

ANTE-MORTEM PROBATE REVISITED: CAN AN IDEA HAVE A LIFE AFTER DEATH?

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Foreword—to Bob Wills

In the eleven years I have been at Ohio State, I have had the good fortune to share the teaching of the Civil Procedure course with my colleague and friend, Bob Wills. Thus I have been with him for about a third of his present tenure at the College. What a help he has been! His encyclopedic knowledge of the cases decided by the Ohio courts is well known to a generation of students—never once have I consulted him on a question of Ohio decisional law and come away empty-handed. Indeed, he usually remembers the volume and page number of the case in the Ohio Reports! And his familiarity with the statutes and the literature is equally impressive. Moreover, his counsel has been offered unstintingly in the area of law reform. For example, he was a guiding oar in the drafting of the Ohio Rules of Civil Procedure.

Indeed in writing the following article I have turned to Bob again and again. His command of Ohio probate law is complete. Further, he recalled that ante-mortem probate was a subject much discussed when he was a law student, and gave me citations which led me to that earlier discussion.**

But over the years Bob's contributions have gone well beyond that of teaching and reform of the law. I have worked with Bob on the College's admissions program and on our various reappraisals of the College's grading system. His application of statistical methods and computer theory is the underpinning of what I believe to be one of the fairest systems of admissions and grading of any law school in the country. Under his influence, we have tried mightily to avoid disadvantaging an applicant because of the humbleness of his origins or for his lack of influential proponents. And once the student is

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** I would like also to acknowledge the suggestions made by my colleague Prof. Robert J. Lynn, who carefully read the manuscript for this article—as it happens, he also was my teacher in Estates II, where he contributed greatly to my basic knowledge of the subject. And I would like to thank Robert W. Trafford, managing editor of the Law Journal, for valuable research assistance.

admitted, the system Bob was instrumental in creating seeks to avoid inequity in grading because of the instructor to whom he is assigned.

None of our colleagues has been more unsparing of his own time or effort in the College's educational mission than Bob Wills. It is this selflessness coupled with unremitting optimism that has so endeared him to his fellow teachers and to his students for the past three decades.

I.

Practitioners have often been asked whether there was not some way absolutely to assure that a testator's will can be admitted to probate without successful challenge on the basis of lack of testamentary capacity, undue influence or lack of compliance with the statutes relating to the validity of wills (as opposed to the success of a specific bequest—which might be affected by changing circumstances). News items regularly appear describing challenges to the wills of wealthy individuals who have left large bequests—often to charitable foundations, churches, hospitals or to individuals particularly deserving in the eyes of the testator, but not, in the eyes of the challengers, “the natural object of one's bounty.”¹ Often, in such cases, long-lost rela-

¹ See, e.g., New York Times Feb. 7, 1965, at 3, col. 6. (“California Ruling Costs Italian Town \$100,000 . . . John Nigro, a cobbler who died in March 1963, directed in his will that the \$100,000 estate he had amassed in this country be used for building a hospital in his native town of Grimaldi. He disinherited his only close survivor, his son, Frank, of Kansas City. Frank contested the will in Los Angeles Superior Court, arguing that his father was incompetent when he wrote the will. His father was irrational and under psychiatric care, the son, now 40, testified. Yesterday the court agreed with the son. Grimaldi lost. The full estate, it was ordered, goes to Frank Nigro.”); New York Times, Nov. 15, 1961, at 45, col. 3. (“Court Upholds Bequest to Foster Vocal Music . . . A will bequeathing a \$228,000 estate to the state to promote vocal music and ‘develop the lungs of children’ was upheld today by the Iowa Supreme Court. William Elisha Hawks, a Cambridge bachelor left his entire estate to the Iowa State Public School Fund . . . Mr. Hawks had no brothers or sisters, but two Des Moines cousins, Mrs. Dora Eckles and Mrs. Myrtle Ross, contested the will.”); New York Times, March 14, 1958, at 50, col. 3. (“Will Dispute Settled. Immigrant's \$150,000 Goes to Helpful Ex-Shoeshine Boy”); New York Times, Aug. 13, 1958, at 29, col. 2. (“Connecticut Bars Ouija-Board Will”); New York Times, April 6, 1957, at 16, col. 6. (“Jury Denies Waiter Bequest of \$700,000”); New York Times, Jan. 21, 1948, at 20, col. 1. (“Aged Testator Held Sane. Witnesses to the will of Balint Medgysey, 80-year-old furrier, who died surrounded by junk in his two-room cold water flat . . . testified in Surrogate's Court . . . that the aged furrier was of sound mind last May 14, when he bequeathed all but \$2,000 of his \$54,000 estate to the State of New York in gratitude for his opportunity to earn a living here . . . Louis H. Cioffi, who was appointed special guardian by Surrogate William T. Collins to protect the interests of unknown infants or incompetents, reported that he was making a search for a niece, Irma Balogh of Matezalka,

tives appear and threaten a challenge, securing a settlement that reduces the value of the original bequests.²

Presently there are available some devices for the testator who seeks to weight the scales in favor of the validity of his will. The *in terrorem* clause in a will threatens beneficiaries with loss of their bequests should they unsuccessfully challenge the validity of the will.³ The testator can, in many states, perpetuate his testimony and that of other persons asserting his testamentary capacity and freedom from undue influence.⁴ He may also make use of the self-proved will, whereby he attaches his affidavit and that of its witnesses to the will swearing that he was free from undue influence and of sound mind when he signed his will.⁵

But even these devices assume a future will contest, after the testator has died and is no longer available to provide first-hand evidence of his mental stability and his freedom from influence—and unable to correct any mistakes in the drawing or witnessing of the will. This article will explore a suggested alternative—a state statute providing for a declaratory judgment as to the validity of a will and the capacity of its maker, to be brought by the testator himself, against all those who would, upon the testator's death, be able to challenge the will. The proceeding would take place while the testator is alive and able to testify, not by deposition but in direct view of the court or jury which would determine his capacity and his freedom from influence and which would decide if the will were properly drawn and witnessed. These findings would be binding upon all those validly made parties to the action or represented in the action, by operation of the doctrines of collateral estoppel, *res judicata*, and virtual representation. If the technical execution of the will were found wanting, it could be corrected, rather than having the issue arise after the testator's death when a flaw in the execution of the will

Hungary, and Joseph Balogh of Satu Mare, Rumania, who might possibly contest the will of their aged uncle.”).

² See, e.g., the Wendel case, discussed in the *New York Times*, Mar. 24, 1931, at 1, col. 3, and in Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 443 (1933).

³ But the *in terrorem* clause is often narrowly construed or even disallowed in many jurisdictions. 5 PAGE ON WILLS § 44.29 (Bowe-Parker Rev. 1962).

⁴ See, e.g., OHIO R. CIV. P. 27, based in part on the UNIFORM PERPETUATION OF TESTIMONY ACT § 1 (1949).

⁵ UNIFORM PROBATE CODE § 2-504 (1972). But the “self-proved” will must be probated and can be challenged on the grounds of capacity and freedom from influence. Thus it “proves” nothing. It merely sets up a rebuttable presumption of validity.

would result in its failure, with intestate succession being the only alternative under state law.

Of course, many questions must be answered with regard to such a statute before a state legislature would adopt it. The exploration of these questions is important for two reasons—one, it will help us in determining the viability of such a statute. Second, the exploration is instructive to an understanding of modern concepts of the jurisdiction of courts to settle disputes between potential adverse parties. Some of these questions are:

1. Would such a statute be constitutionally valid, particularly with regard to nonresident beneficiaries? What is the due process effect of attempting to bind potential challengers—both those named in the will and those left out—some of whom may not reside in the state, others who may have undetermined future interests, and others whose whereabouts are unknown?

2. Does such an action present a justiciable controversy?

3. Would such a procedure undesirably interfere with family relationships to a greater extent than do present will contests? Would it be an undue strain on the probate court?

When the idea first occurred to me (in the process of preparing an examination in my civil procedure course), it immediately raised two questions. First, since the idea seemed so simple and straightforward, why was it not thought of by many others before me—was there something I did not understand about the probate process (a field foreign to my own) that would automatically rule out its practicality or validity? Second, if it had been advocated before, why had it not taken hold? I discussed the idea with a number of practitioners, teachers and judges in the probate field, and they thought it had merit, though applicable only to a limited class of cases. Research turned up no similar statutes presently on the books of any state. The current treatises treat the subject briefly, and with little interest.⁶ But the search led me to a 1933 article, Professor David F. Cavers' *Ante Mortem Probate: An Essay in Preventive Law*.⁷ Cavers was commenting in part on a statute which had been adopted by the Michigan legislature in 1883, and which in turn had been struck down by the

⁶ See, e.g., P. MECHEM AND J. ATKINSON, *CASES AND OTHER MATERIALS ON THE LAW OF WILLS ADMINISTRATION* 540 (4th ed. 1954); 3 *PAGE ON WILLS* § 26.25 (Bowe-Parker Rev. 1961), (but more sympathetic to the idea than others); T. ATKINSON, *HANDBOOK ON THE LAW OF WILLS* 484-85 (2d ed. 1953).

⁷ Cavers, *supra* note 2.

Michigan Supreme Court in 1885, largely on the ground that ante-mortem probate was beyond judicial competence. In many ways the Michigan statute was similar to the one I had envisioned, but with some features that were quite different. When it was interred by the Michigan court, that apparently was the last of state attempts to provide such a proceeding. Yet knowing that the idea had appealed to one distinguished legislature gave me confidence to continue the exploration of the course I had independently begun.

II.

Let us first examine the complete text of the Michigan Act of 1883, set out in the note below.⁸ Section 1 provides for a petition

⁸ 1883 Mich. Pub. St. 17. The text of the Act of 1883 is found in Note, 24 AM. L. REG. (N.S.) 794 (1885) and reads as follows:

Sect. 1. The people of the state of Michigan enact, that to any will heretofore or hereafter executed, the testator may make and annex his petition to be sworn to before and presented to the judge of probate for the county where the testator resides, asking that such will be admitted and established as his last will and testament.

Sect. 2. Every such petition shall contain averments that such will was duly executed by the petitioner without fear, fraud, impartiality, or undue influence, and with a full knowledge of its contents, and that the testator is of sound mind and memory and full testamentary capacity and shall state the names and addresses of every person who at the time of making and filing the same would be interested in the estate of the maker of such will as heir if such maker should at the making of such petition become deceased, and may also contain the names and addresses of any other persons whom such testator may desire to make parties to such proceedings.

Sect. 3. Such judge of probate shall thereupon, upon request of such testator, appoint a time for the hearing of such petition and issue citations to the parties named in such petition, and direct published notice of such hearing, and have such hearing, after proof of service of citations and of publication of notice, in the manner, as near as practicable, as is required for the probate of wills.

Sect. 4. If any person named in such petition shall be a minor, or otherwise under disability, a guardian *ad litem* shall be appointed by such judge to represent such person. On such hearing such judge of probate shall examine into the matters alleged in such petition, and into the testamentary capacity of such testator, and examine witnesses in relation thereto, and if it shall appear that the allegations of such petition are true, and that said testator was of sound mind and memory and full testamentary capacity, such judge shall make a decree thereon, and shall cause a copy of such decree to be attached to said will, certified under the seal of said court, decreeing that the testator, at the making of such will and such petition, was possessed of sound mind and memory, and full testamentary capacity, and that said will was executed without fear, fraud, impartiality or undue influence, which decree shall have the same effect as if made by said court after the death of the testator on the probate of such will, and such will having been so established shall not be set aside or impeached on the grounds of insanity or want of testamentary capacity on the part of the testator, or that the same was executed through fear, fraud, impartiality, or undue influence.

asking the probate court “that such will be admitted and established as his last will and testament.” That language could create confusion as to the effect of the procedure. What does “admitted” mean? Obviously the testator’s estate is not being taken into the court’s custody at that point. Nor is there a mechanism set out for determining that this is testator’s *last* will and testament. Section 2 provides, in addition to testator’s stating that the will is not being executed under undue influence—a self-serving statement at best⁹—that he

state the names and addresses of every person who at the time of making and filing the same would be interested in the estate of the maker of such will as heir if such maker should at the making of such petition become deceased [sic], and may also contain the names and addresses of any other persons *whom such testator may desire to make parties* to such proceedings.¹⁰

The Supreme Court of Michigan construed the first part of this language as not providing for notice to the *wife* of the testator; presumably she was not considered to be included in those who would take *as heir* if the testator died intestate.¹¹

The broad proviso allowing the addition of the names of any other persons “whom such testator may desire to make parties to such proceedings” gave rise to the possibility that some parties named by the testator might have no legally discernable interest in the proceedings, and therefore no standing to raise the crucial issue of testamentary capacity; others who would have such interest might not be named and therefore not bound by the proceedings.

The Act provided for proof of service of the citations upon those named parties and for publication of notice of the hearing.¹² Presumably this meant service within the state upon resident parties and service by publication upon nonresidents.

After a hearing upon the allegations of testamentary capacity, a decree was to be entered by the judge that would have the same effect

Sect. 5. Appeals shall be in the same manner as from probate of wills.

Sect. 6. Nothing in this act contained shall be construed to prevent the revocation of such will, or alteration or other change thereof, as in ordinary wills.

⁹ In this the procedure resembles the “self-proved” will, discussed *supra* at note 5.

¹⁰ Section 2 of the 1883 Michigan Act, set out *supra* note 8 (emphasis added).

¹¹ *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 23 N.W. 28 (1885). The language of the Act of 1883, the text of which is recorded in Note, 24 AM. L. REG. (N.S.) 794 (1885), is quite unclear on this point. At least by modern statute, a surviving spouse is considered to be an heir. See UNIFORM PROBATE CODE § 1-201(17) (1972).

¹² Section 3 of the Act of 1883, set out *supra* note 8.

as if it were determined subsequent to the testator's death.¹³ But then the Act went on to state that nothing therein should prevent a later revocation or alteration of the will,¹⁴ which would make the findings of the court on previous testamentary capacity nugatory.

In *Lloyd v. Wayne Circuit Judge*,¹⁵ the testator had presented his will for probate under the 1883 Michigan statute. The will had excluded one son and the testator's wife. The probate judge dismissed the proceeding on the ground that the Act was unconstitutional, principally because it failed to make provision for notice to the wife. On review, two opinions were filed by the Supreme Court of Michigan, each concurred in by the same two other justices of the court. The first, by Chief Justice Cooley, stressed the lack of joinder of the testator's wife, who was a necessary party to the action, but also added doubt that the proceeding envisioned by the 1883 statute was a "judicial proceeding, and the order made thereupon a judicial judgment." The other opinion, by Justice Campbell, turned on the second issue, that the proceeding envisioned was beyond judicial competence. Justice Campbell said:

The case is one where we can get no help from similar precedents, as the statute is new and singular. Judicial proceedings to probate a will while the testator is living, are unheard of in this country or in England; and inasmuch as the statute only makes the decree effective in the single case of the establishment of the will and subsequent death without revocation or alteration, and leaves it open to the testator to make any subsequent arrangement which he may desire, or to oust the jurisdiction by change of residence, or to leave the will once rejected open to probate in the usual way after death, the proceeding is still more anomalous. I am disposed to think, with the circuit judge, that this is not in any sense a judicial proceeding which he was bound to consider or entertain.

* * *

The broadest definition ever given to the judicial power confines it to controversies between conflicting parties in interest, and such can never be the condition of a living man and his possible heirs. Our statutes have never undertaken, and do not in this case undertake, to give to the heirs any interest which will ever be fixed by this probate, or which may not be cut off at any time by their own death, or by relator by new will or conveyance. It is by no

¹³ Section 4 of the Act of 1883, set out *supra* note 8.

¹⁴ Section 6 of the Act of 1883, set out *supra* note 8.

¹⁵ 56 Mich. 236, 23 N.W. 28 (1885).

means free from doubt what classes of probate proceedings under our system are to be treated as judicial proceedings in the proper sense of that term; and it is not important here to consider that question, because this proceeding is not even a suit for probate. There has never been any proceeding known to our laws for the mere purpose of establishing the will even of a deceased person. The probate of wills under our statutes is merely a part of the proceedings to administer the estates of deceased persons in the court that has jurisdiction and charge of such estates. This rule is so general that in some states devises are not probated at all, and in some the probate is not conclusive, because controversies concerning land are usually tried in other courts. We have enlarged the jurisdiction in probate so as to reach lands for some purposes, and have made all wills subject to probate. But there is no case where an original probate can be granted here, except in the court having jurisdiction over the estate; it cannot be done separately. This statute does not attempt to change the place of ultimate probate, and it does not make a decree against the will either a bar or even admissible to prevent future probate after death. It makes no provision for making a finding either way evidence for any purpose during testator's life, so as to negative testamentary capacity, or otherwise to affect him. And it has no force for any purpose so long as he lives.¹⁶

Several factors may have motivated the decision. First, this initial case reaching the state supreme court was a classic case of a man disinheriting the "natural objects of his bounty"—his wife and son. Second, the wife was not even notified of the proceeding. Third, the court was suspicious of the nature of the proceeding, although it recognized the evil it was intended to remedy. Stated Justice Campbell:

This statute, which was probably designed to prevent the unseemly and disgraceful attempts, too often made, to defeat the enforcement of the last will of persons whose competency to deal with their own affairs was never doubted or interfered with, has been so drawn as to remove none of the difficulties, but rather to make them worse. It is a singular, and in my judgment, a very unfortunate spectacle to see a man compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases. The practice which has usually

¹⁶ 56 Mich. at 240, 23 N.W. at 29.

prevailed in civil-law countries, and also is said to have been customary in various parts of England, (see Seld. Ecc. Jur. Test. 5) of having wills executed or declared in solemn form, or acknowledged before reputable officers and a sufficient number of disinterested witnesses to render it unlikely that the testator is not acting with capacity and freedom, has been approved by the continued experience of most countries, and has saved them from the *post mortem* squabbings and contests on mental condition which have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators.¹⁷

But was not the court letting its views of the *wisdom* of the statute color the determination of its *validity*?

III.

Lloyd v. Wayne Circuit Judge must be understood in terms of the time it was handed down, and the court which decided it. The Michigan court of that era narrowly construed judicial power in the context of the separation between the legislative and judicial branches that is required by typical state constitutional language. In *Anway v. Grand Rapids Ry. Co.*,¹⁸ decided thirty-five years after *Lloyd v. Wayne Circuit Judge*, the Michigan Supreme Court became the first state high court to consider a state declaratory judgment statute, and held the Michigan declaratory judgment act to be unconstitutional under state constitutional separation-of-powers provisions.¹⁹

Anway could have been decided on its facts without striking down the declaratory judgment act—it was seemingly a poor vehicle for determining the act's validity. The bill had alleged that plaintiff was employed by defendant street railway and that he desired to work more than six days in any consecutive seven days; he did not allege he had any contract to do so or that defendant had committed any wrong upon him or threatened to do so; rather it seems that both plaintiff and defendant wanted to know whether a seven-day week violated state protective labor legislation. The supreme court could readily have held that this was a feigned case, that there was no real dispute between the parties, but rather that the real dispute was between the plaintiff and his employer on the one hand and the state

¹⁷ 56 Mich. at 241, 23 N.W. at 30.

¹⁸ 211 Mich. 592, 179 N.W. 350 (1920). See Annot., 12 A.L.R. 26 (1920).

¹⁹ See 6A J. MOORE, FEDERAL PRACTICE ¶ 57.03 (1974).

on the other. Even under today's declaratory judgment acts, a genuine *dispute* of an adversary character must exist:²⁰ there must be the threat of harm befalling one of the parties if the other carries out a threatened course of conduct,²¹ and each must have a legal position adverse to the other on the salient questions.²² But instead of resting the case on these narrow grounds, the court seemed to go out of its way to reach the constitutional issue that it need not have faced.

The court implied that to employ the state judicial system to advise parties who had not yet acted detrimentally toward each other of their legal rights carried the taint of *communism*.²³ Focusing on the straw man it had set up with the decidedly hypothetical case before it, the court brought down the entire statute. It held:

While the advocates of this measure insist that the proceedings authorized by the act do not constitute a moot case, and while the proceedings may not square in all particulars with the technical definition of a moot case, they are such in every essential. The act contemplates determinations of abstract propositions of law before any cause of action has accrued or before any wrong has been committed, or before any damages have been occasioned or threatened; it does not contemplate final process to put the determination of the court into force unless there be a further proceeding on application by petition.²⁴

The court cited numerous previous cases from many jurisdictions, but

²⁰ Maryland Casualty Co. v. Pacific Coal & Iron Co., 312 U.S. 270 (1941); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937); Annot., 108 A.L.R. 100 (1937); 6A J. MOORE, FEDERAL PRACTICE ¶ 57.12 (1974).

²¹ MOORE, *supra* note 19, at ¶ 57.05.

²² *Id.* at ¶¶ 57.12, 57.15.

²³ We note that the learned professor, who is so frequently quoted, entertains the view that it is the duty of the state through its courts to furnish advice to its citizens rather than to leave them to 'unauthoritative advice of counsel.' This adopts the view that 'the state is everything, the individual nothing.' Under our government the state does not till our farms, manufacture our automobiles, conduct our great department stores, or do our law business for us. The unfortunate people of one country are at present trying such experiment in government. We are still a government of laws, operating under a written Constitution, and to it rather than to the question of desirability we must look for our power. If such power as we are here asked to exercise under this act is wanting in the Constitution, then this court lacks such power, and the Legislature lacks authority to grant it.

Anway v. Grand Rapids Ry. Co., 211 Mich. 592, 597, 179 N.W. 350, 352 (1920).

The learned professor quoted in the briefs to whom the court refers is undoubtedly Prof. Edward Borchard; *see, e.g.,* Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1 (1918).

²⁴ Anway v. Grand Rapids Ry. Co., 211 Mich. 592, 605, 179 N.W. 350, 355 (1920).

the decision upon which it relied most heavily, which it said was *entirely* controlling, was none other than *Lloyd v. Wayne Circuit Judge*.²⁵ Thus it is clear that the Michigan court believed that the same reasoning which prevented state courts from rendering declaratory judgments prevented those courts from determining the validity of a will prior to the death of the testator.

Still more years passed. Other states endorsed the concept of the declaratory judgment. Ultimately even the Michigan Supreme Court upheld a declaratory judgment statute,²⁶ worded slightly differently than that which had been struck down in *Anway v. Grand Rapids Ry. Co.* Later still, the United States Supreme Court accepted the concept of the declaratory judgment for the federal courts,²⁷ after first rejecting the idea.²⁸ But by then the concept of ante-mortem probate was virtually forgotten. The idea was discarded, even though the philosophical underpinning of the opinion striking it down was itself undermined by these later developments.

IV.

The following model declaratory judgment statute would remedy some of the weaknesses of the Michigan statute and would incorporate jurisdictional concepts that have been developed in recent years.

Declaratory Judgment as To Validity of Wills and Testamentary Capacity

A person who executes a will [testator] disposing of his estate in conformity with the statutes of [this state] may institute a proceeding for a judgment declaring the validity of the will as to the signature on the will, required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing his will. Any beneficiary named in the will and all of testator's present intestate successors shall be named parties to the proceeding. Service of process may be made in any county in [this state] upon a party who is an inhabitant of or is found within the state. Upon a party who is not an inhabitant of or found within the state, service may be made by mailing a copy of the summons and complaint to the party at his last known address by registered mail. Upon parties whose ad-

²⁵ 211 Mich. at 621, 179 N.W. at 360.

²⁶ *Washington-Detroit Theatre Co. v. Moore*, 249 Mich. 673, 229 N.W. 618 (1930). See Annot., 68 A.L.R. 105 (1930).

²⁷ *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227 (1931).

²⁸ *Willing v. Chicago Auditorium Asso.*, 277 U.S. 274 (1928).

dresses are unknown, or whose interest under the will, or in the estate of the testator should the will be declared to be invalid, is presently unascertainable, service may be made by publication in a newspaper of general circulation published in plaintiff's county in accordance with the statutes of [this state].

* * *

If the court finds that the will has been properly executed and that the plaintiff has the requisite testamentary capacity and freedom from undue influence, it shall declare the will valid and order it placed on file with the court. The will shall be binding in this state unless and until plaintiff executes a new will and institutes a new proceeding under this section naming the appropriate parties to the new proceeding as well as the parties to any former declaratory action plaintiff has brought under this statute.

* * *

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

Several salient differences between this proposed statute and the former Michigan statute can be seen. First, the proposed statute is cast in terms of a declaratory judgment, utilizing a concept that has been broadly accepted in this country, but which was virtually unknown at the time of the Michigan Act. In addition to testamentary capacity, the proposed statute would deal also with the related issue of freedom from undue influence, and with the question of compliance by the testator with the technical requirements of state law for the making of a will—the required number of witnesses, notarization if necessary, and any similar duties imposed by law.

Parties to the action contemplated under the proposed statute would be all those named as beneficiaries in the will and all those who would take by intestate succession should the will be declared invalid and the testator die presently. Presumably, all these persons would have standing to raise the issues regarding the validity of testator's will. The question of how remote, contingent takers could be protected might be covered in the statute by appropriate language, but I believe that on the narrow issues with which the statute is concerned, *e.g.* testamentary capacity and freedom from undue influence, the interests of remote and possibly unborn takers by intestate succession would usually coincide with the interests pressed by present takers;

thus the doctrine of "virtual representation" would ordinarily protect future takers.²⁹ Of course, for the doctrine of virtual representation to protect unborn or unascertained future takers, there must be some persons before the court who would take by intestate succession if the will were to be declared invalid; otherwise a guardian *ad litem* must be appointed to protect such interests. Obviously the interests of takers by intestate succession are not protected by the presence of named beneficiaries whose interests lie in upholding the will.

Next, the proposed statute provides for service of process on the named parties, both within and without the state, by a method of service reasonably calculated to give actual notice and an opportunity to appear and defend, which are requisites of due process of law.³⁰ Service on out-of-state parties under the Michigan statute was by publication. This type of service was held to be inadequate as to persons whose interest is presently ascertainable and whose address is presently known, in *Mullane v. Central Hanover Bank and Trust Co.*³¹

If the court, under the proposed statute, determines that the will is valid, that the testator had sufficient testamentary capacity, and was free of undue influence, a judgment would be entered. Unlike the earlier Michigan procedure, the will would then be placed on file with the court. There could be no valid will discovered after death, since to change the will would require a new proceeding brought by the testator and the new will being filed with the court. This would not be as cumbersome as it might at first seem, since a consent judgment could ordinarily be entered into.

Of course there might be the risk that disgruntled losers of the former judgment would threaten to drag the testator through repeated court battles every time he wanted to change his will. But there are answers to this. First, the testator could refrain from changing the will. The original will could be drawn flexibly enough to anticipate changed circumstances without the need for a new will. And, to

²⁹ See Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 ILL. L. REV. 580, 581 (1936). "The doctrine of virtual representation is based upon the theory that there is some party before the court whose interests in the issue to be decided are so identical with, or so closely similar to, the interests of the absent person, that in protecting his own interests the representative party will bring forward such matter and take such action that, as a necessary by-product, the court will have before it an adequate presentation of the interests which the absent person has in common with him.", citing *Bennett v. Fleming*, 105 Ohio St. 352, 361, 137 N.E. 900, 902 (1922). The doctrine was applied by the court in *Matthies v. Seymour Mfg. Co.*, 270 F.2d 365 (2d Cir. 1959), *cert. den.* 361 U.S. 962 (1960).

³⁰ See text at note 35, *infra*.

³¹ 339 U.S. 306 (1950).

the extent that issues which had been determined in a prior declaratory proceeding would arise in a subsequent one, the former findings would be controlling upon the same parties who had previously litigated the issues, by the doctrine of *res judicata* or collateral estoppel.³² And the former losers would be subject to the expenses of further litigation as well. Moreover, perhaps there could be some statutory method provided for making minor changes that would not again raise the issue of testamentary capacity or undue influence.

Finally, the 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. Without these provisos, a testator might 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.

V.

Two constitutional issues, one based on the typical state constitution and one based on the fourteenth amendment to the Federal Constitution, would likely be raised by parties opposed to a statute such as the one I have proposed.

First, is a proceeding under such a statute within the judicial power of a state court in a state that has a typical separation of judicial and legislative powers doctrine in its constitution? Does it, in other words, involve a justiciable controversy, rather than a feigned or hypothetical case? I would suggest that such a proceeding would be as much within judicial power as is an ordinary declaratory judgment. *Lloyd v. Wayne Circuit Judge* held that a state court could not determine the testamentary capacity of a living testator because there is no judicially cognizable conflict between "a living man and his possible heirs." Perhaps that holding was affected by the belief that a determination under the Michigan statute would not be definitive, since regardless of the finding, the will could be changed. The statute I propose would contain a provision that the will would be binding if the requisites of validity were found³³ as well as a registration provi-

³² *Cromwell v. County of Sac*, 94 U.S. 351 (1876).

³³ The effect of a finding that the will was invalid is more conjectural. Of course if the

sion which would put the will in the files of the probate court and require that any revised will be subjected to a similar judicial determination of testamentary capacity, freedom from undue influence and compliance with the technical requirements for making a valid will. Thus a determination would have the indicia of *finality* necessary for a judicial rather than an advisory determination.

Also, would there be a genuine dispute among potential takers by intestate succession, beneficiaries under a will, and the testator himself as to his testamentary capacity and freedom from undue influence prior to his or her death? Some would say that until the testator dies, the situation is fluid and mutable—the estate may or may not exist when the testator dies, he may or may not reside in the same state at the time of death. But although the estate is not being distributed in the proceeding to determine his capacity and independence from undue influence, there are genuine issues about which these parties could strongly disagree. And these issues are being determined as finally as they would be in *any* declaratory judgment proceeding.

To some extent, *all* declaratory judgments deal with hypothetical and mutable situations. For example, suppose there is a patent licensing agreement and the licensee seeks a declaratory judgment that it need no longer pay royalties. Had it not brought the action, and had it nevertheless ceased royalty payments, it may or may not have been sued by the licensor. Perhaps, though threatening an action, the licensor might not have sued for fear that if it were unsuccessful, an unfavorable determination could be used against it by other licensees in subsequent actions under modern principles of collateral estoppel.³⁴ Or two parties to a contract might get into a heated dispute as to its meaning and a declaratory judgment suit might be brought. No matter how the action comes out, the parties might, on the day after the judgment, abrogate the contract and enter into a new agreement. Or a person may be threatening to erect a building which

finding is based on the lack of the proper witnessing, or the signature, this could readily be solved by redrafting the will and having it properly signed and witnessed. Independence of previous undue influence might be harder to establish in a subsequent proceeding. It is, of course, difficult to prove that a former undue influence has abated. It may be that the testator can never be free of the former dominance and either his estate would be subject to intestate succession or be controlled by an earlier will. On the other hand, even lack of testamentary capacity might improve with psychiatric treatment.

³⁴ *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 406 U.S. 313 (1971).

plaintiff, in a declaratory judgment proceeding, alleges will encroach upon his property. Had there been no declaratory judgment proceeding, or even if there is one and plaintiff loses, the court cannot be certain that the building will ever be erected. Or, where an insurer sues to determine that it need not pay disability benefits to a defendant, even if the defendant wins he might immediately regain his health, or he may die, precluding any actual payments. So there is always a conjectural element to a declaratory judgment proceeding, since harm has not yet befallen the plaintiff, and may never do so, no matter how the declaratory action comes out. But so long as there is an actual dispute between the parties that *could* lead to harm if the threats were carried out, a federal or a state court can hear a declaratory judgment action.

Thus it ought to follow that the fact the testator might actually die penniless, or that his present intestate successors may predecease him, or that he may be domiciled in another state at the time of his death, or that he might change his will, should not preclude a proceeding to determine several very narrow issues about which there can be a genuine, present, factual dispute. Of course all the parties to such a proceeding would not share the same view of testator's capacity and freedom from dominance and of the validity of the will. They could be aligned in the litigation according to their positions on the issues.

Surely it would seem that the state ought to be able to conclude that a testator has sufficient interest in seeing that his estate goes to the takers he has designated—the *raison d'être* of having a system of probate and estate distribution—that he could initiate such an action. After that, the parties would be aligned according to the position they take, for or against the success of the will. Thus a third requisite of a declaratory action—*adverse parties* as well as a genuine dispute leading to a final judgment—would be met by a state procedure which determined capacity, freedom from undue influence and the compliance of the will with legal requirements while the maker of the will is still alive and can supply the best evidence on these issues and can correct any deficiencies which are found.

A second constitutional issue, under the due process clause of the fourteenth amendment to the United States Constitution and analogous state constitutional language, would be whether a person named in a proceeding to determine testamentary capacity, and related issues, could refuse to appear in the proceeding and nonetheless bring an action after the testator's death to redetermine the issues which

were found in the earlier proceeding. The answer would seem to lie within the parameters of two widely cited decisions of the United States Supreme Court. In *Mullane v. Central Hanover Bank and Trust Co.*,³⁵ the Supreme Court upheld a state statute that in many ways resembled the law which is herein proposed. In *Mullane*, the State of New York had provided that trust companies could establish common trust funds, merging small trust funds (of which they are trustees) only for investment purposes to get economies of scale in applying investment advice. Each fund would share ratably in the common fund in proportion to the ratio of its size to that of the entire fund. The problem was that a number of the beneficiaries of the funds were not residents of New York. Could they be served outside the state, by a means of process reasonably calculated to give actual notice, and be bound by the determination in a proceeding to accept the accounts of the trustee? Indeed they could, held the Court.

Judicial proceedings to settle fiduciary accounts have been sometimes termed *in rem*, or more indefinitely *quasi in rem*, or more vaguely still, "in the nature of a proceeding *in rem*." It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both *in rem* and *in personam*. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions *in rem* and those *in personam* in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. 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.³⁶

³⁵ 339 U.S. 306 (1950).

³⁶ 339 U.S. at 312.

It would thus appear that the dominant factor for the Court was not the characterization of the proceeding to close the trustee's accounts as *in personam*, *quasi in rem*, or *in rem*, but rather the state's interest in providing a reasonable means to give to the beneficiaries of trusts and the trust companies that manage them the economic benefits of a pooling arrangement so long as a reasonable opportunity to be heard was afforded the beneficiaries prior to accepting the trustees' accounts.

So too, a state may have an interest in providing to testators assurance that the disposition of their estates which they envisioned in their will shall not founder because of technical mistakes or arguments about testamentary capacity and related issues arising at a time when no absolute proof is possible and mistakes cannot be corrected. There is a further state policy basis for such proceedings—to prevent fraudulent claims to an estate from being asserted on the threat of challenging the will, in the hope that a settlement will be given by those named in the will, often hospitals, foundations or other charitable institutions. In this the interest would resemble that of the state in discouraging “strike” suits by putting limitations upon the bringing of shareholders' derivative actions.³⁷

But another widely studied Supreme Court case might be suggested as pointing in the opposite direction to *Mullane*. In *Hanson v. Denckla*,³⁸ the Court held that a Florida court violated due process of law by determining rights to the proceeds of a Delaware trust when the Delaware trustee, which was considered to be an indispensable party under Florida law, could not be served with process in Florida, though notice was sent by registered mail to it in Delaware. The Florida action had been brought to determine whether the proceeds of the Delaware trust passed by *inter vivos* appointment or instead passed through a Florida testator's will. The Court, speaking through Chief Justice Warren, held that there could be no *in rem* jurisdiction of the Florida court with regard to this Delaware trust, since the corpus of the trust was unquestionably in Delaware, not in Florida, and to assert *in rem* jurisdiction over a *res* that is outside the borders of the forum state violates due process of law. Moreover, there was no jurisdiction over the person of the absent trustee since it did not have sufficient affiliation with the State of Florida to empower Florida's courts to exercise *in personam* jurisdiction.

³⁷ See, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

³⁸ 357 U.S. 235 (1957).

Would the holding of *Hanson* preclude an ante-mortem declaratory proceeding insofar as it determined the rights of nonresidents who had no other affiliation with the forum state? The procedure for the determination of testamentary capacity, and related issues herein proposed, would eliminate the right of intestate successors and the beneficiaries to challenge the will on these issues after the death of the testator. It does seem that the state's interest in such a proceeding would be the basis for jurisdiction to serve nonresident beneficiaries, just as it was in *Mullane*. How can one distinguish this from *Hanson* where the nonresident trustee was held not to have sufficient contacts with the state to subject it to in rem or in personam jurisdiction? The answer seems simple. In *Hanson* the transaction in question, at least in the eyes of the Court's majority, was the validity of a Delaware trust. The trust agreement was entered into when the settlor was a resident of Pennsylvania. The *res* was in Delaware. Even though the issue of its validity arose in the context of a Florida probate proceeding, the probate jurisdiction did not and should not have given the Florida court authority to reach out and interfere with parties and transactions which had had no substantial connection with Florida.³⁹ Very different is the proposed ante-mortem probate proceeding. The contact of the *will* of the testator is with the forum state.⁴⁰ Even though the proceeding cannot be characterized as an in rem proceeding, and presently there is no *res* to distribute, the crucial issue is the place with which the *transaction* has substantial contact.⁴¹ This happens also to be the state whose forum is convenient, whose laws ought to be applied to determine the issues, and whose interest ought to be sufficient to obtain jurisdiction over indispensable parties, which the intestate successors and beneficiaries would be. All these factors, which arguably are the bases of in personam jurisdiction,⁴² would coincide in the state which has provided for such a proceeding.

If the proceeding were important and useful enough, this would be the jurisdictional nexus—not whether the nonresident intestate

³⁹ See the analysis by Prof. Scott in A. Scott, *Hanson v. Denckla*, 72 HARV. L. REV. 695 (1959).

⁴⁰ Cf. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), in which the court upheld the assertion of in personam jurisdiction over a nonresident insurance company on the basis of a single insurance contract reissued in California. There Justice Black based his holding on the fact that the *contract* had sufficient contact with California for its courts to be able to assert jurisdiction to enforce it.

⁴¹ *Id.*

⁴² See Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).

successors and beneficiaries had ever set foot in the forum state or done business there. It must be remembered that no obligation owed by the nonresidents would be determined by the proceeding—as may have been true of *Hanson*. Rather, the validity of the will would be settled once and for all. A worthy purpose. Of course the proceeding would have to provide for a method of notification that comported with due process of law. Mailed notice to those whose addresses were known and whose interests could presently be ascertained, would be sufficient to meet this requirement.⁴³ Publication would suffice for those parties whose addresses were unknown or whose interest could not presently be ascertained.⁴⁴

And even if, *arguendo*, it were conceded that nonresidents could not be bound by the proceeding herein envisioned, that would not be a barrier to binding residents of the state. They are presumed to have sufficient contact with the state for jurisdictional purposes.⁴⁵ And in many, if not most cases, the beneficiaries of testator's will as well as intestate successors would reside in the same state as the testator. Thus even if nonresidents could not constitutionally be bound by the procedure, still its existence would cut post-mortem will challenges to a minimum—also a worthy purpose.

VI.

How would an ante-mortem declaratory judgment proceeding compare with existing will validation procedures in the various states? State practices, which vary greatly,⁴⁶ can best be understood in terms of their historical precursors. At common law there were two types of probate—"probate in the common form" and "probate in the solemn form."⁴⁷ Probate in the common form was essentially nonadversary, in rem in character, and with no provision for notice to interested persons. Basically it was an administrative procedure for accepting a will offered by the executor or administrator, authorizing him to distribute the estate. It was inexpensive and well suited to the usual situation where no challenge was likely to be made to the will's validity. Probate in the solemn form was an adversary proceeding,

⁴³ *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

⁴⁴ *Id.*

⁴⁵ See *Millikin v. Meyer*, 311 U.S. 457 (1940); Annot., 132 A.L.R. 1357 (1940).

⁴⁶ The classic description of the various state practices is found in Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503 (1946).

⁴⁷ *Id.*; T. ATKINSON, HANDBOOK ON THE LAW OF WILLS, § 93 (2d ed. 1953).

according notice to all interested persons, which could be brought even long after the will had been admitted to probate in the common form, or instead of a probate in the common form.⁴⁸

The state legislatures in this country drew on the English model, but added a variety of arbitrary distinctions, sometimes resulting in clumsy and unnecessarily repetitious procedure. In many states the will is offered for probate, either in a specialized probate court, or in some other trial court, in a proceeding resembling the English probate in the common form. Sometimes this procedure does accord notice to interested persons, in distinction to the historical model. But even where there is notice provided and an adversary probate proceeding, some of these states then allow a second adversary proceeding, called a will contest, in which the same issues of testamentary capacity, freedom from influence and the technical compliance of the will with state law can be raised all over again, with no *res judicata* effect given to the initial probate proceeding. In the will contest, notice is usually more widely accorded to interested persons, and the procedure, although again usually characterized as *in rem*, has more of an adversary character. Often there will be a relatively short time after the will has been admitted to probate in which to bring the will contest.⁴⁹ In still other states, there is no separate will contest and the only forum in which to challenge the validity of the will is in the probate proceeding.⁵⁰

Ohio presents an example of inadequate procedure. Ohio law requires notice of the probate proceeding (the presentation of the will to the probate court) to be given only to "the surviving spouse and to the persons known to the applicant *to be residents of the state* who would be entitled to inherit from the testator . . . if he had died intestate."⁵¹ Thus notice, even by publication, is not required to be given to nonresidents or to residents who are unknown to the applicant,^{51.1} (who is usually, but not necessarily, the executor of the estate). The proceeding is largely nonadversary. The will is to be admitted to probate if it appears to be valid on its face.⁵²

The adversary proceeding in Ohio, the will contest, is brought

⁴⁸ *Id.*

⁴⁹ Simes, *supra* note 46.

⁵⁰ *Id.*

⁵¹ OHIO REV. CODE ANN. § 2107.13 (Page Supp. 1975).

^{51.1} *In re Will of Elvin*, 146 Ohio St. 448, 66 N.E.2d 629 (1946).

⁵² *Id.*; *In re Estate of Lyons*, 166 Ohio St. 207, 141 N.E.2d 151 (1957).

today⁵³ in the probate court by a person "interested in a will or codicil admitted to probate in the probate court"⁵⁴ The will contest must be brought within four months⁵⁵ of the time the will is admitted to probate. The Ohio courts have held that this time limit is not a bar to bringing a will contest by a resident of the state known to the applicant of the will for probate who was not informed of the probate proceeding.⁵⁶ But nonresidents, even though not entitled to notice of the probate proceedings, nonetheless are apparently subject to the four month limitation period. The apparent unconstitutionality of this lack of notice to nonresidents, under principles of *Mullane v. Central Hanover Bank and Trust Co.*⁵⁷ and *Walker v. City of Hutchison*,⁵⁸ discussed above, was pointed out in 1958,⁵⁹ yet the statute has not been amended to deal with this. The Ohio will contest statute requires that "[a]ll devisees, legatees, and heirs of the testator, and other interested persons, including the executor or administrator, must be made parties" to a will contest.⁶⁰ To the extent their addresses are known, the Revised Code and the Ohio Rules of Civil Procedure require that such parties be served by certified mail, whether they reside within Ohio or outside Ohio.⁶¹ However, since they are not entitled to personal notice of the initial offering of the will for probate, nonresidents, who would be made parties if a will contest actually were brought, do not get the earlier notification of the probate of the will within the four month time period that might conceivably cause them to initiate a will contest.⁶²

Thus the procedure I suggest for an ante-mortem declaratory judgment statute would be at least as likely to afford actual notice to interested persons as does the present probate law of many states, and indeed might do a better job than the law of some, such as Ohio. As envisioned, the testator initiating an ante-mortem declaratory

⁵³ Until the passage of Senate Bill 145, effective Jan. 1, 1976, the will contest was brought in the court of common pleas, the state's *nisi prius* court.

⁵⁴ OHIO REV. CODE ANN. § 2107.71 (Page Supp. 1975).

⁵⁵ OHIO REV. CODE ANN. § 2107.23 (Page Supp. 1975).

⁵⁶ See *Young v. Guella*, 67 Ohio App. 11 (1941), in which the common pleas court set aside a probate decree where a person entitled to notice and known to the applicant to be a resident of Ohio had not been served with notice of a probate proceeding.

⁵⁷ 339 U.S. 306 (1950).

⁵⁸ 352 U.S. 122 (1956). See also *Schroeder v. City of New York*, 371 U.S. 208 (1962).

⁵⁹ Note, 27 U. CIN. L. REV. 76 (1958).

⁶⁰ OHIO REV. CODE ANN. § 2107.72 (Page Supp. 1975).

⁶¹ OHIO REV. CODE ANN. § 2107.72 (Page Supp. 1975); OHIO R. CIV. P. 4.1.

⁶² See note 59 *supra*.

judgment proceeding would join the intestate successors who would take in the event that he presently were to die without a valid will, and also would join those named in the will. All of these persons, whether residents of the state or nonresidents, whose interests and addresses are known, would be served with notice of the action by a form of notice which comports with due process as interpreted by *Mullane*.⁶³

But there *is* an essential difference between an ante-mortem declaratory proceeding and a conventional will contest. Usually a will contest must be brought in a relatively short time after the will has been offered for or admitted to probate. At that time the testator's intestate successors are presently known and relatively fixed in number. By contrast, there may be a long hiatus between the time of bringing an ante-mortem declaratory proceeding and the actual death of the testator. His wife or children may die, there may be more children born, his parents or siblings might die. A wholly different array of intestate successors might be in existence at the time of the testator's death than were parties to the ante-mortem proceeding. Yet if this new array were not bound by the earlier proceeding, the declaratory action would have been entirely futile. The answer, as alluded to earlier, is the doctrine of virtual representation⁶⁴ and the guardian *ad litem*.

If the interests of the intestate successors at the time of the testator's death coincide with those who were present and litigating in the declaratory action, the later intestate successors should be bound. If it appeared to the court in the declaratory proceeding that there was the possibility that because of the particular array and relationship of the present intestate successors of the testator that in the future there might be intestate successors whose interests would not coincide with present parties, he should appoint a guardian *ad litem* to protect those future interests. For example, the only intestate successor present might be the testator's pregnant wife who is also his sole taker under the will. The expected child might have an adverse interest to that of his mother. The unborn child should be represented by a guardian *ad litem*. If the guardian protects the interest fully and fairly, this should bind future holders of that interest.

With these devices, the differences between an ante-mortem dec-

⁶³ *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306 (1950).

⁶⁴ See note 29 *supra*.

laratory proceeding and the present post-mortem probate proceeding and/or will contest are minimized. The testator need not join every distant relative who might inherit from him in the unlikely event that all of his present intestate successors would expire before the testator's death. Rather he joins the same persons a plaintiff would in a probate proceeding or a will contest—the present intestate successors⁶⁵ and takers under the will.

VII.

In his 1933 article,⁶⁶ Professor David Cavers contended that a disadvantage of the ante-mortem probate procedure in the 1883 Michigan statute was that “it invited will contests and did so under such conditions as to insure the disruption beyond repair of the family participating.”⁶⁷ And yet Cavers at the same time recognized that often the threat of a will contest by “laughing heirs” is enough to exact an unreasonable settlement from those institutions or persons named in a will drawn by a testator who indeed might have been perfectly sane and free from undue influence.⁶⁸ He proposed a very different solution to the problem, resembling procedures on the Continent—a proceeding before an officer of the probate court at which a testator would present his will accompanied by a statement setting forth his heirs and next-of-kin, together with affidavits from testator's counsel and from several other witnesses containing their opinions as to the testamentary freedom and capacity of the testator. The testator would then be examined by the officer. The officer would have discretion to admit the will to probate or to deny probate at that time. If admitted, the will would be sealed and kept in the custody of the court unless revoked by the testator. Upon his death, the will would only be subject to attack on grounds similar to those one would raise in seeking to set aside a judgment. “[W]ant of jurisdiction, fraud or interest on the part of the examining officer, impersonation of affiants or substantial misstatements of fact (but not of opinion) in the affidavits, might properly be grounds for setting aside the probate, in which event the will might be offered for probate in the usual

⁶⁵ It now becomes clear what is meant by the language of section 2 of the Michigan statute set out *supra* note 8, which characterizes interested persons as “those who would be interested in the estate of the maker of such will as heir if such maker should at the making of such petition become deceased,” apparently an awkward way of expressing this same kind of limitation.

⁶⁶ Cavers, *supra* note 2.

⁶⁷ Cavers, *supra* note 2, at 444.

⁶⁸ See notes 1 and 2 *supra*.

manner."⁶⁹

Several contemporary writers endorsed Prof. Cavers' proposal.⁷⁰ While his plan has some appeal, it leans too far in the direction of the denial of a reasonable opportunity to challenge testamentary capacity and related issues by those who have the most to lose—the intestate successors. Indeed, they would not be notified of the pendency of the proceeding and could not be parties to it. Nor is it difficult to imagine that a testator lacking capacity or under undue influence could nevertheless find witnesses who would testify to the soundness of his or her judgment, particularly since these witnesses would not be subject to cross-examination by counsel for adverse interests. Prof. Cavers likens the collateral attack that he would allow on the grant of probate to a living testator to that permitted upon a default judgment. But a default judgment is only valid if there was an attempt to serve parties by a method reasonably calculated to afford actual notice.⁷¹ Prof. Cavers' procedure accords no notice to interested persons to begin with. The procedure before an officer of the court resembles the modern provisions in the Uniform Probate Code for the self-proved will and for deposit of a will with the court in the testator's lifetime,⁷² coupled with an examination by an officer of the probate court, a person who would gain expertise in the procedure but would have no prior knowledge of the person coming before him.

One well-known writer in the thirties endorsed the idea of a judicial proceeding for ante-mortem probate along the lines I have envisioned, but without coming to grips with the constitutional, jurisdictional and practical problems dealt with herein.⁷³ Indeed, I recently discovered that a committee of the National Conference of Commissioners on Uniform State Laws once drafted a proposed uniform law very similar in many ways to the one I have set forth, but again ignoring many problems.⁷⁴ Apparently the work of this

⁶⁹ Cavers, *supra* note 2, at 447. Cf. the opinion of the Michigan Supreme Court at note 16, *supra*.

⁷⁰ See Kutscher, *Living Probate*, 21 A.B.A.J. 427 (1935); Kutscher, *Living Probate*, 15 MICH. S.B.J. 409 (1936), also appearing in 70 U.S.L.R. 133 (1936). See also, Cavers, *Ante-Mortem Probate, Supplementary Procedure to Reduce Hazards of Testamentary Disposition*, 61 TRUST COMP. 327 (1935); Letters to the Editor of the New York Times, Nov. 8, 1936, at 8, col. 7, by R. Nichols Voorhis.

⁷¹ See note 35 *supra*.

⁷² See note 5 *supra*.

⁷³ Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571 (1933). He was the author of the then-well-known *Redfearn on Wills*.

⁷⁴ Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, at 463 (1932).

committee was undermined even before it reported to the Commissioners, when objections were raised that since there was then no law on the subject on the books of any state, the Commissioners would be in the position of advocating new legislation rather than reforming existing legislation.⁷⁵

As far as I can find, from the thirties until now there has been no further advocacy of ante-mortem probate, although the earlier example in Michigan is cited in some current treatises. The idea was essentially buried by the Michigan Supreme Court, on a rationale which would not control its decision today.

VIII.

Suppose a state did adopt a statute along the lines I have suggested. Who would use it? Obviously one who felt apprehensive about the security of his or her bequests. This might not necessarily stem from the omission of a "natural object of his or her bounty" from the will. It might as often be used by an older person with a sizable bequest to a worthy charity, research facility or university who had no immediate family.⁷⁶ That testator would have the most logical basis to fear the appearance of some long-lost, remote and not too unhappy heirs who would have little to lose by a strike suit against takers under the will.⁷⁷ Of course the procedure would also be available to one seeking to assure that he can go to his grave knowing that an ungrateful child or estranged spouse will get no more than the law requires. Would this disrupt families? Certainly. But any more so than would a will contest after the testator has died and can no longer defend his sanity or correct any mistakes in executing the will? Society's allowance of disposition by will presumes that a person has a right to choose his beneficiaries. It is his or her wealth and the law allows the testator to make the policy choice of disposition.

Moreover it is highly likely that such an ante-mortem procedure

⁷⁵ Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings, at 143 (1931).

⁷⁶ Ironically, on the day I finished preparing the manuscript for this article, the newspapers carried reports of the death of Howard R. Hughes, the billionaire recluse. He is almost the paradigmatic user of such a statute—dying a recluse, leaving no children, but some other more distant relatives, with the bulk of his estate presumably destined for charity. After his death, will it not be difficult to ascertain his testamentary capacity and freedom from undue influence on the part of those retainers surrounding the aged and infirm person? If no will is deemed valid, state and federal taxes will take the bulk of the estate; the rest will go to distant relatives.

⁷⁷ See notes 1 and 2 *supra*.

would greatly cut down on will contests. The future "laughing heir" is not as likely to contest when the best evidence of sanity and freedom from influence—the living testator—is at hand. Moreover, a great deal of cost could be avoided by the testator asking his heirs and beneficiaries to agree to a consent judgment. Of course such a consent judgment would preclude a future contest by those who signed (absent successful allegations of fraud). A question would arise as to whether nonsigners would be bound by the outcome. Again the doctrines of virtual representation and related concepts could be held to bind future holders of similar interests, particularly those whose whereabouts would presently be unknown.

It might be asked whether an addled or litigious testator could not drive his relatives to distraction by repeatedly changing the will and bringing proceeding after proceeding to test his sanity. Here again concepts of collateral estoppel coupled with the grant of summary judgment would prevent repeated trials when no new facts were disclosed. Note that the proposed statute does not preclude facts found in an earlier declaratory proceeding from being used, under collateral estoppel principles, in later declaratory proceedings.

I am not certain whether the testator should be compelled to disclose the complete contents of the will in a proceeding to establish his capacity. On the one hand it can be argued that the content of the will has no bearing on the issue of capacity. And that the premature disclosure of the contents might cause early family squabbling, thus discouraging the testator from initiating such actions. But the issue of undue influence often is greatly affected by, indeed often turns upon, the bequest that the testator has made that falls outside the "natural objects of his bounty." It seems hard to deny vital evidence to the opponents of the testator, often disinherited family members who would be precluded from challenging the will after an ante-mortem proceeding had been successfully brought. On balance I would favor disclosure, at least through discovery devices if not by attachment of the will to the initial pleading of the testator.

Finally, of course, the question becomes one of policy to be resolved by the legislature. We have not had enough experience to evaluate how such a procedure would work in practice. Until we try, we cannot be sure whether society would be benefited by such an ante-mortem procedure. In any event, we should discuss the issue and not let it remain dormant for the wrong reasons.