this often, then how often do civil courts make false judgments of liability under the preponderance of evidence standard?

*B. Slayer Statutes that Do Not Have Provisions for
Using Civil Trials to Determine if the Rule Applies*

Some slayer laws, at least on their faces, do not have provisions for using civil trials to determine if a suspected killer should be disinherited. The Kansas slayer statute provides an example of this approach. On its face, it requires a criminal conviction of either murder or manslaughter—it has no provision for using a civil

the Hawaii Department of Human Services drew public outrage by hiring a person who was convicted of murder two decades earlier).

41. Family members of murder victims experience depression, helplessness, and rage toward the person responsible for the killing. See THE IMPACT OF HOMICIDE ON FAMILIES, *supra* note 39, at 2. In a scenario where an innocent family member is wrongly found to have committed the murder, the family member is forced to undergo punishment, including loss of inheritance and potential loss of employment, while the true killer faces no consequences. It is easy to imagine that this would anger the family member..

42. *Castro*, 213 P.3d at 203.

43. *Wrongful Convictions in the United States*, ORENT LAW OFFICES (Sept. 26, 2017) <https://www.orentcriminallaw.com/blog/wrongful-convictions-infographic/>.

44. *Criminal Cases*, U.S. COURTS, <https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases> (last visited Feb. 6, 2022) (“The standard of proof in a criminal trial gives the prosecutor a much greater burden than the plaintiff in a civil trial. The defendant must be found guilty “beyond a reasonable doubt,” which means the evidence must be so strong that there is no reasonable doubt that the defendant committed the crime.”).

proceeding to determine if the rule should apply absent a criminal conviction.⁴⁵ A case that illustrates some of the potential effects of such a slayer rule is *Bird v. Plunkett*.⁴⁶ *Bird* is a Connecticut case from a time when Connecticut had a rule that required a criminal conviction to disinherit the killer.⁴⁷

In *Bird*, a husband “shot and killed his wife.”⁴⁸ The prosecution charged the husband with second degree murder, but he was only convicted of manslaughter.⁴⁹ At the time this case was adjudicated, Connecticut’s slayer rule required a conviction of murder in the first or second degree.⁵⁰ There was no provision in the law for determining by a preponderance of evidence in civil court if the slayer had committed murder: thus, the husband was allowed to inherit his wife’s estate.⁵¹

This case stands in stark contrast to *Castro*. In *Castro*, it was not certain that the wife had anything to do with the husband’s death, but the court found that a preponderance of the evidence showed that she was either the murderer or an accomplice to the murder.⁵² This made her “accountable for the intentional and felonious death of her husband.”⁵³ In *Bird*, the statute on its face required less than felonious and intentional murder—second degree murder would be enough to trigger the slayer rule.⁵⁴ But in *Bird*, the victim’s family did not have the option of proving the husband’s guilt by a preponderance of evidence in court. As a result, even though it was an undisputed fact that the husband shot and killed the wife, he was still allowed to inherit from her.⁵⁵

This seems like an unjust result. One solution to prevent people like the husband in *Bird* from inheriting from their victims would be to adopt the Arizona approach and allow civil trials with a preponderance of the evidence standard.⁵⁶ This is one of the solutions that Connecticut eventually adopted.⁵⁷ The current Connecticut

45. KAN. STAT. ANN. § 59-513 (West 2021).

46. *Bird v. Plunkett*, 17 Conn. Supp. 368, 368–73 (Conn. Super. Ct. 1951).

47. Connecticut now allows a civil trial in determining whether the slayer rule applies. CONN. GEN. STAT. ANN. § 45a-447 (West 2021).

48. *Bird*, 17 Conn. Supp. at 368.

49. *Id.*

50. *Id.*

51. *Id.* at 373.

52. *Castro v. Ballesteros-Suarez*, 213 P.3d 197, 203 (Ariz. Ct. App. 2009).

53. *Id.*

54. *Bird*, 17 Conn. Supp. at 368.

55. *Id.* at 368–73.

56. See ARIZ. REV. STAT. ANN. § 14-2803(A), (F) (2021).

57. CONN. GEN. STAT. ANN. § 45a-447 (West 2021).

slayer law allows civil proceedings to determine whether the slayer rule applies.⁵⁸ However, Connecticut also adopted another solution in its new slayer statute that would prohibit people like the husband in *Bird* from inheriting: the new slayer rule also applies to people who are found guilty of manslaughter.⁵⁹

The text of Kansas's slayer rule takes the best approach to disinheriting killers from the perspective of protecting innocent family members. The Kansas slayer statute automatically applies to convictions of murder or manslaughter,⁶⁰ so in the event of a manslaughter conviction, the victim's family does not have to prove the killing was intentional by a preponderance of the evidence in a civil proceeding. Also, the Kansas statute does not have a provision for a civil trial using the preponderance of evidence standard.⁶¹ So while cases resulting in a manslaughter conviction lead to a relatively simple victory for the innocent family members, in the absence of a murder or manslaughter conviction, the statute does not give the innocent family any path to bar the alleged killer from inheriting. But, as discussed earlier, not having a civil trial provision is likely for the best. The preponderance of the evidence standard makes it too likely that innocent people will be disinherited.

One benefit to the Kansas approach to the slayer rule is that the innocent family members do not have to struggle as hard to disinherit their loved one's killer, as opposed to the hardship created by other rules. For example, if the facts of *Bird* occurred in modern-day Arizona and the husband was convicted of manslaughter, the slayer rule would not automatically apply. The Arizona slayer statute requires felonious and intentional murder,⁶² and manslaughter does not meet that standard. As a result, the family of the victim would be forced to prove by a preponderance of the evidence that the killing was felonious and intentional.⁶³ Having to engage in a separate trial to ensure that their loved one's killer does not inherit would force the family members of the victim to relive their trauma⁶⁴ and incur extensive

58. *Id.*

59. *Id.*

60. KAN. STAT. ANN. § 59-513 (West 2021).

61. *Id.*

62. ARIZ. REV. STAT. ANN. § 14-2803 (2021).

63. *Id.*

64. If a person is traumatized by the murder of a loved one, that person may not want to participate in a civil trial. Lynette M. Parker, *Increasing Law Students' Effectiveness When Representing Traumatized Clients: A Case Study of the Katharine & George Alexander Community Law Center*, 21 GEO. IMMIGR. L.J. 163, 171 (2007). Parker writes that "many traumatized [legal] clients avoid discussing traumatic events at all costs." *Id.* at 170. Thus, if an innocent family member was a crucial witness to the crime, that family member may choose not to participate in recounting the murder to a courtroom for a second time after the criminal trial. Or, a family member may choose not to bring a civil action against the murderer even if they were not needed as a witness. After all, even going out of their way to hire a lawyer and file a lawsuit would involve discussing an extremely traumatic event.

litigation costs.⁶⁵ This trauma and expense could be avoided if the slayer rule automatically applied to manslaughter and murder. And in cases where there is not even enough evidence to charge the alleged killer with manslaughter, perhaps it is best to not disinherit the alleged killer.

Some may argue that manslaughter is not a severe enough crime to warrant disinheritance. While manslaughter sometimes covers murders where there is not enough evidence to prove intent, other times the killing is truly the result of recklessness.⁶⁶ The simple solution for people who fear being disinherited for recklessness is to avoid being reckless. If a slayer statute discourages people from being reckless, then it has achieved a positive result.

The largest shortcoming of the Kansas slayer statute is that it left the door open for courts to create common law remedies in cases where there is no conviction. In *Harper v. Prudential Ins. Co.*, the Kansas Supreme Court reasoned that the Kansas slayer statute did not preclude the common law slayer rule.⁶⁷ The court held that civil trials may be used to determine whether beneficiaries of life insurance policies who are suspected of murder are allowed to inherit.⁶⁸ Thus, despite the Kansas law's cautious approach, Kansas nevertheless has a slayer rule that creates a substantial risk of disinheriting innocent people.

Another shortcoming of the Kansas statute is that it allows people found not guilty by reason of insanity to inherit.⁶⁹ At first glance, this may seem like a good result because these people are not deemed capable of guilt for their crimes.⁷⁰ The focus of this article is on protecting the innocent family members of the victim, and people properly found not guilty by reason of insanity are innocent. However, as

65. See THE NAT'L CRIME VICTIM BAR ASS'N, CIVIL JUSTICE FOR VICTIMS OF CRIME 16–17 (2001), <https://www.co.marion.or.us/DA/victimassistance/Documents/crimeviccivilcases.pdf>. Attorneys usually do not bill clients who are victims of crime upfront, but instead collect a percentage of the plaintiff's winnings. *Id.* In slayer rule trials, this means that the lawyer will get a percentage of the innocent family member's inheritance. There are also other costs such as filing fees, deposition fees, and service of process fees that can take a chunk of the inheritance. *Id.*

66. See *Manslaughter*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/manslaughter> (last visited Feb. 6, 2022) (stating that manslaughter is killing “in a way that is less culpable than murder” and includes intentional killing “in the heat of passion and in response to adequate provocation” as well as “negligently” or recklessly causing the death of another.).

67. *Harper v. Prudential Ins. Co.*, 233 Kan. 358, 367 (1983).

68. *Id.*

69. See KAN. STAT. ANN. § 59-513 (West 2021) (containing no provision for barring people found not guilty).

70. See *Not Guilty By Reason of Insanity*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/not_guilty_by_reason_of_insanity (last visited Feb. 6, 2022) (“‘Not guilty by reason of insanity’ is a plea entered by a defendant in a criminal trial, where the defendant claims that they were so mentally disturbed or incapacitated at the time of the offense that they did not have the required intention to commit the crime, and are therefore not guilty.”).

others have pointed out, just because insane slayers are innocent does not mean they receive any benefit from being allowed to inherit.⁷¹ People that are mentally ill enough to be declared not guilty by reason of insanity seldom get their freedom back,⁷² and even when they do, the share they would have received via inheritance would likely be entirely exhausted by legal and medical fees.⁷³ While insane slayers may be innocent, the share of the victim's estate that would go to them would be wasted. The solution to this problem can be found in the Connecticut slayer statute, which states a person found not guilty of murder by reason of insanity is barred from inheriting from the victim.⁷⁴

C. Requiring a Civil Trial Even When There Is a Murder Conviction

There is another variation in the way jurisdictions administer the slayer rule that warrants discussion. In Montana, a civil trial is necessary if a killer pleads guilty to killing the decedent.⁷⁵ This requirement was invented by the Montana Supreme Court in *In re Estates of Swanson*.⁷⁶ The *Swanson* court held that a guilty plea was not a trial "on the merits" and thus was not enough to satisfy the Montana slayer rule despite the statute clearly requiring that a person found guilty of murder should be barred from inheriting.⁷⁷ This creates a bizarre result where a criminal conviction is not enough to apply the slayer rule, but a civil judgment, which requires a lower burden of proof, is enough to apply the rule. All this accomplishes is ensuring that the victim's family have to go through the inconvenience and hardship of proving in court what the killer has already admitted. They will be forced to relive their trauma for no good reason.

III. VARIATIONS IN THE SCOPE OF THE SLAYER RULE

Jurisdictions also vary in the scope of their slayer rules. For example, Wisconsin narrows the scope of the rule by allowing people to opt out of it.⁷⁸ When a person opts out of the slayer rule, even if they are murdered and the killer heir is

71. Zachary B. Roberson, *Oh the Insanity: After 124 Years, It's Time to Amend Mississippi's Slayer Statute to Account for the Insane Slayer*, 87 MISS. L.J. 441 (2018); Matthew Reisig, *O to A, For Helping Kill O: Wisconsin's Decision Not to Bar Inheritance to Individuals Who Assist a Decedent in Suicide*, 17 AM. U. J. GENDER SOC. POL'Y & L. 785 (2009).

72. Mac McClelland, *When 'Not Guilty' is a Life Sentence*, N.Y. TIMES (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence.html>; Roberson, *supra* note 71.

73. See Roberson, *supra* note 71.

74. CONN. GEN. STAT. ANN. § 45a-447 (West 2021).

75. *In re Estates of Swanson*, 187 P.3d 631, 638 (Mont. 2008).

76. *Id.*

77. *Id.* at 635.

78. WIS. STAT. ANN. § 854.14(6)(b) (West 2021).

convicted of first-degree murder, the killer will not be disinherited.⁷⁹ It might seem difficult to imagine why such a provision would exist, or who would use it, but a Wisconsin case provides a potential answer to both questions. In *Lemmer v. Schunk*, the decedent was terminally ill with lymphoma.⁸⁰ The decedent's wife and younger daughter drove the decedent to a cabin, helped him inside, gave him a shotgun, and then left, knowing that he planned to commit suicide.⁸¹ The decedent's older daughter sued to bar the mother and younger daughter from inheriting under Wisconsin's slayer statute.⁸² The statute required an unlawful and intentional killing, and the court said the mother's and daughter's actions did not meet that threshold.⁸³ But suppose instead that the wife had pulled the trigger for her husband and was found guilty of murder. She would be barred from inheriting. Perhaps the Wisconsin rule incorporated the opt-out provision to protect mercy killers in situations like this. If a terminally ill person can opt out of the slayer rule, then his family will be free to perform a mercy killing without fear of disinheritance.

These opt-out provisions that promote mercy killings can make it more difficult to protect innocent family members. On one hand, terminally ill persons may want their suffering to end, but they are understandably reluctant to end their own lives themselves. A family member assisting them in ending their lives may be in their best interest. But using a slayer rule opt-out provision to promote mercy killings is bad policy. The proper route to giving terminally ill persons a way to end their suffering is through a physician-assisted suicide (PAS) law. PAS laws put life-ending procedures in the hands of trained medical professionals, with extensive safeguards in place to ensure that the terminally ill patient's decision is not being coerced—either by others or by mental illness.⁸⁴ Disinheriting family members that take ending the life of a terminally ill person into their own hands may be harsh, but it is justified. Familial mercy killings have too much potential to cause harm. If a person ends a terminally ill family member's life in a mercy killing, that person takes on the trauma that comes from killing another person. The terminally ill person will be killed without adequate safeguards to ensure that the decision was not a product of coercion or mental illness. And the other family members will lose their loved one even earlier than they expected.

Moreover, if mercy killings are sanctioned via slayer rule opt-out provisions, there is no guarantee that the victim is terminally ill or even ill at all. Physically

79. *Id.*

80. *Lemmer v. Schunk*, 760 N.W.2d 446, 446 (Wis. Ct. App. 2008).

81. *Id.* at 447.

82. *Id.* at 447.

83. *Id.* at 491–92.

84. *E.g.*, OR. REV. STAT. ANN. §§ 127.800–.897 (West 2021) (requiring that all recipients of physician-assisted euthanasia undergo thorough mental wellness screenings).

healthy yet suicidal persons can opt out of the slayer rule so a family member can kill them without being disinherited. In short, states should not include an opt-out provision in their slayer statutes because these provisions promote mercy killings, and mercy killings can have a negative impact on the victim, the innocent family, and even the killer. If a state wants to sanction mercy killings, it should do so through a PAS law instead.

Some jurisdictions broaden the scope of the slayer rule by including crimes other than murder as triggering offenses. For instance, California disinherits individuals who are convicted of abuse or fraud against dependent adults, or who are found to have committed such an offense by clear and convincing evidence in a civil proceeding.⁸⁵ Provisions like this disincentivize mistreatment of dependent adults and thus are good for both the victims and the innocent family members. While disinheritance can be a steep penalty to pay for a crime less than killing, it is hard to argue that the penalty is not justified. After all, if the abused persons had the opportunity and the capacity to change the disposition of their property, they likely would do so in favor of their non-abusive family.

Using a burden of proof higher than preponderance of the evidence is especially important for elder abuse disinheritance provisions; abuse is a much more subjective crime than killing,⁸⁶ and a preponderance of the evidence standard would simply be too low. Connecticut is a jurisdiction uses this dangerously low burden for crimes other than killings.⁸⁷ The Connecticut slayer law states that people found by a preponderance of the evidence to have committed larceny or abuse of the decedent will be disinherited.⁸⁸ As mentioned previously, preventing abusers from taking their victims' property is a good result. But the problem with Connecticut's law is that it enables some family members to make bad faith attempts to increase their share of the inheritance.

The following hypothetical situation illustrates how a family member could make a bad faith attempt to receive a larger portion of the decedent's estate. X was an elderly woman who lived with her son Y. Y was X's sole caretaker, and Y struggled to balance his own life with caring for X. Z was X's other son who moved away to a distant state and visited X once every few years. During one of Z's

85. CAL. PROB. CODE § 259(a)(1) (West 2022).

86. See *Elder Abuse*, AM. PSYCH. ASS'N. (2008), <https://www.apa.org/pi/prevent-violence/resources/elder-abuse>. Elder abuse can manifest itself in a wide variety of ways, "includ[ing] physical abuse, sexual abuse, emotional abuse, financial/material exploitation, neglect, abandonment, and self-neglect." *Id.* Thus, it is much more nuanced than a killing, in which the victim will always be dead.

87. CONN. GEN. STAT. ANN. § 45a-447(a)(1) (West 2021).

88. *Id.*; See CONN. GEN. STAT. ANN. § 53a-320 (West 2021) (providing relevant definitions for § 45a-447).

infrequent visits, Z sneakily took photos of the house that made it appear as though the house was extremely unkempt; in reality, the house looked messy because Y was in the middle of spring cleaning and performing renovations, and Z used some creative camera angles to make it look far worse than it actually was. Z also took pictures of bruising on X's arm from where she accidentally bumped it on a cabinet. A few months later, X died of natural causes. Z knew that X planned to leave her entire estate to Y, but he had a devious plan to get it all for himself. Z brought a lawsuit against Y in civil court alleging that Y abused X and should be barred from inheriting under Connecticut's slayer statute. Z presented the photos of the house he took during his visit to show the "appalling living conditions" to which X was subjected under Y's care. Z also presented the photo of X's bruised arm to convince the court that Y beat X. Under a beyond reasonable doubt standard, Z would likely still need more evidence to establish that Y abused X. But under a preponderance of the evidence standard, these photos would likely be enough for Z's fraud claim to succeed. And if Z invested more money in assembling a legal team than Y, then his plot would be even more likely to succeed.

As the hypothetical situation above illustrates, the preponderance of the evidence standard is too low of an evidentiary burden for a crime that is as subjective as abuse. What may in fact be the best possible care for an elderly or disabled person may appear to be abusive if the narrative is twisted in the right way. Family members who are bitter about the disposition being changed in favor of the primary caretaker have too great an opportunity to fraudulently disinherit the primary caretaker under the preponderance of evidence standard. As a result, the primary caretakers may be pressured into putting their loved ones in nursing homes to avoid possible disinheritance. Studies have shown that the majority of elderly persons prefer to live at home under the care of family members as opposed to in nursing homes.⁸⁹ Even in a hypothetical situation where elderly persons were suffering from dementia, around one-third would still prefer to live at home.⁹⁰ Also, caretakers are likely more hesitant than ever to put their loved ones in nursing homes in the era of COVID-19, as the pandemic creates dangerous conditions for elderly persons in such facilities.⁹¹ A slayer statute that prevents elder abuse is unquestionably a good thing, but setting the burden of proof for abuse too low can

89. Wayne C. McCormick et al., *Similarities and Differences in Attitudes Toward Long-term Care Between Japanese Americans and Caucasian Americans*, 50 J. AM. GERIATRIC SOC'Y 1149, 1149 (2002) [hereinafter *Attitudes Toward Long-term Care*]; Wayne C. McCormick et al., *Attitudes Toward Use of Nursing Homes and Home Care in Older Japanese-Americans*, 44 J. AM. GERIATRIC SOC'Y 769, 769 (1997); Yuri Jang et al., *Willingness to Use a Nursing Home in Asian Americans*, 21 J. IMMIGRANT & MINORITY HEALTH 668, 668 (2019).

90. *Attitudes Toward Long-term Care*, *supra* note 89, at 769.

91. Michael Gold & Ed Shanahan, *What We Know About Cuomo's Nursing Home Scandal*, N.Y. TIMES (Aug. 4, 2021), <https://www.nytimes.com/article/andrew-cuomo-nursing-home-deaths.html>.

cause more harm than good, both for the elderly and their families. Primary caretakers have immense burdens without the threat of bad faith litigation robbing them of their inheritance. Requiring a criminal conviction for the elder abuse slayer rule protects caretakers from fraudulent claims.

IV. CONCLUSION

As this note has illustrated, different slayer statute provisions across the U.S. can have different impacts on the innocent family of the slain person. But what is the ideal slayer statute to protect innocent family members? The following model statute is based on the conclusions reached in this note.

A. Model Slayer Statute

A

No person finally convicted of any form of murder or manslaughter shall receive any portion of the victim's estate. For purposes of joint tenancies and life insurance policies, the killer shall be treated as having predeceased the victim.

B

No person found not guilty by reason of insanity of any form of murder or manslaughter shall receive any portion of the victim's estate. For purposes of joint tenancies and life insurance policies, the killer shall be treated as having predeceased the victim.

C

No person finally convicted of violating this state's dependent person abuse laws shall receive any portion of the victim's estate. For purposes of joint tenancies and life insurance policies, the abuser shall be treated as having predeceased the victim.

D

No person shall be permitted to opt out of this law's provisions. The law will be applied regardless of any victim's intentions as to the disposition of the victim's property.

E

A plea of guilty to any triggering offense against the victim as listed in Sections A or C shall be sufficient to disinherit the killer/abuser of any of the victim's estate. For purposes of joint tenancies and life insurance

policies, any person who pleads guilty to a triggering offense shall be treated as having predeceased the victim.

F

This law will only be applied after all appeals have been exhausted in the criminal proceedings against the alleged killer/abuser. Unless a judgment as listed under Sections A, B, C, or E is entered against the alleged killer/abuser, the alleged killer/abuser shall not be barred from taking whatever share of the victim's estate he/she would take by will or intestacy, and he/she shall not be treated as having predeceased the decedent for purposes of joint tenancies and life insurance policies. There will be no civil trial for determining whether the accused should be disinherited.

B. Discussion of the Model Slayer Statute

Because this model statute covers manslaughter, it applies to killings in which the killer's intentions may be hard to prove. Yet it does not resort to the dangerously low preponderance of the evidence burden to do so. Since a criminal conviction is required, the burden of proof is beyond a reasonable doubt.⁹² This protects against people being wrongfully disinherited, while also ensuring that killers will not be able to inherit just because they are only convicted of manslaughter, like in *Bird*.⁹³

Since the statute applies to killers found not guilty by reason of insanity, the insane killer's share of the estate will not go to waste, as it would if the insane killer was allowed to take it.

Section C attempts to strike a proper balance between disincentivizing abusers and shielding caretakers from opportunistic bad faith litigation. It only takes effect in the event of a criminal conviction, which requires the higher burden of proof of beyond a reasonable doubt.⁹⁴

The statute explicitly forbids opting out of the slayer rule. This provision is an attempt to prevent mercy killings and the trauma and other harms that come with them. The no-opt-out provision applies to abuse cases as well. Typically, criminal abuse statutes require that the abused person have a limited capacity;⁹⁵ preventing people with limited capacities from opting out of the rule removes the opportunity

92. See *Beyond a Reasonable Doubt*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt (last visited Apr. 1, 2022).

93. See generally *Bird v. Plunkett*, 17 Conn. Supp. 368 (Conn. Super. Ct. 1951).

94. See *Beyond a Reasonable Doubt*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt (last visited Apr. 1, 2022).

95. E.g., KY. REV. STAT. ANN. § 508.100(1)(c) (West 2022).

for the abuser to manipulate or coerce the victim into opting out. But if an abused person wishes for the abuser to have a portion of the estate, they still have the freedom to make a lifetime transfer, so their autonomy is not entirely undermined.

Also, Section E makes clear that a guilty plea is sufficient to apply the slayer rule. This will ensure that a court will not adopt the Montana approach that requires a judgment on the merits. This is especially important since there will be no civil trials to determine if the slayer rule applies. Without this section, if a court holds that a guilty plea is not sufficient to apply the rule, then it will create a loophole whereby killers and abusers can inherit from their victims by pleading guilty.

And lastly, the statute stipulates that disinheritance only applies to those found guilty of murder, manslaughter, or abuse, or those found not guilty of murder or manslaughter by reason of insanity. This ensures that courts will not be able apply a common law remedy like in *Harper* that undermines the purposes of the statute by disinheriting people who may be innocent. When compared to the preponderance of the evidence burden, a burden of proof beyond a reasonable doubt will give families less of an opportunity to obtain closure in cases with wrongful acquittals. But this is a necessary tradeoff to ensure that innocent parties are not wrongfully disinherited.⁹⁶ If there is no criminal conviction, then the slayer rule does not apply and the parties can get on with their lives. And if there is a criminal conviction for a triggering offense, then the innocent family members do not have to re-live their trauma in court to get the closure they deserve by disinheriting the killer or abuser. The end result is a strict yet fair law that is extremely predictable and maximizes the welfare of the decedent's innocent family members.

96. This note mentions that one of the problems of slayer rules that use a preponderance of the evidence burden is that this low burden increases the chance that innocent people will be wrongly punished and lose their potential inheritance by being found liable in the civil proceeding. It is worth noting that even if a state adopts a slayer rule that only disinherits people that are convicted of one of the triggering offenses, suspects that are found not guilty may still be subject to wrongful death lawsuits. Wrongful death lawsuits are also decided using a preponderance of the evidence standard. David Landers, *Proving Wrongful Death in a Civil Case*, Nolo, <https://www.nolo.com/legal-encyclopedia/proving-wrongful-death-civil-case.html> (last visited Feb. 6, 2022). Thus, the aforementioned problem cannot be completely solved by reforming the slayer rule alone. But adopting the above slayer rule is a good way for a state to hedge against the effects of a wrongful finding of liability in civil court—if an innocent person who was correctly deemed not guilty in a criminal trial loses a wrongful death lawsuit, that person may at least be able to pay the damages using the inheritance, instead of potentially being driven into debt.

