2021 HOUSE JUDICIARY

HB 1363

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1363
2/2/2021

Relating to ante-mortem probate of wills.

Chairman Klemin called the hearing to order at 10:52 AM.

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

Discussion Topics:

- Proceeding for judgement of a will by legal guardian
- Validity and invalidity of wills

Rep. Sanford: Introduced the bill. 10:53

Michael Kruegger: Testimony #4810, #4811, #4812, #4813, #4814

Kathy Hann: Testimony # 4808 11:04

Blaine Johnson, Crowley Fleck PLLP: Testimony #4921, #4927 11:10

Additional written testimony: #4671

Chairman Klemin closed the hearing at 11:24.

DeLores D. Shimek
Committee Clerk

IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

Jean Kruger, by and through her Co-Guardians Michael Kruger and Kathy (Kruger) Hann, Petitioners, -vs- Ann Marie Kruger, and the Heirs and Beneficiaries of Jean Kruger, Respondents.	Civil No. 18-2019-CV-00089 **ORDER GRANTING** **MOTION TO DISMISS**

SUMMARY OF DECISION

[¶ 1] Petitioners Michael Kruger ["Michael"] and Kathy (Kruger) Hann ["Kathy"], collectively the "Petitioners", filed an Amended Petition for Declaratory Action (Doc. # 4) on January 9, 2019. The Petitioners request the Court grant a Declaratory Judgment invalidating the ward Jean Krueger's ["Jean"] Last Will and Testament (Doc. # 27) dated June 11, 2015. The Respondent Ann Marie Kruger ["Ann"] filed a Motion to Dismiss (Doc. #s 19-23) on April 25, 2019.

[¶ 2] The Court grants the Motion to Dismiss, on the grounds that Jean is surviving and there is not a justiciable matter to invoke the Court's declaratory jurisdiction under N.D.C.C. §§ 32-23-02 and -04 for Michael and Kathy individually as "person[s] interested." The Court also finds Michael and Kathy lack standing as co-guardians/conservators to petition on Jean's behalf and request the Court invalidate the Last Will and Testament under N.D.C.C. § 30.1-08.1-01. The Court concludes the legislative intent was to restrict an action under the North Dakota Ante-

Mortem Probate Act to the "person who executes the will" and then only to declare the "validity" of the Will and not to challenge it pre-death.

STATEMENT OF CASE

[¶ 3] Jean executed a Durable Power of Attorney to Ann Marie Krueger (Doc. # 2, Exhibit 1) on June 9, 2015. Jean then executed her Last Will and Testament (Doc. # 27) on June 11, 2015, naming Ann as her personal representative, and devising almost all of her reported $1.5 million estate to Ann. Michael, Kathy and Ann are Jean's children, and Jean is not survived by a spouse.

[¶ 4] Michael and Kathy filed for guardianship of Jean in Case No. 18-2015-PR-00078. The Neuropsychology Report (Doc. # 3) of Dr. Susan Thompson of Midwest Neuropsychology, dated June 24, 2015, was filed as Exhibit A to the Petition for the emergency appointment (Doc. # 1) on July 17, 2015. Dr. Thompson's impression was Jean suffered from mild to moderate dementia, had present formed visual hallucinations and some mild Parkinsonian type symptoms, and which raised the possibility of Lewy Body Dementia and her status as a vulnerable adult. A hearing was held on the temporary petition on July 24, 2015. The Court appointed Michael and Kathy as temporary guardians/conservators for Jean on July 21, 2015 (Order, Doc. # 10), and affirmed its emergency appointment on July 28, 2015 (Doc. # 14) and allowed the co-guardians/conservators to act independently.

[¶ 5] Dr. William Haug, Jr. of Altru Health Systems was appointed as the expert examiner (Order, Doc. # 26). His Report (Doc. # 32) was filed on September 21, 2015. Dr. Haug also noted Jean's dementia and her visual hallucinations. A contested hearing was held on October

7, 2015. The Court entered its Order, appointing Michael and Kathy as Jean's permanent co-guardians/conservators (Order, Doc. # 53), filed on October 20, 2015, and including full authority in legal and financial matters and her healthcare needs.

[¶ 6] Michael and Kathy filed a Petition for Declaratory Judgment (Doc. # 2) in Case No. 18-2019-CV-00089 on January 9, 2019, pursuant to N.D.C.C. § 59-10.1-01 (Action to Determine Validity of Trust). On the same date, they filed an Amended Petition for Declaratory Judgment (Doc. # 4), under N.D.C.C. Chapter 32-23 (Declaratory Judgments) and N.D.C.C. § 30.1-08-01 of the North Dakota Ante-Mortem Probate Act. Michael and Kathy seek to invalidate Jean's Last Will and Testament due to her dementia and vulnerable condition. They include a letter dated April 25, 2017 from Dr. Thompson (Doc. # 28), in which Dr. Thompson stated she examined Jean on June 24, 2015, and found Jean suffered from at least a moderate degree of dementia which rendered her vulnerable to undue influence, coercion or exploitation.

[¶ 7] Ann was served with the petition on January 9, 2019 by the Grand Forks County Sheriff (Doc. # 3), but did not file an Answer (Doc. #13) until March 6, 2019. Ann then filed a Motion to Dismiss the amended petition (Motion to Dismiss, Doc. #s 19-23), filed on April 25, 2019. Ann alleged "Petitioner's Complaint fails to state a claim upon which relief can be granted," and the Court "lacks subject matter jurisdiction over the cause of action and Petitioners lack standing to commence an ante mortem probate" of the Jean's Estate. Michael and Kathy filed a Brief and supporting documents (Doc. #s 26-33) on May 9, 2019, alleging they have standing as Jean's Co-Guardians/Conservators to pursue an Ante-Mortem declaratory judgment to invalidate the Will. Ann filed a Reply Brief (Doc. #s 34-40) on May 17, 2019.

[¶ 8] The Motion to Dismiss was heard before the undersigned on May 28, 2019. No testimony or evidence was offered. The Court heard arguments of counsel, took the matter under advisement, and now issues this Order Granting Motion to Dismiss.

ISSUES FOR DETERMINATION

[¶ 9] Do Michael and Kathy, in their capacity as Co-Guardians/Conservators, have standing or authority to request declaratory relief, invalidating Jean's Last Will and Testament under the North Dakota Ante Mortem Probate Act?

[¶ 10] Do Michael and Kathy, in their individual capacities as heirs, or interested persons, in Jean's estate, have standing to bring a declaratory action to invalidate Jean's Last Will and Testament under N.D.C.C., Chapter 23-20 (Declaratory Judgment)?

PRINCIPLES OF LAW

[¶ 11] North Dakota Century Code [N.D.C.C.] § 30.1-08.1-01, Declaratory judgment states:

> **Any person who executes a will** disposing of the person's estate in accordance with this title **may institute a proceeding** under chapter 32-23 for judgment **declaring the validity of the will** as to the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will.

N.D.C.C. § 30.1-08.1-01 (Emphasis added).

[¶ 12] N.D.C.C. § 32-23-02, Power to construe contracts, statutes, and wills states:

> **Any person interested under a will**, written contract or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, **may have determined any question of** construction or **validity arising under the instrument**, statute, ordinance, contract, or franchise **and may obtain a declaration of rights, status, or other legal relations thereunder.**

N.D.C.C. § 32-23-02 (Emphasis added).

[¶ 13] N.D.C.C. § 32-23-04, Rights in trust or estate **determined** states:

> **Any person interested as** or through a personal representative, trustee, guardian, conservator, or other fiduciary, creditor, devisee, **heir, next of kin**, or cestui que trust, **in the administration** of a trust, or **of the estate of a decedent**, an infant, a mentally ill or deficient person, or an insolvent, **may have a declaration or rights or legal relations in respect thereto:**
>
> 1. To ascertain any class of creditors, devisees, heirs, next of kin, or others;
> 2. To direct the personal representative or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
> 3. **To determine any question arising in the administration of the estate** or trust, **including questions of construction of wills** and other writings.

N.D.C.C. § 32-23-04 (Emphasis added).

LEGAL ANALYSIS

[¶ 14] An ante-mortem probate act gives a person the ability to seek court validation of his or her will during lifetime, rather than wait until death and a probate proceeding determines the validity. Only five states have enacted such an act: (1) North Dakota in 1977 (Chapter 30.1-08.1); (2) Arkansas in 1979 (A.C.A. § 28-40-202); (3) Ohio in 1980 (R.C. § 2107.081, repealed and now R.C. § 5817.02); (4) Alaska in 2010 (Alaska Stat. § 13.12.530); and (5) North Carolina in 2015 (N.C.G.S.A § 28A-2B-1).

[¶ 15] Petitioners contend the ante-mortem act is new law and has not been fully interpreted. "In many respect, ante-mortem probate is not a product of this century or even the previous one." *Leopold & Beyer*, Ante-Mortem Probate: A Viable Alternative, Arkansas Law

Review, 1990, Vol. 43:131, Page 148. Even ancient laws and customs are recorded in the Bible (notably the Book of Ruth in the Old Testament and the book of Genesis with Isaac and Jacob), which illustrate accounts of the unquestionable right of inheritance given before the death of the decedent. *Id.* "There is evidence in the early development of English ecclesiastical law that a testament could be proved during the testator's lifetime at the testator's request." *Id.* at 149.

[¶ 16] "In 1883, the Michigan legislature made a novel attempt to cope with the disruptive and uncertain post-mortem will contest by enacting one of the earliest ante-mortem statutes." *Id.* at 152. However, the short-lived statute was declared unconstitutional by the Michigan Supreme Court because it enabled the testator to avoid the rights of a spouse and child by failing to provide proper notice; and it failed to provide for finality of judgment because the will could be modified or revoked. *Id.*, citing *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 239, 23 N.W. 28, 29 (1885). "The *Lloyd* court felt that allowing a judicial determination in such a situation would be paramount to issuing an advisory opinion which was prohibited by Michigan's constitution." *Leopold & Beyer,* at 155, citing *Lloyd,* 56 Mich. at 239, 23 N.W. at 29 (no authority exists for circuit court to decide cases not properly judicial).

[¶ 17] "In 1937, the United States Supreme Court spoke to clarify the issue of a court's authority to issue a declaratory judgment." *Leopold & Beyer*, at 155, citing *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 244 (1937) (upholding constitutionality of Declaratory Judgment Act). "By its decision, the Court ratified the Declaratory Judgment Act and gave a new spark of hope for ante-mortem solutions to post-mortem problems." *Leopold & Beyer, supra.* "The National Conference of Commissioners on Uniform State laws created a special committee (in 1932) to draft a uniform act to establish wills before the death of the testator." *Id.* at 161. "During the early 1940s, the drafters of the Model Probate Code (MPC) gave brief consideration to the possibility

of including provisions for ante-mortem probate." *Id.* at 164. "In the early stages of the development of the Uniform Probate Code (UPC), the drafters again gave serious consideration to inclusion of an ante-mortem procedure." *Id.* at 165. No legislation was enacted despite these revivals.

[¶ 18] "Between 1976 and 1982, many articles were written expressing both the advantages and disadvantages of the ante-mortem alternative." *Id.* The first model, the Contest Model, was proposed by Professor Howard Fink of Ohio State University, and is closely related to the Michigan Act of 1883." *Id.* at 166. "This proposal places the testator and the prospective heirs in an adversarial situation which allows for a declaratory judgment." *Id.* "In 1980, Professor John Langbein of the University of Chicago attempted to solve the problems of the contest model with his proposal of the conservatorship model." *Id.* at 167. While it relies on a declaratory judgment, it appoints a conservator to litigate the interests of all the prospective heirs and beneficiaries." *Id.* This model failed due to notice problems, jurisdictional function and public disclosure concerns. *Id.* The third model was the Administrative Model, proposed by University of Georgia Professors Gregory Alexander and Albert Pearson. *Id.* at 168. This theory eliminated notice requirements and both judicial and adversarial functions by using an ex parte proceeding, with a guardian ad litem appointed as an investigating agent for the court. *Id.*

[¶ 19] North Dakota, Ohio and Arkansas enacted their ante-mortem statutes, all based on the Contest Model. *Id.* at 169. Simultaneously, the National Conference of Commissioners on Uniform State Laws drafted several versions of a Uniform Ante-Mortem Probate of Wills Act; however, the enthusiasm waned and the National Conference abandoned its work on the Uniform Act. *Id.* at 169-170

[¶ 20] North Dakota's law was introduced as Senate Bill No. 2198 on January 19, 1977 (Senate Judiciary minutes, Doc. # 35, ¶ 3). Senator Howard Freed was the sponsor of the bill, who became interested in promoting the act after reading an article on the subject by an Ohio State University professor. *Id.* While the minutes do not identify the professor, it appears the reference was to Professor Howard Fink of Ohio State University who, as noted above, was involved in the early stages of development of the Uniform Probate Code. The committee minutes of both the Senate and House make no reference to any person other than the testator/testatrix having authority to bring a petition for a declaratory judgment on a will. Nor is there any reference to bringing such an action to declare the *invalidity* of a will suspected of being the result of undue influence or incapacity. The bill was narrowly drafted, and done with the view "the person drawing the will is concerned about someone causing trouble if they do not receive the same amount as someone else in the family." Doc. # 35, ¶ 10. The committee made some changes to the draft before the legislature adopted the act; however, those changes do not affect the central issue in this case---- that is whether a third party can bring the action to invalidate a will.

[¶ 21] Attorney Larry Richards makes a sensible argument for the Petitioners' case to have a guardian act on behalf of the incapacitated person who was unduly influenced during a time of incapacity. They ask the will be declared invalid because the medical evidence may be stale or nonexistent at Jean's death. Even our current Attorney General, then State Representative Stenehjem less tactfully said "it's easier to find someone 'crazy' before death than to prove after death." *Id.* But North Dakota's law falls short of these protective and prospective measures. Furthermore, the North Dakota State Bar Association did not heartily endorse this "very imaginative" legislation and its effect on the probate code. Doc. # 35, ¶ 4. As noted, only five states have adopted this seldom used, if at all, pre-death procedure. No filings were discovered in

North Dakota under the Act. Furthermore, the National Conference of Commissioners on Uniform State Laws could not agree on a model act.

[¶ 22] North Dakota has not revised its Ante-Mortem Probate Act since its adoption. Its applicable language for this case is "[a]ny person who executes a will...may institute a proceeding under chapter 32-23 for judgment declaring the validity of the will...." N.D.C.C. § 30.1-08.1-01. Arkansas' statute is almost identical to North Dakota's. It provides "[a]ny person who executes a will...may institute an action...for a declaratory judgment establishing the validity of the will." Arkansas Code Annotated (A.C.A.) § 28-40-202(a). Professor Fink's state, Ohio, is more specific. Ohio's law states: "[a] testator may file a complaint....to determine before the testator's death that the testator's will is a valid will. The right....is personal to the testator and may not be exercised by the testator's guardian or an agent under the testator's power of attorney." Ohio Revised Code Annotated (R.C.) § 5817.02(A). Only Alaska extended the right to other persons to act on behalf of a testator. Its applicable statute states: "[a] testator, a person who is nominated in a will to serve as a personal representative, or with the testator's consent, an interested party may petition the court to determine before the testator's death that the will is a valid will...." Alaska Statutes, § 13.12.530. North Carolina was the last state to enact an ante-mortem law, and modeled it after North Dakota, by stating: "[a]ny petitioner....who has executed a will or codicil may file a petition seeking a judicial declaration that the will or codicil is valid." North Carolina General Statutes Annotated (N.C.G.S.A.) § 28A–2B–1(a). In summary, North Dakota, Arkansas, Ohio and North Carolina restrict the right to bring the action to the person who wrote the will. Only Alaska expressly allows a third party, i.e...a nominated personal representative or an interested party with the testator's consent, to bring the action. In Jean's case, Michael and Kathy would not be able to do so as guardians since they apparently are not nominated as personal representatives nor do they

have her consent if she was able to do so. Interestedly, Professor Fink advised Senator Freed when North Dakota was the first to adopt the Act. But three years later, his State of Ohio deemed it necessary to specifically exclude guardians or powers of attorney, and limit the right to petition as being "personal" to the testator.

[¶ 23] Michael and Kathy argue the ante-mortem act does not specifically prevent a third party representative from petitioning the court to determine the invalidity of the ward's will. Our legislators could have included such language as Ohio to expound on any limits; however, it is unnecessary because our Act is clear as written. The North Dakota Supreme Court, in *Estate of Elken,* 2007 ND 107, stated:

> Statutory interpretation is a question of law, fully reviewable on appeal. GO Comm. ex rel. Hale v. City of Minot, 2005 ND 136, ¶ 9, 701 N.W.2d 865. The primary objective in interpreting a statute is to determine legislative intent. Amerada Hess Corp. v. State ex rel. Tax Comm'r, 2005 ND 155, ¶ 12, 704 N.W.2d 8. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, "the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. The language of a statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence. N.D.C.C. §§ 1-02-03 and 1-02-38(2). We construe statutes to give effect to all of their provisions, so that no part of the statute is rendered inoperative or superfluous. N.D.C.C. § 1-02-38(2) and (4). We also construe statutes to avoid constitutional infirmities. E.g., City of Belfield v. Kilkenny, 2007 ND 44, ¶ 8, 729 N.W.2d 120; In re G.R.H., 2006 ND 56, ¶ 15, 711 N.W.2d 587.

Elken, 2007 ND 107, at ¶ 7. N.D.C.C. § 30.1-08-01 is clear and unambiguous, and reflects the legislative intent expressed by Senator Freed when he introduced the initial draft. Who can bring the petition ["any person who executes a will"], and for what purpose ["declaring the validity of the will"], are stated in plain, ordinary, and commonly understood terms. Senator Freed's

proposed draft on this part of the Act was not amended or revised before its final adoption, nor was it affected by the changes made to other sections of the Act before adoption.

[¶ 24] Petitioners cite *In re the Guardianship of Lillian Glasser*, 2007 WL 867783 (N.J.Super.Ct. March 8, 2007) and *In re Conservatorship of Davis*, 954 So.2d 521 (Miss.App 2007) on the standing issue. *Glasser* involved a proceeding to determine a permanent guardian for the testatrix, and her will was invalidated and litigated while she was living. The invalidation was based on undue influence with a lack of testamentary capacity. *Glasser* is the exception, even in New Jersey. Furthermore, the case was decided under a state statute, N.J.S.A. 3B:12-57(1) which provides: "a guardian shall (10) [i]f necessary, institute an action that could be maintained by the ward including but not limited to, actions alleging...undue influence." The Petitioners have not argued or pointed to any comparable North Dakota statute. In fact, North Dakota specifically denies a conservator the "power to make a will" for a ward. N.D.C.C. § 30.1-29-08(2)(c). Neither side has argued Jean had a Will prior to June 11, 2015, which would have been revived if the disputed Will was invalidated. That issue will be left to the probate court at Jean's death.

[¶ 25] Michael and Kathy cite *Davis* for the proposition a conservator has standing to invalidate a will. *Davis* involved the removal of a conservator, and the court determined the Appellant had standing to bring a claim for removal. The Petitioner was the father of minor daughters who were the sole beneficiaries of the ward's will. As such, they had an "anticipated or expected interest" in the estate and were thus an "interested party" under Miss. Code Ann. § 91-7-285. The Will's validity apparently was not decided.

[¶ 26] North Dakota's Ante-Mortem Probate Act does not include any reference to an "interested party." Michael and Kathy alternatively argue they have standing to invalidate Jean's will under N.D.C.C. § 32-23-02 as stated herein. They point to the language "[a]ny person interested under...a will...may have determined any question of....validity arising under the instrument...and may obtain a declaration of rights, status, or other legal relations thereunder." N.D.C.C. § 32-23-02. This is similar to the standing issue in the *Davis* decision. However, N.D.C.C. § 32-23-04 limits the declaratory action, in this case, to Michael and Kathy as heirs interested in the "estate of a decedent." Thus, no ante-mortem relief is available under Chapter 32-23.

[¶ 27] Michael and Kathy allege their sibling Ann has committed fraud and undue influence against their mother Jean which acts have reduced Jean's assets. The Petitioners have the power as guardians/conservators to "prosecute...actions, claims or proceedings in any jurisdiction for the protection of estate assets...." N.D.C.C. § 30.1-29-24(3)(x). As such, they have the opportunity to obtain and preserve the medical testimony which they assert may be unavailable at Jean's death.

[¶ 28] Ann correctly argues the distinction between incapacity to make a will and incapacity required for a guardianship. Any adult who is of sound mind may make a will. N.D.C.C. § 30.1-08-01. The North Dakota Supreme Court, in *Estate of Wagner, et al v. Keller*, 551 N.W.2d 292, (N.D. 1996) referred to *Storman v. Weiss*, 65 N.W.2d 475, 504-05 (N.D. 1954), in explaining testamentary capacity:

> Testator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the object of his bounty, and his relation

> towards them. He must have sufficient mind and memory to understand all of these facts;.... He must also be able to appreciate the relations of these factors to one another, and to recollect the decision which he has formed.

Wagner, 551 N.W.2d 292, 296. By contrast, "incapacity" for guardianship purposes is defined as:

> "Incapacitated person" means any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency to the extent that the person lacks capacity to make or communicate responsible decisions concerning that person's matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters, or which incapacity endangers the person's health or safety.

N.D.C.C. § 30.1-26-01(2). Thus, testamentary capacity is determined by memory, identity of property, and identity of heirs or devisees. Incapacity for a guardianship is determined by a number of factors indicating impairment in decision making and safety.

FINDINGS OF FACT and CONCLUSIONS OF LAW

[¶ 29] Michael Kruger and Kathy (Kruger) Hann are the appointed co-guardians and conservators of Jean S. Kruger, by this Court's order dated October 16, 2015 in Case No. 18-2015-PR-00078.

[¶ 30] Michael Kruger, Kathy (Kruger) Hann, and Ann Marie Kruger are the children of the ward Jean S. Kruger.

[¶ 31] The Petitioners bring a declaratory judgment action pursuant to N.D.C.C. Chapter 32-23, seeking to invalidate Jean S. Kruger's will dated June 11, 2015 on the grounds of undue influence by Ann Marie Kruger and the lack of testamentary capacity of Jean S. Kruger at such time.

[¶ 32] N.D.C.C. § 30.1-08-01 restricts the filing of a declaratory action to Jean S. Kruger as the person who executed the will, and does not allow any third party representative or interested party to do so on her behalf, including the Petitioners as guardians/conservators. It further restricts the action to seek a judicial determination of the validity, and not the invalidity, of the will. In essence, the statute promotes supporting the Will and not challenging it. The Petitioners lack standing to bring the action on behalf of Jean S. Kruger.

[¶ 33] The Petitioners also bring the declaratory judgment action as heirs to determine the validity of Jean S. Kruger's will dated June 11, 2015, pursuant to N.D.C.C. § 32-23-02. The matter is not ripe or justiciable at this time because Jean S. Kruger is surviving and the statute is limited to determining the heirs' interest in the estate of a decedent. The Court lacks jurisdiction to hear the matter at this time.

ORDER

THEREFORE, IT IS HEREBY ORDERED that:

[¶ 34] The Respondent Ann Marie Kruger's Motion to Dismiss is GRANTED.

[¶ 35] No attorney fees or costs are awarded to any parties; however, the Petitioners shall restore, within sixty days, any funds to Jean S. Kruger's estate which were expended in bringing this action.

Dated this 13th day of June 2019.

BY THE COURT:

Don Hager
Judge of the District Court

GENERAL DURABLE POWER OF ATTORNEY

I, Jean S. G. Kruger, the principal, of 2606 13th Avenue, #312, Grand Forks, ND 58201, designate Ann Marie Kruger, of 2606 13th Avenue, #312, Grand Forks, ND 58201, my attorney-in-fact and agent (hereinafter called agent) in my name and for my benefit:

A. GENERAL GRANT OF POWER: To exercise or perform any act, power, duty, right or obligation whatsoever that I now have or may hereafter acquire, relating to any person, matter, transaction or property, real or personal, tangible or intangible, now owned or hereafter acquired by me, including, without limitation, the following specifically enumerated powers. I grant to my agent full power and authority to do everything necessary in exercising any of the powers herein granted as fully as I might or could do if personally present, hereby ratifying and confirming all that my agent shall lawfully do or cause to be done by virtue of this Power of Attorney and the powers herein granted.

1. POWER OF COLLECTION AND PAYMENT. To forgive, request, demand, recover, collect, receive and hold all such sums of money, debts, dues, commercial paper, checks, drafts, accounts, deposits, legacies, bequests, devises, notes, interest, stock certificates, bonds, dividends, certificates of deposit, annuities, pension, profit sharing, retirement, social security, insurance, or other benefits and proceeds, all documents of title, all property, real or personal, intangible and tangible property and property rights, and demands whatsoever, liquidated or unliquidated, now or hereafter owned by, or due, owing, payable or belonging to me or in which I have or may hereafter acquire an interest; to have, use, and take by all lawful and equitable means and legal remedies and proceedings (including foreclosures, cancellations, and any proceeding permitted by law) in my name for the collection and recovery thereof, and to adjust, sell, compromise, and agree for the same, and to execute and deliver for me, on my behalf; and in my name, all endorsements, releases, receipts, or other sufficient discharges for the same;

2. POWER TO ACQUIRE AND SELL. To acquire, purchase, exchange, grant options to sell, and sell and convey real or personal property, tangible or intangible, or interests therein, including my homestead interest in any real property owned by me or my spouse, on such terms and conditions as my agent shall deem proper;

3. MANAGEMENT POWERS. To maintain, repair, improve, invest, manage, insure, rent, lease, encumber, and in any manner deal with any real or personal property, tangible or intangible, or any interest therein, that I now own or may hereafter acquire, in my name and for my benefit, upon such terms and conditions as my agent shall deem proper.

4. BANKING POWERS. To make, receive and endorse checks and drafts, deposit and withdraw funds, acquire and redeem certificates of deposit, in banks, savings and loan associations and other institutions, borrow money, and execute or release such mortgages, deeds of trust or other security

agreements as may be necessary or proper in the exercise of the rights and powers herein granted;

5. **MOTOR VEHICLES**. To apply for a Certificate of Title upon, and endorse and transfer title thereto, for any automobile, truck, pickup, van, motorcycle or other motor vehicle, and to represent in such transfer assignment that the title to said motor vehicle is free and clear of all liens and encumbrances except those specifically set forth in such transfer assignment;

6. **BUSINESS INTERESTS**. To conduct or participate in any lawful business of whatever nature for me and in my name; execute partnership agreements and amendments thereto; incorporate, reorganize, merge, consolidate, recapitalize, sell, liquidate or dissolve any business; elect or employ officers, directors and agents; carry out the provisions of any agreement for the sale of any business interest or the stock therein; and exercise voting rights with respect to stock, either in person or by proxy, and exercise stock options;

7. **TAX POWERS**. To prepare, verify and file federal and state income tax, gift tax, property tax, generation skipping tax and any other tax returns, claims for refund, requests for extension of time, petitions to any court regarding tax matters of all kinds and nature, and to generally in my name, place and stead to execute all tax related documents including but not limited to returns, receipts, offers, waivers, consents, powers of attorney, closing agreements and declarations of all kinds;

8. **SAFE DEPOSIT BOXES**. To have access at any time or times to any safe deposit box rented by me, wherever located, and to remove all or any part of the contents thereof, and to surrender or relinquish said safe deposit box, and any institution in which any such safe deposit box may be located shall not incur any liability to me or my estate as a result of permitting my agent to exercise this power;

9. **INSTRUMENTS**. To sign, seal, execute and deliver all instruments in writing of whatever kind and nature as may be necessary and proper;

10. **SECURITIES**. To purchase United States treasury bills, bonds, certificates and notes, including so-called "estate tax anticipation bonds" and to borrow money and mortgage property to obtain funds for purchase;

11. **TRUSTS**. To create or establish trusts for my sole benefit during my lifetime to be distributed in equal shares to my children upon my death with the share for any deceased child of mine going to his surviving issue by right of representation; to amend or revoke any trust agreement heretofore established by me, and to fund any trust;

12. **INSURANCE**. To purchase life and health and other forms of insurance and to exercise all rights to convert and modify existing insurance policies including the power to borrow against cash values of any policy;

13. **GIFTS**. To embark upon or continue any program of gifts to my children, and their issue, and to make transfers including, but not limited to, gifts in furtherance of any plan or pattern of gifts. As to any transfers made by my

agent to himself/herself or by me to my agent, I specifically waive the provisions of sections 3-02-05, 59-16-02 and 59-18-01.1 N.D.C.C. and direct that there shall be no presumption of undo influence, insufficient consideration or other prohibited acts under sections 3-02-05, 59-16-02 and 59-18-01.1 N.D.C.C.;

14. **DISCLAIMER**. To disclaim interests in property;

15. **EXPENSES**. To pay for medical, legal, hospital, nursing, care, support and maintenance expenses;

16. **MISCELLANEOUS**. To enter into and carry out contracts, notes, chattel mortgages and other engagements relating to agriculture, with the Commodity Credit Corporation, the Secretary of Agriculture of the United States of America, or any other officer or agency of the federal or state governments or any corporation organized thereunder; to enter into acreage reduction agreements; to make soil conservation commitments; and, in general, to do all acts necessary to cooperate with any governmental agricultural program and to participate in and receive all payments and other benefits and proceeds thereunder.

17. **HIPPA RELEASE AUTHORITY/MEDICAL POWERS**. I intend for my agent to be treated as I would be with respect to my rights regarding the use and disclosure of my individually identifiable health information or other medical records. This release authority applies to any information governed by the Health Insurance Portability and Accountability Act of 1996 (aka HIPPA), 42 USC 1230d and 45 CFR 160-164. I authorize:

Any physician, health-care professional, dentist, health plan, hospital, clinic, laboratory, pharmacy or other covered health-care provider, any insurance company and the Medical Information Bureau Inc. or other health-care clearinghouse that has provided treatment or services to me, or that has paid for or is seeking payment from me for such services to give, disclose and release to my agent, without restriction, all of my individually identifiable health information and medical records regarding any past, present or future medical or mental health condition, including all information relating to the diagnosis and treatment of HIV/AIDS, sexually transmitted diseases, mental illness, and drug or alcohol abuse. Further, to have access to medical information, to include but not be limited to, the management of my prescription drugs, access to all pharmaceutical suppliers and records of same, management of actual prescriptions and to allow review of all of my medical records, together with access to and communication with all medical providers, doctors, nurses, pharmacists and all others who will or do provide medical care to me.

B. **INTERPRETATION AND GOVERNING LAW**. This instrument is to be construed and interpreted as a General Durable Power of Attorney. The enumeration of specific powers herein is not intended to, nor does it limit or restrict the general powers herein granted to my agent. This instrument is executed in the State of North Dakota, and the law of the State of North Dakota shall govern all questions as to the validity of this power and the construction of its provisions.

C. **THIRD-PARTY RELIANCE**. Third parties may rely upon the representations of my agent as to all matters relating to any power granted to my agent, and no person who may act in reliance upon the representations of my agent or the authority granted to my agent shall incur any liability to me or my estate as a result of permitting my agent to exercise any power.

D. **DISABILITY OR INCAPACITY OF PRINCIPAL**. In accordance with the provisions of Section 30.1-30-01 of the North Dakota Century Code, I hereby direct that this Power of Attorney shall not be affected by my future disability or incapacity, whether mental or physical.

IN WITNESS WHEREOF, I have executed this General Durable Power of Attorney and photographic copies of this power shall have the same force and effect as the original.

Dated this 9th day of June, 2015.

Jean S. G. Kruger

Jean S. G. Kruger

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF GRAND FORKS)

On this 9th day of June, 2015, before me, a Notary Public within and for said county, personally appeared Jean S. G. Kruger, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that she executed the same as her free act and deed.

Notary Public

My Commission Expires:

RICHARD W. OLSON
Notary Public
State of North Dakota
My Commission Expires June 8, 2017

CONSENT OF ATTORNEY-IN-FACT

I, Ann Marie Kruger, the undersigned, of the City of Grand Forks, County of Grand Forks, State of North Dakota, do hereby consent to serve as Attorney-in-Fact under the foregoing Power of Attorney.

Dated this 9th day of June, 2015.

Ann Marie Kruger

Ann Marie Kruger

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF GRAND FORKS)

On this 9th day of June, 2015, before me, a Notary Public, personally appeared Ann Marie Kruger, known to me to be the person who is described in and executed the within and foregoing Consent of Attorney-in-Fact, and she acknowledged to me that she executed the same.

Notary Public

My Commission Expires:

RICHARD W. OLSON
Notary Public
State of North Dakota
My Commission Expires June 3, 2019

LIVING WILL

OF

JEAN S. G. KRUGER

Chapter 23-06.4 N.D.C.C.

I declare on the 9th day of June, 2015:

a. I have made the following decision concerning life-prolonging treatment (initial 1, 2, or 3):

(1) [JGK] I direct that life-prolonging treatment be withheld or withdrawn and that I be permitted to die naturally if two physicians certify that:

(a) I am in a terminal condition that is an incurable or irreversible condition which, without the administration of life-prolonging treatment, will result in my imminent death;

(b) The application of life-prolonging treatment would serve only to artificially prolong the process of my dying; and

(c) I am not pregnant.

It is my intention that this declaration be honored by my family and physicians as the final expression of my legal right to refuse medical or surgical treatment and that they accept the consequences of that refusal, which is death.

(2) [ ] I direct that life-prolonging treatment, which could extend my life, be used if two physicians certify that I am in a terminal condition that is an incurable or irreversible condition which, without the administration of life-prolonging treatment, will result in my imminent death. It is my intention that this declaration be honored by my family and physicians as the final expression of my legal right to direct that medical or surgical treatment be provided.

(3) [ ] I make no statement concerning life-prolonging treatment.

Olson, Juntunen & Sandberg, Ltd.
Lawyers
Grand Forks, North Dakota

b. I have made the following decision concerning the administration of nutrition when my death is imminent (initial only one statement):

(1) [ ] I wish to receive nutrition.

(2) [JDK] I wish to receive nutrition unless I cannot physically assimilate nutrition, nutrition would be physically harmful or would cause unreasonable physical pain, or nutrition would only prolong the process of my dying.

(3) [ ] I do not wish to receive nutrition.

(4) [ ] I make no statement concerning the administration of nutrition.

c. I have made the following decision concerning the administration of hydration when my death is imminent (initial only one statement):

(1) [JDK] I wish to receive hydration.

(2) [ ] I wish to receive hydration unless I cannot physically assimilate hydration, hydration would be physically harmful or would cause unreasonable physical pain, or hydration would only prolong the process of my dying.

(3) [ ] I do not wish to receive hydration.

(4) [ ] I make no statement concerning the administration of hydration.

d. Concerning the administration of nutrition and hydration, I understand that if I make no statement about nutrition or hydration, my attending physician may withhold or withdraw nutrition or hydration if the physician determines that I cannot physically assimilate nutrition or hydration or that nutrition or hydration would be physically harmful or would cause unreasonable physical pain.

e. If I have been diagnosed as pregnant and that diagnosis is known to my physician, this declaration is not effective during the course of my pregnancy.

f. I understand the importance of this declaration, I am voluntarily signing this declaration, I am at least eighteen years of age, and I am emotionally and mentally competent to make this declaration.

g. I understand that I may revoke this declaration at any time.

Signed Jean S. G. Kruger
Jean S. G. Kruger

City, County, and State of Residence: City of Grand Forks, County of Grand Forks, and State of North Dakota.

In my presence on the 9th day of June, 2015, Jean S. G. Kruger acknowledged the declarant's signature on this document or acknowledged that the declarant directed the person signing this document to sign on the declarant's behalf.

Notary Public

My Commission Expires:

RICHARD W. OLSON
Notary Public
State of North Dakota
My Commission Expires June 8, 2017

INSTRUCTIONS FOR REVOCATION
(Section 23-06.4-05 N.D.C.C.)

1. A declaration may be revoked at any time and in any manner by the declarant, provided the declarant is competent, including by:

a. Signed, dated writing;

b. Physical cancellation or destruction of the declaration by the declarant or another in the declarant's presence and at the declarant's direction; or

c. An oral expression of intent to revoke.

2. A revocation is effective upon communication to the attending physician or other health care provider by the declarant.

3. The attending physician or other health care provider shall make the revocation a part of the declarant's medical record.

MIDWEST
NEUROPSYCHOLOGY
3301 30th Avenue South, Ste. 101/ Grand Forks, ND 58201
Phone: (701) 780-9700/Fax: (701) 780-9709

Cassie R. Scheving
Hammarback & Scheving, P.L.C.
308 DeMers Avenue
P.O. Box 4
East Grand Forks, ND 56721

April 25, 2017

RE: Jean S. Kruger
D.O.B. June 17, 1937

Dear Ms. Scheving,

I received your request for further information regarding my evaluation and impression of Jean S. Kruger (d.o.b. 6/17/37) relating to my June 2015 evaluation of her.

1. On the date of the evaluation, June 24th, 2015, as a result of documented history, clinical interview, and formal neuropsychological testing, Jean S. Kruger showed a pattern of performance consistent with at least a moderate degree of dementia. I state this with a reasonable degree of neuropsychological certainty.

2. The history, nature and pattern of Jean Kruger's cognitive impairment suggested that it reflected a progressive pattern of decline over the prior year or years. Her dementia rendered her vulnerable to undue influence, coercion, or exploitation, and I recommended that family pursue guardianship.

3. As such, it was my professional opinion that Jean Kruger did not on June 24th, 2015, and does not today, have the capacity to make safe or informed decisions on her own behalf regarding her healthcare, finances, or place of residence. She did not and does not have the capacity to enter into a binding document, agreement, contract, or other legal document.

4. With a reasonable degree of neuropsychological certainty, I assert that Mrs. Kruger's cognitive impairment and hence her vulnerability had predated my formal evaluation of her and certainly during the months prior to her evaluation on June 24th 2015. Given the

degree of documented impairment in memory, language, and reasoning on June 24th, 2015, it is my professional opinion as a clinical neuropsychologist with 26 years of experience that Mrs. Kruger would not have had the capacity to enter into a binding agreement contract, or other legal matter on June 9th, 2015, just two weeks prior to my evaluation of her.

Sincerely,

Susan J. Thompson, Ph.D.
Clinical Neuropsychologist

Representative Mark Sanford,
Mr. Chairman and Members of the Committee,

From: Michael Kruger

Date: Tuesday, February 2, 2021

Subject: Support for HOUSE BILL NO. 1363, Relating to ante-mortem probate of wills,

I, along with my older sister, Kathy (Kruger) Hann are the current co-guardians/co-conservators for our mother, Jean Kruger. Neither my sister Kathy or myself receive payment for our services rendered to our mother from our roles as co-conservators/co-guardians. We are committed to ensuring her well being and being an advocate for her given her incapacity due to Lewy Body dementia.

We strongly support House Bill No. 1363, which would give a testator's legal guardian, conservator or power of attorney the ability to institute a proceeding under chapter 32-33 for a judgment declaring the validity or invalidity of the testator's will.

There is a need to develop policies that permit anti-mortem probate of wills if they meet a set of circumstances. The circumstances in our instance are as follows:

Our mother received a medical evaluation by Dr. Shaunta Guathum and testing on 5/29/15 for confusion and hallucinations. At a follow up medical evaluation 6/4/15, additional testing was ordered by the same treating physician for persistent symptoms; these tests included neuropsych testing and a head CT. The head CT was performed 6/5/15. The neuropsych testing was performed by Dr. Susan Thompson on 6/24/15 with recommendation for a guardianship and a diagnosis of Lewy Body dementia. A follow up medical evaluation 7/1/15 with the ordering physician advised a guardianship as recommended in the neuropsych testing.

Emergency guardianship/conservatorship was appointed 7/28/15 with permanent guardianship/conservatorship appointed 10/16/15. Following the appointments, we learned the following facts.

- On 6/9/15, our younger sister, Ann Marie Kruger, brought our mother to an attorney, Richard Olson, JD; a power of attorney was created 6/9/15. We learned this at the court date for permanent appointment from the attorney hired to represent our mother, Kirk Tingum, JD. He has never submitted a bill to be paid for his fees incurred in representing our mother.
- On 6/11/15, our sister returned to the same attorney with our mother and a will was created listing Ann Marie Kruger as the primary beneficiary of our mother's estate. We learned of this 11/4/15.
- Following the death of our father, Frank Kruger on 1/19/11, our sister received $146,400.00 in direct cash checks from our mother from 2/4/11 to 7/16/15. Our sister has referred to this as a loan.
- The visitor's report from Lisa Boxrod, LSW dated 9/20/15 states, "It is my impression that Ms. Krueger is "coached" by Anne Marie. This is evidenced by her repeating herself that include statements Ann Marie makes."

This existence of this power of attorney and will was concealed at the medical appointments that occurred after these documents were created when specifically questioned by the medical professionals who examined our mother which led to the recommendation for a guardianship.

The neuropsychologist who has evaluated our mother and performed the testing has subsequently stated our mother would not have had the capacity to enter into a binding agreement, contract or other legal matter on June 9, 2015 just two weeks prior to her evaluation.

The power of attorney paperwork was invalidated through a legal process. Under current state law, the North Dakota court cites lack of jurisdiction and there is no opportunity to request a judgement on the validity or invalidity of the testator's will while the testator is alive, and they are declared incapacitated.

The intent of this generated will is not consistent with verbal statements from our parents that were made to us, nor is it consistent with the intent of our father's holographic will dated 4/6/1978 that was processed in probate 2/17/11 by our parent's local attorney, Scott Stewart, JD in their hometown of Langdon. The primary asset of the estate of our mother in question involves four quarters of farmland with an estimated value of $1,735,965.00 as of 10/14/15 in Cavalier County, North Dakota.

Under current state law, we are required to wait until our mother's death to bring this matter to the court jurisdiction in probate. There is no ability for anyone to anticipate the length of time that will elapse from the declared date of incapacitation of the testator to the date of the testator's death. There is a very real possibility of not having the ability to call witnesses for testimony if they themselves are deceased or lack the capacity to testify given the passage of time. While there is a way to preserve testimony, this leads to an increased financial burden that not every individual can afford.

It is evident in our circumstance that the following occurred:

- A will was hastily created after a medical evaluation was started that assessed capacity.
- The attorney who drafted the will was not informed of the medical circumstances of the testator.
- The legal documents were concealed both to the medical professionals performing evaluations as well as the court at the initial emergency appointment.
- The primary beneficiary who was, at the time the will was created, the power of attorney and is the one who brought the testator to the attorney who generated a will that excluded the other heirs to her benefit.
- Impartial observers to the case have documented in court what is consistent with the definition of undue influence.
- Medical professionals who have directly evaluated the testator attest to the testator's incapacity within the timeframe of the will creation.

I urge the committee to pass House Bill No. 1363. As physician, I do not appreciate it when an individual has omitted information or frankly lied to me to obtain an outcome they desire when it becomes clear that secondary gain is their objective. I cannot image an attorney does either. Thank you for this opportunity to testify.

Sincerely,

Michael Kruger

Last Will and Testament

OF

JEAN S. G. KRUGER

I, Jean S. G. Kruger, a/k/a Jean Sylina Gilbertson Kruger, a resident of the City of Grand Forks, County of Grand Forks, State of North Dakota, being of sound and disposing mind and memory, and not acting under duress, menace, fraud, or undue influence of any person whomsoever, and considering the uncertainty of this frail and transitory life, do make, ordain, publish and declare this to be my Last Will and Testament. I do hereby expressly revoke all Wills and Codicils heretofore made by me.

ARTICLE I
MY FAMILY

My spouse, Frank Charles Kruger, passed away on January 19, 2011. We have three children, namely: Kathy Ann Kruger Hann; Michael Steven Kruger; and Ann Marie Kruger.

ARTICLE II
PAYMENT OF DEBTS AND EXPENSES

I order and direct my Personal Representative hereinafter named to pay out of my estate all of my legal debts and expenses of my last illness and funeral as soon after my death as conveniently may be paid.

ARTICLE III
DISPOSITION OF PERSONAL PROPERTY - SEPARATE WRITING

I hereby direct that my Personal Representative make disposition of my personal property such as jewelry, furniture and household effects according to the directions contained in a separate written statement now in existence or in existence at the time of my death, which written statement shall be in my own handwriting, dated, and signed by me. It is my intention that those items of personal property mentioned in said separate written statement should be distributed according to the terms of said written statement; and said separate written statement shall be incorporated by reference into this my Last Will and Testament. Any items of personal property not included in said separate written statement or otherwise distributed according to this my Last Will and Testament, shall become part of the residue of my estate.

Jean S. G. Kruger
Jean S. G. Kruger

ARTICLE IV
SPECIFIC BEQUESTS

I give, devise and bequeath the sum of $1,000.00 each to Kathy Ann Kruger Hann and Michael Steven Kruger. Kathy and Michael have careers and their own income and are able to provide for themselves and their families.

ARTICLE V
DISPOSITION OF RESIDUE OF ESTATE

All of the rest, residue and remainder of my property, whether real, personal, or mixed, wherever situated, of which I may die seized or possessed, or to which I may be or become in any way entitled or have an interest, including 4 quarters of land, farmstead in Langdon, vehicles, and all belongings, I give, devise and bequeath to my daughter, Ann Marie Kruger. Ann Marie can manage the farm or sell it all and invest the monies so that she may have a steady income for the rest of her life. Should Ann Marie Kruger predecease me or die in accordance with the terms of Article VI, then I give, devise and bequeath all of the rest, residue and remainder of my property, whether real, personal, or mixed, wherever situated, of which I may die seized or possessed, or to which I may be or become in any way entitled or have an interest, to my other two children, Kathy Ann Kruger Hann and Michael Steven Kruger, in equal shares, share and share alike. If any of my said children shall not survive me, but shall leave issue surviving me, such issue shall take an equal part, per stirpes, the share which such child would have taken if such child had survived me.

ARTICLE VI
SURVIVORSHIP CLAUSE

None of the persons given an interest in my estate shall be deemed to have survived me who shall have died at the same time as I or in or as a result of a common accident or disaster, or under such circumstances as may make it impossible or difficult to determine which of us died first, or within thirty (30) days after my death.

ARTICLE VII
PERSONAL REPRESENTATIVE

I appoint my daughter, Ann Marie Kruger, as my personal representative. In the event that my daughter, Ann Marie Kruger, is unable or unwilling to act, I nominate my son, Michael Steven Kruger, to be the successor personal representative with all of the rights and duties herein given to or imposed upon my personal representative. In the event that my son, Michael Steven Kruger, is unable or unwilling to act, I nominate my daughter, Kathy Ann Kruger Hann, to be the alternate successor personal representative. I direct that they shall not be required to furnish bond.

Jean S. G. Kruger
Jean S. G. Kruger

ARTICLE VIII
POWERS OF PERSONAL REPRESENTATIVE

I hereby authorize and empower my said Personal Representative at the time she deems advisable: to sell the property of my estate, or any part thereof, at public auction or at private sale, for such prices and upon such terms as she may judge best, and to convey the same by such deeds and instruments of conveyance and transfer as may be necessary; to mortgage, hypothecate, invest, re-invest, exchange, manage, control and in any way use and deal with any and all of said property; to accept any composition of security for any debt and to allow extended time for payment of any debt and also to compromise and settle all accounts and matters belonging or relating to my estate and generally to manage said estate as she deems it advisable. The above powers are given and granted to my Personal Representative to do and exercise without application to any court for leave or confirmation, unless the same is expressly required by law, and without giving any bond or security whatsoever. If my Personal Representative shall have a choice of dates in valuing property in my gross estate, she shall elect the date that causes the lower estate and/or inheritance tax on my estate.

IN TESTIMONY WHEREOF, I have set my hand to this my Last Will and Testament, this 11th day of June, 2015.

Jean S. G. Kruger
Jean S. G. Kruger

We, the undersigned, hereby certify that the foregoing instrument was on the day of the date thereof, signed, published and declared by Jean S. G. Kruger to be her Last Will and Testament, in the presence of us, who, in her presence and in the presence of each other have, at her request, hereunto subscribed our names as witnesses to the execution thereof, this 11th day of June, 2015.

Kristen Bertsch of Grand Forks, North Dakota

Autumn Vasichek of Grand Forks, North Dakota

Jean S. G. Kruger
Jean S. G. Kruger

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF GRAND FORKS)

I, Jean S. G. Kruger, the Testatrix, sign my name to this instrument this 11th day of June, 2015, and being first sworn, declare to the undersigned authority that I sign and execute this instrument as my Will and that I sign it willingly or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Jean S. G. Kruger
Jean S. G. Kruger, Testatrix

We, Kristen Bertsch and Autumn Vasichek, the witnesses, sign our names to this instrument, and being first sworn, declare to the undersigned authority that the Testatrix signs and executes this instrument as the Testatrix's Will and that the Testatrix signs it willingly or willingly directs another to sign for the Testatrix, and that each of us, in the presence and hearing of the Testatrix, signs this Will as a witness to the Testatrix's signing, and that to the best of our knowledge the Testatrix is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Kristen Bertsch
Witness

Autumn Vasichek
Witness

Jean S. G. Kruger
Jean S. G. Kruger

Subscribed, sworn to, and acknowledged before me by Autumn Vasichek, the Testatrix, and subscribed and sworn to before me by Kristen Bertsch and Autumn Vasichek, witnesses, this 11th day of June, 2015.

Notary Public

My Commission Expires:

RICHARD W. OLSON
Notary Public
State of North Dakota
My Commission Expires June 3, 2017

Jean S. G. Kruger

DATE: Tuesday, February 1, 2021

TO: Representative Mark Sanford, Mr. Chairman and Members of the Committee

FROM: Kathy (Kruger) Hann

SUBJECT: Support for HOUSE BILL NO. 1363 - Relating To Ante-Mortem Probate Of Wills

Dear Mr. Chairman and Representatives of the Committee,

I am writing to give my full support on House Bill No. 1363, which would give a testator's legal guardian, conservator, or power of attorney the ability to institute a proceeding under chapter 32-33 for a judgment declaring the validity or invalidity of the testator's will.

I, along with my younger brother, Michael Kruger, currently serve as court-appointed co-guardians and co-conservators for our mother, Jean S. Kruger, a life-long resident of North Dakota. We are committed to protecting her well-being and being an advocate for her; she is incapacitated due to her medical diagnosis of Lewy body dementia (LBD).

Elder abuse is a public health problem. According to the World Health Organization (WHO), around 1 in 6 people age 60 years and older have experienced some form of abuse in community settings during the past year, whether physically, emotionally, or financially. Many prevention strategies can be implemented to prevent elder abuse, to take action against it, and to mitigate its consequences. This is why there is a vital need to develop policies that permit anti-mortem probate of wills if they meet a set of criteria for vulnerable adults.

My mother's neuropsych testing confirmed a diagnosis of Lewy body dementia (LBD). LBD significantly impacts the brain regions involved in thinking, memory, and motor control. LBD affects how information is processed with a presentation of neuropsychiatric symptoms such as hallucinations, behavioral problems, and difficulty with complex mental tasks.

Upon appointment of permanent co-guardianship and co-conservatorship on October 7, 2015, we discovered our younger sister, Ann Marie Kruger, brought our mother to an attorney during the midst of a lengthy medical evaluation process determining mental capacity; a power of attorney and will were created listing our younger sister as the primary beneficiary. This information was concealed at the subsequent medical appointments and at the initial emergency guardianship hearing on July 21, 2015.

Under current North Dakota state law, the court cites lack of jurisdiction; there is no opportunity to request a judgement on the validity or invalidity of the testator's will while the testator is alive and they are declared incapacitated. The reality is due to the current law needing to wait until after the testator passes, there may not be witnesses for testimony if they are deceased or incapacited themselves.

The intent of the will generated in June 2015, is not consistent with the character of either of our parents. Our father, Frank C. Kruger, died in 2011. His hand-written holographic will was submitted by our mother, acting as his personal representative, to the court. The court validated our father's intent to leave his personal possessions to "care for our family". Our family consisted of two parents and three children. Among the multiple financial assets of the estate of our mother in question involves four quarters of farmland with an estimated value of nearly two million dollars in Cavalier County, North Dakota. Our younger sister, Ann Marie Kruger, positioned herself through undue influence as the primary beneficiary to inherit the financial legacy of her father, a man whose funeral she did not even attend.

In closing, I humbly ask the committee to help protect the most vulnerable by passing the progressive legislation of House Bill No. 1363. Thank you for this opportunity to testify and for your consideration.

Sincerely,
Kathy (Kruger) Hann

#4921

Blaine T. Johnson
Crowley Fleck PLLP
100 West Broadway, Suite 250
PO Box 2798
Bismarck, ND 58502-2798
701.223.6585

February 2, 2021

House Judiciary Committee
North Dakota State Legislature
Attn: Chairman Klemin

RE: House Bill 2223 – A bill relating to Ante-Mortem Probate

Dear Chairman Klemin:

I am a partner in the law firm of Crowley Fleck PLLP and have served as the Chair of the Real Property Section of the State Bar Association of North Dakota since 2017. The State Bar Association has taken a neutral stance on this particular bill and provides technical assistance. I submit this written testimony independently in opposition to Senate Bill 2223.

I. THE ANTE-MORTEM PROBATE PROVISIONS ARE OF LIMITED USE.

North Dakota is one of only five states to have adopted an ante-mortem probate process. The North Dakota statute is infrequently used. It provides an opportunity for a testator to validate his or her own will prior to death. The practical advantages of doing so are limited. Few testators would desire to go through the probate process to confirm what he or she already believes to be true – that the executed will is properly witnessed and valid, that the testator was of sound mind and possessed the requisite capacity, that the decision to make the will was done without duress or undue influence. While it is touted as a brilliant solution to end will contests; it does not and will not. *See Antemortem Probate is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 MSLJ 1431, 1455-1457 (2017).

Testators who are of questionable capacity are unlikely to subject themselves to a legal determination that the will is in fact valid. Testators whom have intentionally disinherited a child or loved one are unlikely to announce such a decision publicly as required by the ante-mortem process.

II. THE DEFINITION OF "INTERESTED PARTY" INCLUDES PARTIES THAT SHOULD NEVER BE ABLE TO AVAIL THEMSELVES TO THE ANTE-MORTEM PROBATE PROCESS.

NDCC 30.1-01-06(25) defines "Interested Person." While this proposed bill adopts similar but not identical language ("interested party"), the definition of Interested Person includes a number of potential parties such as creditors, beneficiaries of life insurance policies or bank accounts, and

"any other having a property right in or a claim against a trust estate or the estate of a decedent, ward, or protected person."

This may allow such parties to attack the validity of a will in order to secure a more favorable result. Expanding the current statute to allow "interested parties" in all likelihood will serve to increase the number of will contests if anything at all.

While the bill attempts to limit these "interested parties" to those who have obtained consent from the testator, one must question whether or not the testator has the capacity to give such consent if it is also argued that the testator lacked capacity to form a will or was subjected to undue influence. In other words, this limitation may not be the best gate keeper to prevent illegitimate use.

III. BY EXPANDING THE NUMBER OF INDIVIDUALS PERMITTED TO COMMENCE AN ANTE-MORTEM PROBATE PROCEEDING, THE INTERESTS OF THE TESTATOR ARE DIMINISHED.

The Uniform Probate Code places a great deal of weight on preserving and protecting the intent of the testator. The testator has sole authority to execute a will, to revoke a will, to amend or change a will. Ultimately this is a basic tenant of American society, the ability to dispose of one's property as he or she sees fit. Furthermore, it is long held that heirs and devisees have no interest in the testator's property until the moment of death. This bill suggests otherwise and permits heirs, devisees, and a number of others to make a claim to the testator's estate before the body is even cold.

Testamentary capacity is presumed and the burden of proving the lack thereof is upon the contestant to the will. In re Estate of Stanton, 472 N.W.2d 741 (N.D. 1991). Similarly, the claim of undue influence must be proven by the person contesting the will and that mere suspicion is not enough. *Estate of Ostby*, 479 N.W.2d 866, 871 (N.D.1992).

The ante-mortem probate process is an adversarial one. The concept adopted by North Dakota is referred to as the "Contested Model." Permitting interested parties, guardians, conservators, nominated personal representatives, attorney in fact allows these permitted individuals to put the testator on the defensive and can further be used to harass the testator.

The testator is forced to expend money on attorneys and witnesses in order to even participate in the ante-mortem process. In addition to the monetary price that the testator must pay, it is a mental and physical burden upon the testator as well. Participation in court proceedings, testifying, witnessing family disharmony as those you love fight over your belongings in front of you, and in some cases being forced to face a court's determination that you are no longer competent.

Testators that intentionally disinherit individuals for valid reasons, or sometimes no reason at all, often do not want that disinherited party to know. They do not want to face the animosity or create disharmony while they are still alive. They may realize that they could very well change their mind at a later point in time. The ante-mortem probate process forces the testator to commence another action and notify everyone again if the change is to be made. If this bill were to take effect, an ante-mortem probate process initiated by a permitted party will make it more difficult for the

testator amend his or her will because of the process that is required once a court has validated the will.

IV. THE BELIEF THAT THE ANTE-MORTEM PROBATE PROCESS PROVIDES FOR THE BEST EVIDENCE IS A MISNOMER.

The strongest argument for the ante-mortem probate process is the availability of the testator to prove the validity of the will and confirm the testator's intent. Allowing other third parties the benefit of commencing an ante-mortem probate does not necessarily achieve such a goal. One of the permitted parties could and often does commence the ante-mortem probate process when the testator no longer has the capacity to testify or provide any valuable information about the execution of the will.

The *Sanford v. Murdoch* case is prime example of this problem. *Sanford v. Murdoch*, 285 S.W.3d 620 (Ark. 2008). The testator in this case, Marilyn Martin executed a will and revocable trust in 2002 which provided ultimate disposition of her property to her mother, if living, and if not to an animal shelter in Las Vegas, Nevada. In 2007, Ms. Martin was diagnosed with a malignant brain tumor. Immediately, Ms. Martin amended her trust to provide that following the death of her mother,10% of the trust assets would be given to the animal shelter and the remaining balance split between two friends. Ms. Martin's comprehension and memory problems continued to worse. Months after her diagnosis, her niece traveled to Arkansas from California to visit her. Following the visit, Ms. Martin revoked her Power of Attorney and executed an entirely new will leaving everything to the niece. The niece then commenced a petition for ante-mortem probate to validate the new will. By this point in time the niece had moved Ms. Martin to California. Ms. Martin passed away prior to the ante-mortem proceeding being concluded. Lay witnesses testified that Ms. Martin "did not know was what going on" at the time the most recent will was executed, while her physician deemed her "still decisional" which the court put significant weight on.

This scene of events illustrates the grave possibility that one whom exerts undue influence actually uses the ante-mortem probate process to affirm what would otherwise be an invalid will. The use of undue influence convinces the testator that they should not provide any inheritance to an opposing individual, and they often convince the testator that the opposing individual cannot be trusted to act as personal representative or attorney in fact.

The inclusion of guardians and conservators indicates that the authors of this bill have already recognized the fact that the testator has been deemed to lack appropriate capacity and is of limited benefit to any ante-mortem probate process.

Additionally, those parties that may have credible evidence or allegations of the testator's lack of capacity or being subject to undue influence are often unlikely to raise those concerns during an ante-mortem probate proceeding. It may be difficult to face a parent with evidence of capacity or raise the issue out of fear of being removed from the will entirely by upsetting the testator.

Additional information and more in-depth analysis is provided in the included law review article, "The Case Against Living Probate" by Mary Louise Fellows as published in the Michigan Law Review (1980).

Respectfully,

Blaine T. Johnson

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The Case Against Living Probate

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THE CASE AGAINST LIVING PROBATE

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Living probate proposals have received increasing support in the last few years. Living probate enables a testator, prior to his death, to adjudicate several legal and factual issues that might be raised in a post-mortem will contest.[1] Michigan enacted the first living probate statute in 1883,[2] but two years later the Michigan Supreme Court voided the statute on state constitutional grounds.[3] The idea of living probate thereafter lay dormant until the 1930s, when several proponents, most notably Professor David Cavers, encouraged its reconsideration.[4] These commentators were unable to provoke legislative action. In 1946 the drafters of the Model Probate Code rejected living probate, saying that "[t]he practical advantages of such a device are not great in view of the fact that few testators would wish to encounter the publicity involved in such a proceeding."[5] Although the National Conference of Commissioners on Uniform State Laws continued to study living probate,[6] the idea attracted few supporters until the publication of an article by Professor Howard Fink in 1976.[7] Since that article appeared, Arkansas,[8] North Da-

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† I gratefully acknowledge the valuable suggestions of Professors Daniel Farber, Michael Graham, John Muench, John Nowak, Lawrence Waggoner, and Dean Peter Hay.

1. "Living" probate and "ante-mortem" probate are synonymous; I will employ the former term throughout this Article.

2. *See* Act of Apr. 11, 1883, 1883 Mich. Pub. Acts 17.

3. *See* Lloyd v. Wayne Circuit Judge, 56 Mich. 236, 23 N.W. 28 (1885). The court voided the statute because it failed to provide for notice to a testator's wife, and because it authorized a proceeding beyond the scope of judicial power. The statute required notice be given "heirs," but the Michigan Supreme Court construed that language as excluding the testator's wife.

4. *See* Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934); Cavers, *Ante Mortem Probate: Supplementary Procedure Proposed To Reduce Hazards of Testamentary Disposition*, 61 TRUST COMPANIES 327 (1935); Kutscher, *Living Probate*, 21 A.B.A.J. 427 (1935); Kutscher, *Living Probate*, 15 MICH. S.B.J. 409 (1936); Redfearn, *Ante Mortem Probate*, 38 COM. L.J. 571 (1933). The National Conference of Commissioners on Uniform State Laws prepared a draft uniform act in 1932. First Tentative Draft of Uniform Act To Establish Wills Before Death of Testator, in HANDBOOK OF THE NATL. CONF. OF COMMRS. ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-SECOND ANNUAL CONFERENCE 465 (1932).

5. MODEL PROBATE CODE, Introduction at 20 (1946).

6. Professors Eugene F. Scoles and Allan D. Vestal prepared a draft of a uniform ante-mortem probate statute during their work on the Uniform Probate Code in the 1960s.

7. *See* Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264 (1976).

kota,[9] and Ohio[10] have enacted living probate statutes, and the drafters of the Uniform Probate Code have commenced work on a Uniform Ante-Mortem Probate Act.[11] More recently, Professor John Langbein and Professors Gregory Alexander and Albert Pearson have separately endorsed the idea of living probate.[12] They criticize existing legislation, however, and present alternative theoretical and practical approaches to living probate procedure.

This Article presents the case against living probate in hopes of preventing a reform that was appropriately discarded a century ago. Part I describes the various living probate proposals, highlighting their similarities, differences, and procedural complexities, and the benefits they seek to realize. Part II lays out four failings of living probate that call the desirability of this reform into question. Finally, in Part III, I propose an alternative reform which concentrates on the underlying problem inspiring living probate proposals — the expense and uncertainty of a mental capacity requirement for executing a valid will.

I. Living Probate Proposals

In recent years scholars have advanced three different living probate proposals: Professor Fink advocates a "Contest Model"[13] for living probate procedure, Professor Langbein advocates a "Conservatorship Model," and Professors Alexander and Pearson advocate an "Administrative Model." Although the procedural differences between these models are significant, all three proposals envision the same limited scope of inquiry at living probate, and all attempt to reap the same benefits: improving the evidence of testamentary capacity and protecting testamentary freedom.

The various proposals for living probate statutes reflect nearly identical views of the proper scope of inquiry during living probate

8. *See* Ark. Stat. Ann. §§ 62-2134 to -2137 (Cum. Supp. 1979).

9. *See* N.D. Cent. Code §§ 30.1-08.1-01 to -04 (Supp. 1979).

10. *See* Ohio Rev. Code Ann. §§ 2107.081 to .085 (Page Supp. 1979).

11. *See* National Conference of Commissioners on Uniform State Laws, Joint Editorial Board for the Uniform Probate Code, Uniform Ante-Mortem Probate Act (3d Working Draft, April 18, 1978). At the Summer 1979 meeting of the NCCUSL, it approved the formation of a new drafting committee for a Uniform Ante-Mortem Probate Act. The Joint Editorial Board of the Uniform Probate Code will also cooperate on this project. A.B.A. Section of Real Prop., Prob. & Trust Law, 8 Prob. & Prop., at 17 (1980).

12. *See* Langbein, *Living Probate: The Conservatorship Model*, 77 Mich. L. Rev. 63 (1978); Alexander, *The Conservatorship Model: A Modification*, 77 Mich. L. Rev. 86 (1978); Alexander & Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 Mich. L. Rev. 89 (1979).

13. Professor Langbein, and not Professor Fink, selected this label. *See* Langbein, *supra* note 12, at 63.

proceedings. In each model, the proceeding is limited to the issues of compliance with will execution formalities (*e.g.*, signature of testator, number of witnesses attesting and signing the will), testamentary capacity, and undue influence. In other words, living probate would determine the validity of the testamentary instrument, but would not interpret its contents.

Deciding questions of compliance with will execution formalities during ante-mortem inquiry appears justified, but that advantage alone hardly justifies living probate. Adjudication of these questions can correct errors in will execution, thereby assuring the testator that the will is secure against attack for failure to comply with the formalities. This advantage is slight because only testators who have retained an attorney will make use of living probate proceedings, and attorneys rarely have had problems with execution formalities in recent years.[14] Moreover, substantial Uniform Probate Code reforms already enable a testator to make sure that he has complied with execution formalities. The testator and the witnesses need only sign affidavits and complete certain procedures before a notary public (or any other officer authorized to administer oaths) to raise an irrebuttable presumption of compliance.[15] I am suggesting not that questions of compliance with execution formalities should be excluded from living probate inquiry,[16] but only that this inquiry alone cannot justify creating this proceeding.

Construction of the contents of a will falls outside the scope of ante-mortem inquiry for several reasons. First, although the testimony of the testator would frequently help to resolve ambiguities and questions about a particular disposition, just as the attorney drafting the instrument failed to identify troublesome dispository language, the judge and the other parties may also overlook trouble-

14. The estate planning literature contains step-by-step procedures to ensure the validity of a will throughout the United States. *See, e.g.*, A.J. CASNER, ESTATE PLANNING 86-90 (4th ed. 1979); J. DUKEMINIER & S. JOHANSON, FAMILY WEALTH TRANSACTIONS: WILLS, TRUSTS, AND ESTATES 285-87 (2d ed. 1978); J. RITCHIE, N. ALFORD & R. EFFLAND, CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 164-66 (5th ed. 1977).

15. *See* UNIFORM PROBATE CODE §§ 2-504, 3-406(b). As opposed to establishing a conclusive presumption of compliance with certain formalities, the drafters could have merely provided that a will accompanied by signed affidavits meets all necessary procedural formalities. Such a statute would eliminate any possible allegations of a violation of procedural due process based on the use of conclusive presumptions. In any case, the statute would withstand constitutional attack on substantive due process grounds and should lead to the elimination of unnecessary litigation at probate. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 497-98 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1092-97 (1978).

16. In fact, the self-proved will promulgated by the UPC could be adopted in conjunction with the living probate proceeding and made a prerequisite to presenting the will to living probate.

some dispository language. Second, the proceeding could be lengthened and complicated unnecessarily while the parties resolve ambiguities that may never be relevant or important. Perhaps the parties should be able to raise construction questions, but should not be barred from litigating the issue later because of a failure to raise the issue in ante-mortem proceedings. Because of my fundamental criticisms of living probate in general, however, I do not discuss the merits of this possible expansion of the scope of the inquiry in this Article.

Inexplicably, issues concerning fraudulent interference in will execution (other than the question of undue influence) are also excluded from the living probate proceedings.[17] In this Article, I will address the application of living probate proceedings to allegations of fraud.

Proponents of each of the three living probate models foresee two advantages in its use. First, living probate could improve the fact-finding process in will contests involving allegations of mental incapacity, fraud, or undue influence by providing the testator the opportunity to testify. In such cases, the testator's state of mind and intent are determinative issues.[18] The availability of the testator for questioning eliminates the need to rely exclusively upon the testator's observed and reported actions.[19] The fact-finding process is further improved because the litigation occurs near the time of execution of the will, which is the critical time of inquiry in determining the will's validity.[20] This evidentiary advantage provides a strong argument for enacting a living probate statute.

Second, living probate proposals promote testamentary freedom

17. The Michigan statute enacted in 1883 included fraud within the scope of its proceedings. *See* Act of Apr. 11, 1883, 1883 Mich. Pub. Acts 17, § 2.

18. *See, e.g.*, Parrisella v. Fotopulos, 111 Ariz. 4, 522 P.2d 1081 (1974) (undue influence); Estate of Fritschi, 60 Cal. 2d 367, 384 P.2d 656, 33 Cal. Rptr. 264 (1963) (testamentary capacity); *In re* Estate of Newhall, 190 Cal. 709, 214 P. 231 (1923) (fraud); *In re* Anderson Estate, 353 Mich. 169, 91 N.W.2d 356 (1958) (testamentary capacity). *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §§ 51-52 (testamentary capacity), 55 (undue influence), 56 (fraud) (2d ed. 1953); W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS §§ 12.21 (testamentary capacity), 14.3–.4, 14.6 (fraud), 15.3, 15.5-.6 (undue influence) (rev. ed. 1960).

19. For examples of cases relying on observable and reportable actions of the testator to determine testamentary capacity, see Estate of Kirk, 161 Cal. App. 2d 145, 326 P.2d 151 (1958); *In re* Estate of Strittmater, 140 N.J. Eq. 94, 53 A.2d 205 (1947); Hickman v. Hickman, 244 S.W.2d 681 (Tex. Civ. App. 1951), *error ref. n.r.e.* In addition, see Note, *Eccentricities and Testamentary Capacity*, 46 DICK. L. REV. 254 (1942).

20. *See* Estate of Lingenfelter, 38 Cal. 2d 571, 241 P.2d 990 (1952) (testamentary capacity); *In re* Estate of Ricks, 160 Cal. 450, 117 P. 532 (1911) (fraud); Boland v. Aycock, 191 Ga. 327, 12 S.E.2d 319 (1940) (undue influence); Downey v. Lawley, 377 Ill. 298, 36 N.E.2d 341 (1941) (undue influence); Montgomery v. Willbanks, 202 S.W.2d 851 (Tex. Civ. App. 1947) (fraud); Estate of O'Loughlin, 50 Wis. 2d 143, 183 N.W.2d 133 (1971) (testamentary capacity).

by offering the testator greater assurance that his dispository scheme will be carried out. In post-mortem probate, courts often substitute their own view of a fair dispository scheme for that of the testator by finding that the testator's scheme is abnormal.[21] Abnormality of the dispository scheme bears on determinations of testamentary capacity, fraud, and undue influence. When a court investigates testamentary capacity, the dispository scheme provides information about the testator's state of mind at the time of execution.[22] When a court investigates fraud or undue influence, the dispository scheme may prove critical in determining whether the wrongful conduct affected the contents of the will.[23] Obviously, the more atypical the distribution, the more vulnerable the will to claims of mental incapacity, fraud, or undue influence.[24] But many courts fail to recognize that a finding that a disposition is "abnormal" should mean that the dispo-

21. *See* Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271 (1944). In addition, see Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMP. L.Q. 231 (1962); 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).

22. *See In re* Estate of Arnold, 16 Cal. 2d 573, 107 P.2d 25 (1940); *In re* Estate of Jensen, 185 Minn. 284, 240 N.W. 656 (1932); Keen's Estate, 299 Pa. 430, 149 A. 737 (1930). The courts substantially agree on the legal standard of mental capacity necessary for execution of a will. The testator must have at the time of execution of the will the ability to know and understand: (1) The nature and extent of the testator's property; (2) the persons who are the natural objects of the testator's bounty; and (3) the disposition the testator is making of his property. In addition, the testator must also have the capacity to appreciate these concepts in relation to each other, and to form an orderly desire as to the disposition of his property. *E.g.*, Estate of Fritschi, 60 Cal. 2d 367, 384 P.2d 656, 33 Cal. Rptr. 264 (1963); *In re* Anderson Estate, 353 Mich. 169, 91 N.W.2d 356 (1958); Hall Will, 402 Pa. 212, 166 A.2d 644 (1961).

23. The elements necessary to prove fraud are: (1) misrepresentation or suppression of a material fact; (2) known to be false by the person making the misrepresentation at the time it was made; (3) made for the purpose of inducing the decedent to act in reliance thereon; (4) action by the decedent in reliance on the misrepresentation or suppression of fact; (5) injury to the decedent or another resulting from the induced action. *See, e.g.*, Kyle v. Pate, 222 Ark. 4, 257 S.W.2d 34 (1953); Franklin v. Belt, 130 Ga. 37, 60 S.E. 146 (1908); Roblin v. Shantz, 210 Or. 371, 311 P.2d 459 (1957); Stirk's Estate, 232 Pa. 98, 81 A. 187 (1911); *In re* Dand's Estate, 41 Wash. 2d 158, 247 P.2d 1016 (1952).

Undue influence is defined as conduct that destroys the free agency of the decedent and substitutes the decedent's testamentary wishes for those of another. Although the instrument is executed by the decedent and all apparent formalities are present, the will or a part of the will is a product of a captive mind, and, consequently, testamentary intent is so lacking that the will is invalid. Parrisella v. Fotopulos, 111 Ariz. 4, 522 P.2d 1081 (1974); Estate of Franco, 50 Cal. App. 3d 374, 123 Cal. Rptr. 448 (1975); *In re* Estate of Carpenter, 253 So.2d 697 (Fla. 1971); Yribar v. Fitzpatrick, 91 Idaho 105, 416 P.2d 164 (1966); Breault v. Feigenholtz, 54 Ill. 2d 173, 296 N.E.2d 3 (1973). Specific factors considered in finding a causal connection between undue influence and the testamentary disposition include consideration of an apparently unnatural or unjust dispository scheme that can be explained by influential conduct by a legatee or by one who is interested in benefiting the legatee. *See* Estate of Teal, 255 Cal. 2d 520, 154 P.2d 384 (1945); Estate of Peters, 9 Cal. App. 3d 916, 88 Cal. Rptr. 576 (1971); *In re* Will of Fenwick, 348 A.2d 12 (Sup. Jud. Ct. Me. 1975).

24. *See* Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, *supra* note 4, at 442-43. In addition, see Fink, *supra* note 7, at 265 n.1 for a description of unreported cases in which the critical factor was an unnatural distribution.

sition appears unnatural for the particular testator. Instead, probate judges find a dispository scheme abnormal when they feel a contestant has been unfairly excluded from a share of the testator's bounty.[25] Living probate discourages judges from invalidating a will

25. *See* M. SUSSMAN, J. CATES & D. SMITH, THE FAMILY AND INHERITANCE 184-88 (1970); Cavers, *supra* note 4, at 441-43; Fink, *supra* note 7, at 265-66; Langbein, *supra* note 12, at 66. *See also* Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 92 (1953) (noting that juries find for the contestant in the majority of cases in California). The courts' inclinations to substitute their own views of a dispository scheme for that of the testator and the dangers of such a jurisprudence were perhaps best stated in 1876 by the Pennsylvania Supreme Court in Cauffman v. Long, 82 Pa. 72, 77-78 (1876):

> The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged. No right of the citizen is more valued than the power to dispose of his property by will . . . . It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. In many instances testamentary dispositions of property seem harsh, if not unjust, the result, perhaps, of prejudice as to some of the testator's kindred, or undue partiality as to others. But these are matters about which we have no concern. The law wisely secures equality of distribution where a man dies intestate. But the very object of a will is to produce inequality . . . . It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements . . . . It must be remembered that in this country a man's prejudices are a part of his liberty. He has a right to them; he may be unjust to his children or relatives; he is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law.

For examples of the improper standard of abnormality, *compare* Estate of Goetz, 253 Cal. App. 2d 107, 61 Cal. Rptr. 181 (1967), *with* Rizzo v. D'Ambrosia, 2 Mass. App. Ct. 837, 310 N.E.2d 925 (1974). In *Estate of Goetz*, evidence showing that the decedent erroneously suspected her husband of trying to poison her and of mistreating her led neither the jury nor the California Court of Appeal to invalidate a will which excluded her husband. In contrast, a Massachusetts court in *Rizzo* affirmed a verdict holding a will invalid based on testimony that at the time the will was executed, the testator suffered from the delusion that his niece was poisoning him. In the *Goetz* case the delusion was disregarded but in *Rizzo* it was of critical importance. The best, and perhaps only, explanation for the difference in results can be found in the respective courts' views concerning what constituted a proper disposition under the circumstances of the case. Never identifying the beneficiaries under the proffered will, the *Rizzo* court stated:

> Here, the decedent's delusion that he was being poisoned by his niece concerned the very person who, as she had been rendering him daily care and assistance for more than ten years, *would seem to have had* the greatest claim to his bounty.

2 Mass. App. at 838, 310 N.E.2d at 926 (emphasis added).

The *Goetz* court, when addressing the allegation of undue influence, indicated its view as to naturalness of the disposition

> It was, indeed, *entirely natural that testatrix should consider* that in view of her husband's advanced years he would have an ample amount, ... Mrs. Goetz' husband and her son had not been on good terms and *it is unlikely that the husband would have left anything to the respondent.*

253 Cal. App. 2d at 107, 118, 61 Cal. Rptr. at 181, 188 (emphasis added). Both courts imposed their own determinations of a fair and reasonable disposition of the decedent's property in light of the relationship between the testator and the litigants, the financial dependency of each litigant upon the testator, and the contributions of each litigant to the welfare of the testator. *Accord, In re* Estate of Coles, 205 So. 2d 544 (Fla. Dist. Ct. App. 1968); Adams v. Calia, 433 S.W.2d 661 (Ky. 1968); *See generally* Epstein, *supra* note 21, at 238-49; Green, *supra* note 21, at 277-81, 298-311; Note, *Testamentary Capacity in a Nutshell; A Psychiatric Reevaluation*, 18 STAN. L. REV. 1119, 1129, 1130-31, 1141-43 (1966).

Bequests to nonprofit organizations viewed as unworthy of financial support suffer frequent attack. In the case of *In re* Strittmater's Estate, 140 N.J. Eq. 94, 53 A.2d 205 (1947), a 49 year-old decedent, who was survived by some cousins whom she saw only infrequently during the last few years of her life, left her entire estate to the National Women's Party. Her mem-

despite insubstantial evidence of incapacity, fraud, or undue influence. The testator's presence and ability to testify would inhibit reliance by the court on its view of "fairness" in the dispository scheme to resolve these issues.[26]

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bership in the organization spanned over nineteen years. The court relied on memoranda written by the testator six years before she executed the will to find that she harbored an insane hatred for men. Although the testator's business dealings with her male attorney and male banker were entirely reasonable and normal, the court attributed the inconsistency to her "split personality." The Court concluded that her psychosis caused her to leave her estate to the National Women's Party, and it therefore invalidated the will.

In contrast, in Jones v. South Dakota Children's Home Society, 238 N.W.2d 677 (S.D. 1947), an 85-year-old decedent, who had previously suffered a stroke, executed a will revoking a prior will that contained substantial bequests to collateral relatives and substituting bequests to charities including a crippled children's hospital, a boys' ranch, a boys' home, and a township. The court held that the decedent possessed sufficient mental capacity to execute the will. The court reasoned that the testator was justified in revoking the bequests to his relatives because they were in part responsible both for the imposition of a guardianship over his estate and for the subsequent sale of his property. The court also refused to rely on the evidence concerning the decedent's weakened mental state that did not relate to the specific time frame in which the decedent executed the will. The court rejected the argument that leaving the property to a government was evidence of the decedent's incompetence.

The court in *Strittmater* was dealing with an insane delusion. Therefore, focusing on the particular disposition was justified because the legal issue was whether the insane delusion affected any part of the dispository scheme. The finding of an insane delusion in *Strittmater*, however, seems irreconcilable with *Jones*. Perhaps the best explanation for the different results is found in the courts' views as to the worthiness of the respective beneficiaries named in the wills.

The imposition of the court's view of a natural disposition is not limited to cases alleging testamentary incapacity, but includes cases in which fraud or undue influence is at issue. *See, e.g.*, *In re* Estate of Gelonese, 36 Cal. App. 3d 854, 111 Cal. Rptr. 833 (1974). In *Gelonese*, the decedent bequeathed substantially larger shares of her estate to three of her children than to the other two. The two disfavored children contested probate of the will on the grounds that the will was procured by fraud and undue influence. A jury held that a presumption of undue influence had been established by the disfavored children upon showing a confidential relationship between the decedent and the favored children, active participation in the execution of the will by these children, and undue benefit to them. The jury also held that the proponents of the will had failed to rebut that presumption. The appellate court affirmed the jury verdict that the will was procured through the undue influence of the favored children:

> [T]here can be no question that this element was established by substantial evidence. *The will was an unnatural one in that it did not treat all of decedent's children equally* . . . . In the light of the evidence, although in conflict, that decedent wanted her children to share equally in her estate, [three of the children] would receive substantially more under the will than [two other children].

36 Cal. App. 3d at 866, 111 Cal. Rptr. at 841 (emphasis added).

In contrast, in Burke v. Thomas, 282 Ala. 412, 21 So. 2d 903 (1968), the court did not find that a beneficiary's active involvement in the execution of the will and the decedent's dependency upon the beneficiary for care raised an inference of undue influence. A distant relative had moved into the decedent's home for the purpose of caring for her during her illness. Without sufficient income to pay for her care, the decedent instead promised to leave the relative all of her property. The relative and the decedent asked an attorney to draft such a will, and the relative was present during the will's execution. The beneficiary under a prior will alleged undue influence and testamentary incapacity. The jury found the will valid, and the Supreme Court of Alabama affirmed their decision. The *Burke* court found that the care provided by the relative explained the bequest.

Like the mental competency cases, the *Gelonese* and *Burke* decisions can be best rationalized by looking not to the differences in the quality or the nature of the evidence showing undue influence, but, rather, to the courts perception of the fairness of the disposition.

26. Of course, many courts realize the danger of considering the fairness of a dispository

Living probate therefore draws its usefulness entirely from the testator's presence and testimony. The presence of the testator at a living probate proceeding serves both society's interest in accurate factual determinations on issues relating to will validity and the testator's interest in preventing courts from judging the "fairness" of his testamentary disposition.

A. *The Contest Model*

Professor Howard Fink proposed this model for living probate in 1976, and it has subsequently been enacted in Arkansas, North Dakota, and Ohio. The Contest Model envisions an adversarial proceeding that results in a declaratory judgment on issues of testamentary capacity, compliance with execution formalities, and undue influence. The parties to the proceeding include expectant heirs and beneficiaries of the proffered will.[27] In sum, the Contest Model changes only the timing of the litigation; otherwise the proceeding is essentially identical to a post-mortem will contest.

Because the Contest Model changes only the timing of the adjudication, it imposes substantial hardships on the testator and on the expectant heirs and beneficiaries of any will revoked by the proffered will. The testator loses the benefits of a confidential testamentary disposition during his life. Family harmony is seriously threatened since family members learn of unfavorable dispositions before the testator's death. The expectant heirs[28] and beneficiaries of prior wills affected by the proffered will (hereinafter both classes of persons are referred to as *presumptive takers*) must bear litigation costs early although their inheritance remains uncertain until the testator's death. To take, they must not only survive the testator, but they also risk that the testator will consume or otherwise dispose of the property before his death. Beneficiaries under the proffered will who receive less than their intestate succession share, or less than the bequests made to them under a prior will, may abstain from litigating for fear that if they lose, the testator will execute a new will disin-

scheme and refuse to invalidate a will on that basis. *See, e.g.*, Jackson's Exr. v. Semones, 266 Ky. 352, 98 S.W.2d 505 (1936); Safe-Deposit & Trust Co. v. Berry, 93 Md. 560, 49 A. 401 (1901); *In re* Estate of Martin, 1 Or. App. 260, 457 P.2d 662 (1969); *In re* Sommerville's Estate, 406 Pa. 207, 177 A.2d 496 (1962).

27. Professor Fink's proposal mistakenly omitted beneficiaries of prior wills affected by the proffered will from the list of parties to the living probate proceeding. The three statutes presently enacted also omit these persons.

28. The term "expectant heirs" refers to those persons who would take under the intestate succession statute if the testator were to die immediately before living probate proceedings were commenced. *See* ARK. STAT. ANN. § 62-2136 (Cum. Supp. 1979); N.D. CENT. CODE § 30.1-08.1-02 (Supp. 1979); OHIO REV. CODE ANN. § 2107.081-.085 (Page Supp. 1979).

heriting them entirely. Moreover, fickle testators who frequently change their wills could repeatedly confront family members with the dilemma of whether to contest each proffered will in ante-mortem proceedings. All these disadvantages of the Contest Model have led proponents of living probate to propose modifications in order to alleviate the hardships imposed upon both the testator and the presumptive takers.

B. *The Conservatorship Model*

Professor John Langbein proposes to reduce the family tensions living probate might create, and to improve the litigating posture of the will contestants, through the appointment of a guardian ad litem to represent all persons whose property interests might suffer from an ante-mortem finding that a will is valid. Langbein refers to his proposed scheme as the Conservatorship Model. The procedure duplicates the adversarial and adjudicative format of the Contest Model. The testator would petition the court with probate jurisdiction for a declaratory judgment that his will was obtained without undue influence and that he possessed testamentary capacity at the time of execution. A copy of the executed will would accompany the petition. To assure adequate preliminary counseling, proper drafting and execution of the will, and prevention of frivolous proceedings, the Conservatorship Model would require that the testator be represented by an attorney. The presumptive takers and beneficiaries of the proffered will would receive notice and an opportunity to appear at the living probate proceeding. In addition, the court would appoint a guardian ad litem to represent all persons whose property interests might suffer from a finding that the testator possessed testamentary capacity or was free from undue influence. The testator would bear the reasonable expenses incurred by the guardian ad litem.[29] Thus, persons with potential interests in invalidating the will could decline to contest the testator's suit in their own names, while continuing to be represented by the guardian ad litem.

Professor Langbein suggests that the guardian ad litem reduces living probate's disruption of family harmony. The presumptive takers "would be able to communicate any relevant information or suspicions to the guardian ad litem in confidence, without having to take actions hostile to the testator."[30] According to Professor Langbein,

29. *See* Langbein, *supra* note 12, at 79.

30. *Id.* at 78.

> [The Conservatorship Model] 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.[31]

Langbein also predicts that the guardian ad litem would better protect the interests of unborn or unascertained heirs, as well as those presumptive takers who calculate that benefits of invalidating the proffered will are too remote to justify litigating.[32]

While I will describe the flaws of living probate at some length below, I feel compelled to challenge one feature of the Conservatorship Model at the outset. I doubt that employing a guardian ad litem will preserve the family harmony threatened by a living probate proceeding. Placing the guardian ad litem as a buffer between the presumptive takers and the testator achieves little. To represent fully presumptive takers, the guardian ad litem will necessarily rely on information the presumptive takers provide. He will obtain documents from them, take their depositions, and investigate their suspicions. The testator and others who want the will upheld are very likely to recognize the sources of information used to challenge the will. Although Langbein envisions an informal proceeding in which the evidence would be presented in a nonadversarial context without the use of a jury, the proceeding remains adjudicative, and opposing testimony will still be presented.[33] In essence, the proceeding is both adversarial and potentially acrimonious.

C. *The Administrative Model*

Professor Gregory Alexander's doubts about the adequacy of Langbein's proposals eventually led him to construct the Administrative Model for living probate. Alexander believes that a living probate scheme will not be viable unless testators can keep their testamentary dispositions confidential. At first, Alexander proposed to preserve confidentiality by providing the testator a living probate procedure in which the presumptive takers would receive no notice or opportunity to appear, and only a guardian ad litem would investigate the issues of testamentary capacity and undue influence.[34] In

31. *Id.* at 79.

32. *Id.*

33. *See id.* at 75-76, 80-81.

34. *See* Alexander, *supra* note 12, at 91. As the representative of presumptive takers including unborn or unascertained heirs, the guardian ad litem would provide information about the mental capacity of the testator and about whether the will was obtained free from undue influence.

electing to preserve confidentiality, the testator would sacrifice the certainty provided by the Conservatorship Model. Any declaratory judgment issued would create only a presumption of validity that could be challenged in a subsequent post-mortem contest.[35] Alexander envisioned that both the Conservatorship Model and this "nonbinding option" would be available to the testator.

A year after proposing this "nonbinding option," Alexander decided that the ante-mortem declaratory judgment should be binding even absent notice and a hearing for presumptive takers. Writing with Professor Albert Pearson, Alexander developed a plan for an ex parte living probate proceeding in which only a guardian ad litem would appear. Because the proposal envisions an administrative-type proceeding rather than an adversarial one, Alexander and Pearson label it the "Administrative Model."[36]

Unlike the Conservatorship Model or the "nonbinding option," the Administrative Model's guardian ad litem would not represent the presumptive takers or the beneficiaries of the proffered will, but would function more as a civil prosecutor or special master accountable to the court.[37] Initially, the testator would petition the appropriate court for a declaration that the will was duly executed and that the testator possessed testamentary capacity and was free from undue influence. Although the will would accompany the petition, only the judge could inspect it.[38] If the court believed that the will contained unusual provisions, it could alert the guardian ad litem to inquire into specific matters without disclosing the terms.[39] The guardian ad litem would have the responsibility of interviewing the

35. If the court determined, after considering the evidence provided by the guardian ad litem, questioning the testator, and reviewing the proffered will, that the testator possessed testamentary capacity and was free from undue influence, it would issue a declaratory judgment establishing a presumption of will validity for purposes of any post-mortem contest. To make this option more attractive, Alexander proposes that the presumption of validity could only be overcome by evidence establishing probable cause for invalidation that the guardian ad litem did *not* present in the ante-mortem proceeding. *See* Alexander, *supra* note 12, at 92. This presumption is stronger than the rebuttable presumption of validity with respect to issues of testamentary capacity, fraud, and undue influence created under the Uniform Probate Code for self-proved wills. *See* UNIFORM PROBATE CODE § 3-406. But doubt remains whether the strength of the presumption would decrease strike suits enough to justify the administrative burden on the courts and the increased burden on testators; Langbein asserts that it would not. *See* Langbein, *supra* note 12, at 77-78 n.50.

36. Alexander & Pearson, *supra* note 12, at 111-12. This proposal is very similar to the one proposed by Cavers in 1934. *See* Cavers, *supra* note 4, at 445-47.

37. Alexander & Pearson, *supra* note 12, at 113-14. Because the guardian ad litem only functions as an investigator for the court, the "guardian" label chosen by Alexander and Pearson is probably inappropriate; it will be used in this Article solely to avoid confusion.

38. *Id.* at 113.

39. *Id.* at 114.

testator (outside the presence of the attorney who drafted the will), members of the testator's family, and others who know the testator well. Based on these interviews the guardian ad litem would report his determination of the issues to the court.[40] The trier of fact would then make binding determinations on the issues of testamentary capacity and undue influence.

Like the Conservatorship Model, the Administrative Model still would disrupt family harmony. After interviews by the guardian ad litem, family members will likely grow curious as to the contents of the will. Although Alexander and Pearson do not suggest this, presumably the testator may waive the no-notice and restrictive procedures. If so, the secret procedure becomes elective and the testator's failure to waive confidentiality may fuel unpleasant suspicions among family members.

D. *Unresolved Issues*

Before leaving this discussion of the living probate proposals, three unresolved procedural issues require discussion so that the reader has a more complete understanding of the complexity of living probate. Below I describe the thorny issues of appealability of a living probate decree, collateral effect of a living probate decree, and revocability of a will validated by living probate.

Parties to a living probate proceeding could appeal a finding of validity or invalidity of a will.[41] Difficulties will arise, however, in defining the duty of a guardian ad litem to pursue an appeal under the Conservatorship or Administrative Model. If the testator dies before the parties have exhausted their opportunities for appeal, the distribution of the estate will await a final order. Once a final order upholding the will has been issued, all the living probate proposals contemplate that it will bind those persons who had notice of the proceeding. The Administrative Model, of course, would bind even those persons who were not notified of the proceeding.

The literature contains little discussion of the collateral effect of a final ante-mortem order holding the proffered will invalid.[42] The proponents of living probate have concerned themselves more with the binding effect on presumptive takers of an order upholding the

40. *Id.* at 114.

41. *See* OHIO REV. CODE ANN. § 2107.084 (Page Supp. 1979).

42. Professor Fink recommended that a limitation be placed on the use in subsequent proceedings of the facts found in the ante-mortem proceeding so as to eliminate a testator's fear "that by instituting a proceeding to determine his testamentary capacity he runs the risk that an unfavorable verdict or unfavorable findings could be detrimental (or even determinative) in a future proceeding testing his mental capacity." Fink, *supra* note 7, at 277.

will. Under the Contest and Conservatorship Models, an order from an ante-mortem probate proceeding holding a will invalid binds the legatees because they were made parties to the proceeding. If the testator re-executes the will after the final order of invalidity, or if the testator executes another will containing different dispositions, the final order and other findings of fact from the proceeding are admissible evidence at a later living probate proceeding or at a post-mortem probate will contest.[43] Res judicata does not apply to this latter case because the issue presented there is whether the testator possessed testamentary capacity or was free from fraud or undue influence when the *second* execution occurred. Nevertheless, a prior finding of testamentary incapacity will bear on whether the testator possessed testamentary capacity at a later time. A prior finding of fraud or undue influence with respect to a prior will is likely to be given less weight even if the dispositions are nearly identical because the same instances of wrongful conduct are less likely to affect the second execution by the testator. The contestants to the will must offer evidence of further wrongful conduct or continuing wrongful conduct at the time of the subsequent execution in order to have the second will declared invalid.

Similar questions arise under the Administrative Model. Arguably, presumptive takers should benefit from a finding of invalidity if the same will is presented at a post-mortem will contest because the testator already enjoyed an opportunity to prove the validity of the will. The difficult issue, however, is whether the testator satisfactorily represents the legatees named in the proffered will. The legatees' interests, in a sense, derive from that of the testator, and when

43. *See* N.D. CENT. CODE § 30.1-08.1-04 (Supp. 1979); OHIO REV. CODE ANN. § 2107.085 (Page Supp. 1979); Fink, *supra* note 7, at 275. Both Fink's living probate proposal and the North Dakota statute contain redundant language:

> The facts found in a proceeding brought under this [section/chapter] shall not be admissible in evidence in any proceeding other than one brought in [this state/North Dakota] to determine the validity of a will; nor shall the determination in a proceeding under this chapter be binding, upon the parties to such proceeding, in any action not brought to determine the validity of a will.

Fink, *supra* note 7, at 275; N.D. CENT. CODE § 30.1-08 .1-04 (Supp. 1979). The second phrase does not seem to provide any additional limitation on the use of the facts found in the proceeding, although in his explanation of the provision, Fink implies that two issues are involved:

> [T]he proposed statute provides that facts found in a proceeding under the statute are not admissible in evidence in actions other than for the determination of the validity of a will, and that the determination in such a statutory proceeding shall not be binding for collateral estoppel purposes upon the parties in other actions not involving the determination of the validity of a will.

Fink, *supra* note 7, at 277.

The drafters of the Ohio statute eliminated the last phrase; perhaps they, too, found the language redundant. In any case, the use of the indefinite article in all of these statutes suggests that the drafters contemplated that the findings of fact would be admissible into evidence in litigation concerning the validity of a subsequent will.

so viewed, they should be bound by any order that binds the testator. If legatees could use a finding of validity against the presumptive takers, even though the legatees have not suffered litigation costs, presumptive takers should benefit from a finding of invalidity. On the other hand, because the Administrative Model does not require presumptive takers personally to litigate the issues, they have not incurred litigation costs and thus, arguably, they are not unfairly hurt if they cannot bind the legatees of the proffered will to a finding of invalidity. In any case, just as in the Contest Model or Conservatorship Model, if a testator re-executes the same will or drafts another will with different provisions, a living probate finding that a prior will was invalid should be admissible into evidence.

Allowing a living probate finding of invalidity to bind the testator and the legatees (and admitting that finding in contests over subsequently executed wills) may deter the use of the living probate proceeding. Nevertheless, this apparent disadvantage of living probate should not be removed; it will properly deter the use of the procedure in cases where questions of testamentary incapacity, fraud, or undue influence should legitimately be raised. Moreover, judges might be more reluctant to make a binding determination of will validity and preclude any further litigation by persons adversely affected by the will if they know that a finding of invalidity will have no binding effect on either the beneficiaries under the will or the presumptive takers.

In contrast to their silence on collateral effects, proponents of living probate have carefully addressed issues concerning the appropriate manner for totally or partially revoking a court-approved will. They have suggested three alternative approaches to revocation. Langbein argues that the formalities for revocation should be the same for court-approved wills as they are for other types of wills.[44] Arkansas has adopted this proposition.[45] Fink argues that the testator should be required to petition the court to revoke or modify a will it approved in a previous living probate proceeding.[46] North Dakota has adopted this proposition.[47] Alexander and Pearson propose a compromise; the testator could revoke by submitting notice of the revocation to the court.[48]

44. Langbein, *supra* note 12, at 81.

45. *See* ARK. STAT. ANN. § 62-2137 (Cum. Supp. 1979). The Ohio statute provides for revocation either under court supervision or under the conventional revocation statute. *See* OHIO REV. CODE ANN. § 2107.084(C)-(D) (Page Supp. 1979).

46. Fink, *supra* note 7, at 276-77.

47. *See* N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1979).

48. Alexander & Pearson, *supra* note 12, at 119.

Alexander and Pearson's approach to revocability seems to be the most appropriate. Requiring court approval of a subsequent revocation or modification of the will eliminates post-mortem allegations of revocation or of incapacity, fraud, and undue influence with respect to a revocation. Requiring a court proceeding, however, seems to restrain unjustifiably a testator's freedom to modify or revoke an existing testamentary scheme. Since virtually all testators who use the living probate proceeding would obtain the advice of an attorney, they would usually know the risks of an informal revocation and could prudently decide whether to institute further proceedings. Requiring mere notice to the court eliminates the possibility of unfounded or erroneous allegations that the court-approved will has been revoked without imposing another costly and time-consuming procedure on the testator. Although requiring notice increases the risk that an otherwise valid revocation must go unrecognized, the protection against unfounded allegations of revocation probably makes that risk worthwhile.

II. The Failings of Living Probate

The case against living probate can be rested on any of several flaws in the Contest, Conservatorship, and Administrative Models. First, the proposals will fail to achieve their own stated objectives of improving the evidence available during probate and assuring testators that their dispository schemes will be carried out. Second, all three proposals make the testator pay a high price for these ephemeral advantages. Finally, and perhaps most important, all three proposals are unfair to presumptive takers, and under the Administrative Model that unfairness may rise to the level of a constitutional due process violation.

A. *Quality of Evidence at Living Probate*

One of the alleged advantages of living probate is the improved fact-finding possible when adjudicating the issues of capacity, fraud, and undue influence before the testator's death.[49] On the contrary, living probate sacrifices considerable evidence in order to obtain the testator's testimony. Under the Contest Model, presumptive takers are deterred from coming forward with meritorious evidence of fraud or undue influence. As long as the testator remains free to execute a new will, a successful challenge to a will on grounds of fraud and undue influence will achieve little; the testator can always

49. *See* text at notes 18-20 *supra*.

re-execute the will and force the presumptive takers to find further wrongful conduct to invalidate the will again. Even if the original will failed to reflect the testator's true intent, once free from fraudulent beliefs or undue influence the testator may execute a new will which, consistent with his true intent, disinherits the challengers. Professor Langbein responds that perhaps living probate should not resolve issues of undue influence at all. But he ultimately concludes that "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 easy (and so common) to tack an undue influence count on to an unsound mind claim."[50]

I seriously doubt that interjecting a guardian ad litem into proceedings under the Conservatorship Model will improve the quality of the evidence presented during probate. To the extent that use of a guardian ad litem provides anonymity for persons who offer evidence of testamentary incapacity, fraud, and undue influence, it also removes an important disincentive to the raising of unfounded allegations. Imposing the reasonable cost of the guardian ad litem on the testator[51] enhances this problem. Thus, it is unclear that the Conservatorship Model of living probate would lead to a correct decision more often than the Contest Model.

Finally, to the extent that the Administrative Model ensures confidentiality, it also increases the risk of an erroneous finding that a will was executed free from fraud and undue influence, or that the testator possessed testamentary capacity. The Adminstrative Model subverts the goal of improving fact-finding during living probate because it precludes interested parties who possess relevant information from participating in the adjudicatory process. A legislature that enacts the Administrative Model should understand that one of the consequences will be to uphold some wills that otherwise would be found invalid.

B. *Testamentary Freedom: Assuring That the Testator's Disposition Will Be Followed*

A second alleged advantage of living probate is that it will promote testamentary freedom by assuring the testator that a court will carry out his will after his death. Unfortunately, testators will have two lingering doubts even after a will is found valid in a living probate proceeding — doubts that will deter many testators from using

50. Langbein, *supra* note 12, at 84-85 (footnote omitted).

51. *See id.* at 75.

living probate. Testators will remain uncertain as to the validity of their wills because of the possibilities of a post-mortem contest based upon fraud on the court and fraud or undue influence occurring after the living probate decree is issued, and also because other states may refuse to recognize the living probate decree of the forum state.

Even after a testator obtains a living probate decree that his will is valid, presumptive takers can challenge the court-approved will by alleging either fraud on the court *during* the living probate proceeding or fraud or undue influence *after* the proceeding that prevented the testator from revoking his will. Under the living probate proposals, presumptive heirs can set aside a living probate order upon a showing of fraud on the court.[52] Fraud on the court would likely include the execution of a will that includes bequests to likely contesters solely to deter them from litigating if the testator sought to obtain a judgment on testamentary capacity that might bear on the validity of a new will executed shortly thereafter. If the contestants can establish the testator's intent and can show that they abstained from litigating because of the bequests to them, the court might nullify the living probate decree.[53] Fraud on the court might also include fraudulent concealment of evidence from the guardian ad litem (assuming a Conservatorship or Administrative Model), and may even include the negligent failure of the guardian ad litem to investigate suspicious conduct.[54]

Presumptive takers can also challenge the court-approved will in a post-mortem proceeding by showing that fraud or undue influence *after* living probate prevented the testator from revoking the will and executing a new one. In many cases, wrongful conduct occurring before the execution of the will may continue after execution, and a binding living probate decree therefore will not prevent challenges based on fraud or undue influence. With attacks on the will based on fraud and undue influence remaining viable after the testator's death, living probate only prohibits post-mortem attacks alleging testamentary incapacity. However, most reported cases that contain allegations of testamentary incapacity also include allegations of fraud and undue influence — primarily because deception and duress intrude more easily upon the physically or mentally weakened testator.[55] Thus, for all practical purposes, wills may be

52. Alexander & Pearson, *supra* note 12, at 117.

53. Under the Administrative Model, the occurrence of this type of fraud would diminish because the incentive of the guardian ad litem to investigate would not hinge so greatly on the dispository scheme.

54. Alexander & Pearson, *supra* note 12, at 118.

55. *See* Langbein, *supra* note 12, at 84-85.

no more immune from attack after living probate than before.

The testator faces a further troubling uncertainty after obtaining a living probate decree: the extraterritorial effect of the decree is uncertain; it may bind only those persons over whom the forum state had personal jurisdiction under the minimum contacts test of *International Shoe Co. v. Washington*[56] and its progeny. The extraterritorial effect of a living probate decree concerns, most importantly, full faith and credit principles. If the court possessed proper jurisdiction, its decree would obtain full faith and credit in every American jurisdiction. Below I examine at some length recent Supreme Court decisions bearing on the limits of a court's jurisdiction, and explore their implications for the extraterritorial effect of a living probate decree. In order to aid an understanding of these decisions, I begin with a brief theoretical discussion of the competing theories of jurisdiction necessary to obtain a probate decree.[57]

A probate decree may be viewed as merely an exercise of the state's power to control assets located within its boundaries.[58] This view, generally called the *physical power* theory,[59] implies that each state possesses exclusive control over property located within its borders and that a foreign decree cannot affect that property.[60] It further implies that the basis for the local probate proceeding, or the jurisdiction of the court, is the property in the estate that is located within the state.[61] Following this narrow view of jurisdiction for probate would lead to inconvenient, inefficient, and expensive probate administration. With respect to living probate, this traditional *in rem* jurisdiction theory provides no basis for a living probate pro-

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56. 326 U.S. 310 (1945).

57. For a helpful discussion of these alternative views see Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 225-54 (1944); Currie, *The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws*, 33 U. CHI. L. REV. 429 (1966).

58. *See* Hanson v. Denckla, 357 U.S. 235 (1958); Frederick v. Wilbourne, 198 Ala. 137, 73 So. 442 (1916); State *ex rel.* Atty. Gen. v. Wright, 194 Ark. 652, 109 S.W.2d 123 (1937); *In re* Reynolds' Estate, 217 Cal. 557, 20 P.2d 323 (1933); Bowen v. Johnson, 4 R.I. 112 (1858); Frame v. Thormann, 102 Wis. 653, 79 N.W. 39 (1899), *aff'd.*, 176 U.S. 350 (1900).

59. *See, e.g.*, Hanson v. Denckla, 357 U.S. 235, 246 (1958); Pennoyer v. Neff, 95 U.S. 714 (1877); Hopkins, *supra* note 57, at 225. *See generally*, Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of Pennoyer v. Neff*, 43 BROOKLYN L. REV. 600, 601-06 (1977).

60. Frederick v.Wilbourne, 198 Ala. 197, 73 So. 442 (1916); Pritchard v. Henderson, 18 Del. (2 Penne.) 553, 47 A. 376 (1900); McCartney v. Osburn, 118 Ill. 403, 9 N.E. 210 (1886); *In re* Neumayer's Estate, 168 Misc. 173, 5 N.Y.S.2d 331 (Sup. Ct. 1938).

A probate decree in one state is given extraterritorial effect only as to property located in that state. Regardless of the decedent's domicile or the fact that parties to the first proceeding are also parties to the second proceeding in another state, the first court's decree has no effect on property located in that other state.

61. *See* Hanson v. Denckla, 357 U.S. 235, 247-49 (1958).

ceeding since there is no specific property to distribute.[62]

An alternative view of probate decrees applies the maxim *mobilia sequuntur personam* and treats property wherever located as if situated at the decedent's domicile at the time of his death.[63] For reasons that will become obvious later in this discussion, I will refer to this view as the *status* theory. Although by its terms and as applied in most cases,[64] the maxim is limited to personal property, this restriction continues more as a remnant of the physical power theory than as a necessary restriction to assure certainty of land titles and protection of creditors.[65] The theory implies that states abandon territorial control over property. Jurisdiction for a probate proceeding would hinge not upon the state's power over property but upon the state's power to determine the status — intestacy or testacy — of a domiciled decedent.[66] Under the status approach, an ex parte proceeding in the testator's domiciliary state determining testacy or intestacy would be entitled to full faith and credit in sister states; contestants could attack the decree collaterally only to determine whether the decedent was actually domiciled in the state issuing the probate decree.[67]

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62. *See* Fink, *supra* note 7, at 282-83. Existing living probate statutes, however, are designed in a manner that assumes *in rem* jurisdiction. The Arkansas statute may be used by "[a]ny person who executes a will disposing of all or part of an estate located in Arkansas." ARK. STAT. ANN. § 62-2135 (Cum Supp. 1979). Further, it provides that the expectant heirs and the beneficiaries named in the will "shall be deemed possessed of inchoate property rights." ARK. STAT. ANN. § 62-2136 (Cum. Supp. 1979). The North Dakota statute contains a similar provision defining the interests of the will beneficiaries and expectant heirs as "inchoate property rights." N.D. CENT. CODE § 30.1-08.1-02 (Supp. 1979). The Ohio statute provides that the proceeding is available not only to persons domiciled in Ohio but also to persons owning real property in Ohio. OHIO REV. CODE ANN. § 2107.081(A) (Page Supp. 1979).

63. *See* Henderson v. Usher, 118 Fla. 688, 160 So. 9 (1935); Kurtz v. Kurtz's Estate, 169 Md. 554, 182 A. 456 (1936); Crippen v. Dexter, 79 Mass. (13 Gray) 330 (1859); Grignon v. Shope, 100 Or. 611, 197 P. 317 (1921); Holland v. Jackson, 121 Tex. 1, 37 S.W.2d 726 (1931); Hodge v. Taylor, 87 S.W.2d 533 (Tex. Civ. App. 1935).

64. *See, e.g.*, Clarke v. Clarke, 178 U.S. 186 (1900); Pritchard v. Henderson, 18 Del. (2 Penne.) 553, 47 A. 376 (1900); Lowe v. Plainfield Trust Co., 216 A.D. 72, 215 N.Y.S. 50 (1926); Hopkins, *supra* note 57, at 249-52.

65. *See* Hopkins, *supra* note 57, at 252-54; Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 632-48 (1954).

66. *See* Hopkins, *supra* note 57, at 228-29, 250-51.

67. A court can ignore a divorce decree upon proof that the state that rendered the decree was not at the time the domicile of either spouse. *See, e.g.*, Williams v. North Carolina, 325 U.S. 226 (1945); Fink v. Fink, 37 Ill. App. 3d 604, 346 N.E.2d 415 (1976); Staley v. Staley, 251 Md. 701, 248 A.2d 655 (1968); Sorrentino v. Mierzwa, 25 N.Y.2d 59, 250 N.E.2d 58, 302 N.Y.S.2d 565 (1969).

Applying the status theory to probate cases has been justified by analogy to divorce cases, *see* Hopkins, *supra* note 57, at 228-29, 250-51, in which domicile of the plaintiff provides an adequate jurisdictional basis for a divorce decree, thereby requiring extraterritorial recognition of the decree even in the absence of personal service upon the defendant. *See* Williams v. North Carolina, 317 U.S. 287 (1942); Rosenstiel v. Rosenstiel, 368 F. Supp. 51 (S.D.N.Y. 1973); R. LEFLAR, AMERICAN CONFLICTS LAW 451-52 (3d ed. 1977). The analogy to divorce

Before *Shaffer v. Heitner*,[68] a landmark jurisdiction decision, the Supreme Court did not accept either view of probate jurisdition exclusively. The Court endorsed the physical power theory when determining whether a probate judgment should obtain full faith and credit.[69] It held that a decree from a state concerning property within its boundaries was entitled to full faith and credit everywhere.[70] Similarly, the Court held that as to property not within territorial boundaries of a state, the full faith and credit clause had no application to that state's probate decree as it operated *in rem*.[71] Contrary to the physical power theory, however, the Court also required sister states to recognize a probate decree to the extent that the decree determined personal rights of persons subject to the forum state's *in personam* jurisdiction.[72] These latter holdings do not

cases is not perfect, however. The ex parte divorce proceeding affects *only* the marital status. I use the term "only" intentionally because at the point that a spouse institutes a divorce suit, the marriage exists "in name only; divorce or no, the state does not force unwilling people to live together." Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 29 (1966). The divorce decree serves the domiciliary state's interest in freeing citizens from impediments to remarriage without inflicting economic harm on the nonresident defendant. It does not affect child custody, child support, or alimony. *See* Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); May v. Anderson, 345 U.S. 528 (1953); Estin v. Estin, 334 U.S. 541 (1948); Currie, *supra*, at 27-31; Krauskopf, *Divisible Divorce and Rights to Support, Property and Custody*, 24 OHIO ST. L.J. 346 (1963). Only a forum with jurisdiction over the defendant not based solely on the marriage status can determine these interests. *See* Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of Shaffer v. Heitner*, 63 IOWA L. REV. 997, 1016-17 (1978) (in which Vernon addresses the problem of obtaining jurisdiction in actions for support and alimony in light of Shaffer v. Heitner, 433 U.S. 186 (1977)).

A probate decree, on the other hand, is made solely to determine testacy or intestacy — to resolve claims of economic interest. A finding of testacy or intestacy operates only to determine, as between competing claimants, who will obtain the property found in the decedent's estate. Nevertheless, the divorce analogy remains persuasive. Although the Supreme Court has held that an ex parte divorce proceeding cannot determine a wife's right to child custody, child support, or alimony, it has also held, in Simons v. Miami Beach First Natl. Bank, 381 U.S. 81 (1965), that the ex parte divorce proceeding may operate to terminate her right to inherit dower as the spouse of the decedent. 381 U.S. at 85. *See* Currie, *supra*, at 27-44, for an excellent discussion of this case. The *Simons* case may make the analogy to divorce cases more appropriate than it would otherwise appear.

Interestingly, the status theory harmonizes with the basic rationale for the Administrative Model; the issue of testacy or intestacy concerns primarily the decedent and the state. *See* Alexander & Pearson, *supra* note 12, at 102-03. But adoption of the status theory of jurisdiction for probate proceedings, does not eliminate the requirement of notice to interested parties. Whether presumptive takers own constitutionally protected property interests and must be given notice and an opportunity to appear at a probate proceeding still requires resolution. *See* text at notes 111-63 *infra*.

68. 433 U.S. 186 (1977).

69. *See* VanDusen v. Barrack, 376 U.S. 612 (1964); Hanson v. Denckla, 357 U.S. 235 (1958); Riley v. New York Trust Co., 315 U.S. 343 (1942); Iowa v. Slimmer, 248 U.S. 115 (1918); Baker v. Baker, Eccles & Co., 242 U.S. 394 (1917); Overby v. Gordon, 177 U.S. 214 (1900); Wilkins v. Ellett, 108 U.S. 256 (1883). *Cf.* Arndt v. Griggs, 134 U.S. 315 (1890) (action to recover possession of land and quiet title).

70. *See* Robertson v. Pickrell, 109 U.S. 608 (1883) (dictum).

71. *See* Thorman v. Frame, 176 U.S. 350 (1900).

72. *See* Riley v. New York Trust Co., 315 U.S. 343 (1942) (dictum); Robertson v. Pickrell,

necesarily conflict with the physical power theory; they may only have expanded it to include a state's power over persons as well as over property located within the state's boundaries.[73]

The Court's decision in *Hanson v. Denckla*[74] most clearly demonstrated its abandonment of the status theory. In *Hanson*, the Court denied Florida jurisdiction to decide, as against a Delaware trustee, whether a Florida decedent had validly exercised an inter vivos power of appointment over a trust corpus located in Delaware. In upholding Florida jurisdiction, the Supreme Court of Florida had relied on an earlier Florida Supreme Court decision in *Henderson v. Usher*[75] that had essentially adopted the status theory:[76]

> Since the interpretation of the will is the primary question with which we are confronted, we are impelled to hold that the res is at least constructively in this state and that the Florida courts are empowered to advise the trustees how to proceed under it and what rights those affected have in it. For the immediate purpose of this suit the will is the res and when that is voluntarily brought into the courts in Florida to be construed the trust created by it is to all intents and purposes with it.[77]

Chief Justice Warren, writing for the Court in *Hanson*, rejected this argument:

> The settlor-decedent's Florida domicile is . . . unavailing as a basis for jurisdiction over the trust assets. For the purpose of jurisdiction *in rem*

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109 U.S. 608 (1883) (dictum). *Cf.* Cheever v. Wilson, 76 U.S. (9 Wall.) 108, 121 (1869) (dictum) (in a dispute involving the validity of a divorce decree rendered in Indiana, the Court stated that so far as the decree related to real property located in Washington, D.C., it could have no extraterritorial effect; but, if valid, it bound those who were parties in the case, and could have been enforced in the *situs* by the proper proceeding conducted there); Watts v. Waddle, 31 U.S. (6 Pet.) 389, 396 (1832) (court held that decree concerning title to land bound persons over whom the court possessed jurisdiction *in personam* although the land in question was located in another state); Massie v. Watts, 10 U.S. (6 Cranch) 148, 157-60 (1810) (in dispute over jurisdiction of a Kentucky court, arising out of suit brought to obtain conveyance of land located in Ohio, Court stated that jurisdiction of chancery court is sustainable in cases of fraud, trust, or contract wherever the defendant is found, although land outside of court's jurisdiction may be affected by the decree); R. LEFLAR, *supra* note 67, at §§ 82, 165, 201. *But cf.* Courtney v. Henry, 114 Ill. App. 635 (1904) (Illinois court could disregard two previous Ohio cases concerning title to land in Illinois because full faith and credit principles do not apply to decisions that affect interests in real estate).

The extraterritorial effect of a decree from Forum 1 affecting land in Forum 2 may be severely limited if the decree only binds persons who were made parties to the first litigation. In many instances subsequent litigation involves third persons who were not parties to the first judgment. *See, e.g.*, Fall v. Eastin, 215 U.S. 1 (1909); Clarke v. Clarke, 178 U.S. 186 (1900).

73. *See* Hazard, *supra* note 59, at 242-45. *But see* Smit, *supra* note 59, at 601-06 (argues that courts have replaced the physical power test with the reasonableness test). After *Shaffer* and its progeny, the viability of the physical power theory is left in doubt. Requiring that the defendant have minimum contacts with the forum despite the situs of property within the forum, undercuts the physical power theory. *See* notes 79-103 *infra* and accompanying text.

74. 357 U.S. 235 (1958).

75. 118 Fla. 688, 160 So. 9 (1935).

76. *See* 100 S.2d 378, 385 (Fla. 1956).

77. 118 Fla. at 692, 160 So. at 10.

> the maxim that personalty has its situs at the domicile of its owner is a function of limited utility . . . . The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, this Court has rejected the suggestion that the probate decree of the State where decedent was domiciled has an *in rem* effect on personalty outside the forum State that could render it conclusive on the interests of nonresidents over whom there was no personal jurisdiction.[78]

In *Shaffer v. Heitner*,[79] decided in 1977, the Court apparently rejected application of the physical power theory to property. *Shaffer* involved a challenge to Delaware's assertion of jurisdiction to decide a shareholder derivative suit based on a nonresident defendant's ownership of stock in a Delaware corporation. The Court recognized, contrary to *Pennoyer v. Neff*,[80] "that an adverse judgment *in rem* directly affects the property owner by divesting him of his rights in the property before the court."[81] This recognition led the Court to hold "that in order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising 'jurisdiction over the interests of persons in a thing'. The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum contacts standard elucidated in *International Shoe*."[82] The Court did not go so far as to say that the presence of property in the state was irrelevant:

> This argument, of course, does not ignore the fact that the presence of property in a State may bear on the existence of jurisdiction by providing contacts among the forum State, the defendant, and the litigation. For example, when claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant, it would be unusual for the State where the property is located not to have jurisdiction. In such cases, the defendants' claim to property located in the State would normally indicate that he expected to benefit from the State's protection of his interest.[83]

The Court thereby held that the presence of property within the forum could be evidence of the nonresident defendant's expectation of benefit from the state's protection and could thereby constitute the critical nexus between the forum and the nonresident needed to sat-

78. 357 U.S. 235, 249 (1958) (footnotes and citations omitted).

79. 433 U.S. 186 (1977).

80. 95 U.S. 714 (1877).

81. 433 U.S. at 206. Although *Shaffer* could be read narrowly as serving only to reverse quasi-in-rem jurisdiction of the *Harris v. Balk* type, later Supreme Court cases make it clear that it was not intended to be read restrictively. *See* Hay, *The Interrelation of Jurisdiction and Choice-of-Law in U.S. Conflicts Law*, 28 INTL. & COMP. L.Q. 161, 166-70 (1979).

82. 433 U.S. at 207 (footnote omitted).

83. 433 U.S. at 207-08 (footnotes omitted).

isfy the minimum contacts test. The court stated that the nexus would exist, for example, where a mortgagee sues a nonresident-mortgagor-landowner to foreclose a mortgage on land located in the forum, or where a plaintiff sues a nonresident landowner alleging that the condition of the property located in the forum caused personal injury to the plaintiff.[84]

Although a less clear case, *Shaffer* may not invalidate attempts to require nonresident claimants, such as intestate succession takers, to litigate the validity of a will in a jurisdiction where property found in the estate is located. The *Shaffer* Court indicated that a strong state interest combined with the location in the state of property that is the source of the underlying controversy could support jurisdiction:

> The State's strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property would also support jurisdiction, as would the likelihood that important records and witnesses will be found in the State.[85]

This dictum may prove crucial in determining the limits of a state's jurisdiction in probate cases, because often no nexus will exist between the state and the nonresident-estate claimant. To say that a will contestant enjoyed "the benefits from the State's protection of his interest" ignores the "voluntariness" aspect of the minimum contacts test. As stated in *Hanson*, "it is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State . . . ."[86] That the decedent happened to leave property in the forum state in which the defendant claims an interest says nothing about the defendant's voluntary contact with the forum.[87]

If, regardless of the presence of property in the forum, the *Shaffer* decision requires a forum-defendant nexus[88] under the standards

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84. *See* 433 U.S. at 208.

85. 433 U.S. at 208 (footnotes omitted).

86. 351 U.S. at 253.

87. Criticisms of *Hanson*'s distinction of McGee v. International Life Ins. Co., 355 U.S. 220 (1957), that there were not equivalent minimum contacts between the Delaware trustee and the decedent, are inapplicable here. *See, e.g.*, Kurland, *The Supreme Court, the Due Process Clause and the In Personam Jurisdiction of State Courts From Pennoyer to Denckla: A Review*, 25 U. CHI. L. REV. 569, 621-22 (1958). Beneficiaries or intestate takers who are claiming in probate are distinguishable from the nonresident defendant in *McGee*. In *McGee* the nonresident defendant solicited a reinsurance agreement with a resident of California, the offer was accepted by the California resident in California, and the insurance premiums were mailed from California until the insured's death. The Supreme Court upheld personal jurisdiction over the nonresident insurance company because the suit was based on a contract that had substantial connection with California. *But see* Fink, *supra* note 7, at 282, 282 n.40.

88. The importance of the "purposeful act" was reiterated in *Shaffer*, *see* 433 U.S. at 216, and in Supreme Court cases decided after *Shaffer*. *See* World-Wide Volkswagen Corp. v.

set forth in *International Shoe Co. v. Washington*[89] for assertion of jurisdiction in a probate case, probate administration will fall into substantial disarray. The emphasis on the forum-defendant nexus is not new but previously had been the basis for the decision in *Hanson*, in which the Court held that Florida's interest in winding up the estate of a decedent domiciled in Florida was insufficient to override the burden on a nonresident defendant to litigate there.[90] The holding in *Hanson* was not particularly disruptive of probate administration because property located in the state continued to be a valid basis for assertion of jurisdiction. Now, if under *Shaffer*, the presence of property in the state is also not alone sufficient for jurisdiction, an executor or administrator might have to probate a will in each state in which potential claimants reside.

When the Supreme Court realizes that present rules of jurisdiction may preclude any one forum from adjudicating everyone's interest in probate, it may not insist on the forum-litigation-defendant nexus for living probate decrees.[91] Instead, the Court may refer to its holding in *Mullane v. Central Hanover Trust Co.*,[92] in which it held that New York had jurisdiction to settle a New York trustee's accounts as against nonresident beneficiaries, based not *in rem*[93] or *in personam*,[94] but rather by necessity:[95]

Woodson, 444 U.S. 286, 297-98 (1980); Rush v. Savchuk, 444 U.S. 320, 329 (1980); Kulko v. California Superior Court, 436 U.S. 84, 91 (1978). However, none of these cases involved a dispute centering upon the ownership of property in the state attempting to assert jurisdiction.

89. 326 U.S. 310 (1945). All assertions of jurisdiction must be evaluated according to this minimum contacts standard. This reexamination was not attempted in *Shaffer*. "It would not be fruitful for us to re-examine the facts of cases decided on the rationales of *Pennoyer* and *Harris* to determine whether jurisdiction might have been sustained under the standard we adopt today. To the extent that prior decisions are inconsistent with this standard, they are overruled." 413 U.S. at 212 n.39.

90. *See* Hanson v. Denckla, 357 U.S. 235, 259-60 (1958) (Black, J., dissenting); notes 74-78 *supra* and accompanying text.

91. The Court has been criticized for not having given adequate consideration in *Hanson* to the problem of multiplicity of litigation. *See* Smit, *supra* note 59, at 609 n.41.

92. 339 U.S. 306 (1950). *See* Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960 (1957), *appeal dismissed sub nom.* Columbia Broadcasting Sys., Inc. v. Atkinson, 357 U.S. 569 (1958).

93. The trustee's account did not affect title to the property and the trustee's obligation to beneficiaries was not a sufficient res. *See* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916). In *Dunlevy* the Supreme Court held that Pennsylvania lacked jurisdiction to terminate a nonresident's claim to the proceeds to a life insurance policy owed by the interpleading plaintiff insurance company. *But see* Smit, *supra* note 59, at 624-25. Smit argues that the asserted claim against the insurance company should itself be a sufficient res for jurisdictional purposes. *See also* Hazard, *supra* note 59, at 278-81. Of course, after *Shaffer*, even if a sufficient res were found in the *Dunlevy* case, minimum contacts with the forum by the nonresident defendant would be required.

94. This was true because the court lacked the requisite jurisdiction over both creditor and debtor needed to determine conclusively whether one was liable to the other. *See* New York Life Ins. Co. v. Dunlevy, 241 U.S. 518 (1916). *But see* Currie, *supra* note 57, at 435 n.34.

> It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.[96]

Like *Mullane*, the state's interest in avoiding multiple litigation and in permitting effective recourse to the benefits of its laws are also present for probate administration.

Assuming that after *Shaffer* the Court will carve out an exception for probate and other similar multiple litigation situations, many questions remain as to the appropriate forum for conducting probate. The Court is likely to adopt one of the following two approaches for determining jurisdiction. Under the first approach, jurisdiction for probate matters would be based on the domicile of the decedent. If the Court were to adopt this approach, it would have to overrule *Hanson*. By abandoning the traditional legal fiction that naming a *res* as a party defendant is sufficient to obtain jurisdiction and by recognizing that persons' rights in property are at stake, the Court after *Shaffer* is free to identify the appropriate forum in which to conduct probate administration irrespective of the situs of the property found in the decedent's estate. In most cases, probate administration, which includes discovery and collection of assets, determination and payment of taxes, debts, funeral and administrative expenses, determination and distribution to persons entitled to receive the property under the will or by the intestate succession statute, can most easily be conducted at the domicile of the decedent.[97] This forum is no less convenient for all the estate claimants than any other forum, and it is as likely as any other forum to be the place where most of the claimants reside, the place where most of the property is located, and the place where witnesses and records are easily available. Also, the claimants to the estate have usually not

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Currie suggests that *Dunlevy* was an erroneous decision. Given the need to avoid multiple payment, Currie argues that jurisdiction is proper in a state in which one claimant could have been sued to determine liability if there had been no competing claims.

95. *See* Fraser, *Jurisdiction by Necessity — An Analysis of the Mullane Case*, 100 U. PA. L. REV. 305 (1951). *See also* Hazard, *supra* note 59, at 283-84. Other scholars have written in support of such an approach. *See* Smit, *The Importance of Shaffer v. Heitner: Seminal or Minimal?*, 45 BROOKLYN L. REV. 519, 523 (1979).

96. 339 U.S. 306, 313 (1950).

97. *See* Hopkins, *supra* note 57, at 249-54, 263-70; Currie, *supra* note 57, at 429-38.

entered into any transactions with respect to property found in the estate, but, instead, their interest arises out of their personal relationship with the decedent.[98]

The essential implication of binding all claimants, regardless of minimum contacts with the forum, to an adjudication of probate in the decedent's domicile is that the status theory would replace the physical power theory in probate.[99] The decree would have to be given full faith and credit in any other state. To infer this result from the *Shaffer* decision is troubling because that case emphasized the territorial limitations on state power and checked the trend toward nationwide service of process begun by *International Shoe*. Yet, by requiring a nexus between the forum, the litigation, and the defendant, the Court diminished the state's power to control property found within its borders. Looking at the *Shaffer* decision from this viewpoint, complete probate in the decedent's domicile is not a surprising result.

If the Court adopts the domicile-of-the-testator-approach, living probate decrees issued from any of the living probate models would be afforded full faith and credit as long as the forum was the domicile of the decedent at death.[100] The living probate decree might also be accorded full faith and credit if the forum is the domicile of the decedent at the time of the proceeding. In either case, if the court were to adopt the domicile-of-the-testator approach, the attractiveness and usefulness of all the living probate models would increase.

A second approach available to the Court for determining a proper forum for probate is to base jurisdiction upon the situs of the property. This approach can be supported by the dictum in *Shaffer* suggesting that a strong state interest combined with property lo-

98. One exception to this latter generalization encompasses secured creditors of the decedent. But when tangible or intangible *personal* property is at issue, even secured creditors cannot claim substantial unfairness if the probate forum is not the situs of the property. They had no reasonable expectation that the property would remain in the same forum where security was perfected. As for real property, however, requiring secured creditors to litigate their claims in a forum other than the situs of the property may raise problems of fairness. To resolve this difficult issue, a court must balance the interest of the estate in avoiding multiple litigation, the interest of the state in providing one forum to wind up the estate, and the interest of the creditor in not having to perfect his claim in a foreign state. *See* Smit, *supra* note 59, at 608-13.

99. *See* notes 63-67 *supra* and accompanying text.

100. Under the Administrative Model, a question still remains as to whether notice and an opportunity to appear are constitutionally required. Assuming that these protective safeguards are not necessary, the living probate decree issued under the Administrative Model must be given extraterritorial effect under the domicile-of-the-testator approach. *But see* note 62 *supra* (describing the jurisdictional rules of existing living probate statutes).

cated in the state might be sufficient to support jurisdiction.[101] The extraterritorial effect of the decree would be limited to property located in the forum. If the Court were to adopt this approach and bar probate proceedings at the testator's domicile, then the extraterritorial effect of the living probate models would be severely restricted. Jurisdiction based on situs of the property would be unavailable because no particular property is at issue in living probate.[102] The property found in the testator's estate at the time of his death could totally differ from the property owned at the time of the living probate proceeding. A state would thus have no strong interest in asserting jurisdiction merely because the testator owned property in the state at the time of the proceeding. Without such an interest presumably a state could only assert jurisdiction over a nonresident claimant under the minimum contacts standard, and the extraterritorial effect of the living probate decree would be so limited.[103]

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101. *See* note 85 *supra* and accompanying text.

102. *See* note 62 *supra* and accompanying text.

103. Questions of *in personam* jurisdiction as it relates to the extraterritorial effect of the ex parte proceeding become very complicated under the Administrative Model. If the constitutionality of the Adminstrative Model were based on the adequacy of its procedures, see notes 158-63 *infra* and accompanying text, the ability to obtain personal jurisdiction arguably still might be important even though the parties would not have the right to notice or the opportunity to appear. The requirement would continue to impose important territorial limits on the power of a state. Such a rule would also be consistent with existing case law. If the Administrative Model were found to be constitutional on the theory that the state has created no protectible property interest, see notes 111-57 *infra* and accompanying text, then personal jurisdiction seems unnecessary. Whether this decree will be given effect in another state depends not upon full faith and credit of judgment principles but instead upon choice-of-law rules and upon whether the law of another state must be given full faith and credit in the forum. The same result would follow if the Administrative Model were found to be constitutional on the theory that it involves not a judgment, but rather a law prescribing will execution formalities in the state that waives the substantive formalities of mental capacity and absence of fraud or undue influence upon compliance with these designated procedural formalities. *See* text at notes 157-58 *infra*. In such a case, the extraterritorial effect of the ex parte proceeding again will depend upon choice-of-law rules and upon whether the law of the state must be given full faith and credit in the forum.

The general common-law choice-of-law rule is that the law of the situs of the testator's land (including that jurisdiction's relevant choice-of-law rules) determines the validity of bequests of real property, R. LEFLAR, *supra* note 67, at 401; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 239 (1971), and that the law of the testator's domicile at death determines the validity of bequests of personal property. R. LEFLAR, *supra* note 67, at 401; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 263 (1971). To ensure that a will would be valid regardless of where the testator owns land or is domiciled at the time of his death, many states have enacted statutes specifying additional choice-of-law rules to determine the validity of wills of real and of personal property. *E.g.*, ILL. REV. STAT. ch. 110 ½, § 7-1 (1977); N.Y. EST., POWERS & TRUST LAW § 3-5.1(c) (McKinney 1967); UNIFORM PROBATE CODE § 2-506. These statutes generally declare that a will is valid if executed in accordance with the formalities prescribed by the forum state, by the state where it was executed, or by the state where the testator was domiciled at the time of its execution. These statutes are not uniform. Some may provide that a written will is valid if executed in compliance with the law of the place where the testator is domiciled at the time of death. *See, e.g.*, N.Y. EST., POWERS & TRUST LAW § 3-5.1(c) (McKinney 1967); UNIFORM PROBATE CODE § 2-506. Still other statutes may provide that the will is valid if admitted to probate in another state. *See, e.g.*, ILL. REV. STAT. ch. 110 ½, § 7-1

In summary, the extraterritorial effect of the living probate decree is inextricably intertwined with the recent landmark case of *Shaffer v. Heitner*, which leaves the basis for jurisdiction of a probate proceeding in doubt. Relying on *Mullane*, I suggest that the Court is likely to permit a probate court to assert jurisdiction over a nonresident claimant despite the claimant's lack of minimum contacts with the forum. Not to recognize jurisdiction over the nonresident claimant in this situation would preclude one forum from adjudicating everyone's interest in probate. As in *Mullane*, the Court will be reluctant not to make an exception to the general jurisdictional rules. The proper forum for this "jurisdiction by necessity" may be either the decedent's domicile or the situs of property found in the decedent's estate. If domicile is accepted as a proper forum and if jurisdiction by necessity is carved out as an exception to the forum-litigation-defendant nexus insisted upon in *Shaffer*, the living probate decree will have the binding effect its proponents expected. If, however, the Court refuses to recognize an exception to the forum-litigation-defendant nexus, or if the Court limits jurisdiction by necessity to the situs of the property, then the living probate decrees

(1977). However, these statutes have been interpreted to apply only to formal requirements for a valid execution; invalidity due to substantive requirements like mental incapacity, fraud, or undue influence remains subject to the common-law rules described above. *See* Crossett Lumber Co. v. Files, 104 Ark. 600, 149 S.W. 908 (1912); Guidry v. Hardy, 254 So. 2d 675 (La. App. 1971); Schalk v. Dickinson, 232 N.W.2d 140 (S.D. 1975).

Although narrow application of these statutes is usually insignificant because of the substantial similarity of will validity standards among the various states, it may substantially reduce the extraterritorial effect of nonbinding decrees produced under the Administrative Model unless the forum state has adopted a similar law. Absent adoption of the Administrative Model or of laws reflecting a similar policy not to recognize expectancies as protectible property interests (or not to require testamentary capacity or absence of fraud and undue influence for the execution of a valid will), another state is not likely to recognize the decree from the ex parte proceeding. Unless the contacts with the state are so slight and casual that to apply the forum's state law would be inconsistent with due process, the forum is free to apply its own law in furtherance of its own view of public policy. *See* Clay v. Sun Ins. Office, Ltd., 377 U.S. 179 (1969); Pacific Employers Ins. Co. v. Industrial Accident Commn., 306 U.S. 493 (1939); Alaska Packers Assn. v. Industrial Accident Commn., 294 U.S. 532 (1935); Hague v. Allstate Ins. Co., __ Minn. __, 289 N.W.2d 43 (1979) *cert. granted*, 100 S. Ct. 1012 (1980). For a proposal that a state only be allowed to apply its law to a case where it has the minimum contacts required by *International Shoe* for the exercise of specific personal jurisdiction over the defendant, see Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872 (1980).

When presented, for example, with a factual situation in which the decedent domiciled in Illinois at his death obtained an ex parte determination in Illinois that a will bequeathing all his property to a religious cult is valid, a court in another state, which is the situs of some of decedent's personal property and domicile of decedent's children, will be very reluctant to refuse the children an opportunity to litigate the issues of testamentary capacity, fraud, or undue influence. In the absence of a specific choice-of-law statute to the contrary, a court in the second state is likely to find either that eliminating mental capacity, absence of fraud, and undue influence as requirements for the execution of a valid will is contrary to the state's public policy, or that an expectancy interest as defined in the state is property deserving of due process protection. In either case, the second state has the power not to apply Illinois law.

will only bind those persons who purposefully avail themselves of the privilege of conducting activities within the forum state. For the Administrative Model, the extraterritorial effect is even more uncertain unless the Court is willing to recognize jurisdiction of courts in the state of domicile of the decedent.

Because the extraterritorial effect of a living probate decree remains uncertain, a testator cannot be sure that his will is safe from attack as long as he has presumptive heirs, property, or domicile outside the forum state. This uncertainty, combined with the threat of post-mortem challenges based on claims of fraud on the court and fraud or undue influence subsequent to the living probate decree, significantly reduces the assurance of validity that a living probate decree can offer a testator.

C. *Excessive Costs to Testators*

A third failing of living probate is the high price it exacts from testators in return for an ephemeral assurance that their wills are secure from challenge. That price includes physical and mental examination, participation in the court proceeding, the cost of an attorney and of a guardian ad litem (depending upon the proposal adopted), and the risk of family disharmony. These costs will inevitably deter many testators from using the proceeding regardless of the benefits obtained.

After balancing the benefits of living probate against these costs, a testator will very likely turn to alternative methods of achieving certainty of testamentary disposition — most notably to the revocable trust.[104] Although expectant heirs may challenge a revocable trust for mental incompetency,[105] fraud, or undue influence,[106] potential challengers are much less likely to know that that trust exists than that a will exists. The settlor of the trust need not publicly disclose its existence. Moreover, when a trust exists for a significant period, the trustee's testimony concerning the settlor's capacity to

104. *See* Alexander & Pearson, *supra* note 12, at 95; Langbein, *supra* note 12, at 67.

105. Most states have statutes that incapacitate a property owner under the protection of a guardian or conservator from making inter vivos gifts, but permit him to execute a will. The legal standard for donative capacity may therefore be more stringent than the legal standard for testamentary capacity. If the property owner is not under the care of a guardian or conservator, however, the courts apply the same legal standard for donative capacity as they do for testamentary capacity. *See, e.g.*, Lowe v. Hart, 93 Ark. 548, 125 S.W. 1030 (1910); Thorne v. Consand, 160 Ind. 566, 67 N.E. 257 (1903); Stouffer v. Wolfkill, 114 Md. 603, 80 A. 300 (1911); Flynn v. Union Natl. Bank of Springfield, 378 S.W.2d 1 (Mo. App. 1964); Patterson v. Halterman, 161 Mont. 278, 505 P.2d 905 (1973); Riggs v. American Tract Socy., 95 N.Y. 503 (1884); Grignon v. Shope, 100 Or. 611, 197 P. 317 (1921).

106. *See* 4 A. Scott, The Law of Trusts § 333-333.3 (3d ed. 1967).

conduct business with the trustee reduces the chance of successful challenge. Through the revocable trust, the settlor can help to protect against disruption of his dispository scheme[107] without relinquishing significant control of the property before death. Given this attractive alternative, few people are likely to use living probate.

D. *Unfairness to Presumptive Takers*

Quite apart from the usefulness or attractiveness of living probate to the testator, the three living probate proposals raise troubling policy questions. To prevent unwarranted strike suits and to preserve the right to testamentary freedom, the living probate schemes sacrifice fair adjudicatory procedures for the presumptive takers. The Contest Model requires presumptive takers to choose between unattractive alternatives: they can either remain silent, allowing the will to be validated and to extinguish their expectancies, or they can challenge the will, disrupting family harmony and incurring litigation costs earlier than otherwise necessary to retain the possibility of inheriting an indeterminate amount of property. Even if their challenge succeeds, they risk later disinheritance by the testator either through his donative transfers or through his execution of a subsequent will that requires the presumptive takers to decide again whether to litigate.[108]

These alternatives are improved under the Conservatorship Model. The use of a guardian ad litem, however, will do little to shield presumptive takers since the sources of the guardian's information will often be obvious to the testator. Of course, the presumptive taker's ability to litigate fraud and undue influence in post-mortem proceedings by showing that wrongful conduct prevented revocation of the court-approved will reduces the unfairness of the Contest and Conservatorship Models. That breach of living probate's promise of certainty against future attack, however, hardly deserves recognition as an attribute of the proposals.

Of all the proposals, the Administrative Model places the presumptive takers in the worst possible position; they receive no notice of the proceeding and depend completely upon the investigation of a disinterested guardian ad litem. Without an economically interested

107. *But see* Knowles v. Binford, 268 Md. 2, 298 A.2d 862 (1973).

108. A challenge based on testamentary incapacity during living probate is less of an imposition on the presumptive takers because, at the least, the finding of incapacity can be introduced in a subsequent will contest (ante-mortem or post-mortem). This problem is obviously worse if the presumptive takers must pay for their own litigation costs as under the presently enacted statutes in Arkansas, North Dakota, and Ohio.

party litigating the issues, the likelihood of erroneous determinations substantially increases. For two important reasons, providing confidentiality and avoiding risk of family disharmony, costs of notice, and risk of unfounded allegations does not justify a procedure that fails to provide presumptive takers notice or an opportunity to appear during the living probate process. First, as a matter of policy, notice and a hearing for presumptive takers seem desirable. Second, denying notice and a hearing may violate the due process clause of the Constitution.

Alexander and Pearson want to eliminate notice and a hearing for presumptive takers because they fear that the risks of family disharmony and breached confidentiality that accompany these safeguards will deter testators from using living probate. But the risk of family disharmony or breached confidentiality deters use of the living probate procedure in exactly those cases where the state should be most concerned about providing notice to, and a full hearing for, disappointed heirs.

A testator who disinherits a distant cousin in favor of a religious cult is not as likely to be concerned about family harmony and confidentiality as is a testator who disinherits his nuclear family in favor of the same organization. In the latter case, the testator might be quite attracted by the secrecy of the Administrative Model. But that attraction cannot justify a less accurate procedure for determining will validity, particularly when the primary purpose of requiring mental capacity is to protect the testator's family and society from uninformed dispositions that leave family members as wards of the state.[109] The features of the Administrative Model that may be attractive to testators conflict with this public policy.[110]

Notice and a hearing for presumptive takers may be more than a wise policy — they may be a constitutional right. Alexander and Pearson argue that the lack of notice and hearing under the Administrative Model is constitutional because presumptive takers do not own constitutionally protected property interests.[111] While conceding that the differences between ante-mortem and post-mortem probate "provide an insignificant basis for constitutional distinction,"[112]

109. *See* Epstein, *supra* note 21, at 232-33; Note, *Testamentary Capacity in a Nutshell; A Psychiatric Reevaluation*, *supra* note 25, at 1122-24. *See generally* Cavers, *supra* note 4.

110. Alexander and Pearson suggest that their proposal could be modified either to provide notice and an opportunity to appear to nuclear family members, or to exempt them from the binding decree, but they ultimately reject these modifications as inconsistent with the nonadversarial ex parte proceeding. *See* Alexander & Pearson, *supra* note 12, at 115-16.

111. *See* Alexander & Pearson, *supra* note 12, at 98-99.

112. *Id.* at 111.

Alexander and Pearson argue first that the landmark *Mullane v. Central Hanover Bank and Trust Co.*[113] decision does not offer grounds to extend due process protection to presumptive takers *either before or after* the testator's death. In *Mullane*, the court struck down a New York statute that gave pooled trust beneficiaries notice of a judicial settlement of accounts by publication alone. The Court held that publication alone was a constitutionally inadequate method of notice "to known present beneficiaries of known place of residence," but that it was an adequate form of notice to beneficiaries "whose interests are either conjectural or future" and to those "whose interests or addresses are unknown to the trustee."[114]

Alexander and Pearson correctly observe that *Mullane* does not necessarily require that contingent future interests (which they acknowledge to be traditional property rights) receive due process protections. Publication notice had been provided to these interests under the New York statute, and the constitutional question was therefore never presented to the Court.[115] Nevertheless, the Court did reach the question of the adequacy of the publication notice for persons owning remote contingent interests, and it held such notice sufficient.[116] The Court balanced the difficulty in discovering the addresses of remote trust beneficiaries against their interests and concluded that requiring notice by mail to these persons would impose an excessive burden on the trustee.[117] Since the trustee already knew the place of residence of all known present beneficiaries, publication notice was inadequate for those persons.[118] This balancing implies that the remote beneficiaries were entitled to at least some protection, and that they would have had a constitutional right to appear in the proceedings had they seen the publication notice.[119]

Just as *Mullane* implies that holders of contingent remainders are entitled to some due process protection, the similarities between the

113. 339 U.S. 306 (1950). For examples of state court cases holding *Mullane* inapplicable to probate proceedings, see Alexander & Pearson, *supra* note 12, at 101 n.39.

114. 339 U.S. at 318.

115. Alexander & Pearson, *supra* note 12, at 99-100 n.36.

116. 339 U.S. at 317-18.

117. The court stated that the "practical difficulties and costs that would be attendant on frequent investigations into the status of great numbers of beneficiaries . . . would impose a severe burden on the plan, and would likely dissipate its advantages." 339 U.S. at 317-18.

118. 339 U.S. at 318.

119. That this reading of *Mullane* is more fair is further demonstrated by the Court's comparison of the problem of discovering the beneficiaries who owned remote interests with those cases in which persons had been missing for many years and the state provided for the administration of their property. *See* 339 U.S. at 317 (*citing* Blinn v. Nelson, 222 U.S. 1 (1911); Cunnius v. Reading School Dist., 198 U.S. 458 (1904)).

expectancies of presumptive takers and contingent remainders suggest that expectancies should be protected as well. The failure of the Administrative Model to provide any notice of a probate procedure that can extinguish these expectancies may therefore violate the Constitution.

Alexander and Pearson argue against extension of *Mullane* to expectancies by reference to traditional property law classifications[120] and to a state's power to define the rights of inheritance. First, they observe that the trust beneficiaries in *Mullane* owned estates recognized at common law as property, whereas presumptive takers have

> neither a traditionally enforceable interest in the testator's property nor a fiduciary relationship with the property's custodian. To illustrate the distinction, consider inter vivos transfers of property by the testator. Such transfers generally are valid despite their adverse effect on expectant heirs and legatees. Those individuals whose hopes are extinguished by such transfers have no rights to compensation.[121]

Simons v. Miami Beach First National Bank,[122] in which the Supreme Court held that a state ex parte divorce proceeding could not only bind the nonresident spouse on the issue of marital status, but could also terminate the spouse's dower rights, supports this distinction. Unfortunately, the *Simons* Court did not discuss thoroughly the reasons why the financial loss of dower was not a deprivation of property.[123] The dower interest in a decedent's estate is, if anything, more substantial than the rights of other presumptive takers being litigated in a living probate proceeding. And the ex parte divorce proceeding and its effect on dower is functionally similar to the living probate proceeding of the Administrative Model and its effect on other expectancy interests. Dower depends upon a finding of marriage or nonmarriage just as the expectancy interests depend upon a finding of testacy or intestacy. Also, just as the plaintiff in a divorce proceeding must prove grounds for divorce, the finding of testacy or intestacy depends upon factual inquiry into testamentary incapacity, fraud, or undue influence. Nevertheless, *Simons* does not foreclose further inquiry. *Simons* has been severely criticized in the literature.[124] More importantly, the ex parte divorce proceeding in *Simons* is distinguishable from the living probate pro-

120. *See* Alexander & Pearson, *supra* note 12, at 101-02.

121. *Id.* at 101-02 (footnotes omitted).

122. 381 U.S. 81 (1965).

123. In a brief paragraph the court merely noted the inchoateness of Ms. Simons's claim to dower, which might suggest that at the time of the ex parte divorce proceeding, the right to dower was not property within the meaning of the due process clause. *See* 381 U.S. at 85 & n.6.

124. *See* Currie, *supra* note 67, at 33-38.

ceeding under the Administrative Model in that the plaintiff in *Simons* was at least provided notice and an opportunity to appear. Presented with a case where these protections, rather than personal jurisdiction, were absent,[125] the Court might not hold that the dower interest can be terminated.

Although the Alexander and Pearson distinction between an expectancy interest and a traditionally recognized estate in property may appeal to a property lawyer, constitutionally protected property interests are identified not by a state's formalistic labelling but instead by their functional alikeness[126] to property interests recognized as protected under the due process clause by the Supreme Court. The expectancies at issue in living probate may be functionally identical to the contingent interests considered in *Mullane*.

A comparison between the conditions and events that can prevent an expectancy and an equitable contingent remainder from vesting uncovers striking similarities. Consider the following example:

> *O* declares a trust in Blackacre, naming himself as trustee and retaining a power to revoke the trust at any time. Under the trust, *O* retains an income interest in Blackacre until his death, whereupon Blackacre is to be transferred in tenancy in common to those of *O*'s children who are alive at his death. At the time the trust is created, *C* is *O*'s only child, and *O* is unmarried.

O owns a reversionary interest in Blackacre that will become possessory upon his death without children surviving. The reversionary interest will pass at his death either by intestate succession or by will unless *O*, through an inter vivos conveyance, transfers the reversionary interest. *C* owns an equitable contingent remainder in Blackacre and, as *O*'s sole expectant heir, an expectancy interest in *O*'s reversionary interest in Blackacre. *C*'s equitable contingent remainder is a traditionally recognized property interest but the expectancy interest is not.

The equitable contingent remainder can be totally defeated if: (1) *C* predeceases *O*; (2) *O* revokes the trust and transfers the remainder interest in Blackacre to another person during his life; or (3)

125. *See* Vernon, *supra* note 67, at 1016-17. Vernon questions how the nonresident spouse can obtain jurisdiction in actions to obtain alimony and support under *Shaffer*.

126. *See* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 454 (1977); Currie, *supra* note 67, at 34-37. *Cf.* United States v. Seeger, 380 U.S. 163 (1965) (lower court decision holding unconstitutional a statute that exempted certain conscientious objectors from combatant training and service in the military reversed based on determination that the statute exempted individuals whose conscientious scruples against such services were parallel to those of other persons exempted by the Act except that they were not rooted in the supposed dictates of a "Supreme Being," as the Act seemed to require).

O revokes the trust, retains Blackacre in fee simple absolute until his death, and devises it to another person by will or allows it to pass by intestate succession to his heirs. *C*'s equitable contingent remainder can be partially defeated if *O* has another child who also survives *O* or if *O* modifies the trust reducing the share of the remainder going to his children. In any case, *C* would not have standing to object to any actions *O* took with respect to Blackacre. The expectancy interest that *C* owns in the reversion can also be totally defeated if: (1) *C* predeceases *O*; (2) *O* transfers the reversionary interest in Blackacre to another person during his life; or (3) *O* devises the reversionary interest to another person by will. Similarly, the expectancy interest may be partially defeated by the birth of siblings or if *O* transfers only a portion of the reversionary interest to another person by inter vivos conveyance or by will.

A difference between this equitable contingent remainder and this expectancy interest in this reversion concerns the possibility of *O* dying leaving a surviving spouse. Theoretically, *C*'s equitable contingent remainder may be less vulnerable to defeat by the surviving spouse than *C*'s expectancy interest. The surviving spouse may, by statute in some states,[127] or by court-made law in other states,[128] claim a forced share against the trust corpus. In nearly all states, however, the surviving spouse would receive at least a portion of the property found in the probate estate.[129] In this example, even if the state provides only for a spouse's statutory share of the probate estate, it will have no effect on *C*'s interest; in order for the reversionary interest to pass through the probate estate and become possessory and available to the surviving spouse, *C* would have had to predecease *O* — and that would in itself defeat his expectancy interest.

The enjoyment a person derives from owning either of these two interests before possession is also nearly identical. Although in most states the equitable contingent remainder can be gratuitously transferred by quitclaim deed and the expectancy interest cannot, the expectancy interest can effectively be gratuitously transferred by warranty deed.[130] Moreover, in a few states, neither a contingent remainder nor an expectancy interest can be gratuitously transferred

127. *See, e.g.*, N.Y. EST., POWERS & TRUST LAW § 5-1.1(b)(1)(E) (McKinney 1967); N.D. CENT. CODE § 30.1-05-02(1)(a) (Supp. 1979); UPC § 2-202(1)(i).

128. *See, e.g.*, Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937); 1 A. SCOTT, *supra* note 106 at § 57.5.

129. *See, e.g.*, ILL. REV. CODE § 2-1(a)-(c) (1977); UPC § 2-102.

130. If the transfer is supported by full and adequate consideration, the expectancy interest can be transferred by quitclaim.

inter vivos by quitclaim deed.[131] The differences in enjoyment would therefore be almost nonexistent.

Moreover, not all interests injured by a living probate finding of will validity are mere expectancies. Consider the following example:

> *O* dies leaving a valid will containing the provision: "I devise Blackacre to *A* for life and then to such of *A*'s children as *A* shall appoint by will, and in default of appointment to *B*." A thereafter executes a will that appoints Blackacre to his child *C*.

A owns a special power of appointment that can only be exercised by a valid will. *B* owns a vested remainder subject to defeasance by the valid exercise of the power by *A*. At the time *A* offers a will for living probate, *B*'s interest falls within the class of traditional property interests. Yet under the Administrative Model, *B* would not be given notice or the opportunity to appear at an ante-mortem probate proceeding determining the validity of *A*'s will. Thus, even under the criteria established by its proponents, the Administrative Model should be amended to provide notice to default takers.

Finally, *Mullane* should apply to a living probate procedure because, even assuming the interests adjudicated at the time of the proceeding are mere expectancies, the adjudication will, after the testator's death, bind persons who would have owned traditional property interests but for the prior ex parte proceeding.[132] Alexander and Pearson reject this analysis by asserting that the property right arises only after probate is completed. They argue first that since the state can define the right to inherit, the state also possesses the right to decide when the property right comes into existence:[133]

> Inheritance through testate or intestate succession . . . is simply a state-supervised gift. Until the gift is completed, the expectant recipient has no greater property rights than the expectant recipient of an inter vivos gift. Under our probate system, the succession rights of expectant heirs and legatees do not receive formal legal recognition until (1) a will has been admitted to probate, or (2) the existence of a valid

131. *See* L. SIMES & A. SMITH, THE LAW OF FUTURE INTERESTS §§ 394-96, 1858-59 (2d ed. 1956).

132. *See id.*, at 1858-59.

133. *See* Alexander & Pearson, *supra* note 12, at 102. The Court in Simons v. Miami Beach National Bank, 381 U.S. 81, 85 (1965), accepted this theory for dower rights. The issue will be discussed further at note 139 *infra* and accompanying text.

Fixing the time that the property rights arise after formal probate is completed is important to Alexander and Pearson for two reasons. First, it eliminates any claim that by accelerating the adjudication of the validity of the will, the presumptive takers are denied due process protection that they would otherwise enjoy. Second, if their constitutional analysis is accepted as correct, reforms to reduce procedural requirements and inefficiencies in probate administration after the decedent's death could doubtless be implemented. For example, the UPC has promulgated in §§ 3-301 to -306 an informal probate proceeding that is ex parte and is very similar to the probate in common form that existed in England and that is already in effect in several states today. *See* T. ATKINSON, *supra* note 18, at §§ 93-95.

will has not been established and the establishment of any later discovered will is barred by the law.[134]

The flaw in this analysis is that the law in the various states does not clearly define inheritance as arising after a state approves or rejects a will. Heirship status under an intestacy statute is determined immediately after a decedent's death. If an heir should die before completion of probate, his share of the decedent's estate passes to the beneficiaries under his will or to his intestate heirs.[135] Alexander and Pearson acknowledge that states have many laws in which rights of succession takers are recognized upon the decedent's death; they attribute these laws to "administrative convenience and necessity"[136] only.

Secondly, Alexander and Pearson argue that, until probate is complete, the property right is so contingent that it should not be raised to the level of a protectible property interest.[137] That probate is required to determine whether the decedent died intestate or testate and to determine and pay taxes and other debts does not necessarily lead to a conclusion that no property interest arises until after probate is completed. All the facts necessary to resolve the questions arising at probate, especially whether the decedent died testate or intestate, are known or knowable as of the time of the decedent's death. The law provides all the necessary criteria for determining who should share in the decedent's estate. That such a determination has not yet been made should not lead to the conclusion that no property interests exist.

Contrary to the argument made by Alexander and Pearson, this aspect of a testamentary transfer distinguishes it from an inter vivos gift. Unlike the uncompleted gift where the donor has not yet entered into a legal transaction, at the decedent's death, the decedent no longer owns the property — a transfer has occurred. All that remains to be done is to apply the various rules of law to determine who is the recipient of the transfer. To deny the expectant heir opportunities to present relevant evidence and to ensure correct application of the rules of law arbitrarily imposes a financial loss on him.[138]

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134. Alexander & Pearson, *supra* note 12, at 98.

135. Even if no law in a particular state provides that property rights arise at the time of the decedent's death, a claim that they arise at that time may derive from rules and procedures that raise the claimants' expectations. This idea of expectations arising through "de facto" procedures is seen in Perry v. Sindermann, 408 U.S. 593 (1972). In addition, *see* Van Alstyne, *supra* note 126, at 455.

136. Alexander & Pearson, *supra* note 12, at 98 n.31.

137. *See* Alexander & Pearson, *supra* note 12, at 111.

138. The very act of dealing with what purports to be an "individual case" without first

Hanson v. Denckla[139] supports this analysis. In *Hanson*, the Court found that Florida lacked jurisdiction in a post-mortem probate proceeding over a Delaware trustee, and therefore, that Delaware could ignore a Florida judgment. The Court relied upon the due process clause to determine the fairness of Florida's assertion of jurisdiction. The Court's analysis applied inferentially to all nonresident will beneficiaries or intestate takers.[140] The Court necessarily found that these parties owned a property interest protected by the due process clause of the fourteenth amendment.[141]

If a protectible property interest arises, at the latest, when the decedent dies, litigating the validity of the decedent's will before death in a binding declaratory judgment proceeding would seem also to require due process protection for the presumptive takers. Although the interest is subject to more contingencies than after the decedent's death, it would seem that the differences in the quality of the interest are not so important as to warrant a constitutional distinction. To hold otherwise would mean that a testator could unilaterally destroy an individual's right to inherit upon petitioning the court to recognize his will as valid.[142]

Alexander and Pearson are correct in identifying the law of succession as a statutory creation. "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction."[143] The states have the power and in fact frequently repeal existing intestate succession statutes and enact new ones that provide for different distributive schemes.[144] Similarly, the state has the

affording the person involved the protection of a hearing offends the concept of basic fairness that underlies the constitutional due process guarantee. *See* Mackey v. Montrym, 443 U.S. 1, 20 (1979) (Stewart, J., dissenting).

139. 357 U.S. 235 (1958). This argument appears inconsistent with the *Simons* case in which the Court, relying on Florida law providing that no dower right survived an ex parte decree of divorce, held that the spouse could not claim dower at the probate of her ex-husband's estate. Reading *Simons* and *Hanson* together, however, suggests that a testator, by merely petitioning a court to determine the validity of a will during his life, may destroy a protectible property interest. Formulating the issue in this way, the Court is unlikely to rely on *Simons* and to uphold the constitutionality of the Administrative Model.

140. 357 U.S. at 259 (Black, J., dissenting).

141. The same inference can be drawn from other earlier Supreme Court decisions concerning probate decrees. *See, e.g.*, Riley v. New York Trust Co., 315 U.S. 343 (1942).

142. *See* Currie, *supra* note 67, at 36, in which the author predicts that the Supreme Court would not permit "a state to dispense with notice if a man sued simply to extinguish his wife's expectancy of a statutory share in his estate."

143. Irving Trust v. Day, 314 U.S. 556, 562 (1942). *See also* Mager v. Grima, 49 U.S. (8 How.) 490 (1850); United States v. Fox, 94 U.S. 315 (1876); United States v. Perkins, 163 U.S. 625 (1896).

144. For example, in recent years, states have enlarged the share of the estate going to the

power to increase the requirements for executing a valid will and the power to create rights in certain persons, such as a spouse or children of the decedent, to take a share of the estate contrary to the testamentary scheme found in the will. To say that the state has the power to destroy a particular individual's expectancy interest in another person's property is not to say, however, that if the state continues to recognize the individual's expectancy interest, it is not a protectible property interest. The entitlement cases beginning with *Goldberg v. Kelly*[145] make this proposition clear.

As they did with *Mullane*, Alexander and Pearson argue that the protectible property interests recognized in the entitlement cases are distinguishable and involve more substantial interests than the expectancy interests at stake in probate. Relying on *Roth v. Board of Regents*,[146] *Perry v. Sindermann*,[147] *Arnett v. Kennedy*,[148] and *Bishop v. Wood*,[149] they identify two necessary requirements for finding that a governmentally conferred interest is the equivalent of property and, therefore, must be provided due process protection: (1) a present enjoyment of that benefit and (2) state-induced reliance on its continuation in the absence of specific grounds for termination or disqualification.[150] To these two requirements, I would add that the specific statute or regulation creating the benefit is the exclusive source that determines who the state intended to benefit and upon what conditions the benefit can be terminated.

Alexander and Pearson argue that the expectancy interests owned by the presumptive takers fail to meet the requirements of present interest and reliance:

> [D]espite such statutory provisions, neither category of potential takers can claim present use or enjoyment of the decedent's property. Their interests are wholly prospective and lack recognition as existing property rights. Indeed, to use the more vivid language of the Supreme Court in *Roth*, their interests represent nothing more than an abstract desire for the decedent's property or a unilateral expectation of a right to it. For constitutional purposes, a property right arises, if at all, when the inquiry into the existence of a valid will has been completed and rules of succession have been applied. Only then are the prerequisites of the entitlement cases, particularly that of justifiable reliance, satis-

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surviving spouse and have reduced the share of the estate going to the decedent's issue, parents, siblings, and other collateral heirs.

145. 397 U.S. 254 (1970). In addition, see Currie, *supra* note 67, at 35-36.

146. 408 U.S. 564 (1972).

147. 408 U.S. 593 (1972).

148. 416 U.S. 134 (1974).

149. 426 U.S. 341 (1976).

150. Alexander & Pearson, *supra* note 12, at 105.

fied.[151]

Alexander and Pearson apply these criteria too literally and, most importantly, ignore the specific statutes creating the inheritance rights. The mere fact that an individual does not presently possess property does not mean that he does not presently enjoy ownership of that property.[152] That his right to future possession (in the case of an expectancy interest) is subject to many conditions and contingencies makes it less valuable than an indefeasibly vested remainder. But no one would argue that the latter, which is also a creature of state law, is not a protectible property interest. Alexander's and Pearson's arguments as to the lack of state created reliance is similarly flawed. The state, through the intestate succession statute and the will execution statute, has induced reliance. The intestate succession statute identifies certain classes of persons who are eligible to share in the decedent's estate if he dies without leaving a valid will. The will statute provides the requirements for a valid will. An individual qualifying as an heir under the intestate statute is induced by the state to rely upon the inheritance absent the execution by the testator of a valid will.[153] The valid will is the specific ground for termination identified in the statute. In accordance with state law, whether or not a valid will exists depends on whether the decedent possessed mental competency and was free from fraud and undue influence at the time the will was executed. Thus, the expectancy interest can only be terminated if these individualized factual issues are resolved. Because the expectancy interest meets the requirements of an entitlement, those factual issues must be resolved in a proceeding that satisfies the due process clause.

Emphasizing the statutory provisions creating the benefit, rather than the quality and nature of the right at stake, seems correct in light of the entitlement cases. A review of two of these cases illustrates this conclusion. In *O'Bannon v. Town Court Nursing Center*,[154] elderly residents of a nursing home claimed to have a constitutional right to a hearing before a state or federal agency could revoke the

151. *Id.* at 107-08.

152. Alexander and Pearson may be limiting entitlements to rights that are presently possessed rather than merely presently owned. This restriction would be erroneous. Entitlements are a recognition that governmental largess is equivalent to traditionally recognized property rights. *See* Goldberg v. Kelly, 397 U.S. 254 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964). Since traditional property rights need not be possessory, entitlements should also not need to be possessory.

153. A similar analysis applies with respect to beneficiaries named in an existing valid will. Under the will statutes, they are induced by the state to rely upon the inheritance absent the execution by the testator of a valid will.

154. 100 S. Ct. 2467 (1980).

certification of the nursing home facility. The nursing home had been certified by the Department of Health, Education, and Welfare [HEW] as a "skilled nursing facility." It thereby became eligible to receive payments from HEW and from the state Department of Public Welfare [DPW] for providing nursing care services to aged, disabled, and poor persons who were in need of medical care. The nursing home entered into formal provider agreements with the two governmental agencies in which HEW and DPW agreed to reimburse the nursing home for care provided to persons eligible for Medicare or Medicaid benefits on the condition that the nursing home continue to qualify as a skilled nursing facility. The Court held that the Medicaid provisions "do not confer a right to continued residence in the home of one's choice . . . . [W]hile a patient has a right to continued benefits to pay for care in the qualified institution of his choice, he has no enforceable expectation of continued benefits to pay for care in an institution that has been determined to be unqualified."[155] By virtue of the statutory and regulatory scheme, the elderly patients were presently enjoying residence in the nursing home and had relied on its continuing qualification absent a showing that it was no longer a "skilled nursing facility." Nevertheless, the statute did not expressly provide that the elderly patients had a "right to continued residence" and, therefore, it was not a statutorily created benefit enjoying due process protection.

Bishop v. Wood[156] also illustrates the Court's reliance on the statute creating the benefit to identify an entitlement. The petitioner had been employed as a policeman by the City of Marion, North Carolina. The tenure of his employment was based on a city ordinance. The ordinance was ambiguous — it could have been read both as guaranteeing employment absent cause for dismissal and as granting no right to continued employment. Although the ordinance had not been interpreted by a North Carolina court, a United States district judge held that the latter interpretation was the correct one. The Supreme Court accepted this interpretation of the ordinance. The Court held that the policeman's employment was not a protectible interest and, therefore, that it did not enjoy due process protection. The fact that the statute was ambiguous and may have induced reliance by the employee was not relevant. The government retained control over both whom it intended to benefit and the con-

155. 100 S.Ct. at 2475.

156. 426 U.S. 341 (1976). In addition, see Roth v. Board of Regents, 408 U.S. 564, 577 (1972).

ditions upon which it could terminate those benefits.[157]

In accordance with the foregoing analysis, the Administrative Model may be constitutional if it is viewed as changing the substantive law of wills. Although some inquiry into testamentary capacity and lack of fraud and undue influence is conducted in the ex parte proceeding, these issues are not necessarily relevant to a finding of a valid will. Instead, a state may define a valid will to be an instrument approved by a court after submission by the testator. Under the Administrative Model, however, the court does not have absolute discretion in judging will validity. Alexander and Pearson seem unprepared to change the substantive law of wills by eliminating the requirements of testamentary capacity and freedom from fraud and undue influence. To the contrary, the Administrative Model establishes a procedure by which these factual issues are adjudicated. Thus, so long as the state law continues to require a valid will (defined as a document executed by a decedent with mental competency who was free from fraud and undue influence) to defeat the statutorily created expectancy interests, a protectible property interest exists. And because it exists, a proceeding with adequate safeguards is required to resolve the issue of whether or not a valid will exists.

Even if the expectancy interests of presumptive takers are entitled to due process protections, the constitutional analysis remains incomplete. The procedures available to the expectant takers under the Administrative Model might satisfy the mandates of due process.[158] In *Mathews v. Eldridge*,[159] the Supreme Court articulated the balancing aproach that it will follow in determining the procedural safeguards required:

> Our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action;

157. *See generally* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977); Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978); Van Alstyne, *supra* note 126.

158. The Court employs a balancing test to determine whether state procedures satisfy due process. *See* Barry v. Barchi, 433 U.S. 55 (1979) (suspension violated due process by lack of assurance of a prompt postsuspension hearing); Mackey v. Montrym, 443 U.S. 1 (1979) (Massachusetts' statute requiring suspension of driver's license for refusal to take a breath-analysis test after arrest did not violate due process); Memphis Light, Gas & Water Div. v. Croft, 436 U.S. 1 (1978) (due process requires both opportunity to complain of excessive utility charges and notice to customers of the procedure for contesting bills); Mathews v. Eldridge, 424 U.S. 319 (1976) (evidentiary hearing prior to initial termination of social security disability benefits not required by due process). *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 15, at 498-503; Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

159. 424 U.S. 319 (1976).

> second, the risk of an erroneous deprivation and such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and the administrative burdens that the additional or substitute procedural requirements would entail.[160]

Identifying the procedures required by this balancing test is difficult; the standard inevitably leads to uncertainty in adjudication.[161] Whether the Administrative Model provides sufficient procedural safeguards is therefore difficult to predict.

That an individual's financial security does not typically hinge upon the right to inherit (unlike welfare payments, public sector licenses, and many entitlements) implies that, under the *Eldridge* formula, the probate procedure need not include a full-trial-type hearing.[162] Along with recognizing that a deprivation of the expectancies of presumptive takers is unlikely to cause severe financial insecurity for presumptive takers, the Court, in accordance with *Eldridge*,[163] will also weigh heavily the good-faith judgment of the legislature that the procedure assures fair consideration of the claims of presumptive takers. But despite the relative unimportance of these property interests and the presumption in favor of the adopted procedure, the Court might invalidate the elimination of all notice and opportunity for a hearing unless there is some alternative procedure to assure representation of the interests of the presumptive takers.

Looking to the *Mullane* case for an analogous situation, the Court held that the state could not eliminate notice by mail for present income beneficiaries even though the statute provided for the appointment of a guardian ad litem to represent absent persons who might have any interest in the income of the trust fund at issue. For holders of more remote interests, the Court varied the form of notice, allowing notice by publication rather than by mail, after balancing the nature of the property interest at stake against the cost and delay in the administration of the common trust fund. From this case, due process seems to require notice and an opportunity to appear. Unlike the proceeding in *Mullane*, presumptive takers cannot appear at the living probate proceeding under the Administrative Model. Also unlike *Mullane*, the guardian ad litem in the Administrative Model acts only as an objective investigator rather than an advocate repre-

160. 424 U.S. at 334-35.

161. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 15, at 502-03.

162. *See* Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267 (1975).

163. 424 U.S. at 349.

senting the presumptive takers' interests. The lack of notice and hearing under the Administrative Model may therefore violate the due process clause of the Constitution.

III. An Alternative to Living Probate

Over the last fifty years, commentators have suggested numerous statutory reforms designed to eliminate or to reduce unfounded contests based on claims that testators lack mental capacity to execute their wills. The proposals for living probate are only the most recent of the suggested statutory reforms. I believe that these and other proposals fail because they assume that mental capacity must remain an essential prerequisite to execution of a valid will. Below I challenge that assumption — I refute John Langbein's claim that "[n]o one seems to believe that the substantive law of testamentary capacity is misguided . . . ."[164] In short, I suggest that the benefits derived from requiring mental capacity are insufficient to justify the costs of adjudicating mental capacity in probate courts.

Statutes in every American jurisdiction require that testators possess a minimum mental capacity at the time they execute their wills.[165] Yet few courts or scholars have ever explained why a testator's mental competency is an appropriate prerequisite to a validly executed will.[166] Obviously, most people instinctively feel that mentally incompetent individuals should not be allowed to dispose of their wealth by will. They are troubled by the possibility that, for example, a mental incompetent would able to give property at death to a frivolous organization rather than to family members. They are uneasy not necessarily because the distribution is unfair in the abstract, but because the testator may be mentally incapable of evaluating the fairness of the distribution. Thus, the requirement of mental capacity protects testators from their own irrational testamentary dispositions.[167] The requirement also protects the testator's family and society generally by invalidating irrational dispositions that would force families to become wards of the state.[168]

Some commentators suggest that the primary function of the

164. Langbein, *supra* note 12, at 66.

165. The first Statute of Wills enacted in England did not refer to the mental capacity of the testator. 32 Hen. VIII, c. 1 (1540). This omission was corrected two years later by amendments providing that an instrument executed by an "idiot or, by any person *de non sane* memory" was not a valid will. 34 & 35 Hen. VIII, c. 5, § 14 (1542).

166. For a rare exception, see Green, *Public Policies Underlying the Law of Mental Incompetency*, 38 Mich. L. Rev. 1189 (1940).

167. *See* Epstein, *supra* note 21, at 233.

168. *See id.* at 232-33; Green, *supra* note 166, at 1204-07, 1211-12, 1216-18.

mental capacity requirement is to protect the family; they discount its importance in protecting the testator. Further, they assert that the requirement harms testators more than it protects them because testators fear the personal malignment and disturbance of their reasoned testamentary plan that the requirement permits.[169] That latter fear is warranted; the mental capacity requirement protects families from disinheritance at the cost of allowing courts to police the fairness of distributions.[170]

I propose to remedy these problems by abolishing the mental capacity requirement and providing a statutory election to those we most fear may suffer in the event of disinheritance.[171] First, states should amend their will execution statutes to eliminate the requirement of testamentary capacity at the time of execution. Second, common-law property states should extend the surviving spouse's right to elect a statutory share to minor children of the decedent whenever there is no surviving spouse or the surviving spouse is not the children's parent.[172] In community property states, whenever there is no surviving spouse or the surviving spouse is not the children's parent, minor children should receive a share of both the community property and the separate property found in the decedent's estate. If a spouse and minor children who are also the children of the spouse survive the decedent, common-law property states should increase the elective share going to the spouse to take into account the increased expenses of rearing the children.[173] Community property states should similarly increase the amount going to the surviv-

169. *See* Epstein, *supra* note 21, at 232-34, 246-47; Note, *Testamentary Capacity in a Nutshell; A Psychiatric Reevaluation*, *supra* note 25, at 1123-24 (1966). *See generally*, Cavers, *supra* note 4.

170. *See* text at notes 20-39 *supra*.

171. For an alternative to my proposal, see Epstein, *supra* note 21. Epstein, a Philadelphia attorney, proposes that legislatures should sever the issue of testamentary capacity from the issue of fairness and reasonableness of the distribution. Epstein proposes "Family Maintenance Legislation" that allows a court to exercise its discretion in providing satisfactory maintenance for persons designated by the statute. The court would inquire into the fairness of the disposition only after finding that the testator possessed testamentary capacity, without reference to the "naturalness" of the dispository scheme. Unless narrowly designed, this proposal could limit the testamentary freedom of the testator as much as or more than sustaining the claim of testamentary incapacity through inappropriate determinations of "unnaturalness." The proposal actually only codifies the courts' power to apply a fairness standard that they already apply. Moreover, this proposal fails to protect the testator against maligning allegations of mental incompetency. Claimants not protected by the family maintenance legislation would continue to challenge the will for lack of other recourse. Even claimants protected by the family maintenance legislation might attack the will on testamentary incapacity grounds. In addition, see England's Inheritance (Provision for Family and Dependents) Act, 1975, ch. 63.

172. The amount of the children's share should depend upon the value of the estate. If one child survives, the first $50,000 and one third of the remaining estate would seem adequate. If more than one minor child survives, perhaps they should receive the entire estate.

173. Distributing the property to the surviving spouse instead of to the children eliminates

ing spouse if the decedent's children are also the children of the spouse. My proposal excludes adult children because, although they are natural objects of the testator's bounty, their livelihood rarely depends on the decedent. Restricting testamentary freedom to provide for those without financial dependency seems unjustified.[174] Moreover, providing adult children a statutory share might reduce their incentive to take care of their sick or elderly parents.[175]

This approach to the problem of unwarranted allegations of testamentary incapacity is far preferable to living probate. It eliminates any need to inquire into the testator's mental competency. The elective share to the surviving spouse and/or minor children only slightly increases the restrictions on testamentary freedom already existing in the law. Often persons who die testate no longer have minor children, and most states already provide some form of elective share for the spouse. Further, the benefits to the testator of knowing that presumptive takers cannot challenge the will on grounds of mental incompetency outweigh the cost of forfeiting control over the disposition of part of the estate.

This proposal rests on the conclusion that, after protecting the nuclear family, society has little or no interest in imposing the requirement of mental competency.[176] Although it does not provide a

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the need to appoint a guardian in cases where the surviving parent will likely care for the children.

174. I do not propose a statute that permits persons who show financial dependency upon the testator to claim a share of the estate; that would encourage litigation and further encumber probate administration. Rather, I propose a conclusive presumption of dependency based on certain familial relationships.

175. If they know they can never be totally disinherited they may not be so willing to give their parents care and affection when they are sick and elderly. To the extent my proposal may create some disincentive to care for an irrational parent because that parent could disinherit the adult child, I think that the possibility of being included in the will may still encourage the child not to abandon his parents.

Although not a necessary aspect of my proposal, I think that the elective share of the spouse and the minor children should operate not only against the probate estate but also against inter vivos transfers that are essentially will substitutes like the revocable inter vivos trust. Without going into detail, I agree with the theory of the augmented estate adopted in the Uniform Probate Code in which the elective share operates against probate and nonprobate property. I also agree with the aspect of the augmented estate under the Uniform Probate Code in which a transfer of property to the spouse prior to the decedent's death reduces the amount of the elective share. *See* UNIFORM PROBATE CODE § 2-202. I also believe the statute should reflect that the elective share to a surviving spouse in noncommunity property states rests not only on the presumption of financial dependency but also on the assumption that the spouse actively participated in the acquisition of the marital property. The statute should limit the amount or availability of the elective share if the surviving spouse just recently married the decedent or married the decedent late in life after the decedent had accumulated much of the property.

176. The laws of succession protect against obviously wasteful dispositions independently of the testamentary capacity requirement. For example, courts will not permit an executor of an estate to carry out a testator's direction to dump cash into the ocean or to prevent real estate from remaining productive. *See, e.g.*, Colonial Trust Co. v. Brown, 105 Conn. 261, 135 A. 555

perfect solution, it does balance protection of testamentary freedom against protection of presumptive takers. The testator forgoes some testamentary freedom by the provisions that give the surviving spouse and/or minor children the right to elect against the will, while presumptive takers other than nuclear family members forgo their right to claim a share in the estate based on the testator's mental incompetency.[177] This proposal is less complex, more fair, and better directed toward the problem of capacity-based contests than is living probate.

State choice-of-law statutes that adopt the will execution statutes of another state do not also incorporate the testamentary capacity requirements of the other state.[178] The constitution does not mandate extraterritorial recognition of my proposed statutory amendment in most situations, and the proposal will therefore provide certainty against unwarranted attack only in those states that enact similar succession law rules. Thus, the general effectiveness of my proposal hinges upon its adoption in a large number of states.[179]

(1926); Eyerman v. Mercantile Trust Co., 524 S.W.2d 210 (Mo. Ct. App. 1975); Brown v. Burdett, 21 Ch. D. 667 (1882). *See also* Note, *Wills — Direction in Will To Destroy Estate Property Violates Public Policy*, 41 MO. L. REV. 309 (1976). The need to prevent wasteful dispositions therefore cannot be used to justify the mental capacity requirement.

177. States that implement my proposal should eliminate the requirement of testamentary capacity for all testators who die after enactment of the amendment. Unlike new formal will requirements, this amendment can apply retrospectively. This application appears constitutional under the Supreme Court case of Usury v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). Although probably not constitutionally required, the statutory amendment should not apply to a will through which a testator exercises a power to appoint that the donor created prior to the statutory enactment. The donor of the power created it assuming it would only be exercised in a will by a person who possessed testamentary capacity. Fairness therefore requires that testamentary capacity remains a prerequisite for wills that exercise powers granted before the enactment of the proposed amendment. Moreover, default takers own property interests that can be defeated only upon a valid exercise of the power. At the time those interests were created, the prerequisites to a valid will included the requirement of testamentary capacity. Fairness suggests that the legal rule continue to be preserved for default takers who obtained their interests prior to the enactment of the proposed statutory amendment.

Analogous to the interests owned by the default takers are possibilities of reverter or rights of entry. Statutes that limit the duration of these interests or that create special statutes of limitation or recording deadlines have been upheld, but the issue has not been decided by the United States Supreme Court. *E.g.*, Trustees of Schools of Township No. 1 v. Batdorf, 6 Ill. 2d 486, 130 N.E.2d 111 (1955); Hiddleston v. Nebraska Jewish Educ. Socy., 186 Neb. 786, 186 N.W.2d 907 (1971). *But see* Biltmore Village, Inc. v. Royal, 71 S.2d 727 (Fla. 1954); Board of Educ. of Cent. School Dist. No. 1 v. Mills, 15 N.Y.S.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965). *See also* Comment, *Removing Old Restrictive Covenants — An Analysis and Recommendation*, 15 KAN. L. REV. 582 (1967).

178. *See* note 103 *supra*.

179. An alternative to this proposal is to preserve the right of spouses and minor children to allege testamentary incapacity and to deny them an elective share. This proposal is less attractive in that it involves expensive litigation without significant benefits to either the testator or nuclear family members. Testamentary freedom would be somewhat greater, but the risks that a testator's mental competency would be challenged also increase. The spouse and/or children may obtain a greater share of the estate by a finding of invalidity, but that difference would be reduced by litigation costs.

I believe the requirement of absence of fraud and undue influence should be retained. Unlike the testamentary capacity requirement, the requirement of absence of fraud and undue influence exists to deter wrongdoers and to assure that they do not benefit from their wrongdoing. If contestants could not challenge a will on the basis of fraud or undue influence, testators would have little protection from deception and duress. Retaining the requirement of absence of fraud and undue influence raises two major issues. First, will those persons who would otherwise allege testamentary incapacity now allege fraud and undue influence and therefore reduce the usefulness of my proposal to abolish the mental capacity requirement? As noted earlier, most reported cases that contain allegations of testamentary incapacity also contain allegations of fraud and undue influence because deception and duress more easily influence a physically or mentally weakened testator.[180] Thus, the answer may very well be yes. On the other hand, courts that would otherwise use the requirements of fraud and undue influence to strike down seemingly unfair dispositions will have less reason to do so if the nuclear family is entitled to a forced share of the testator's estate.

A second issue concerns how states might best resolve issues of fraud or undue influence. I believe that the Uniform Probate Code's self-proving will procedure offers the best method.[181] Under this procedure, a testator can obtain a rebuttable presumption against fraud and undue influence upon presentation of the self-proved will to probate. This provides some protection to the testator as well as to intended legatees while still deterring wrongdoers.

CONCLUSION

The idea of determining the validity of wills during the lifetime of the testator carries superficial appeal. Not only might it provide the testator with greater assurance of testamentary disposition, it might also improve the quality and nature of the evidence available during probate. A critical review of the various living probate schemes reveals, however, that they fail to achieve these benefits, they impose significant costs on testators, and they inadequately protect the rights of presumptive takers.

Discouraging challenges based on allegations of testamentary incapacity troubles me little except to the extent that the proposals fail to protect the nuclear family from total disinheritance. But a pro-

180. *See* text at note 55 *supra.*

181. *See* UNIFORM PROBATE CODE §§ 2-504, 3-406.

bate proceeding that discourages challenges based on allegations of fraud and undue influence alarms me, because it encourages wrongdoers to try to convince the testator to use the procedure. To the extent that living probate discourages challenges based on fraud and undue influence, it is both unwise and unfair to presumptive takers. Living probate cannot prevent all post-mortem challenges to a will; by slightly varying the basis of a fraud or undue influence allegation, presumptive takers can often challenge the court-approved will after the decedent's death. To the extent these issues remain litigable in a post-mortem proceeding, living probate fails in its promise of assuring testators that their dispository scheme will avoid attack after their death.

The primary purpose of this Article was to discourage the adoption of living probate schemes. My own proposal for reform is of only secondary importance. In my opinion, living probate fails to advance the law of succession. And that failure impedes reform by creating the illusion that a problem has been corrected.

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February 1, 2021

To: Representative Lawrence Klemin
Chairman, North Dakota House of Representative
Committee on the Judiciary
From: Larry Richards, Attorney at Law

RE: Testimony Regarding House Bill No. 1363—Ante-Mortem Probate of Wills

Mr. Chairman and members of the committee I am writing you today to give my full endorsement on this proposed legislation and request a DO PASS recommendation.

As you might be aware, I am the attorney who represented the Kruger family in their attempt to void a Last Will and Testament executed by their mother which disinherited two of her three children. The strong medical evidence, including statements made by a neuropsychologist, clearly demonstrates that their mother was not competent at the time the Will was executed and almost certainly made under undue influence. The District Court found it was powerless to act because current North Dakota law does not allow for the voiding of the will until after death.

Besides my involvement in this case, I have further reason to strongly encourage the enactment of this legislation. As an attorney, a great deal of my practice has been dedicated to serving vulnerable adults in our state. I have worked on dozens of guardianship cases, including assisting Adult Protective Services in obtaining guardians for our vulnerable elderly. In addition, I have served as a Guardian Ad Litem who advocates for the best interest of these vulnerable individuals in hundreds of cases. The pain and cruelty I have seen our elderly endure at the hands of their own relatives who have exploited them is heartbreaking. The simple and sad fact is that this type of victimization of our elderly continues to be a crisis in our state. While there are various economic and cultural reasons for this trend which are to lengthy for me to discuss here, we have tools available to stop it, including the legislation before you.

In fact, I wish I could say that the Kruger family is the first time I have heard of Wills being executed in this manner. The truth is I receive frequent calls from other families who face similar dilemmas, but due to one circumstance or another most find themselves powerless to stop it. In reality, the current state law is such that a nefarious individual can spirit away a vulnerable adult and unduly influence them to execute a will while the victim's family--and even the victim's court-appointed guardian--is powerless to invalidate it while they are alive. When the victim dies, the rightful heirs are stuck fighting the wrongdoer in court to fulfill the testator's real intent while the wrongdoer may even have access to the victim's estate as the Personal Representative and utilize the victim's own financial resources to fight them off. This may very well be what is in store for the future of the Kruger family.

I would also like to note that as a result of my research in the area I learned that the current trend in the law, and the courts nationwide, is for the expansion of the consideration of pre-mortem probate disputes. In fact, North Dakota's passage of Chapter 30.1-08 which allowed pre-mortem validation of wills is an example of such a trend. I would further point out that what is requested here is merely a logical extension of the progressive legislation that North Dakota has already passed.

By permitting pre-mortem will contests, there are several advantages in the furtherance of justice: 1.) to avoid spurious will contests in the future, 2.) to avoid evidentiary problems that are present when a will is offered to probate after death (i.e. when the testator or other witnesses are no longer available to testify), and 3.) to prevent the frustration of the testator's intent. See Leopold & Beyer, Ante-Mortem Probate, 43 Ark. Law Rev. 131, 159 (1990). For instance, in the case of the Kruger family, one of the medical providers who has relevant testimony has already moved out of state which will pose a difficulty for them in the future.

Simply put, North Dakota has a long tradition of coming to the aid of a neighbor in need. We strive to do the right thing, protect the innocent and punish the wrongdoers. I would ask that you assist families of our elderly in combating continued exploitation by giving them yet another tool to do so. Please make a DO PASS recommendation.

Finally, please note that, while I represented the Kruger family in the past, I presently do not and my testimony is made in my individual capacity. I do not present this testimony on behalf of them or any other individual, corporation or other entity. I have not and will not receive any compensation for the presentation of this testimony.

Thank you for your time and consideration as well as your service to the State of North Dakota

Sincerely,

Larry J. Richards
Attorney at Law

2021 HOUSE STANDING COMMITTEE MINUTES

Judiciary
Room JW327B, State Capitol

HB 1363
2/9/2021

Relating to ante-mortem probate of wills.

Chairman Klemin called the meeting at 9:02 AM

Present: Representatives Klemin, Karls, Becker, Buffalo, Christensen, Cory, K Hanson, Jones, Magrum, Paulson, Paur, Roers Jones, Satrom, and Vetter.

Discussion Topics:

- PR or other interested parties' permission for ante-mortem probate
- Ability of testator to contest will before death

Motion made by Representative Roers Jones Do Not Pass.
Representative Satrom seconded.

Roll call vote

Representatives	Vote:
Representative Lawrence R. Klemin	Y
Representative Karen Karls	Y
Representative Rick Becker	Y
Representative Ruth Buffalo	A
Representative Cole Christensen	Y
Representative Claire Cory	Y
Representative Karla Rose Hanson	Y
Representative Terry B. Jones	Y
Representative Jeffery J. Magrum	N
Representative Bob Paulson	Y
Representative Gary Paur	Y
Representative Shannon Roers Jones	Y
Representative Bernie Satrom	Y
Representative Steve Vetter	N

Motion passed 11-2-1

Representative Roers Jones will be the carrier.

Chairman Klemin closed meeting at 9:13 AM.

DeLores D. Shimek by Marge Conley
Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1363: Judiciary Committee (Rep. Klemin, Chairman) recommends **DO NOT PASS** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1363 was placed on the Eleventh order on the calendar.