

# LIVING PROBATE: THE CONSERVATORSHIP MODEL

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Within the last year or so there has been a considerable revival of interest in the subject of living probate. In 1977 the state of North Dakota enacted the first living probate scheme<sup>1</sup> to reach the American statute books in this century; another has been pending in the Ohio legislature,<sup>2</sup> and the draftsmen of the Uniform Probate Code have begun work on a Uniform Ante-Mortem Probate Act.<sup>3</sup> Living probate is addressed to the predicament of a testator who fears that after his death his estate may be subjected to a will contest in which it will be alleged that he lacked the mental capacity to execute his will. The recent legislation and draft legislation would permit the testator to bring suit against potential contestants in order to obtain an adjudication regarding his capacity while he is alive and best able to inform the determination.

The main purpose of the present Article is to suggest a somewhat different theoretical and practical approach to structuring the living probate procedure. I shall characterize the procedure called for in the North Dakota act and in similar proposals as the Contest Model of living probate, in distinction to a Conservatorship Model that I shall advocate to be the better way. Part I of this Article reviews briefly the problem to which living probate is addressed and the alternatives that can presently be employed to forestall post-mortem capacity litigation in the absence of a living probate system. In Part II the Contest Model is examined and certain of its shortcomings are identified. Part III shows why

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† References and suggestions from David Currie (Chicago), Allison Dunham (Chicago), Howard Fink (Ohio State), William Francisco (St. Mary's, San Antonio), Philip Kurland (Chicago), Irwin L. Langbein, Esq., Lawrence Waggoner (Michigan), and Richard Wellman (Georgia), and the diligent research assistance of John Mangum (Chicago '80) are gratefully acknowledged. In many places this Article has drawn upon the knowledge of my late colleague Max Rheinstein, with whom I had the good fortune to discuss the problems of living probate over many years.

1. N.D. CENT. CODE § 30.1-08.1 (Supp. 1977).

2. Enacted as this Article was in press: Amended Substitute House Bill No. 505, 1978 Ohio Legis. Bull. 442 (to be codified as OHIO REV. CODE ANN. §§ 2107.081-.085 (Page)).

3. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, JOINT EDITORIAL BOARD FOR THE UNIFORM PROBATE CODE, UNIFORM ANTE-MORTEM PROBATE ACT (2d Working Draft, Jan. 6, 1978).

a procedure modelled upon the existing principles and procedures for determining the capacity of the living in the conservatorship context commends itself as the superior design for living probate legislation.

Living probate is a fitting subject to discuss in the *Michigan Law Review* in a Festschrift for George Palmer. Living probate was first attempted in Michigan<sup>4</sup> in the nineteenth century, but it was done badly and miscarried<sup>5</sup> for want of the sort of careful forethought and design that has in the twentieth century characterized the series of national probate-reform projects that have emanated from the University of Michigan Law School. The revival of living probate in the present day has been possible only because of the persistent refusal of American legal scholars to allow the underlying problem to go unsolved.<sup>6</sup> Concern with matters of procedure and remedy is one of the greatest strengths of American legal scholarship, and over the last generation George Palmer has been the largest figure working in the tradition of remedy law in the field of trusts and estates.

## I. THE NEED FOR LIVING PROBATE

### A. Capacity Litigation

Discussion of living probate must begin with the problem of the will contest alleging testamentary incapacity. Although we do not have comparative data directly on point,<sup>7</sup> the impression is widespread that such litigation occurs more frequently in the United States than on the Continent or in England. We may point to several factors that bear upon the differential:

(1) In civil law countries, children as well as the spouse have a forced share entitlement in the estate of a parent. The

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4. Act of Apr. 11, 1883, 1883 Mich. Pub. Acts 17, reprinted in R. WELLMAN, L. WAGONER, & O. BROWDER, *PALMER'S CASES AND MATERIALS ON TRUSTS AND SUCCESSION* 117 n.3 (3d ed. 1978); Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 268 n.8 (1976); 33 AM. L. REG. (O.S.) 794 (1885).

5. See *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N.W. 28 (1885).

6. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934), has had an enduring influence. The article by Professor Howard P. Fink, *supra* note 4, has been especially important in provoking the latest legislative action. The recent Commissioners' draft, *supra* note 3, is based substantially upon drafts done in the 1960s by Professors Eugene F. Scoles and Allan D. Vestal during work on the Uniform Probate Code, and on a draft uniform act prepared in 1932. UNIFORM ACT TO ESTABLISH WILLS BEFORE DEATH OF TESTATOR (Tent. Draft No. 1, 1932), in HANDBOOK OF THE NATL. CONF. OF COMMRS. ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-SECOND ANNUAL CONFERENCE 463 (1932).

7. For crude and outdated figures from New York, see Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 518 & n.58 (1934).

disinherited child, who is the typical plaintiff in American testamentary capacity litigation, is unknown to European law.<sup>8</sup> The European parent can leave his heir disgruntled with the statutory minimum, but that share will often be large enough by comparison with the potential winnings from litigation to deaden the incentive to contest.

(2) Many American jurisdictions permit will contests on the question of capacity to be tried to a jury,<sup>9</sup> which may be more disposed to work equity for the disinherited than to obey the directions of an eccentric decedent who is in any event beyond suffering. Civil jury trial has disappeared from English estate law; it was never known on the Continent.

(3) American law is unique among Western civil procedural systems in failing to charge a losing plaintiff with the attorney fees and other costs incurred by the defendant in the course of resisting the plaintiff's unjustified claim.<sup>10</sup> In testamentary capacity litigation the American rule has the effect of requiring decedents' estates to subsidize the depredations of contestants. Put differently, the American rule diminishes the magnitude of a contestant's potential loss, which diminishes his disincentive to litigate an improbable claim.

(4) Civil law systems provide for the so-called authenticated will, which is executed before a quasi-judicial officer called the notary.<sup>11</sup> This is not the only means of making a valid will in European countries, and because it is costly it is not widely used. But the notarial procedure does permit a testator who fears a post-mortem contest to generate during his lifetime and have preserved with the will evidence of exceptional quality regarding, *inter alia*, his capacity. The notary before whom the testator executes his will is not a judge; he does not adjudicate capacity. But he is a legally qualified and experienced officer of the state who is obliged to satisfy himself of the testator's capacity as a precondition for receiving or transcribing the testament.<sup>12</sup> The authenti-

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8. See, e.g., for Germany, T. KIPP & H. COING, *ERBRECHT* 52-105 (13th ed. 1978). See also Cahn, *supra* note 7, at 521, concluding: "The elaborate growth of the doctrine of undue influence at common law may be attributed to the lack of [a forced heirship] system and to a desire to palliate certain resultant hardships."

9. See generally Annot., Right to Jury in a Will Contest, 62 A.L.R. 82 (1929); 3 W. BOWE & D. PARKER, *PAGE ON THE LAW OF WILLS* § 26.85 (1961).

10. See *Hall v. Cole*, 412 U.S. 1, 4 & n.4 (1973), and literature cited therein.

11. See M. RHEINSTEIN & M. GLENDON, *THE LAW OF DECEDENTS' ESTATES* 198-99 (1971). See generally Brown, *The Office of the Notary in France*, 2 *INTL. & COMP. L.Q.* 60 (1953).

12. M. RHEINSTEIN & M. GLENDON, *supra* note 11, at 198. For Germany, see T. KIPP & H. COING, *supra* note 8, at 200; 1 U. VON LÜBTOW, *ERBRECHT* 194-95 (1971). For Italy,

cated will is, therefore, extremely difficult for contestants to set aside for want of capacity in post-mortem proceedings. (This civil law notarial practice was the inspiration for certain so-called living probate proposals in the United States in the 1930s, which we shall discuss and distinguish shortly.)<sup>13</sup>

A major reason that the impact of capacity litigation in America is so difficult to measure is that most of it is directed towards provoking pretrial settlements, typically for a fraction of what the contestants would be entitled to receive if they were to defeat the will. Especially when such tactics succeed, they do not leave traces in the law reports. Thus, the odor of the strike suit hangs heavily over this field.<sup>14</sup> The beneficiaries named in the will are likely to be either charitable organizations whom the testator preferred to his relatives, or else those of his relatives and friends whom he loved most and who are most likely to want to spare his reputation from a capacity suit. They are typically put to the choice of defending a lawsuit in which a skilled plaintiff's lawyer will present evidence to a jury at a public trial touching every eccentricity that might cast doubt upon the testator's condition, or compromising the suit, thereby overriding the disposition desired by the testator and rewarding the contestants for threatening to besmirch his name.

On the other hand, this is not an invariable scenario. No one seems to believe that the substantive law of testamentary capacity is misguided and should be repealed. There is a consensus that madmen should not be writing wills, and that enfeebled testators should not be allowed to be victimized by domineering nurses, counselors, or whomever. Yet there is little hope that doctrinal refinement in the law of capacity could enable the courts to do a better job of separating meritorious from unfounded capacity contests. The genre is inevitably intensely factitious: the recurrent issue is the condition of the particular testator as the trier can infer it from evidence of his past conduct and circumstances.

The attraction of a living probate system is that it promises to yield better results from the same body of substantive law, by improving the procedure and the evidence used to determine the

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see G. BARTOLINI, *MANUALE DEL NOTAIO* 67 (6th ed. 1957).

13. See text at notes 23-31 *infra*.

14. "Contestants have nothing to lose—the 'nuisance value' of delay and the abhorrence of respectable persons for publicity may result in a settlement." Cahn, *supra* note 7, at 518. Beyond the "deepseated suspicion of contestants' *bona fides*" that Cahn refers to, *id.*, nothing much is known or knowable about the actual dimensions of the strike-suit phenomenon, since neither the winners nor the losers have any particular incentive to leave traces of it.

question of capacity. The basic insight is that since the substantive question is capacity as of the time of execution of the testament, execution would be the ideal time to determine capacity. The longer adjudication of any question is postponed, the more likely it is that the quality of the evidence available to the trier will deteriorate. In the field of testamentary capacity, that probability is a certainty: post-mortem adjudication of capacity insures by definition that the best evidence of capacity—the testator himself—will be placed beyond the reach of the court. However novel the concept of living probate, it responds to purposes that have long been emphasized at common law in the best evidence rule. What has kept living probate from the statute books has been the concern that in attempting to resolve the capacity question during the lifetime of the testator, other problems of procedure and judicial economy would arise that might outweigh the gain. These are matters to which we shall turn in Part II of this Article.

Operating without living probate, the American estate-planning bar has had to devise some techniques for protecting against the danger of capacity contests. One factor—although hardly the predominant one—in the explosive growth in the use of will substitutes, especially the revocable inter vivos trust, is that they are more resistant to capacity challenges (even though, paradoxically, the substantive standard of capacity is higher for inter vivos than for testamentary transfers).<sup>15</sup> Trusts belong to the jury-free realm of equity law; and the settlor who lives with his trust for a while, conveying property to it and receiving income distributions, has the opportunity to show greater deliberateness than someone who merely signs a will that works no lifetime consequences upon him. The will substitutes also involve the settlor with intermediaries such as bank or trust company officers who have acted in reliance upon his seeming capacity in the ordinary course of their business and whose testimony will usually be available to support his capacity in the event of challenge.

In a case in which there is a particular risk of post-mortem capacity contest—where, for example, an elderly testator of substantial means and peculiar habits wishes to disinherit his relatives in favor of a charity or a friend<sup>16</sup>—the main reliance of the estate planning bar is on the afforced execution ceremony, whose

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15. See text at notes 61-65 *infra*.

16. See the example given in W. LEACH, *CASES AND TEXT ON THE LAW OF WILLS* 46 (2d ed. 1960).

object is to generate and preserve superior evidence of capacity. The testator is expressly cautioned about the seriousness and the irregularity of the projected disinheritance and asked to explain it either before<sup>17</sup> or at<sup>18</sup> the execution ceremony. These proceedings may be videotaped,<sup>19</sup> or a stenographer may attend to transcribe them. Witnesses well above the statutory minimum (including both strangers and longtime professional acquaintances such as the family physician and priest) may be asked to attend the execution and to observe the testator's condition and statement of purposes. Psychiatrists may sometimes be employed in these proceedings.<sup>20</sup> If a stenographer has attended, the resulting transcript may be circulated to the witnesses for verification and attestation.<sup>21</sup>

Such precautions achieve a result somewhat similar to the authenticated will of civil law practice. Although no public official such as the Continental notary is employed, highly persuasive evidence of capacity is secured. The object is to enable the estate to discourage post-mortem contests without litigation, merely by disclosing to potential challengers the precautions that were taken; or if litigation ensues, to enhance the position of the proponents of the will, preferably enabling them to avoid jury trial by winning at the summary judgment stage. Nevertheless, precaution is not adjudication, and summary judgment may be hard to obtain if the testator left significant evidence of feebleness or eccentricity. Without summary judgment, the estate must run the risk and expense of trial, usually jury trial. The contestants in an undue influence suit can argue that the precautions taken were themselves symptomatic of the overreaching being complained of, and even in an ordinary ("unsound mind") capacity challenge, the argument can be made that what the precautions really show is that the people who were counselling the testator had doubts about his capacity. The afforced execution ceremony is, therefore, not a wholly adequate solution to the underlying problem. It is a splendid, lawyerly stopgap, but it can only imperfectly occupy the procedural void left by the want of an effective living probate system.<sup>22</sup>

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17. Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 92 (1958).

18. W. LEACH, *supra* note 16, at 47.

19. On evidentiary admissibility of videotape in court proceedings, *see generally* Annot., 66 A.L.R.3d 637 (1975), and sources cited therein.

20. *But see* Jaworski, *supra* note 17, at 93.

21. W. LEACH, *supra* note 16, at 47.

22. There are a couple of other devices in current practice that may help deter will contests. An *in terrorem* clause can be inserted, typically disallowing benefits under the

## B. *What Living Probate Is Not*

Because a good deal of the thinking about living probate that went on in the United States in the 1930s had the Continental authenticated will in mind, the label "living probate" was used to describe some features of notarial will practice that have no necessary connection with the business of establishing testamentary capacity, but which also commend themselves as desirable reforms for American probate procedure. Before turning to consider the design of the living probate system, it will be convenient to distinguish these other matters from true living probate.

(1) A main function of the notary in the European legal systems is to provide for official safekeeping of notarized documents. Notarial deposit of a will serves (in combination with relatively strict rules for revoking such wills) to discourage the testator from ineffective attempts at altering or revoking the will, and it prevents accidental destruction, unauthorized tampering, or outright forgery from occurring subsequent to the authenticated execution. Writers of the 1930s called for equivalent American arrangements,<sup>23</sup> and the Uniform Probate Code and a variety of individual states have now made provision for courthouse depository schemes.<sup>24</sup>

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will to anyone who contests it; however, such a provision cannot influence a contestant who is left nothing under the will, but who would take if it were invalidated. Furthermore, many jurisdictions limit the enforcement of such clauses; *see, e.g.*, UNIFORM PROBATE CODE § 3-905.

There are ways of preserving testimony about capacity, but without adjudication these self-serving declarations by the testator and his friends work no particular improvement on the afforded execution ceremony. *E.g.*, UNIFORM PERPETUATION OF TESTIMONY ACT; N.Y. Surr. Ct. Proc. Act § 2507(1) (McKinney 1967), *noted in* E. CLARK, L. LUSKEY, & A. MURPHY, *GRATUITOUS TRANSFERS* 227 (2d ed. 1977). There was a Chancery procedure, sometimes called *de bene esse* procedure, for perpetuating testimony, and Blackstone treats the anticipated will contest as its characteristic sphere:

If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses, although no suit is depending; for, it may be, a man's antagonist only waits for the death of some of them to begin his suit. This is most frequent when lands are devised by will away from the heir at law, and the devisee, in order to perpetuate the testimony of the witnesses to such will, exhibits a bill in Chancery against the heir, and sets forth the will *verbatim* therein, suggesting that the heir is inclined to dispute its validity; and then, the defendant having answered, they proceed to issue as in other cases, and examine the witnesses to the will; after which the cause is at an end without proceeding to any decree, no relief being prayed by the bill; but the heir is entitled to his costs, even though he contests the will. This is what is usually meant by proving a will in Chancery.

3 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*450 (1768).

23. *E.g.*, REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES 8, 17-18, 77-81 (1939); Kutscher, *Living Probate*, 21 A.B.A.J. 427 (1935).

24. UNIFORM PROBATE CODE §§ 2-901 to 902 & Comments.

(2) The Continental notary—who is, I reiterate, a fully qualified lawyer and sworn officer of the state—is obliged when conducting the procedure for authenticated testation to satisfy himself of the identity of the testator and to oversee the testator's compliance with the formalities. European law attaches to the authenticated will an extremely strong (although nominally rebuttable) presumption of validity, on the very reasonable supposition that this expert in legal paperwork will have taken his statutory responsibilities seriously. The most important effect of this presumption is in those cases (the vast preponderance) in which there is no contest and in which no question of rebutting the presumption arises. In these cases the authenticated will is treated as "self-proving," in the sense that it is given effect in post-mortem affairs without the need of judicial proceedings to establish its genuineness and formal validity.<sup>25</sup>

American reformers, embarrassed or annoyed by the costly and pointless rite of summoning attesting witnesses or handwriting experts for mandatory judicial proceedings convened to probate uncontested wills, looked longingly at the self-proving feature of the authenticated will. Eventually, Texas<sup>26</sup> and then the Uniform Probate Code<sup>27</sup> jurisdictions enacted a common law version, whose simple expedient is to extend a somewhat similar presumption of validity to any will which contains an attestation clause of sufficient particularity and which is executed before an American notary. Because our notary is such a frail imitation of his European counterpart,<sup>28</sup> our draftsmen have been careful to limit the effect of notarization to the technicalities of Wills Act formal compliance. Section 3-406 of the Uniform Probate Code allows the self-proving will to effect a conclusive presumption of mechanical compliance with the signature requirements for the testator and the attesting witnesses, but contestants' right to prove fraud or forgery is expressly reserved. The Official Comment to section 3-406 also makes clear that "proof of undue influence [or] lack of testamentary capacity" is not precluded.<sup>29</sup> The self-proving will is not living probate.

(3) The Continental authenticated will is virtually immune

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25. Louisiana has long made similar provision for its notarial (called "nuncupative") will. "Nuncupative testaments received by public acts do not require to be proved . . . ; they are full proof of themselves, unless they are alleged to be forged." LA. CIV. CODE ANN. art. 1647 (West 1952).

26. TEX. PROB. CODE ANN. § 59 (Vernon 1956).

27. UNIFORM PROBATE CODE § 2-504.

28. See text at note 11 *supra*.

29. UNIFORM PROBATE CODE § 3-406 Comment.



from attack on asserted grounds of Wills Act noncompliance. The notary has supervised the execution, and the notarial presumption of validity sheathes the will. Observers in the common law world have occasionally suggested<sup>30</sup> that some version of notarial testation, perhaps mandatory, might be devised in our legal system in order to prevent laymen from attempting those home-drawn wills that so frequently fail on account of pathetic violations of the Wills Act formal requirements. For present purposes it should suffice to say that grave objections can be advanced against mandatory notarial testation,<sup>31</sup> and that in any event the topic would once again lead us away from the proper sphere of living probate. Living probate is not meant as a remedy for the problem of the home-drawn will. In wills that fail for formal defects, questions of capacity need never be reached. Living probate, which contemplates ante-mortem judicial proceedings, concerns the lawyer-served end of the estate planning spectrum where compliance with the Wills Act forms is routinely achieved.

Sometimes in discussion of living probate a rather opposite point is suggested: since living probate is not the answer to the intractable problems of mass testation, and since only a relative handful of testators would have occasion to make use of it, living probate is a frill that the legal system can do without. The answer, of course, is that many established legal procedures and remedies are seldom used; the temporary restraining order and the equitable tracing decree, for example, are scarcely common-

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30. JUSTICE (British Section of the International Commission of Jurists), HOME-MADE WILLS 1, 4-6, 8 (1971). Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571 (1933), thought that living probate was a good cure for execution defects, but did not propose making the procedure mandatory.

31. The *Justice* proposal for compulsory notarial testation, *supra* note 30, would extend notarial procedure far beyond the European systems, where the notarial will is an optional and relatively seldom used mode of testation. Since the common law world scarcely knows a proper notary, the *Justice* proposal finds it "advisable to have, attached to the staff of each registry or subregistry of births, marriages and deaths one or more officials ('Wills Officers') who would be qualified to act as witnesses of wills." *Id.* at 5. This is, of course, the standard English nostrum of recent decades: paternalistic bureaucratization and socialization, without regard to the alternatives and the costs. The proposal is also self-defeating, since it would require the invalidation of wills not made in accordance with the awkward but mandatory procedure.

There are some less drastic steps that can be taken to reduce the incidence of home-drawn wills that fail for violation of the Wills Act formal requirements. The Uniform Probate Code has tried to reduce the number and complexity of formalities, so laymen would have less to get wrong..See UNIFORM PROBATE CODE art. II, pt. 5, General Comment; and §§ 2-502 to 503 & Comments. I have elsewhere urged that the proponents of a defectively executed will should be allowed to prove that the defect was harmless to the purposes of the Wills Act. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

place. So long as the extortionate capacity contest constitutes a real threat to the estate planning of the elderly, the inclination should be to provide the procedural device needed to forestall it. If living probate is to be fairly resisted, it must be on the ground that the gain is not worth the cost. Having reached considerations of cost, I now turn to discuss the actual design and operation of living probate procedure.

## II. THE CONTEST MODEL

The crux of the problem we have been discussing is that the post-mortem format in which the capacity contest is now fought seriously disadvantages the proponents of the will by requiring that the testator whose condition is the issue be unavailable before the contest can be aired. The natural instinct of a legislative draftsman contemplating this predicament is to devise a procedure that moves the contest forward into the lifetime of the testator.

Both the Michigan statute of 1883 and the North Dakota statute of 1977 took this approach to living probate. They authorized the testator to sue to establish his capacity to execute the particular will against defendants comprising those persons who would be his heirs if he were to die at the moment of the suit. (I shall hereafter call these people the "heirs apparent."<sup>32</sup>) The Michigan statute, which was declared in violation of the state constitution on its first attempted use,<sup>33</sup> foundered on account of a variety of defects that a modern draftsman would not repeat.<sup>34</sup> The North Dakota statute, written against the background of the extensive twentieth-century experience with the declaratory judgment mechanism, is the better example. It allows the testator to "institute a proceeding . . . for a judgment declaring the [formal] validity of the will . . . and the testamentary capacity and freedom from undue influence of the person executing the will."<sup>35</sup>

This legislation does indeed respond to the need of the proponents of the will. The ante-mortem will contest permits a fundamental enrichment of the proofs. The testator whose condition is in issue can appear in court for the trier to observe and to exam-

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32. Other labels are known: "heirs expectant," "heirs presumptive." The North Dakota statute describes these people as "all the testator's present intestate successors." N.D. CENT. CODE § 30.1-08.1-02 (Supp. 1977).

33. *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N.W. 28 (1885).

34. See *Fink*, *supra* note 4, at 268-74.

35. N.D. CENT. CODE § 30.1-08.1-01 (Supp. 1977).

ine. He becomes available for medical examination, and he will have the opportunity to guide cross-examination and rebuttal of opposing witnesses. The attraction of this solution is manifest. It appears at once simple and apt. Since the problem is one of timing—undue postponement of the contest—the remedy is to accelerate the contest into the testator's lifetime.

Unfortunately, a series of closely interconnected changes other than this one of timing also take place when living probate takes this form of an accelerated will contest.

(1) To speak of accelerating the contest is to assume that the testator's fear would necessarily materialize, that the contest will be brought against his estate post-mortem if he is not allowed to bring it ante-mortem. But, of course, that will not always be true. Any anticipatory remedy scheme involves some overprediction among the user class.

If a testator mistakenly foresees a will contest that would not have been brought, the heirs apparent can simply concede or default; little harm is done, and the testator obtains the decree he wants for his own peace of mind. But there are situations in which the heirs apparent would contest as defendants a will that they would not have contested as objectors to probate: the testator's suit may be an irreparable blow to family harmony, and persons who would have been loath to start trouble may then decide to finish it; the estate may be worth more in the prospect than in the leaving, on account of consumption or devaluation in the interval between testation and succession; the contumacious among the heirs apparent may predecease the testator; and so forth. In these cases the overprediction incident to the ante-mortem contest format will increase the total stock of will contests, and that must be reckoned as a social cost. The courts must process the extra caseload, and under the American system of minimal recovery of court costs from the litigants, the taxpayers will subsidize it. Furthermore, because litigation is such an unpleasant activity for the parties, especially litigation as ugly as a family fight over the question of whether one of the members is demented, there are nonfinancial reasons for treating an extra increment of such litigation as imposing a worrisome social cost.

(2) Under the Contest Model of living probate the parties are reversed. Those who deny the testator's capacity—the plaintiffs in conventional capacity contests—are made defendants in the ante-mortem suit. This transposition might have implications adverse to the testator for the allocation of the burden of

proof,<sup>36</sup> but otherwise it works to the detriment of the persons made defendants. The Contest Model requires the heirs apparent to make the decision to litigate earlier than it is in their interest to do so, quite apart from the evidentiary advantage that they have in post-mortem contests as a result of the testator's enforced silence and which living probate is designed to overcome.

To take an example already alluded to, the heirs apparent who successfully defend a living probate suit must still wait for the testator's death before any of them can acquire a beneficial interest in his property. Decades can separate victory from succession, during which time the property can diminish in value for a variety of reasons. Depending upon the relative ages and affluence of the parties, the difficulty of the proofs, and the other factors that bear on the risk preferences of the heirs apparent, the financial investment necessary to defend such a lawsuit may appear quite unwise, even though the testator be quite mad.

Perhaps the most striking difficulty that inheres in conceiving of living probate as a lawsuit between the testator and his heirs is expressed in a fundamental maxim of property law: *nemo est haeres viventis*, commonly rendered as "the living have no heirs."<sup>37</sup> Heirship arises at the moment of the ancestor's death. Those of his heirs apparent who predecease him do not become his heirs-at-law; while the ancestor lives, there is a possibility that persons yet unborn may be among his ultimate heirs; and persons such as the children of a living child who have been born but are not among the heirs apparent may eventually become heirs if their parent predeceases the testator.

The North Dakota statute deals with this problem by fiat: the heirs apparent are "deemed possessed of inchoate property rights."<sup>38</sup> This legislative patent may suffice to create standing and interest for purposes of the jurisdiction's case-and-controversy requirement, but it does not face up to the underlying dilemma of the heirs apparent. Those named as contestants may not survive to be beneficiaries even if they fight and win (at their own expense); the ultimate heirs may include persons who are not heirs apparent but who will be bound by litigation to which they were not parties;<sup>39</sup> and the defendants are exposed to the range

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36. In some, but not all, jurisdictions, a presumption of sanity shifts the burden of proof to the contestants. See 9 J. WIGMORE, EVIDENCE § 2500, at 356-58 (3d ed. 1940). In living probate, however, the presumption of sanity from due execution should not pertain; the proceeding is irregular and the burden of proof should, as usual, follow allegation.

37. Literally, "no one is the heir of the living."

38. N.D. CENT. CODE § 30.1-08.1-02 (Supp. 1977).

39. Professor Fink argues that "the interests of remote and possibly unborn takers

of litigation management difficulties usually associated with a (plaintiff's) class action, especially the free rider problem, which comes about because of the absence of any provision for the active litigants to enforce contribution from others who may benefit from the litigation.

The largest failing of the North Dakota scheme is not intrinsic to the Contest Model of living probate and could have been avoided. We have seen how the difficulties incident to possible fluctuations among the heirs apparent and in the estate are magnified by the necessity of allocating and paying defensive litigation costs at a time potentially so far in advance of actual probate. It is a serious mistake of legislative policy to permit the testator to inflict upon his heirs apparent the choice between defaulting or bearing these accelerated costs. Living probate is a testator's option, provided for the testator's benefit, and it should proceed at the testator's expense. Any living probate scheme, but especially one like the North Dakota statute that is fashioned in the Contest Model, is unfair if it does not require the testator to defray the reasonable costs of opposing his claim.

No reform, however, can cure the basic shortcoming of the Contest Model, which is the inherent want of defensive ripeness. The testator needs to have his capacity adjudicated before it is squarely in the interest of his heirs to challenge it. The conventional adversarial format of the will contest against the testator's heirs cannot really be adapted to solve this problem.

### III. THE CONSERVATORSHIP MODEL

The thesis of the present Article is that a reconceptualization of the underlying cause of action along the lines of the existing procedure that is used to determine the capacity of the living with respect to their property in protective proceedings would eliminate the defects that have characterized the Contest Model of living probate.

Every Anglo-American legal system has a court which takes jurisdiction over the affairs of persons who become unable to care for themselves or their property. In England it is aptly called the Court of Protection. In the United States this jurisdiction is com-

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. . . would usually coincide with the interests pressed by present takers [*i.e.*, by the heirs apparent]; thus the doctrine of 'virtual representation' would ordinarily protect [*sic*; estop?] future takers." Fink, *supra* note 4, at 275-76. Thus, for example, Fink would allow a child who lacked the heart to resist his parent's living probate suit to bind his own children, the testator's grandchildren, by his default, even if the child thereafter predeceased the testator, leaving the grandchildren as the testator's actual heirs.

monly attached to the probate court or to the probate division of the court of general jurisdiction. Although this protective jurisdiction and its basic principles of procedure are ancient, there is wide diversity on matters of terminology and practical detail. For simplicity's sake I shall base the present discussion upon the fairly widely adopted<sup>40</sup> model of the Uniform Probate Code (UPC). The UPC exemplifies the modern tendency to call proceedings to protect the property of an adult "conservatorship" and to restrict the term "guardianship" to the supervision of the person's nonproprietary affairs.<sup>41</sup> In many states, however, the term "guardianship of the property" is still used for what we shall be describing as conservatorship. Nothing of importance turns on the terminology; what is hereafter called the Conservatorship Model of living probate might easily have been called the Guardianship Model.

Protective proceedings may be involuntary, in the sense that they are instituted on the motion of someone other than the person to be protected and are resisted by him; or voluntary, in which instance the person to be protected himself requests the creation of the protective regime.<sup>42</sup> The analogue to living probate is, of course, the latter. Under the UPC procedure, the person to be protected must be represented by counsel, and the court is empowered to have him examined by a court-appointed physician.<sup>43</sup> There is provision for notice and right of appearance for relatives and others "who would be adversely affected" by mismanagement of his affairs.<sup>44</sup> If the court determines, after hearing, that the person is sufficiently disabled that his affairs require conservatorship, the court may (either directly or through an appointed conservator) exercise "all the powers over his estate and affairs which he could exercise" if he were able.<sup>45</sup> Powers to enter into or to alter a variety of gratuitous transfers commonly regarded as will substitutes are expressly included, but the power to make a will is expressly excluded.<sup>46</sup> (This exclusion, which makes perfectly good sense in a pure conservatorship scheme, is discussed in Subsection B below).<sup>47</sup>

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40. Regarding state adoption of the Uniform Probate Code, see 8 UNIFORM LAWS ANN. 83 (Supp. 1979).

41. UNIFORM PROBATE CODE §§ 1-201(6), -201(16), 5-101, -312, -401(2), -409.

42. UNIFORM PROBATE CODE §§ 5-404 to 407.

43. UNIFORM PROBATE CODE § 5-407.

44. UNIFORM PROBATE CODE §§ 5-404(a), -405.

45. UNIFORM PROBATE CODE § 5-408(3).

46. UNIFORM PROBATE CODE § 5-408(3).

47. See text at note 66 *infra*.

### A. *The Procedure in Outline*

The suggestion now to be developed is that this conservatorship procedure lends itself to imitation for the design of a living probate system. We are adapting a long-established procedure for determining the competence of the living that has been constructed with due regard for the interests of the person whose property is at stake, his relatives, and others. We may sketch the main features of Conservatorship Model living probate as follows:

#### 1. *Initiation*

The testator would petition the court that now makes capacity determinations in conservatorship and guardianship cases for a declaration that he possesses capacity to execute a particular will, and he would attach the will in executed form to his petition.<sup>48</sup> Attaching the will involves publicity and thus the sacrifice of the privacy that is such a desirable incident to ordinary will-making, but the sacrifice is essential. The standard of the substantive law is testamentary capacity not in the abstract, but in the context of the particular testamentary disposition. That disposition is disclosed to the trier in post-mortem capacity litigation,<sup>49</sup> and it would have to be in ante-mortem proceedings as well.<sup>50</sup>

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48. I see no reason for in-court execution of the will. Since counsel will be obligatory, see text at note 51 *infra*, he can supervise out-of-court execution. Having the will executed in advance of the living probate proceeding protects against the testator dying with the will unexecuted before the lawsuit comes to adjudication. A contestant might attempt to argue in subsequent post-mortem proceedings that the testator was in fact incapable when he executed the will, which is the time as of which capacity is relevant, and that he secured his living probate immunization during a legally irrelevant subsequent "lucid interval." Although such a contest should be easily defeated, an estate planner who wanted to forestall it could have the testator re-execute the will on the date and hour of adjudication.

49. For a stimulating argument against this practice, see Comment, *A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity*, 2 CONN. L. REV. 616 (1970).

50. Reacting to a prepublication draft of this Article, Professor Gregory Alexander of the University of Georgia Law School has prepared a paper pointing out that the will could be kept secret if the living probate decree were made nonbinding. Alexander, *The Conservatorship Model: A Modification*, 77 MICH. L. REV. 86 (1978). In evaluating this suggestion, readers should bear in mind that the testator who values ante-mortem secrecy over post-mortem collateral estoppel already has available the devices described in the text at notes 16-22 *supra*. I find it hard to imagine that there would be much potential demand among testators for a *via media* between those procedures and true living probate that imports collateral estoppel, although I see no particular harm in a legislative draftsman providing such an option.

In the post-mortem contest that Alexander's procedure would permit, counsel for the average contestant would find it child's play to identify fact issues (especially of the undue influence variety) beyond the scope of the former inquiry in the *ex parte* proceeding,

As in voluntary conservatorship proceedings,<sup>51</sup> the petitioning testator should be obliged to be represented by counsel. The requirement of representation should assure adequate preliminary counselling of the testator and proper drafting and execution of the will; it would also protect against any frivolous use of the procedure by a perverse or entertainment-seeking testator.<sup>52</sup>

## 2. Parties; Guardian Ad Litem

The liberal provision for notice and right of appearance in existing conservatorship practice should be carried over to Conservatorship Model living probate. The heirs apparent, the beneficiaries named in the will that is the subject of the proceeding, and the beneficiaries named in any former will or wills that might be revoked or amended under the new one should have the right to notice<sup>53</sup> and appearance.

The guardian ad litem is a familiar figure of protective jurisdiction. In a Conservatorship Model living probate scheme this device can be adapted to overcome the defensive disadvantage of the heirs apparent, which is, as we have seen, the great problem of Contest Model living probate. The appointment of a<sup>54</sup> guardian ad litem should be mandatory. He would represent all persons whose ultimate property interests might be adversely affected by a mistaken determination that the testator possessed capacity to execute the will. That is to say, he would represent the heirs apparent, all potential heirs unborn or unascertained at the time, and persons whose potential interests under any previous will or wills still in force might be impaired under the new will. The heirs apparent would, therefore, have the attractive choice of declining to contest the testator's suit in their own names, while still being represented by the guardian ad litem. They would be able to communicate any relevant information or suspicions to the guardian ad litem in confidence, without having to take actions overtly hostile to the testator. (If this procedure is to serve its

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thereby resisting summary judgment and restoring his strike suit to its full nuisance value. I fear that Alexander's suggestion tracks Continental notarial will procedure too closely to be an adequate remedy against the seamy abuses so characteristic of adversary procedure in American will contests. The estate planning bar would understand this, and the optional nonbinding living probate procedure would only clutter the statute book.

51. UNIFORM PROBATE CODE § 5-407(c).

52. For other deterrents to overuse, see the discussion of costs in text at notes 55-56 *infra* and text at note 39 *supra*.

53. See UNIFORM PROBATE CODE §§ 5-405, 1-401; Fink, *supra* note 4, at 284-86.

54. Or more than one if in a particular situation there were a significant conflict of interest among these people respecting the capacity determination.



purpose, the requirement of notice to the heirs apparent and to the beneficiaries under any prior will or wills thought to be affected by the new will is essential.) The guardian ad litem would not necessarily have to wage bitter contest in such a case, no matter how sane the testator appeared, but he would be obliged to put the testator to fair proof. Subject to court supervision, the guardian would have powers of discovery, including the right to have documents produced and to take depositions in matters bearing on possible undue influence.

The guardian ad litem device in Conservatorship Model living probate has two distinct advantages over the will-contest-against-the-heirs format discussed in Part II of this Article. It would permit full development and ventilation of evidence of incapacity without requiring family members to step forward and assert that the testator lacked capacity. Those positions adverse to the testator would be developed, but not in the exaggerated mold of adversary contest, which has such unpleasant implications for family harmony and for the human values at stake. Second, in combination with the cost-shifting provision mentioned next, the guardian ad litem device cures the defensive awkwardness that bedevils the Contest Model of living probate. The heirs unborn or unascertained would be represented, as would those of the heirs apparent who, under Contest Model procedure, would have to calculate that their chances of profiting were too remote to justify litigating.

### 3. *Costs*

For the reasons developed at the conclusion of Part II,<sup>55</sup> justice requires that the testator be required to pay the reasonable costs of the guardian ad litem. This cost-shifting would also constitute an appropriate disincentive to inconsiderate use of the living probate system.

The concern is sometimes voiced in discussions of living probate that testators would use the procedure to excess. Similar reservations were expressed earlier this century when generalized anticipatory relief through the declaratory judgment format was being routinized in American civil procedure, and the concern turned out to be groundless. Court proceedings are expensive, uncertain, awkward, public, and altogether unpleasant. There is no foundation for the idea that any significant segment of the populace would find the opportunity to litigate testamentary ca-

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55. See text following note 39 *supra*.

capacity attractive.<sup>56</sup> The further deterrent of the cost-shifting rule should eliminate all doubt on this point.

#### 4. *Hearing and Decree*

As provided in present conservatorship procedure, any appropriate medical examination would be conducted automatically; the results would be made available in advance of hearing to the trier (and to the guardian ad litem and any other litigants). If persuaded that the testator possessed the requisite capacity and freedom from undue influence, the court would issue an ante-mortem judgment that would be conclusive on the point in post-mortem proceedings to probate the will.

This version of living probate would also follow present conservatorship procedure and have the court determine testamentary capacity without the use of a jury. In this respect Conservatorship Model living probate, which is otherwise oriented towards improving the defensive opportunities of potential challengers as compared to Contest Model procedure, would provide an important improvement for the testator.

A number of American jurisdictions provide a right to jury trial for persons resisting (involuntary) guardianship or conservatorship proceedings;<sup>57</sup> the UPC leaves the jury right to local option in guardianship matters,<sup>58</sup> but does not employ jury procedure in voluntary conservatorship proceedings. The petitioner seeking a protective regime has nothing to gain from jury trial, and the interests of others are too remote. In the context of living probate, nonjury procedure would also be advisable on strictly functional grounds, since the anticipatory format would bring about such a fundamental change in the nature of the proofs. In a conventional will contest convened when the testator is in his grave, the issue of his capacity at the time of the execution of the will has to be inferred from scattered evidence of conduct, circumstances, and condition, on which relatively little adjudicative expertise can be brought to bear, and which a panel of laymen might be thought to be able to try as well as a professional judge. In living probate, however, where the testator is available for

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56. On the other hand, just those factors that would make a testator loath to use living probate procedure should prevent the drawing of any negative inference from its nonuse. Contestants' burden should not be lightened on the ground that a testator did not put himself through costly, public, unpleasant living probate proceedings.

57. See generally Annot., Constitutional Right to Jury Trial in Proceeding for Adjudication of Incompetency or Insanity or for Restoration, 33 A.L.R.2d 1145 (1954).

58. UNIFORM PROBATE CODE § 5-303(b).

testing, medical evidence will become vastly more central. A judge who deals regularly with the gerontology questions that recur in protective jurisdiction develops an adjudicative expertise to which juries cannot aspire. Living probate is too novel a cause of action for the heirs apparent to have any historic claim to jury trial, and there is no functional justification for it either. The analogy to existing conservatorship and probate jurisdiction reinforces the view that Conservatorship Model living probate belongs on the equity side of the law/equity test for jury rights.

### 5. *Revocation*

There has been a tendency in the literature and the legislation of Contest Model living probate to insist that court approval of testamentary capacity should somehow transform the particular will into a kind of "court will" requiring court approval for any subsequent revocation or amendment that the testator might decide to undertake.<sup>59</sup> I doubt that the point would have practical importance, because most testators who are at once sufficiently prudent and well-counselled to have used living probate procedure and sufficiently aged or decrepit to have needed it will not lightly venture out of the safe harbor that they will have achieved. The testator who uses living probate procedure will almost always be making his true "last will." Further, if the need for modification does become inevitable, he and his lawyer are likely to understand that the circumstances that made the use of living probate advisable in the first place are persisting, and that the procedure ought to be used again despite the nuisance and expense. However, as a matter of procedural law, there is no intrinsic reason<sup>60</sup> to impose particular requirements for the revocation or amendment of a will that has been the subject of a successful living probate action.

#### B. *Testation Under Conservatorship Model Procedure*

To complete our sketch of this preferred format for living probate, we need to glance at certain of the interactions between the substantive law of testamentary capacity and the Conservatorship Model remedy scheme.

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59. *E.g.*, N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1977).

60. When a Continental notarial execution and deposit scheme is in effect, the rule must be otherwise, *e.g.*, for Germany, BÜRGERLICHES GESETZBUCH [BGB] § 2256; but I have explained, *see* text at notes 23-31 *supra*, why living probate need not be connected to and should not be confused with supervised execution and deposit. *See also* note 48 *supra*.

1. "A lunatic may draw a valid will."<sup>61</sup>

Legislation and case law have distinguished three levels of capacity for three different judicial purposes. We need to pause briefly over this scale of substantive capacity law in order that it not confuse our own particular topic.

As part of its laudable effort to disentangle conservatorship of the estate from guardianship of the person, the UPC is careful to separate the "disability" that occasions conservatorship from the "incapacity" that necessitates guardianship. The Official Comment says: "The purpose of guardianship is to provide for the care of a person who is unable to care for himself. There is no reason to seek a guardian in those situations where the problems to be dealt with center around the property of a disabled person."<sup>62</sup> A person who requires conservatorship of his financial affairs may still be competent to handle his domestic arrangements.

For purposes of writing a will there is a third standard, testamentary capacity, which is universally regarded in the Anglo-American authorities as the lowest—beneath the guardianship and conservatorship levels. Hence, as indicated in the language quoted in the heading to this section from a Florida opinion, the courts have on numerous occasions found that a person already adjudicated incompetent ("lunatic") for purposes of guardianship or conservatorship nevertheless possessed adequate capacity to make a will.<sup>63</sup> A variety of explanations, none of them particularly convincing, has been offered for this rule. It has been said, for example, that a lunatic needing sustained protection might still have "lucid intervals" in which he would be capable of formulating testamentary intent.<sup>64</sup> It has been said that since testamentary dispositions will not render the person a public charge during his lifetime, there is less reason to interfere with them.<sup>65</sup> There is some hint that a person is thought to need more of his wits when engaged in a transaction, commercial or gratuitous, with a fully capable and self-interested person, but the counterargument seems at least as attractive—that a testamentary disposition is more likely to be ill-considered than an inter vivos transfer

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61. *Skelton v. Davis*, 133 So. 2d 432, 436 (Fla. Dist. Ct. App. 1961).

62. UNIFORM PROBATE CODE § 5-304 Comment; see generally UNIFORM PROBATE CODE §§ 5-303, -401(2) & Comment.

63. See Annot., Effect of Guardianship of Adult on Testamentary Capacity, 89 A.L.R.2d 1120 (1963).

64. See, e.g., *Succession of Lanata*, 205 La. 915, 18 So. 2d 500 (1944).

65. *Jenckes v. Court of Probate*, 2 R.I. 255, 258 (1852).

because a will involves no present parting with ownership or possession.

Regardless of its rationale, however, the rule that pitches the substantive standard of capacity for testation below the guardianship and conservatorship levels has reinforced the division between inter vivos and testamentary jurisdiction—between protection and probate. Courts of protection have not had occasion to reach the precise question of testamentary capacity. This explains, for example, why the UPC presently excludes the power to make a will for a disabled person from the otherwise plenary powers of the conservatorship scheme,<sup>66</sup> and it also explains why inventive estate planners have found it so difficult to take advantage of the existing protective jurisdiction in order to fashion some form of “do-it-yourself” living probate.<sup>67</sup>

Nevertheless, it is easy to see why the lower substantive standard of testamentary capacity would pose no difficulty for a living probate system based upon the procedures of the court of protection. The present concern to prevent the two substantive standards from being jumbled would have no bearing on a procedure designed expressly to permit questions arising under the lower standard to be determined. What we have called Conservatorship Model living probate would on no account confuse the substantive standard for conservatorship questions with that for testation. It would simply adapt the procedures used to determine the capacity of the living in protective jurisdiction for the procedural needs of the living testator. There are already common law jurisdictions in which the court of protection is empowered to write<sup>68</sup>

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66. See UNIFORM PROBATE CODE § 5-408(3); text at note 46 *supra*.

67. *E.g.*, *Pond's Estate v. Faust*, 95 Wash. 346, 163 P. 753 (1917); *Pond v. Faust*, 90 Wash. 117, 155 P. 776 (1916). For intimations of a more liberal view, see *Cornia v. Cornia*, 546 P.2d 890 (Utah 1976), noted in ABA Committee on Trends, Probate and Trust Division, *Significant Current Trends in Probate and Trust Law—1977*, 12 REAL PROP., PROB. & TRUST J. 528, 529 (1977). Evidence generated in the course of conservatorship proceedings has been used to sustain testamentary capacity. See, *e.g.*, *Gilmer v. Brown*, 186 Va. 630, 44 S.E.2d 16 (1947).

For an unsuccessful attempt to use existing declaratory judgment procedure to nullify the will of a living testator, see *Cowan v. Cowan*, 254 S.W.2d 862 (Tex. Ct. App. 1952).

68. For the English practice, see *Re H.M.F.*, [1975] 2 All E.R. 795; Hunt & Reed, *Statutory Wills for Mentally Disordered Persons*, 34 CONVEYANCER & PROP. LAW. (n.s.) 150 (1970).

It has been pointed out by various students of living probate, including Cavers, *supra* note 6, at 448 n.27, and Alford, *Some Major Problems in Alternatives to Probate*, 32 REC. ASSN. B. CITY N.Y. 53, 72-73 (1977), that federal law once made nominal provision for ante-mortem determinations of the testamentary capacity of certain Indians. See DEPT. OF INTERIOR, U.S. INDIAN SERV., REGULATIONS RELATING TO THE DETERMINATION OF HEIRS AND APPROVAL OF WILLS § 53 (1915). It appears that ante-mortem review of Indian wills was abandoned in 1923. See DEPT. OF INTERIOR, U.S. INDIAN SERV., REGULATIONS RELATING TO

or to prevent the writing<sup>69</sup> of a will. We can be confident, therefore, that the lower substantive standard fits easily enough into the procedural model that we have been recommending.

## 2. *Undue Influence*

Broadly speaking, two major theories may be advanced in testamentary capacity litigation in present post-mortem will contests; they are commonly known as the "unsound mind" and the "undue influence" doctrines.<sup>70</sup> We have seen why living probate is especially apt for the unsound mind case, in which the essential issue is the general mental condition of the testator. In the undue influence case, the typical allegation is that a wrongdoer took advantage of the testator's condition to importune him into making or enlarging a testamentary provision for the wrongdoer. Because such a case turns as much on the wrongdoer's conduct as on the testator's condition, it involves proofs that may be much wider than the medical evidence of testator's condition that living probate is well-suited to generate. It can be suggested, therefore, that living probate should be confined to the unsound mind cases.

Many factors point in the opposite direction, however, and I think that the recent North Dakota statute, like living probate proposals of the past, has taken the correct position in providing for a declaration of "the testamentary capacity and freedom from undue influence of the person executing the will."<sup>71</sup> Two features of the Conservatorship Model living probate that we have described make the system well suited to flushing out any wrongdoer who would be brazen enough to contemplate having a captive testator procure a living probate decree in order to immunize a tainted will. The will is disclosed with the living probate petition, so that the unnatural disposition would show on the face of the litigation documents at the outset of the proceeding, and the procedure envisions a guardian ad litem and a court with powers to investigate suspicions of undue influence. Failure to extend the res judicata effect of the living probate decree to the undue influence theory would undermine most of the reform, since it is so

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THE DETERMINATION OF HEIRS AND APPROVAL OF WILLS § 37 (1923). I have not been able to locate in the published materials any evidence that the authority to review wills for capacity ante-mortem was put to use. See DIGEST OF FEDERAL INDIAN PROBATE LAW (1972), with its marvelously named testators (*e.g.*, Alexander Stinking Bear, Lucy Little Tail, Great Deal/Plenty Woman).

69. See *In re Estate of Bechtold*, 150 N.J. Super. 550, 376 A.2d 211 (Ch. Div. 1977).

70. See generally T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 232-41, 255-62 (2d ed. 1953).

71. N.D. CENT. CODE § 30.1-08.1-01 (Supp. 1977).

easy (and so common) to tack an undue influence count to an unsound mind claim.<sup>72</sup>

#### IV. CONCLUSION

This Article accords with a long tradition of scholarship in recognizing the need for a living probate system. The particular thesis that I have put forth is that the difficult procedural problems that arise if living probate is constructed in the format of an anticipatory will contest are neatly avoided by modelling the system upon existing procedures for determining the capacity of the living in protective jurisdiction. This Conservatorship Model living probate in the form that I have described it serves the needs of the testator as well as Contest Model procedure (even better if the avoidance of jury trial is regarded as an improvement); the procedure is much more sensitive to preserving family harmony; it cures the defensive awkwardness of Contest Model procedure; and it contains important internal constraints against overuse.

The geriatric revolution is allowing ever larger numbers of people to reach the age of declining physical and mental condition. Old age is not a good time of life to do one's estate planning, but circumstances may always arise in which an elderly or afflicted person will have no choice but to revise or to make a will. We cannot expect that everyone will have the double good fortune to do his estate planning in the prime of life, and then to enjoy tranquil family and financial affairs that give him no cause to revise his will. The testator who has cause to fear that his physical and mental condition will be made the basis for extortionate post-mortem litigation challenging his testamentary capacity has a moral claim on the legal system to provide him with the means of preventing the depredation. I hope to have shown the way out of the procedural problems that have sidelined the living probate remedy in the past. The relatively few testators who need living probate ought to be allowed it under a procedure that safeguards all the relevant interests.

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72. See T. ATKINSON, *supra* note 70, at 253-55.