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THE CONSERVATORSHIP MODEL: A MODIFICATION

Gregory S. Alexander*†

Reform-minded probate lawyers have discussed the idea of ante-mortem probate for many years.¹ Yet, owing to several seemingly unavoidable defects, it has never attracted widespread support and only recently has been implemented anywhere in the United States.² In his article, *Living Probate: The Conservatorship Model*,³ Professor John Langbein has eliminated many of those defects and has made the idea much more feasible. In doing so, he has contributed to the development of simple, convenient, and efficient systems of probate. However, his proposal introduces new flaws that threaten the practical working of his procedural model.

Basically, Langbein proposes that living probate be a non-adversary proceeding rather than a lawsuit between the testator and his heirs. Several problems that Langbein finds disturbing attend the adversarial proceedings of earlier attempts at ante-mortem probate.⁴ Among these are the potential disruption of family harmony, various disadvantages to the heirs apparent, and the absence of constraints against testators' overuse. To avoid these problems, Langbein advocates a court-appointed guardian ad litem who would represent all persons whose eventual property interests might be adversely affected⁵ by a determination that a testator had testamentary capacity to write his will

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1. The significant literature on ante-mortem probate extends from Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440 (1934), to Fink, *Ante-Mortem Probate Revisited: Can an Idea Have Life After Death?*, 37 OHIO ST. L.J. 264 (1976). See also Kutscher, *Living Probate*, 21 A.B.A.J. 427 (1935); Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571 (1933).

2. Within the past year two states have added ante-mortem probate provisions to their codes. N.D. CENT. CODE § 30.1-08.1 (Supp. 1977); Amended Substitute House Bill No. 505, 1978 Ohio Legis. Bull. 442 (to be codified as OHIO REV. CODE ANN. §§ 2107.081-.085 (Page)).

3. Langbein, *Living Probate: The Conservatorship Model*, 76 MICH. L. REV. 63 (1978). [Professor Langbein comments on a prepublication draft of Professor Alexander's Article in *id.* at 74 n.50.—Ed.]

4. See Cavers, *supra* note 1; Fink, *supra* note 1.

5. This group would include those persons Langbein describes as "heirs apparent," Langbein, *supra* note 3, at 72, and any takers whose shares under previous wills are reduced or eliminated if the later will is probated. *Id.* at 78.

and did so without undue influence. Specifically, Langbein seeks to prevent open family strife in will contests through an imaginative use of the familiar device of the guardian ad litem.⁶ Under Langbein's proposal, although the real contestants have the right to appear in the proceedings, they can also assert their interests anonymously by revealing their objections to the guardian ad litem. Anonymity reduces the disinclination many feel to offer evidence of incapacity even when the will ought to be contested. Moreover, the conservatorship model accommodates all the relevant interests, including those of potential heirs who are unborn or otherwise unascertained at the time of the proceeding. Finally, by requiring that counsel represent the testator and by shifting the costs of the guardian ad litem to the testator, the Langbein proposal discourages excessive use of the ante-mortem procedure. Only testators who genuinely need living probate—those whose wills are likely to be extortionately challenged because of the testator's advanced age or disabled condition⁷—would wish to bear the predictably high costs of inhibiting post-mortem contests.

These advantages are undeniably real, but they are obtained at a great price: under any evaluation of his proposal, features of Langbein's procedure impose costs. Professor Langbein erroneously assumes that these costs are unavoidable under any system of living probate. I shall argue that these features are not essential and that they may be eliminated without sacrificing the advantages of his model. Providing testators alternative versions of his procedure would achieve substantially the same benefits while making living probate attractive to more testators than Langbein's model is likely to. Specifically, allowing testators to choose a *nonbinding* version of the conservatorship model would more completely suit the differing needs of testators, thereby mitigating the costs of living probate while preserving its advantages.

I should emphasize that Langbein and I agree on the basic proposition that some living-probate procedure is needed. Furthermore, his discussion convincingly establishes the case for a non-adversary approach. While we disagree on some material characteristics of such a procedure, it is worth reiterating that we share the view that testators ought to be able to avoid post-mortem litigation.

6. See generally UNIFORM PROBATE CODE art. V.

7. See Fink, *supra* note 1, at 289-90.

I. THE CONSERVATORSHIP MODEL AND ITS COSTS

Underlying Langbein's article is his strong concern about the threat of strike suits which contest valid wills in order to obtain pretrial settlements that grant contestants part of what they would receive if they defeated the will.⁸ Langbein considers this threat serious, given some of the peculiarities of American procedure. In particular, he disfavors the use of jury trials in will contests and the rule that defendants bear their own litigation costs even where the plaintiff's claim is unjustified. In Langbein's view, these procedural rules make illegitimate will contests easier, since jurors generally sympathize with disappointed family members more than judges do and since the cost of a contest is minimized.⁹

To discourage the strike suit, Langbein concludes, ante-mortem probate proceedings must be binding. Unless the proceeding's declaratory judgment estops disappointed heirs from bringing any post-mortem contests, the danger that the will might be upset or that the estate might be subjected to further litigation makes the ante-mortem proceeding worthless to the testator. A binding procedure, however, unmistakably benefits testators by impeding strike suits.

But a testator necessarily incurs costs under a binding procedure—with its collateral estoppel—which he would not incur under a nonbinding procedure. Specifically, Langbein insists that if the judgment is to be binding, notice and a right to appear must be given to heirs apparent and beneficiaries of the will in issue or of a former will that is amended or revoked; he also expects the petitioning testator to attach his will to the petition, thereby disclosing its contents to the court and all parties. As Langbein

8. Other proponents of living probate share Langbein's concern and have pointed to examples of contests brought by disgruntled survivors. See Cavers, *supra* note 1, at 443 & n.10; Fink, *supra* note 1, at 265-66 & 265 n.1.

A major empirical study of testamentary behavior in Cuyahoga County, Ohio (Cleveland), corroborates this concern. The study concluded that settlements ended most will contests and that "[p]eople who institute[d] claims or contests had a very good chance of getting something" M. SUSSMAN, J. CATES, & D. SMITH, *THE FAMILY AND INHERITANCE* 188 (1970).

9. Substantial sentiment disfavors the use of juries in probate matters. One source of this sentiment is the belief that lay persons lack the perspective and legal training to deal knowledgeably and rationally with problems of testamentary capacity and undue influence. See generally Simes, *The Function of Will Contests*, 44 MICH. L. REV. 503, 555-57 (1946). Empirical data support many observers' intuition that juries routinely overturn wills that disadvantage those persons closest to the testator, even when the substantive standards for capacity and undue influence are satisfied. See Note, *Will Contests on Trial*, 6 STAN. L. REV. 91, 92 & nn.4-5 (1953). The Stanford study further indicates that trial judges provide little protection against mistaken jury verdicts. *Id.* at 92.

notes,¹⁰ capacity to make a specific disposition, not capacity in general, is at issue in testamentary litigation. The standard for capacity is usually thought to require that the trier consider the specifically contested disposition.¹¹ Shifting the contest from post- to ante-mortem does not alter that requirement, nor does changing the proceeding from adversarial to non-adversarial.¹² Ante-mortem disclosure itself, however, may have significant consequences. Family members normally discover the contents of a will only after the testator's death, by which time, of course, the will's confidentiality need not be preserved, since the testator's relationship with his heirs, some of whom the will may have disappointed, is ended. In the ante-mortem format, however, personal relationships continue after the probate proceeding and may suffer seriously from the disclosure of the will's contents. That is one reason testators usually wish to keep their dispositions secret. Langbein's binding-decree version of living probate, by making the will a public record of the court, strips testamentary acts of this attractive confidentiality.

Sacrificing the confidentiality of the conventional testamentary process may deter some testators who need ante-mortem probate from using it.¹³ Granted, it cannot be said confidently

10. Langbein, *supra* note 3, at 82.

11. The same requirement holds true for undue-influence cases. Proof of both incapacity and undue influence is heavily circumstantial. Incapacity and undue influence are frequently found, particularly by juries, when the will contains "unnatural provisions," that is, bequests to strangers at the expense of the natural objects of the testator's bounty, particularly family members. 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, 619-21 (1970); Note, *supra* note 9, at 92. The mere presence of unnatural provisions, of course, establishes neither incapacity nor undue influence. T. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 255-56 (2d ed. 1953).

12. The terms "adversarial" and "non-adversarial" call for a word of clarification. Professor Langbein's model would lead to adversary litigation if an heir apparent contested the inter vivos proceeding, but his procedure would not otherwise follow the conventional adversarial format of will contests. Moreover, it is arguable that Langbein's model invariably leads to adversarial action by the guardian ad litem. Suppose, for example, that family members disclose evidence of incapacity to the guardian. His fiduciary duty would require him to contest the will vigorously. Langbein suggests that the guardian "would not necessarily have to wage bitter contest . . . no matter how sane the testator appeared, but he would be obliged to put the testator to fair proof." Langbein, *supra* note 3, at 79. But given the guardian's fiduciary duty, and his liability in the event that a failure to litigate vigorously is viewed as a breach of that duty, he will feel a strong incentive to challenge the will on every possible ground of invalidity.

13. In fact, the Model Probate Code excluded any provision for ante-mortem probate partially because publicity was thought to be unavoidable in an inter vivos procedure: "The 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." MODEL PROBATE CODE, *Introduction* at 20 (1946).

that testators prefer secrecy of contents to security against post-mortem challenges, for no occasion to make this choice has yet arisen. But if an ante-mortem probate procedure without this potential disincentive to its own use can be devised, testators have a "moral claim"¹⁴ to such a procedure. Langbein's model assumes that the choice between confidentiality and security is unavoidable and opts for security. In the next Part, I suggest that if that choice must be made, individual testators should make it.

II. MODIFYING THE CONSERVATORSHIP MODEL: A NONBINDING OPTION

Even if notice and disclosure are indispensable to a binding ante-mortem procedure,¹⁵ testators need not be put to the choice between disclosure or probate only after death. Ante-mortem probate would serve more testators if they could choose between a binding procedure that requires disclosure to all the parties and a nonbinding procedure that requires disclosure only to the trier. A system with that option would benefit testators by permitting them, if they wished to keep their wills secret, to forego some, but not all, protection against post-mortem contests rather than to forego inter vivos security altogether.

The option of nonbinding ante-mortem probate would be worthless, however, unless it actually protected testators to at least some extent against post-mortem contests. The civil law, notarial-will model used in European legal systems largely because of the notary's influence, substantially protects wills against post-mortem testamentary litigation and yet preserves the secrecy of the contents.¹⁶ Since American procedure has no counterpart to the notary, one might suppose that testators in this country can protect themselves against will contests only through a binding judgment, with all its costs. Langbein, for one, disfavors the notarial model because of differences between civil law and American procedures.¹⁷ But a nonbinding version of ante-mortem probate that adopts the features of Langbein's proposal other than its binding effect would, for reasons that contribute to the success of the notarial will, discourage, though admittedly not preclude, post-mortem litigation.

14. Langbein, *supra* note 3, at 85.

15. See text at note 26 *infra*.

16. M. RHEINSTEIN & M. GLENDON, *THE LAW OF DECEDENTS' ESTATES* 198 (1971).

17. For general discussions of the notarial will and its forms, see C. AUBRY & C. RAU, *DROIT CIVIL FRANÇAIS* §§ 670-71 (6th ed. 1954) (3 *CIVIL LAW TRANSLATIONS* 149-73 (1969)); M. RHEINSTEIN & M. GLENDON, *supra* note 16, at 198-99.

A nonbinding, ex parte proceeding would produce a record of considerable weight, and, like the notarial will, would preserve strong evidence on the issues of incapacity and undue influence. Existing probate procedures do not preserve such evidence as effectively. The availability of well-preserved evidence on these questions would, of course, make it more difficult to successfully contest the will post mortem.

Judgments rendered in these proceedings would compare somewhat to those in the Uniform Probate Code's (UPC's) informal probate proceedings,¹⁸ but would also differ notably. Like informal probate, the ante-mortem proceedings would be non-conclusive,¹⁹ but they would command more respect and deserve more weight than informal probate because they would issue from a judge, rather than a nonjudicial registrar, and would not be used routinely. Moreover, unlike informal probate, the ante-mortem procedure would require that the guardian ad litem independently provide information about the testator's capacity to the court. The conservatorship model's safeguards would still apply, as would its procedure for establishing testamentary capacity and freedom from undue influence, except that only the testator and the guardian ad litem could appear and be heard. If the testator met the capacity requirements, the court would issue a declaratory judgment establishing a presumption of validity in any post-mortem contests. Unlike the presumption that arises under the UPC from the execution of a will with a self-proving clause,²⁰ this presumption would apply to the substantive determination of capacity and undue influence, not merely to compliance with formalities of execution.

Most important, that presumption should help proponents of the will obtain summary judgment in post-mortem contests. The heirs apparent and disfavored devisees under previous wills could contest the will post mortem, but to overcome the presumption of validity they would need evidence that the court had not considered in the ante-mortem proceeding. They would retain the right to prove fraud in the ante-mortem proceeding, but absent such proof, the proponents would be entitled to summary judgment. This restriction should help deter "depredatious" strike suits, since contestants would have to offer new evidence of incapacity or undue influence.

It might be argued that the requirement of new evidence

18. UNIFORM PROBATE CODE art. III, pt. 3.

19. UNIFORM PROBATE CODE § 3-302.

20. UNIFORM PROBATE CODE § 2-504.

would not deter such suits, for contestants could easily find some scraps of evidence that were not presented to the court in the original proceeding. Surely not every possible indicium of incapacity or undue influence would be exhaustively considered at the ante-mortem hearing, especially since unattending family members would have ready access to evidence of the testator's behavior that would be probative of his testamentary capacity. Additional evidence having been found, contestants could escape summary judgment and display the evidence to a sympathetic jury.

To forestall such use of new but weak or even fraudulent evidence to get the question of capacity before a jury, the court should preliminarily evaluate new evidence to determine whether it establishes probable cause for invalidation.²¹ This simple screening process, which would sift new evidence for credibility and probative value beyond that of evidence already considered ante mortem, should effectively eliminate post-mortem challenges based on trivial, patently incredible, or essentially repetitive evidence. Evidence which does not establish probable cause for invalidation should not reach the jury, and the court, upon a preliminary finding that there is not such probable cause, should issue a summary judgment.

The threat of post-mortem strike suits looms so large in a nonbinding version of ante-mortem probate principally because juries tend to decide against wills, especially those which disfavor members of the testator's family.²² This tendency, by increasing the probability of a successful suit, encourages disappointed heirs to initiate a contest. The proponents' disadvantage in this situation is remedied, however, or at least considerably reduced, if the issues are tried before judges, who are better suited than jurors to grapple with technical questions of capacity and undue influence.²³ As the Model Probate Code recognized, "Most of the questions of fact likely to arise in connection with probate matters can be decided more satisfactorily by the judge than by the jury and at less expense."²⁴ Thus, the conservatorship model's reform—eliminating the jury trial from ante-mortem proceedings—could advantageously be completed by removing the jury from proceedings after the inter vivos hearing as well. The procedure for

21. For two uses of probable cause in will contests, see RESTATEMENT OF PROPERTY § 428, Comment k; UNIFORM PROBATE CODE § 3-905.

22. See Note, *supra* note 9, at 92, 95-96.

23. See Simes, *supra* note 9, at 555-57.

24. MODEL PROBATE CODE § 18(a), comment (1946).

post-mortem contests after inter vivos probate would be unique in several respects, so there would be no need to adhere to the procedural conventions of testamentary litigation in this context. States recognizing the right to jury trial could reserve the right for contests not preceded by an ante-mortem proceeding. Of course, spurious contests are brought less to overturn the will than to exact a settlement, but fewer contestants would be willing to bear the costs of initiating testamentary litigation without the advantage of jury trial.

Following its policy of flexibility, the UPC allows interested persons to choose between alternative procedures for settling an estate.²⁵ Such flexibility should characterize ante-mortem probate as well. Those testators who would benefit from ante-mortem probate have different needs and preferences, a wider variety of which could be accommodated by making available more than one kind of ante-mortem probate. Testators whose circumstances portend contests by disappointed heirs apparent or devisees may consider a binding ante-mortem probate essential. Testators who anticipate no strike suits may prefer the less drastic alternative, since it offers them both some protection against extortion and privacy for their testamentary acts. This flexible approach may relieve the problem of under-utilization of ante-mortem probate and may consequently make more worthwhile the effort to implement living probate.

III. CONCLUSION

My proposal of an alternative to Langbein's model assumes, as does Langbein,²⁶ that an ante-mortem determination will wholly estop subsequent challenges to testamentary capacity only if all those whose interests are affected receive notice of the proceeding and an opportunity to be heard. That due process requires notice of probate proceedings is not, however, as clear as that assumption may seem to suggest. Courts have traditionally accorded wide discretion to states in probate matters in deference to states' interests in facilitating simple and efficient systems of wealth succession and in securing the title of property transferred. The Supreme Court has never tested the weight of that deference in a due process case.²⁷ Furthermore, heirs apparent,

25. UNIFORM PROBATE CODE §§ 3-102, 3-105.

26. See Langbein, *supra* note 3, at 78-79.

27. It is worth noting that the Supreme Court has recognized this state interest in recent decisions involving the constitutional validity of state statutes limiting the rights of illegitimate children to inherit. *E.g.*, *Trimble v. Gordon*, 430 U.S. 762, 770 (1977);

and even devisees under former wills, arguably do not possess the kind of interest that due process protects; that question, too, is less clear than Langbein suggests. Thus, a *binding* ante-mortem determination of testamentary capacity might not require notice and the attending loss of confidentiality after all. I will pursue these issues and their significance for the Langbein model in a subsequent article.

Whatever the resolution of those questions, Langbein, in attempting to make ante-mortem probate more feasible, has attended to one objective—protecting testators from illegitimate post-mortem contests—at the sacrifice of another—the confidentiality of the will. As a result, his otherwise valuable proposal loses much of its practical appeal; few testators are likely to risk the social repercussions of disclosing the contents of their wills. Testators need not be put to this choice, however. Allowing testators to choose between alternative procedures that emphasize different benefits and exact different costs would fully comport with the UPC's dedication to flexibility in probate process. Absent data indicating that most of those who would use ante-mortem probate would prefer absolute protection against post-mortem litigation rather than confidentiality, it would be counterproductive to condition ante-mortem probate on the costly terms of Professor Langbein's model.

Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 170 (1972); Labine v. Vincent, 401 U.S. 532, 537-39 (1971). The Court recently reaffirmed the strength of this interest in Lalli v. Lalli, 99 S. Ct. 518, 525 (1978). Although these cases deal with equal protection requirements of state succession statutes and consequently are only tangentially related to the issue posed here, they are nevertheless indicative of the Court's basic attitude on the degree of deference owed to states in succession matters.