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ALTERNATIVE MODELS OF ANTE-MORTEM PROBATE AND PROCEDURAL DUE PROCESS LIMITATIONS ON SUCCESSION

Gregory S. Alexander* and Albert M. Pearson**†

Ante-mortem probate stands as a significant recent development in the American law of wealth succession.¹ It confronts a problem that seriously impairs our probate system, the depredatious will contest,² and promises to help revitalize the probate process. Already

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1. In light of modern attacks on the probate system, e.g., N. DACEY, *HOW TO AVOID PROBATE* (1965), and Bloom, *The Mess in Our Probate Courts*, *READER'S DIG.*, Oct. 1966, at 102, it is easy to overlook that probate reforms, such as the Uniform Probate Code, are not purely contemporary. They may be directly traced to earlier work, beginning with the suggestions in Atkinson, *Old Principles and New Ideas Concerning Probate Court Procedure*, 23 *J. AM. JUD. SOC.* 137 (1940), and Atkinson, *Wanted — A Model Probate Code*, 23 *J. AM. JUD. SOC.* 183 (1940), and continuing through the Model Probate Code. L. SIMES & P. BASYE, *PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE* (1946) [hereinafter cited as *MODEL PROBATE CODE*]. Hence it is accurate to characterize the probate reform movement as evolutionary rather than revolutionary. Scoles, *Probate Reform*, in *DEATH, TAXES AND FAMILY PROPERTY* 136, 139 (E. Halbach ed. 1977). Nevertheless, the Uniform Probate Code has had a catalyzing effect on the reform movement, as a survey of the recent literature indicates. See, e.g., Crapo, *The Uniform Probate Code — Does It Really Work?*, 1976 *B.Y.U. L. REV.* 395; DuPont, *The Impact of the Uniform Probate Code on Court Structure*, 6 *U. MICH. J.L. REF.* 375 (1973); Parker, *No-Notice Probate and Non-Intervention Administration under the Code*, 2 *CONN. L. REV.* 546 (1970); Straus, *Is the Uniform Probate Code the Answer?*, 111 *TR. & EST.* 870 (1972); Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 *CONN. L. REV.* 453 (1970); Wellman, *The Uniform Probate Code: A Possible Answer to Probate Avoidance*, 44 *IND. L.J.* 191 (1969); Zartman, *An Illinois Critique of the Uniform Probate Code*, 1970 *U. ILL. L.F.* 413. See generally R. WELLMAN, L. WAGGONER & O. BROWDER, *PALMER'S CASES AND MATERIALS ON TRUSTS AND SUCCESSION* 2-17 (3d ed. 1978).

2. The characterization of will contests as "depredatious" accurately suggests how will contests frequently function in the contemporary probate system. As Langbein observes, "most [capacity litigation] is directed toward provoking pre-trial settlements, typically for a fraction of what the contestants would be entitled to receive if they were to defeat the will." Langbein, *Living Probate: The Conservatorship Model*, 77 *MICH. L. REV.* 63, 66 (1978). The magnitude of the social problem presented by compromise-seeking will contests is indicated by the number and variety of devices estate planners use to mitigate the effect of such contests. These include revocable inter vivos trusts, see note 23 *infra*, adoption, in terrorem clauses and designated heirship. As Langbein notes, however, these devices are only imperfect responses to the problem. Ante-mortem probate offers a direct remedy. For a recent discussion of the destructive consequences of will contests, their effect on family relationships, and the consequent incentive to avoid the probate system, see Alford, *Some Major Problems in Alternatives to Probate*, 32 *REC. ASSN. B. CITY N.Y.* 53, 58-60 (1977).

enacted in several states³ and currently under active study by the Joint Editorial Board of the Uniform Probate Code and the National Conference of Commissioners on Uniform State Laws,⁴ ante-mortem probate is likely to be widely implemented in some form. But while legislators and academics alike support ante-mortem probate as a general idea,⁵ disagreement has emerged over the specific form it should take.

A recent exchange in the *Michigan Law Review*⁶ offered two alternative schemes for ante-mortem probate, both of which contemplate a procedural design materially different from that of the few existing ante-mortem probate statutes. That new design was termed the conservatorship model, contrasting with the more traditional contest model. The exchange reflected a disagreement over what the authors assumed to be an unavoidable trade-off between two objectives: protection against post-mortem strike suits, and confidentiality of a will's contents during the testator's lifetime. The exchange did not, however, explore the possibility of an ante-mortem probate scheme that would achieve both objectives. What made these objectives appear incompatible was the assumption that any version of ante-mortem probate that would preclude post-mortem attacks on the will must necessarily provide due process protective features, requiring notice to all expectant heirs and legatees under earlier wills and the opportunity for them to appear in the proceeding.

In this Article, we shall challenge that assumption and propose a workable scheme of ante-mortem probate that both protects the testamentary plan against strike suits and preserves the confidentiality of the plan during the testator's lifetime. Section I reviews the conservatorship model as developed by Professor Langbein and identifies its objectionable features. In Section II, we address the general constitutional question of what property interests command due process protection. This context poses the constitutional problem narrowly, but our analysis has broad implications regarding constitutional notice requirements for any probate reform. Concluding in that Section that due process does not compel notice and a right to

3. Arkansas Ante-Mortem Probate Act of 1979, Senate Bill No. 234; OHIO REV. CODE ANN. §§ 2107.081-085 (Page Supp. 1978); N.D. CENT. CODE § 30.1-08.1 (Supp. 1977).

4. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, JOINT EDITORIAL BOARD FOR THE UNIFORM PROBATE CODE, UNIFORM ANTE-MORTEM PROBATE ACT (3d Working Draft, April 18, 1978). The National Conference voted last summer to initiate study toward a Uniform Ante-Mortem Probate Act.

5. See Alford, Book Review, 14 GA. L. REV. 146, 148 (1979).

6. Langbein, *supra* note 2, and Alexander, *The Conservatorship Model: A Modification*, 77 MICH. L. REV. 86 (1978).

appear for expectant heirs and legatees, we prepare in Section III an administrative design for a no-notice version of ante-mortem probate. Our discussion anticipates prudential objections to the model, offering a possible exception to the no-notice provisions to favor the nuclear family, an exception we ultimately reject.

I. THE CONSERVATORSHIP MODEL REVIEWED

A. *Outline of the Model*

The conservatorship model responds to defects in the present American version of living probate. As currently conceived and enacted, ante-mortem probate employs an adversarial format: the testator institutes a declaratory judgment action in the appropriate court,⁷ naming past and present beneficiaries and all expectant heirs at law as parties. The petition requests a judgment declaring that the will satisfies the formal requirements of execution and that the testator possesses testamentary capacity and is free from undue influence. Unless subsequently revoked or amended,⁸ a will that has successfully survived this proceeding is immune from post-mortem contest by anyone.⁹

Under this format, ante-mortem probate is essentially an accelerated will contest.¹⁰ Of course, circumstances may alter considerably between the ante-mortem hearing and succession, through changes in the benefited class or the extent and value of the testator's property. In view of such uncertainties, potential heirs and legatees cannot calculate in ante-mortem probate whether it is in their interests to claim defects in the will. Without that knowledge, they are un-

7. Jurisdiction to probate wills in the majority of states rests in separate courts, variously termed surrogates' court (New York), orphans' court (Pennsylvania), or the court of ordinary (until recently, Georgia). In other states the court of general jurisdiction, such as a circuit court, has jurisdiction over probate matters, including the appointment of executors and administrators and supervision of estate administration. The classic treatment of these matters is Simes & Basye, *The Organization of the Probate Court in America* (pts. 1 & 2), 42 MICH. L. REV. 965, 43 MICH. L. REV. 113 (1944), reprinted in MODEL PROBATE CODE, *supra* note 1, at 385 (1946).

8. For revocation or modification of court-approved wills, the Ohio and North Dakota ante-mortem probate statutes require a formal proceeding, including a hearing before the court that originally reviewed the will, on the validity of the revocation or modification. OHIO REV. CODE ANN. § 2107.084(C) (Page Supp. 1978); N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1977).

9. Declarations of a will's validity are directly appealable, but they are not subject to collateral attack. *E.g.*, OHIO REV. CODE ANN. § 2107.084(E) (Page Supp. 1978). The findings are not controlling, however, on issues for which there was no opportunity to litigate in the ante-mortem proceeding. Thus, the probate decree may be set aside on a showing of fraud upon the court in obtaining the order. *See Fink, Ante-Mortem Probate Revisited: Can an Idea Have Life After Death?*, 37 OHIO ST. L.J. 264, 277 (1976).

10. Langbein, *supra* note 2, at 74.

likely to incur legal costs and endanger family harmony by asserting the will's invalidity.¹¹ Yet, the contest model relies on heirs and legatees to raise issues of testamentary capacity. The conservatorship model resolves this problem of ripeness by adopting the procedural apparatus currently used to protect the interests of incapacitated individuals:¹² The court appoints a guardian ad litem to represent all persons whose eventual property interests might be harmed by successful scrutiny of the will.¹³ Any concerned heirs or legatees may discreetly protect their interests by informing the guardian ad litem of their objections to the proffered will, avoiding an open contest between family members, or they may choose to contest on their own.

This model's procedure substantially mirrors the specifications for actual conservatorship in the Uniform Probate Code.¹⁴ The testator would attach the executed will to a petition for a court declaration of testamentary capacity. The expectant heirs at law and all beneficiaries named in the proffered will and in past wills have the right to notice and an opportunity to appear in the probate proceeding. The guardian ad litem would have extensive powers of discovery over matters of capacity and undue influence.¹⁵ A doctor would examine the testator, and the medical report would be freely available to the court, the guardian ad litem, and any other litigant. The proceeding itself would be relatively informal: the evidence would be aired in a nonadversarial context, and the judge would determine capacity without a jury. The testator would be required, however, to be represented by counsel. Finally, this conservatorship model imposes no special requirements for revocation or amendment of a certified will; that is, the existing rules on revocation and alteration¹⁶

11. Langbein, *supra* note 2, at 73-74.

12. To protect the person or property of a physically or mentally incompetent individual, the court having protective jurisdiction may appoint a guardian. The terminology varies considerably from state to state. The Uniform Probate Code [hereinafter cited as U.P.C.] refers to the guardian of an adult's property as a "conservator," U.P.C. §§ 1-201(6), 5-401(2), and restricts the term "guardian" to persons appointed to protect the nonproprietary interests of incapacitated individuals. U.P.C. §§ 1-201(16), 5-312. Article V of the U.P.C., which deals with protective proceedings, fundamentally changes both the basic concept of property guardianship and the specific procedures of conservatorship. For example, the conservator is given the same title to the property of the protected person that a trustee would have, U.P.C. § 5-420, and he is granted broad powers of management that can be exercised without court order. U.P.C. § 5-424. These and other provisions reflect the Code's general attempt to reduce court supervision of fiduciaries wherever possible.

13. That is, a determination that a will is free from defects in execution, testamentary capacity, or undue influence.

14. U.P.C. §§ 5-403 to -407.

15. These powers are also discussed in Langbein, *supra* note 2, at 79.

16. *See generally* T. ATKINSON, HANDBOOK OF THE LAW OF WILLS §§ 84-87 (2d ed. 1953).

would fully apply to wills probated ante-mortem, with no provision either for court supervision or for notice to the court or any individual.

B. *Flaws in the Model*

In an earlier critique,¹⁷ one of us criticized the Langbein model of ante-mortem probate for incorporating specific features that many testators are likely to find unattractive. We shall review and develop those points so that we may develop an ante-mortem probate scheme that most improves upon existing methods of wealth transmission.

The efficacy of ante-mortem probate as a response to nonmeritorious will contests depends substantially on the extent of its use by testators who are likely subjects of such attacks.¹⁸ Two features of the Langbein model may deter testators from using it: It requires that the will be attached to the public petition and it provides notice and an opportunity to appear to all expectant heirs and legatees. By exposing the will's contents and imposing extra costs, these features jeopardize ante-mortem probate as a reform measure.

1. *Disclosure of the Terms of the Will*

Requiring that the testator attach the will to a public petition while at the same time granting notice and the opportunity to appear in the proceeding to all heirs apparent and persons who would be legatees under previous wills sacrifices confidentiality of the will's contents. Testators under this procedure risk disclosing their testamentary plans to individuals for whom they have made no provision or a less generous provision than anticipated. Armed with this knowledge, potential contestants can better calculate their monetary incentives to claim genuine or fictitious defects in the will,¹⁹ but the trier may well doubt whether any challenge is motivated by true doubt of capacity rather than by disappointment with the will's

17. Alexander, *supra* note 6, *passim*.

18. As Professor Fink observes, ante-mortem probate is obviously directed at the testator who feels "apprehensive about the security of his or her bequests." Fink, *supra* note 9, at 289. Such a testator is most likely an elderly person who has made substantial bequests to charitable institutions or nonrelatives who might be regarded as unnatural beneficiaries. Fink provides some notable examples of such testators. *Id.* at 265 n.1.

19. Even with complete knowledge of the will's contents, however, calculation of the value of contesting the will remains imperfect. As we noted in Section I.A., inheritance interests are not settled until the testator's death. Yet potential contestants may well assume that if the testator is elderly — as he is likely to be — the succession plan incorporated in a will that he offers for ante-mortem probate represents the testator's final thinking. He is not likely later to benefit individuals for whom little or no provision is made in a will that is probated ante-mortem.

terms. Such circumstances increase the probability of error on the question of capacity. Moreover, the testator's costs in the proceeding increase if every assertion of incapacity must be rebutted, however ill-founded. If questioned, capacity would be more accurately determined in ignorance of the personal stakes involved. That same ignorance of the will's terms would eliminate the threat of strike suit, occurring under the Langbein model at the ante-mortem rather than the post-mortem stage.

In addition to its effects on the quality of the procedure, testators are likely to rebel against disclosure's effects on social ties. It is usually thought desirable to maintain the privacy of the testator's plans until death. In conventional, post-mortem probate, the contents of the will are normally disclosed to family members and to interested parties, but the testator's personal relationships have ended. In the ante-mortem format, however, these relationships continue after the probate proceeding, and disclosure of the will's contents may seriously impair them. Although the public's access to the will may easily be limited by a condition that only members of the family and other persons having a specific interest in the estate will receive notice of the proceeding and have access to the proffered will,²⁰ the testator may desire that the will remain secret from acquaintances, from remote relatives who might qualify as expectant heirs at law,

20. The notice provisions of the Uniform Probate Code serve this purpose. *See, e.g.*, U.P.C. §§ 1-201(20), 3-204, 3-306. *See generally* R. WELLMAN, L. WAGGONER & O. BROWDER, *supra* note 1, at 344-49.

Professor Langbein recommends that "[t]he liberal provision for notice and right of appearance in existing conservatorship practice should be carried over to Conservatorship Model living probate." Langbein, *supra* note 2, at 78. The unique features of conservatorship merit comment. Section 5-404 allows "any person who is interested in [the protected person's] estate to petition for a protective order, including appointment of a conservator. Section 5-405 leaves the scope of required notice to the court's determination once persons who have filed a request for notice under § 5-406 have been notified. Thus, § 5-405 does not prescribe mandatory notice to all persons affected by the protected person's estate, because not many of those who do not request notice will have a significant legal interest. Probably most of the persons considered interested by § 5-404 are creditors. Individuals who lack such a direct and present proprietary stake in the affairs of the protected persons are not deemed interested persons, and notice is not mandatory for them. The protected person, who is also notified of the proceedings, normally represents those whose interest is nonproprietary; hence notice is usually unnecessary for such persons. In this connection, the Code distinguishes between the constitutionally required notice given to the protected person and prudential notice that may be given to others who are related to the protected person in such a way that they may assist in the protection.

The U.P.C. provisions dealing with notice in conservatorship do not contemplate an ante-mortem probate proceeding. The class of persons interested in the protected person is different in the two contexts. In conservatorship, notice must be provided to protected persons because they are the interested parties within each estate. Beyond them, not many persons are then interested (technically) in the estate, so that notice to them covers most technical interests. In ante-mortem probate, only the testator who initiates the proceeding has a technical interest in the estate, so notice is constitutionally unnecessary. No other individuals have interests comparable to that of the protected person in conservatorship that are at stake in the ante-mortem probate procedure.

and even from members of the nuclear family. By notifying interested persons and giving them the right to appear in a proceeding that publicizes the will, the conservatorship model plainly sacrifices the testator's privacy.

2. *The Costs of Notice*

Providing notice to every interested person, as required in all existing versions of ante-mortem probate including Professor Langbein's, will aggravate the costs of the procedure and may well impair its efficiency. A court may consider it necessary to require extensive proof of heirship or other bases of interest to determine who should be notified and allowed to appear. Since the court must notify those persons who will become heirs upon the testator's death, it must reach more than those who would immediately appear to be heirs, if it is to avoid being underinclusive. The determination of that class will make the notice requirement even costlier than it is under conventional probate procedure. Furthermore, the task of satisfying the requirement may distract the court from the main objective of the procedure.

The notice requirement may also impair the guardian ad litem's discovery. Although the burden of complying with the notice requirement will technically rest on the testator, the guardian may consider it prudent to monitor such compliance before initiating discovery. And the guardian who monitors such broad notice provisions may pay less attention to the essential task of investigating incapacity and undue influence. An ante-mortem probate model should avoid such byways that might distract the court and the guardian from the central issue of capacity.

The threat to the efficacy of ante-mortem probate posed by the disadvantages outlined here — the social effects of premature disclosure of the will's contents and the added complications and costs of the notice requirement — is even more apparent when this procedure is compared with alternative methods of protecting dispositive plans, notably the revocable trust. By making and preserving a private record to demonstrate capacity and the absence of outside influence, individuals who might otherwise use ante-mortem probate can substantially achieve their goal through a revocable living trust. Wealth transfers effected through such trusts are generally immune from the perils of testamentary proof.²¹ They are rarely upset on the

21. See J. RITCHIE, N. ALFORD & R. EFFLAND, *CASES AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS* 481 (4th ed. 1977).

basis of incapacity or undue influence, largely because the settlor is available to defend the transaction and the trust is usually well established when the settlor dies. Thus, unusual provisions, which might trigger a contest if included in a will, usually escape compromise proceedings, and the plan is implemented as originally intended. Moreover, revocable living trusts preserve privacy since they are free from the inventory and accounting procedures of the probate court.²² These features suggest why the revocable living trust is such a popular dispositive device and why many individuals would not be willing to sacrifice simplicity and confidentiality to use the conservatorship model of ante-mortem probate.²³

Professor Langbein and others²⁴ have apparently assumed that any version of ante-mortem probate that leads to a binding determination necessarily includes notice and appearance provisions, entailing substantive disclosure of the will. In light of the disadvantages of such provisions, that assumption is worth testing; a binding proceeding that does not involve notice and disclosure would preserve all of the advantages of the conservatorship model without sacrificing features of conventional probate that many testators regard as indispensable.

II. DUE PROCESS, CONSTITUTIONAL PROPERTY, AND PROBATE

Until recently, the dominant procedural model for the probate of

22. J. FARR, AN ESTATE PLANNER'S HANDBOOK § 14, at 93 (3d ed. 1966).

23. We do not suggest that revocable inter vivos trusts solve the problem of compromise contests. Such trusts can be successfully attacked on grounds of incapacity and undue influence, and the vulnerable individual may wish to obtain complete assurance that his plan will not be upset. Revocable inter vivos trusts are also weakened by the possibility of involuntary modification or termination by a surviving spouse, as in *Krause v. Krause*, 285 N.Y. 27, 32 N.E.2d 779 (1941), but see *In re Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951), and occasionally by creditors. See generally Schuyler, *Revocable Trusts — Spouses, Creditors and Other Predators*, 8 U. MIAMI INST. EST. PLAN. ¶ 74.1300 (1974).

The possibility of extending the ante-mortem procedure to revocable trusts bears consideration. Such trusts could be secured from subsequent attacks on grounds of incapacity or undue influence in the same way as wills. The functional similarities between revocable trusts and wills is well known, provoking questions about the testamentary character of such trusts and the need to comply with typical Wills Act formalities. At the same time, however, the conclusion in many cases that the power to revoke does not render dispositions in the trust testamentary, e.g., *National Shawmut Bank v. Joy*, 315 Mass. 457, 53 N.E.2d 113 (1944), may suggest that the interests taken by beneficiaries under such trusts are materially different than the expectancy interests of heirs or legatees under pending wills. Such a difference would complicate an extension of our procedure to revocable trusts. Moreover, the similarities between bases for contesting wills and revocable trusts have not been thoroughly and rigorously studied. More needs to be known about the points of similarity and difference between these two devices before any suggestion is made to extend ante-mortem procedures to revocable trusts.

24. MODEL PROBATE CODE, *supra* note 1, at 20; Fink, *supra* note 9, at 276; Langbein, *supra* note 2, at 78.

wills and administration of estates has required prior notification of the proceedings to all interested persons.²⁵ But the appearance of the Uniform Probate Code has renewed interest in developing procedures for no-notice probate and unsupervised administration to simplify the transfer of property at death.²⁶ Most of the academic commentary has found the no-notice feature incompatible with constitutional due process requirements,²⁷ supposing that any form of ante-mortem probate is, like conventional probate procedures, subject to the notice and appearance obligations of the fourteenth amendment due process clause.²⁸ This premise reflects two assumptions. First, it assumes that early Supreme Court precedent sustaining no-notice, common form probate stands on an outmoded view of in rem proceedings and the procedural due process requirements applicable to them.²⁹ Second, it assumes that the status of expectant heir at law or potential beneficiary under current or former wills confers a constitutionally protected property interest.³⁰ We

25. Simes, *The Function Of Will Contests*, 44 MICH. L. REV. 503, 524 (1944). A 1952 study of probate in common form found that 17 states did not require notice before the probate of a will. Levy, *Probate in Common Form in the United States: The Problem of Notice in Probate Proceedings*, 1952 WIS. L. REV. 420, 422. There have been relatively few changes in notice requirements since then. Many of the states that do employ some type of summary probate procedure also provide that notice of the appointment of a personal representative and of probate of a will be given to interested parties or to the legal heirs after the proceeding.

26. The Uniform Probate Code provides opportunities for probate and administration by private arrangement, U.P.C. §§ 3-102, 3-107, 3-108, 3-1006, art. 3, General Comment, and informal probate procedures that do not require judicial supervision, U.P.C. §§ 3-301, 3-302 and Comment. A similar scheme was incorporated in the Pennsylvania Probate Estates and Fiduciary Code, adopted in 1972. See Straus, *Pennsylvania Falls in Line*, UPC NOTES, March 1979, at 1, 10. But cf. Levy, *supra* note 25, at 433 (noting that few states had dropped their notice requirements in response to the Model Probate Code).

27. E.g., Note, *The Constitutionality of the No-Notice Provisions of the Uniform Probate Code*, 60 MINN. L. REV. 317 (1976).

28. E.g., Fink, *supra* note 9, at 276, 283-87. The notable exception is Cavers, *Ante Mortem Probate: An Essay In Preventive Law*, 1 U. CHI. L. REV. 440 (1934), but his failure to include provision for notice should perhaps not be overemphasized since he did not directly address the notice question and since due process notions have evolved rather substantially since he wrote.

29. See, e.g., *Christianson v. King County*, 239 U.S. 356, 373 (1915); *Farrell v. O'Brien*, 199 U.S. 89 (1905); *Robertson v. Pickrell*, 109 U.S. 608 (1883); *Case of Broderick's Will*, 88 U.S. (21 Wall.) 503 (1874); *Darby's Lessee v. Mayer*, 23 U.S. (10 Wheat.) 465 (1825).

30. This assumption is reflected, for example, in recent reform efforts of the Kansas Judicial Council Probate Law Study Advisory Committee. Using the U.P.C. and other modern probate laws as points of reference, the Kansas study and the resulting proposed legislation were directed at simplifying probate procedure. But, as a reporter for the Kansas Judicial Council indicates, the Advisory Committee regarded procedural due process requirements, especially those for notice, as serious restraints on the extent of reform measures that it could undertake. See Hearrell, *Probate Law — A Study and Proposals*, 1974 KAN. JUDICIAL COUNCIL BULL. 82, 89, 111-12. And those requirements were rigorously defined on the basis of recent Kansas decisions such as *In re Estate of Barnes*, 212 Kan. 502, 512 P.2d 387 (1973). See also *Chapin v. Aylward*, 204 Kan. 448, 464 P.2d 177 (1970) (notice required in tax foreclosure proceeding); *Pierce v. Board of County Commrs.*, 200 Kan. 74, 434 P.2d 858 (1967) (no-

will concede the first assumption for the sake of argument. A closer analysis of recent due process theory and precedent, however, reveals that the second assumption is unsupported and that due process does not compel notice provisions for ante-mortem probate.

As we shall explain below, due process requires notice and a right to a hearing only when state action threatens one's liberty or property. A property interest may be legal ownership or a state-endorsed entitlement. Inheritance through testate or intestate succession, however, is simply a state-supervised gift. Until the gift is completed, the expectant recipient has no greater property rights than the expectant recipient of an inter vivos gift. Under our probate system, the succession rights of expectant heirs and legatees do not receive formal legal recognition until (1) a will has been admitted to probate, or (2) the existence of a valid will has not been established and the establishment of any later discovered will is barred by law. Either of these eventualities initiates the state's duty to provide procedural due process protection to the succession rights that arise. Admittedly, lawyers typically pretend that such rights exist from the time of the testator's death, using the legal fiction of relation back; but that fiction serves administrative considerations subsidiary to and dependent upon the outcome of probate proceedings.³¹ Those

tice required in tax foreclosure proceeding); Note, *supra* note 27, at 324-28; Comment, *Notice Requirements in California Probate Proceedings*, 66 CALIF. L. REV. 1111, 1118-19 (1978).

31. This analysis concerning the time when testamentary transfers become effective does not conflict with the well-established rule of property law fixing the testator's death, not the completion of probate, as the time when interests transfer. That rule appears in a variety of contexts. Heirs and legatees, for example, normally are required to survive only the decedent's death, not the completion of probate proceedings. For the common law Rule Against Perpetuities, the life in being must be alive at the testator's death; persons conceived or born between the testator's death and completion of probate cannot qualify as lives in being. For tax purposes, too, the date of death is generally the relevant time. Thus, to qualify for the marital deduction under I.R.C. § 2056, an interest passing to the surviving spouse must be a nonterminable interest as of the testator's death. See *Jackson v. United States*, 376 U.S. 503, 507-11 (1964). Moreover, in determining whether a general testamentary power of appointment is in existence at the time of the donee's death for purposes of I.R.C. § 2401, some authority suggests that the donee need not survive the probate of the donor's will, only the death of the donor, for the power to be includible in the donee's gross estate. *Estate of Bagley v. United States*, 443 F.2d 1266 (5th Cir. 1971). In these situations and others, the idea that time of death is the relevant moment is implemented through the legal fiction of relation back. Even though the validity of a will, and hence the identity of legatees having property interests, usually cannot be determined at the decedent's death, we sometimes deem the interests as having passed at death. It is important to recognize, however, the purposes served by the relation-back fiction, because the time when testamentary transfers are deemed effective may vary according to the purpose of that determination. As the earlier examples illustrate, the relation-back fiction usefully serves the interests of administrative convenience and necessity. Where it is necessary to identify a certain moment when property interests transfer even though the transfers are not actually effective until the conclusion of probate, the time-of-death rule as rationalized by relation back is advantageous. But where those considerations are not present, the time-of-death rule is pointless. Thus, the timing of testamentary transfers for due process purposes should depend on the time of those transfers' practical effectiveness. As we

considerations are irrelevant to the due process analysis that follows.

Two lines of argument are typically offered to require procedural due process safeguards for probate proceedings. The first argument extends the holding of *Mullane v. Central Hanover Bank & Trust Co.*³² to probate proceedings. The second, relying on the recent entitlement cases beginning with *Goldberg v. Kelly*,³³ maintains that the right to inherit through either testate or intestate succession is a statutorily recognized property interest and hence that any state action affecting that interest — whether judicial or administrative — triggers requirements of the due process clause.

Mullane overturned a New York statute requiring only notice by publication for the hearing of original accountings of a common trust fund. After refusing to classify the accounting procedure as an in rem or in personam proceeding, the Court concluded that publication alone was not a constitutionally adequate method of notice. Publication was sufficient for those beneficiaries whose whereabouts were unknown or whose interests were “either conjectural or future or, although they could be discovered upon investigation, do not in due course of business come to the knowledge of the common trustee.”³⁴ But, the Court held, present beneficiaries whose addresses were known must at least be notified by ordinary mail.³⁵

It is hardly surprising that the *Mullane* Court paid so little attention to the threshold question of the existence of a protectable property interest: the parties did not dispute it. For present purposes, however, we shall probe further into the facts of *Mullane* to develop a more detailed view of the sweep of the Court’s ruling. The interests of the trust beneficiaries in *Mullane* can be divided into two broad categories. One group of beneficiaries held a right to the present use and enjoyment of the current earnings of the common trust fund while the other could enjoy benefits only after certain events predetermined in the trust instrument. Although indicating that the distinction between present and future interests might affect the form of notice, the Court in *Mullane* nevertheless extended due process protection to all trust beneficiaries whose interests were then in question.³⁶

discuss in the text, even after the death of the decedent, the effectiveness of testamentary transfers remains uncertain until the conclusion of probate when the relevant succession track — testate or intestate — is finally ascertained.

32. 339 U.S. 306 (1950).

33. 397 U.S. 254 (1970).

34. 339 U.S. at 315-17 (quote at 317).

35. 339 U.S. at 318.

36. Our reading of *Mullane* may be unnecessarily generous. It is unclear whether the

The *Mullane* Court's extension of due process protection to some future and contingent interests does not mean, however, that similar protection extends to any person with sufficient imagination to conceive of a series of events that might lead to rights in the property of another. The interests of the trust beneficiaries in *Mullane*, whether currently enjoyed or delayed subject to a contingency, have traditionally been deemed presently operative and have conventionally been distinguished from expectancies.³⁷ They were fixed in form by the legal instruments creating the trusts in the first instance. These interests resulted from the settlor's private, consensual transfer of his personal rights in a way respected and regarded by law as immediately committing the donor and immediately giving the trustee duties to the beneficiary, even though the donor may to some extent reserve or restrict the beneficiary's use and enjoyment of the transferred interests. The state's only involvement in the transaction was to establish the formalities for recognition and enforceability;³⁸ it did

Court regarded contingent remainders as constitutionally protected property interests. That question was not presented to the Court, since publication notice had been provided to contingent remaindermen under the trusts. In other contexts, the distinction between vested and contingent remainders has been regarded as material for constitutional purposes. See O. BROWDER & R. WELLMAN, *FAMILY PROPERTY SETTLEMENTS: FUTURE INTERESTS* 26 (1965). And nonvested future interests, including contingent remainders, reversions, and rights of entry, generally have received less protection against a variety of governmental acts, such as condemnation and tax sales. O. BROWDER, L. WAGGONER & R. WELLMAN, *FAMILY PROPERTY SETTLEMENTS: FUTURE INTERESTS* 156-57 (2d ed. 1973). This distinction is reflected in various contexts. It appears, for example, in the traditional equitable jurisdiction to extinguish remote future interests when they no longer serve any socially useful purposes, see *Baker v. Weedon*, 262 So. 2d 641 (Miss. 1972), and in statutes that bar possibilities of reverter and rights of entry for the purpose of clearing land titles. Although the effect of these statutes may be to cut off interests that have not yet become possessory, they have been sustained against due process attack in a number of cases. *E.g.*, *Trustees of Schools v. Batdorf*, 6 Ill. 2d 486, 130 N.E.2d 111 (1955).

37. Under the common law rule of inalienability, contingent remainders and other nonvested future interests were regarded as functionally equivalent to expectancies. The common law rule has been largely abandoned, and the distinction between nonvested future interests and expectancies is now well recognized. "[T]he inalienability rule is based . . . on the now discredited notion that a contingent future interest is not a present property interest, but rather is one that might arise in the future." O. BROWDER, L. WAGGONER & R. WELLMAN, *EDITORS' COMMENTS TO FAMILY PROPERTY SETTLEMENTS* 10 (1974). See also 1 *AMERICAN LAW OF PROPERTY* § 4.102 (A.J. Casner ed. 1952).

38. Under the positivist view of procedural due process, property rights arise in three distinct ways: 1) the federal or state constitution provides for them; 2) the state confers property rights upon private parties, and 3) the state permits private parties to create property rights among themselves. Succession law, along with the law of contracts, trusts, and property, falls into the third category. The state's role there is to define what the property interest is and to set the prerequisites for recognition.

The Supreme Court's recent debtor-creditor cases illustrate the relationship of such third category rights and procedural due process principles. In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), for example, the Court accepted as a given the law of Louisiana concerning the property rights of the debtor and creditor. The buyer/debtor acquired not only a general ownership interest in the goods, subject to the vendor's lien, but also a possessory interest. Since both interests were recognized under state law, neither could be extinguished through

not purport to dictate the character of the benefit transferred or the categories of potential or eligible recipients. While the trust beneficiaries in *Mullane* had no antecedent right to have property placed in trust for their benefit, they acquired judicially enforceable rights once that transfer occurred, and the state formally recognized those rights through its substantive law of trusts. *Mullane* forcefully establishes that the state cannot terminate or limit such rights in a binding judicial proceeding without first affording notice and an opportunity to appear to parties whose interests may be adversely affected.

The relevance of *Mullane* to the question of whether and when procedural due process requirements attach in probate proceedings is limited not simply because *Mullane* did not involve a probate proceeding³⁹ but also because the existence of a protectable property interest at the time of the trust accounting was so well recognized. The Court granted the effect of a judicial decree on the undisputed interests of the trust beneficiaries: "We understand that every right which beneficiaries would otherwise have against the trust company . . . for improper management of the common trust fund during the period covered by the accounting is sealed and wholly terminated . . ." ⁴⁰ Reliance on *Mullane* to establish the same procedural due process requirements for the probate proceedings fails because the interests of the trust beneficiaries in *Mullane* are fundamentally different from those that the testator's legal heirs and legatees under current and former wills may assert in probate proceedings.

The precise difference is between an interest that is a present legal right and one that is no more than a hope or expectancy of a legal right. More specifically, quite unlike the trust beneficiaries in *Mullane*, the heirs at law and legatees named in any unprobated will have neither a traditionally enforceable interest in the testator's property nor a fiduciary relationship with the property's custodian.⁴¹

the state's adjudicatory mechanism without affording the buyer/debtor protection. Without formal legal recognition of these interests, the debtor's due process claim would presumably have failed. However, a necessary aspect of state recognition of property rights is specifying when they come into being.

39. The applicability of *Mullane* to probate proceedings has been widely debated. See 3 AMERICAN LAW OF PROPERTY § 14.37 (A.J. Casner ed. Supp. 1958).

Mullane has been held inapplicable in probate proceedings in several state courts. E.g., *In re Pierce's Estate*, 245 Iowa 22, 60 N.W.2d 894 (1953); *Baker Natl. Bank v. Henderson*, 151 Mont. 526, 445 P.2d 574 (1968), *appeal dismissed*, 393 U.S. 530 (1969); *Continental Coffee Co. v. Estate of Clark*, 84 Nev. 208, 438 P.2d 818 (1968); *New York Merchandise Co. v. Stout*, 43 Wash. 2d 825, 264 P.2d 863 (1953).

40. 339 U.S. at 311.

41. Even as to those beneficiaries in *Mullane* whose interests were most contingent, the distinction between contingent remainders and expectancies is well settled. Moreover, the view that expectant heirs and legatees have no present property interests is familiar for private law purposes, see O. BROWDER, L. WAGGONER & R. WELLMAN, *supra* note 37, at 10, and it

To illustrate the distinction, consider inter vivos transfers of property by the testator. Such transfers generally are valid despite their adverse effect on expectant heirs and legatees.⁴² Those individuals whose hopes are extinguished by such transfers have no rights to compensation. Furthermore, the death of the testator does not materially alter their situation. The principal effect of death on the interests of legal heirs and legatees is to reduce the contingent events that may limit or bar altogether their realization of an interest in the decedent's estate. Death itself does not confer such an interest. For the legal heirs and legatees, that moment arrives when formal probate proceedings have been completed.⁴³

The logic of our system of succession helps to explain why potential heirs and legatees hold only expectancies. By establishing a probate system, the state determines that a decedent's property will pass through either testate or intestate succession rules. The universal preference is that property be distributed in accordance with the decedent's desires as expressed in a valid will. Failing that, the state's alternative method, intestate succession, attempts to follow the decedent's presumed wishes.⁴⁴ It is important to bear in mind, however, that the testate and intestate rules contemplate the transfer of a decedent's property to persons who but for the state's designation would have no claim to it on any independent basis of positive law such as contract.⁴⁵ Furthermore, since the state is the source of the property right, the preconditions of that right, including the moment of its inception, must also be determined by the state. That is, the state defines who will succeed to ownership by incorporating the decedent's wishes, expressed or presumed, and further prescribes when

was frequently expressed in early Supreme Court cases. *E.g.*, *Scott v. McNeil*, 154 U.S. 34, 49 (1894); *Randall v. Krieger*, 90 U.S. (23 Wall.) 137, 148 (1874). What we suggest is that modern due process jurisprudence would also differentiate between those interests.

42. Standing to attack inter vivos transfers generally is restricted to creditors who claim that such transfers are made in fraud of their interests and, less generally, to spouses of transferors when transfers are made in derogation of marital property rights. Children, except in Louisiana, and collateral relatives have no standing as such to attack lifetime transfers as defeating their interests as prospective distributees. *See* W. MACDONALD, *FRAUD ON THE WIDOW'S SHARE* 264-67 (1960).

43. *See* note 31 *supra*.

44. Absent such a scheme, the disposition of property upon the death of the owner would impose serious social and legal burdens on the state. *See generally* Friedman, *The Law of the Living, The Law of the Dead: Property, Succession and Society*, 1966 *Wis. L. Rev.* 340.

45. The same, of course, is true of persons who anticipate becoming beneficiaries under inter vivos trusts. No property rights in the trust beneficiaries are created until ownership is transferred effectively, consistent with conventional property rules. Following such a transfer, however, the full procedural protections of *Mullane* apply. As we shall discuss more fully in the text, what distinguishes trust beneficiaries from legal heirs and legatees before the conclusion of probate is present enjoyment of benefits or a presently recognized right to enjoy benefits in the future. The latter right need not be indefeasibly vested.

the rights become fixed. Prior to formal determination of the existence of a valid will or intestacy, legatees and legal heirs possess nothing more than an expectancy of enrichment. This expectancy may be either fulfilled or frustrated, depending upon the outcome of the formal inquiry into whether the conditions for inheritance by testate or intestate succession have been met. The absence, prior to that determination, of any right to present or future possession, use, or enjoyment of the property distinguishes probate proceedings for due process purposes. Without any apparent exceptions, the Supreme Court's procedural due process decisions have involved the judicial resolution of disputes concerning preexisting property interests. *Mullane* clearly fits this pattern, as do the more recent debtor-creditor cases.⁴⁶

The traditional procedures of American probate do not suggest that more than expectancies are involved. Though adjudicative in form today, the probate process is not inherently a means of resolving conflicting property interests. Reduced to fundamentals, the state through probate aids individuals in transferring property that is indisputably theirs to the objects of their generosity at death. Only the cumulative weight of custom and history makes the complete or partial abandonment of the adjudicative model a debatable proposition. Yet if the state can determine to its own satisfaction the testator's intentions through an ex parte or administrative hearing instead of traditional probate, the due process objections raised by heirs or legatees should not bar the development of such new formats. While notice to affected parties and the opportunity to appear have traditionally been associated with the adjudicative model of probate proceedings,⁴⁷ those procedural incidents are present only because legislatures heretofore have elected to use the adversarial system to resolve probate questions and because those incidents are implicit in the adversarial process.⁴⁸ They are not a function of the characterization for due process purposes of the interests of the heirs or the legatees.

The second constitutional objection to our proposal is based on the Supreme Court's entitlement cases.⁴⁹ Until their emergence in

46. See note 38 *supra*. See also *North Ga. Finishing, Inc. v. Di-Chem*, 419 U.S. 601 (1975); *Fuentes v. Shevin*, 407 U.S. 67 (1972).

47. In *Allan v. Allan*, 236 Ga. 199, 223 S.E.2d 445 (1976), the Georgia court held that *Mullane* notice requirements apply only in judicial proceedings that involve binding court orders. See generally the discussion in R. WELLMAN, L. WAGGONER & O. BROWDER, *supra* note 1, at 344-49.

48. See note 85 *infra* and accompanying text.

49. These cases involve both liberty and property interests under the due process clause.

the early seventies, it was generally assumed that a state could unilaterally revoke any right or benefit that it conferred on its citizens. That view was based on the distinction between rights and privileges. Under that distinction, government jobs, licenses, welfare, and other state benefits were seen as privileges bestowed out of the generosity of government; since they could be withheld absolutely, it followed that they could be conferred upon citizens conditionally even though the conditions imposed would violate the Constitution in other contexts.⁵⁰

In *Goldberg v. Kelly*,⁵¹ the Supreme Court rejected the right/privilege distinction as it applied to welfare payments and set the stage to reject it for state-conferred entitlements generally. Justice Brennan noted: "[I]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property."⁵² The majority did not question that terminating the plaintiff's right to receive public assistance extinguished a presently enjoyed property interest. Some of the Court's language, however, stressed the extreme importance of welfare payments to the poor,⁵³ an analysis that suggests a potentially narrow scope for the Court's new doctrine. The remainder of the Court's opinion in *Goldberg* centered on the consequences of erroneously halting welfare payments and the need for a pretermination hearing to minimize the possibility of error.⁵⁴

Although it recognized that entitlements can be property in the constitutional sense and hence can merit due process protection, *Goldberg* said little about how one determines whether a relationship between the state and the individual creates a property interest.

The Supreme Court's seminal decision is *Goldberg v. Kelly*, 397 U.S. 254 (1970). See also *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Dixon v. Love*, 431 U.S. 105 (1977); *Meachum v. Fano*, 427 U.S. 215 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Board of Regents v. Roth*, 408 U.S. 564 (1972).

50. For a discussion of the development of this doctrine and a critique, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). Dissenting in *Bishop v. Wood*, 426 U.S. 341, 353 n.4 (1976), Justice Brennan suggested that the Court's current approach to the definition of property for constitutional purposes revives the right/privilege distinction.

51. 397 U.S. 254 (1970).

52. 397 U.S. at 262 n.8.

53. 397 U.S. at 264.

54. 397 U.S. at 265-71. The Court's discussion here foreshadowed the more refined emphasis in later cases on accuracy and consistency as the paramount purposes of procedural due process safeguards. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976). This theme in the Court's decisions reflects the instrumental view of procedural due process.

The Court offered only this unilluminating comment: "The extent to which procedural process must be afforded the [welfare] recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the government interest in summary adjudication."⁵⁵

The vagueness of that standard presented no obstacle to the extension of the *Goldberg* rationale to the summary suspension of a driver's license in *Bell v. Burson*.⁵⁶ But in *Perry v. Sindermann*⁵⁷ and *Board of Regents v. Roth*,⁵⁸ due process challenges to the nonrenewal of two teaching contracts, the Court held that, before a government benefit such as employment can be characterized as property, the claimant must establish both a present enjoyment of that benefit and a state-induced reliance on its continuation.⁵⁹ In both cases, when notice of nonrenewal was received, the teachers were enjoying the present benefit of a job.⁶⁰ The entitlement issue therefore turned on the presence of some state-induced reliance on continued enjoyment of the benefit. In this vein, *Sindermann* indicates that reliance can be shown through the provisions of state law or through understandings between the state and the individual that guarantee continued employment unless cause for dismissal or nonrenewal is demonstrated.⁶¹ In short, a de facto tenure could be proved even if the educational institution purported not to have a tenure system.⁶² *Roth* involved the nonrenewal of the teaching contract of a probationary employee holding a tenure track position.⁶³ Neither state statute, university rule, nor Roth's contract created any right to re-

55. *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

56. 402 U.S. 535 (1971).

57. 408 U.S. 593 (1972).

58. 408 U.S. 564 (1972).

59. *Board of Regents v. Roth*, 408 U.S. at 576, 578.

60. In *Roth*, the notice of nonrenewal came during February, the middle of the academic year for which the plaintiff held a contract. *Board of Regents v. Roth*, 408 U.S. 564, 568 (1972). In *Sindermann*, notice of nonrenewal came at the end of the academic year. *Perry v. Sindermann*, 408 U.S. 593, 595 (1972).

61. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

62. The teacher's contract in *Sindermann* ran year-to-year, pursuant to a college policy that purported to deny any tenure system. In fact, that disclaimer was not as convincing as the college may have presumed. The Faculty Guide seemed to deny tenure in one sentence and in the next establish the right to "permanent tenure." 408 U.S. at 600. Given the ambiguity of the college's official position, the Court turned to substantive contract law for the suggestion of an implied agreement or understanding that would rise to a legitimate entitlement of continued employment. *Sindermann* does not authorize a court to ignore the state's formal rules or policies on reemployment whenever it feels that informal practice may depart from them.

63. *Board of Regents v. Roth*, 408 U.S. 564, 566-67 (1972).

employment beyond the term of the present academic year.⁶⁴ The fact that most probationary faculty were rehired after the first year was insufficient in the Court's view to give Roth a de facto property interest:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.⁶⁵

After *Sindermann* and *Roth*, several key generalizations seemed possible. First, state rules and understandings determine whether employment benefits or other interests conferred by the state on individuals are constitutionally protected property. Second, present use or enjoyment of a benefit without state-induced reliance upon its continuation is insufficient to trigger due process safeguards. And third, the indeterminant "grievous loss" standard is plainly not a test for a constitutionally protected property interest.⁶⁶ This last aspect of the decisions is especially significant since the "grievous loss" standard contemplates an aggressive judicial role in determining whether or not state benefits are entitlements for due process purposes.⁶⁷

Although the pattern of analysis in *Sindermann* and *Roth* basically continued, two later developments affect the entitlement cases' applicability to probate proceedings. First, in *Arnett v. Kennedy*,⁶⁸ the Court reaffirmed that once the state through positive law or practice creates an entitlement interest, the adequacy of the procedural protection for that interest is determined exclusively by reference to constitutional norms.⁶⁹ Thus, while the state can control whether a

64. 408 U.S. at 578.

65. 408 U.S. at 577.

66. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court adopted the "grievous loss" phraseology that originally appeared in Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951). The government's political labeling of certain groups in *McGrath* seriously risked stigmatizing individual group members along with other possible consequences such as the loss of job and criminal prosecution. The use of the term "grievous loss" to describe these consequences was apt, but scarcely can be viewed as an effort by Justice Frankfurter to establish a comprehensive standard for procedural due process.

67. With original variations, Professor Tribe has argued the case for an expanded judicial role perhaps as forcefully as anyone. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 10-12, at 532-39 (1978). He gives major credit to Professor Van Alstyne's thinking on the subject, *supra* note 50.

68. 416 U.S. 134 (1974).

69. The plurality opinion in this case took the view that the federal government could create an entitlement and define the procedural protection to be given to it. 416 U.S. at 152-58. Only Justice Rehnquist, the author of the opinion, Chief Justice Burger, and Justice Stewart

property interest comes into being, it cannot create an entitlement and then anticipate complete judicial deference to its procedural safeguards. Second, in *Bishop v. Wood*,⁷⁰ the Court clarified the hierarchical inquiry courts must make into state law and practice to characterize entitlement interests. If state law on its face or as authoritatively construed by a state court confers no expectancy of a permanent job or of the receipt of benefits, a federal court must hold that no procedural due process protections attach to their termination.⁷¹ Thus, specific state statutes or rules virtually foreclose judicial inquiry into informal practice that might otherwise be reasonably viewed as creating a legitimate expectation of entitlement.⁷²

The argument that the entitlement cases apply to probate has a superficial appeal: Succession statutes do explicitly recognize that either the legatees under a will or the heirs at law will assume ownership of the decedent's property.⁷³ But obviously, despite such statutory provisions, neither category of potential takers can claim present use or enjoyment of the decedent's property. Their interests are wholly prospective and lack recognition as existing property rights. Indeed, to use the more vivid language of the Supreme Court in *Roth*, their interests represent nothing more than an abstract desire for the decedent's property or a unilateral expectation of a right to it.⁷⁴ For constitutional purposes, a property right arises, if at all, when the inquiry into the existence of a valid will has been completed and the rules of succession have been applied. Only then are

subscribed to that analysis. The remaining six Justices adhered to the conventional entitlement theory that, while the state is free to define property interests in the first instance, the adequacy of the procedural protections given to those interests is a question of constitutional law. 416 U.S. at 167, 185, 211.

70. 426 U.S. 341 (1976).

71. 426 U.S. at 344-47. The Court in *Bishop* conceded that the ordinance in question could fairly be read as conferring a right to continued employment unless cause for discharge is shown. 426 U.S. at 345. It deferred to the federal district judge's interpretation of a North Carolina case indicating that an entitlement to continued employment could arise only if granted by statute or contract. Otherwise, a public employee served at the pleasure of the government. 426 U.S. at 345. The district judge found against the discharged employee on the entitlement claim. 426 U.S. at 345.

72. The Court in *Bishop v. Wood*, 426 U.S. 341, 344 (1976), explicitly reaffirmed the rule in *Perry v. Sindermann*, 408 U.S. 593, 601 (1972), that a property interest could be created by ordinance, rule, or implied contract. Nevertheless, after *Bishop* it is clear that the reasonableness of expectations will be as much a function of judicial decision as statute, rule, or contractual provision. As a practical matter, if the law specifically denies creation of an entitlement, proof of contrary expectations based on conduct or implied understandings engendered by the state will carry no weight. Only the inevitability of flawed draftsmanship gives *Sindermann* any future, however limited it might be.

73. See notes 30-31 *supra* and accompanying text.

74. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

the prerequisites of the entitlement cases, particularly justifiable reliance,⁷⁵ satisfied. Thus, by the criteria of the entitlement cases themselves, the claim that procedural due process protections extend to probate proceedings — ante-mortem or post-mortem — would appear to fail.⁷⁶

More fundamentally, however, the relevance of the entitlement cases to probate seems doubtful. When the state creates an entitlement, it confers upon the private individual a right to receive public funds or a right to engage in a business, profession, or other activity that is subject to state regulation. The state's role in the succession process, however, is quite different. It has merely established alternative modes of wealth transmission at death, including inter vivos transactions conferring death benefits as well as testate or intestate succession, but leaves the choice to the decedent who may or may not execute a will. In wealth succession, therefore, the state does not confer public benefits upon private individuals for substantive reasons of its own, but rather the state effects an owner's preference as to the beneficiaries of personal generosity. Indeed, given a valid will, the state takes no interest, save in limited instances such as forced share statutes,⁷⁷ in the identity of devisees or their relationship to the testator. Moreover, even when the decedent fails to execute a will and the rules of intestate succession apply, the heirs at law share in the estate not because they are considered deserving in any substantive sense, but because the distribution comports with the presumed intent of the testator.⁷⁸

If, in probate, the state is not creating a new property interest but

75. The Court has consistently required some present legal interest in the entitlement cases. See *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 9, 10-11 (1979); *Morrissey v. Brewer*, 408 U.S. 471, 481-82 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Professor Tribe has challenged the wisdom of that requirement. L. TRIBE, *supra* note 67, § 10-19, at 518-19. But see Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1296 (1974).

76. Despite this conclusion, it would be misleading to describe our proposal as indifferent to the interests of expectant heirs or legatees. The question of testamentary capacity is central to Anglo-American probate law and for that reason the state has the strongest of interests in its accurate resolution. Our proposal recognizes that fact and incorporates two features to promote the integrity of the factfinding process: (1) an in camera judicial examination of the proffered will to uncover possible indications of fraud, undue influence, or testamentary incapacity; and (2) a court-supervised investigation by a guardian ad litem into the circumstances of the execution of the will. To the extent that the integrity of the factfinding process is a concern of expectant heirs or legatees, these provisions advance their interests, but as an incidental matter only. Nevertheless, if it were necessary to confront the argument directly, the recommended safeguards would be stringent enough to satisfy due process standards for adequacy. See *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 14-16 (1979).

77. See note 126 *infra*.

78. Intestate succession also serves the important state interest in reposing title in property.

rather is formally recognizing the transfer of a preexisting property interest from the decedent to other individuals, what is the proper conceptualization of the state's role for due process purposes? Under this transactional approach, the state and the decedent act cooperatively. If the state is satisfied that it is carrying out the testator's wishes — in other words, that a valid will exists in cases where this route has been selected — that should conclude the matter since all the parties necessary to transfer the property interests affected by probate are represented. Probate can therefore be purely administrative or *ex parte*. Legatees and heirs may be keenly interested observers, but that does not give them a right to participate in the proceeding that determines the validity of the will.

Under the entitlement cases, the state has the power to identify what event brings entitlement interests into being. The distinction between probationary and permanent employees accepted in *Roth* is illustrative.⁷⁹ New faculty members were hired from year to year until granted tenure, at which point they could be dismissed only for cause. The Court did not question that the timing of the transformation from abstract desire to legitimate claim of entitlement was wholly within the control of the state. If one assumes that the interests of legatees or heirs must eventually become constitutionally protected property, the Constitution in no way prevents the state from placing the critical instant of recognition at some point after the inquiry into the will's validity.

To complete our evaluation of probate procedure in light of the entitlement cases, we should briefly comment on one particular scholarly criticism of the Supreme Court's entitlement cases since *Roth*:⁸⁰ the Court's lack of sensitivity to so-called intrinsic values implicit in the due process clauses of the fifth and fourteenth amend-

79. *Board of Regents v. Roth*, 408 U.S. 564, 566-68 (1972). See also note 38 *supra*.

80. The literature reviewing and criticizing the Supreme Court's current approach to procedural due process issues is plentiful. One recent effort is Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978). Other important contributions include: Christie, *Injury to Reputation and the Constitution: Confusion and Conflicting Approaches*, 75 MICH. L. REV. 43 (1976); Friendly, *supra* note 75; Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976); Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977); Rabin, *Job Security and Due Process: Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1976); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975); Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); Comment, *Entitlement, Enjoyment, and Due Process of Law*, 1974 DUKE L.J. 89; Note, *Specifying the Procedures Required by Due Process: Towards Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

ments.⁸¹ Although the currently predominant *instrumental* values — accuracy and consistency in factfinding — are acknowledged as fundamental to procedural due process, it is argued that another, equally fundamental value demands recognition: the protection of personal dignity.⁸² Procedurally, this means personal participation in government decisions that may affect an individual's interests adversely and reasons for any completed decision.⁸³

Commentators have offered two responses to protect these intrinsic concerns, neither of which warrants requiring extensive procedural deference to prospective heirs or legatees. First, some suggest a dramatic broadening of the property notion to include all state-induced expectations.⁸⁴ But proponents of this approach seem to require a *deprivation* by the state of some currently held interest, no matter how tenuous or ephemeral, to trigger due process safeguards. As we have argued, probate deprives heirs and legatees of nothing; it merely investigates the existence of a valid will. The transfer of a decedent's property — the *sine qua non* for due process protection — occurs after probate and is a function of its outcome. The second protection for intrinsic values detaches procedural due process — notably the principle of personal participation — from the property limitation entirely. The right to personal participation is seen as a *substantive* aspect of personal liberty under the due process clause and hence is a procedural protection that must be available whenever the state acts to “dispose of an individual situation” or “does the individual grievous harm.”⁸⁵ This theory may well embrace probate proceedings, but its anomalous aspects limit its persuasiveness. The theory lacks a confining analytic framework. Without such bounds, state proceedings could be deemed to affect so many people that virtually everyone would be entitled to receive notice. Beyond the obvious monetary costs, ubiquitous notice would lose any capacity to

81. The basic summary of these arguments is drawn from L. TRIBE, *supra* note 67, §§ 10-7 to 10-19, at 501-63.

82. *See id.* § 10-7, at 501-06.

83. *See id.* §§ 10-12 & 10-13, at 532-43.

84. Tribe attributes this view to Van Alstyne based on the latter's article. *Id.* at 483-87. A number of commentators have been critical of *Bishop v. Wood*, 426 U.S. 341 (1976), and other entitlement cases, yet have not urged the abandonment of property as a limitation on procedural due process. *See, e.g.*, Monaghan, *supra* note 80, at 434-44. *See generally* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 500-02 (2d ed. 1973).

The cases most closely exemplifying this approach would be *Bell v. Burson*, 402 U.S. 535 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

85. L. TRIBE, *supra* note 67, § 10-12, at 538-39.

evoke a response.⁸⁶ Moreover, this second theory finds acceptance exclusively in scholarly circles; no court has adopted it.

In reviewing this Section, recall that our analysis of the due process requirements for ante-mortem probate does not rest on a differentiation between ante-mortem and post-mortem probate. Although a factual distinction might be drawn between the ante-mortem and post-mortem interests of the legal heirs and legatees, it would depend solely on the relative reduction in contingencies that could terminate those interests. Surely a greater number of contingencies can affect the interests of heirs and legatees before the testator's death than after; but, just as surely, many contingencies remain after the death as probate proceeds. Such a relative, marginal reduction in the probability of inheritance provides an insufficient basis for constitutional distinction. Heirs and legatees hold no certain interests until the state completes its supervisory role in probate, and the applicability of due process safeguards should not hinge on the removal of only one of many potential contingencies in the state's final determination. Consequently, we treat the constitutional question in the ante- and post-mortem settings as identical. Our analysis not only clears the way for a no-notice version of ante-mortem probate, but also clarifies the constitutional question for the no-notice feature adopted in the Uniform Probate Code⁸⁷ and other probate reform efforts. The no-notice ante-mortem probate proceedings suggested in this Article represent a prime example of what might come.⁸⁸

III. IMPLEMENTING THE ADMINISTRATIVE MODEL

After considering the merits of a binding, no-notice version of

86. For a discussion of the consequences of the overuse of *Mullane* notice requirements in the probate context, see R. WELLMAN, L. WAGGONER & O. BROWDER, *supra* note 1, at 349-50.

87. See note 26 *supra*.

88. Our analysis suggests that the format for probate is a policy choice for the state; it can be administrative, ex parte, or traditionally adjudicative. But critically, American probate procedure largely results from a general preference for the adjudicative model. That model implies the presence of adversary parties, the development of a factual basis for each position, and a decision by the trier of fact on the validity of the proffered will. Having committed the will to this process, it would be anomalous for the state to notify the legatees under a proffered will and not the heirs at law who could be expected to challenge it. Thus, the traditional probate notice requirements may originate not from due process fairness concerns, but from the equal protection notion of treating similarly situated parties similarly. The parallel between due process and equal protection analysis is particularly close when a classification restricts the availability or exercise of procedural rights within the judicial system. Compare the majority and dissenting opinions in *Douglas v. California*, 372 U.S. 353 (1963). See also *Ross v. Moffit*, 417 U.S. 600, 609-18 (1974); *Lindsey v. Normet*, 405 U.S. 56, 74-79 (1972). A similar parallel can be seen in the Supreme Court's cases involving equal access to the courts. *Bounds v. Smith*, 430 U.S. 817 (1977); *Ortein v. Schwab*, 410 U.S. 656 (1973); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

ante-mortem probate and eliminating the constitutional objections to such a reform, we are in a position to formulate its design. Essentially our proposal contemplates a two-part scheme: enactment of the ante-mortem statute itself and revision of the statutory conditions on the right to contest. The format outlined here is by no means the exclusive route to binding, no-notice, ante-mortem probate, and we shall incidentally mention alternative provisions of varying attractiveness.

A. *The Proposed Administrative Format*

The basic statute would retain many of the features suggested by Professor Langbein, especially the guardian ad litem, but would respond to the criticisms made earlier by modifying his model in several important respects. Most fundamentally, our proposal reformulates the procedure for ante-mortem determinations. Discussions of ante-mortem probate, including Langbein's, have thus far conceived of the procedure as an accelerated will contest,⁸⁹ an adversarial adjudication of a dispute. As we discussed in Section II, that format normally entails notice requirements and participatory rights. Langbein's model tempers the adversarial nature of the procedure through the guardian ad litem, but his proposal is still wedded to an adjudicative design. Our alternative is an administrative proceeding, neither adjudicative nor adversarial. It is not an accelerated will contest, but rather an ex parte proceeding in which the state satisfies its interest in certain factual conditions of testate succession. The proceedings could be patterned along the following outline.

1. *Initiation*

As with the Langbein model, ante-mortem probate would be initiated with a petition to the conservatorship court⁹⁰ for a declaration that the testator duly executed the will,⁹¹ possessed the requisite capacity,⁹² and was free from undue influence. The petition would also include the will that the petitioner wishes to certify, so that the

89. Langbein, *supra* note 2, at 74.

90. Jurisdiction over conservatorship usually is vested in the court having jurisdiction over probate matters, whether that is a specialized court or one of general jurisdiction. In a few states, however, concurrent jurisdiction is exercised by equity courts.

91. Generally, the petition would allege that the will is in writing, was signed by the petitioner (or by some other person in the petitioner's presence and by the petitioner's direction), and was signed by two witnesses in the presence of the petitioner. See generally Rees, *American Wills Statutes*, 46 VA. L. REV. 613 (1960).

We agree with Langbein, *supra* note 2, at 77 n.48, that there is no reason for requiring in-court execution of the will.

92. See generally T. ATKINSON, *supra* note 16, §§ 50-55.

trier may determine aspects of capacity, especially lack of undue influence, that depend on the specific testamentary disposition at issue.⁹³ To assure confidentiality of the testamentary plan, however, the will should be inspected only by the trier,⁴ in camera. Such limited access to the will does not impede the investigation of capacity, and it corresponds to the procedure followed in other contexts where confidentiality of documents is vital.⁹⁴

2. *The Guardian Ad Litem*

The court would immediately appoint a guardian ad litem. Although we endorse Langbein's guardian concept, we conceive of the guardian's role differently. Rather than representing, as a court-appointed fiduciary, all individuals holding potential property interests,⁹⁵ the guardian would act under our model as the court's agent. Consistent with our nonadversarial procedure, the guardian should not represent any individual interests in the proceeding; our ante-mortem probate model does not resolve conflicting individual claims, but rather determines facts important to the state. The guardian in ante-mortem probate should be more closely analogous to a court-appointed special master than to the representative of a class of claimants.⁹⁶ Like a special master, the guardian would be accountable to the court. Nevertheless, the guardian who acts maliciously or for an improper purpose may be held liable to individuals, including expectant heirs, who can prove damage as a result of that breach of public duty.⁹⁷

The guardian's responsibility should extend to interviewing the

93. *See id.* § 55, at 255-56.

94. Both the Freedom of Information Act and the Federal Privacy Act include procedures for ex parte court determination on the substance of claims disclosure. If the federal government claims in a Freedom of Information Act suit, for example, that a document is exempt from disclosure, the court examines the document in camera to segregate exempt from nonexempt portions. 5 U.S.C. § 552(a)(4)(B) (1976). A similar procedure is followed in requests for access under the Federal Privacy Act. 5 U.S.C. § 552(a)(g)(3)(A) (1976).

95. *See* Langbein, *supra* note 2, at 78.

96. Masters, special masters, receivers, auditors, and assessors are among the many labels for court-appointed, specialized, nonjudicial personnel whose roots extend back to early English equity practice. Today, their functions, which have varied substantially over time, are usually defined by statute. *See, e.g.*, FED. R. CIV. P. 53; GA. CODE ANN. §§ 10-101 through -104 (1973). For a discussion of the flexible role of masters and their use in recent litigation, see Brakel, *Special Masters in Institutional Litigation*, 1979 A.B.F. RES. J. 543.

97. The extent of a guardian's potential liability would depend, of course, on local state law concerning the scope of immunity for public officials. Generally, however, it seems likely that a guardian, acting as a lower administrative officer, would be liable only if he acted maliciously or for an improper purpose. That is, he would not be liable if he acted honestly and in good faith. *See* W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 989 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* § 895D (1979).

testator (without the presence of the attorney who prepared the will),⁹⁸ members of the family, and other relatives and friends who could provide evidence bearing on undue influence and capacity. Based on those interviews, the guardian would report to the court concerning probable undue influence and capacity. This limited scope of responsibility should remove any disincentive to serve as guardian that might accompany fiduciary obligations to explore every possible suggestion of invalidity.⁹⁹ At the same time, there would be adequate opportunity for evidence of testamentary defects, especially if the court can question the testator and members of the nuclear family.¹⁰⁰

Unlike Langbein, we do not contemplate informing the guardian of the will's contents, though the court might be given discretion to do so. The reason for this restriction is, again, to guard the confidentiality of the testator's wishes. Unlike the trier, who must make the ultimate findings on capacity, the guardian has no responsibilities that necessarily demand knowledge of the will's contents. Rather, the guardian investigates the testator's capacity generally, and should investigate no less vigorously or effectively when ignorant of the will's specific terms.¹⁰¹ Admittedly, the conventional view suggests that reference to specific testamentary dispositions is essential to determine capacity, and undue influence especially, because the presence of an unusual bequest signals possible impropriety or other incapacity.¹⁰² But the court, which will have access to the document and hence be aware of any extraordinary dispositions, can alert the guardian to inquire into specific matters bearing on such dispositions without disclosing the terms. Following that court supervision, the guardian's interviews and personal evaluation should fully enable the trier to determine testamentary capacity.

98. Although we agree with Professor Langbein that individuals who wish to use the antemortem procedure should be required to be represented by counsel, we suggest that the attorney responsible for the will not be present when the testator is interviewed by the guardian ad litem. Generally, representation by counsel seems unnecessary, given the nonadversarial nature of the proceeding. The guardian will be subject to the constant supervision of the court, adequately protecting the testator's interests. Furthermore, by using tactics that are characteristic of adversary proceedings, an attorney, particularly one who has participated in the preparation of the will, might threaten the informal character of the procedure and burden the exchange between testator and guardian.

99. See Alexander, *supra* note 6, at 89 n.12.

100. See notes 126-30 *infra* and accompanying text.

101. Defining and limiting the guardian's responsibilities in this way may also respond to common criticisms from the estate planning bar, charging conflicts of interest and other abuses by guardians ad litem. See Goldstein, *Once More, Surrogate Talk*, N.Y. Times, Sept. 4, 1977, § 4, at 5, col. 1.

102. See Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 301-02 (1944).

3. *Notice and Hearing*

Notice and opportunity to appear in the proceeding would be provided more restrictively than in the Langbein model.¹⁰³ As we have seen, expectant heirs and legatees have no constitutional right to notice, and strong practical reasons militate against giving notice to more remote expectant heirs. Beyond the guardian ad litem, notice should not be required for any other individual, not even for members of the testator's nuclear family whose interests are constitutionally indistinguishable from those of more remote heirs. For reasons that will be developed later,¹⁰⁴ a state might choose to exempt the nuclear family from the binding effects of the ante-mortem proceeding. Under such an exemption, they would be unaffected by the determination, and there would be even less reason to require formal notice.

Dispensing with notice — effectively rendering the ante-mortem hearing an *ex parte* proceeding — is not completely without precedent or analogy. Two states currently permit residents to amend the plan of intestate succession prescribed by descent and distribution statutes.¹⁰⁵ Under those designated-heir statutes, any competent person¹⁰⁶ may file a written statement with the court declaring that a designated person shall be deemed the declarant's heir at law for succession of wealth. Although the legislative history of the acts demonstrate that their original purpose was to authorize a circumvention of statutory bars against inheritance by illegitimate children, both statutes have been interpreted to permit designation of any individual, regardless of age or relationship to the declarant, as heir at law.¹⁰⁷ Despite the obvious effect such a proceeding has on the re-

103. Our model differs as well from the notice provisions in U.P.C. conservatorship procedure. See note 20 *supra*.

104. See notes 126-30 *infra* and accompanying text.

105. ARK. STAT. ANN. § 61-301 (1947); OHIO REV. CODE ANN. § 2105.15 (Page 1976).

106. The Ohio statute provides that the designator must be a person "of sound mind and memory," and it provides that the court must determine whether the declarant is of sound mind and is acting free of restraint. OHIO REV. CODE ANN. § 2105.15 (Page 1976). That language otherwise tracks the standard for testamentary competence provided in OHIO REV. CODE ANN. § 2107.02 (1976), except that the latter statute specifically provides that minors lack testamentary capacity while the designated-heir statute is silent on the point.

107. The Arkansas statute, first enacted in 1853, was originally titled "An act to authorize and prescribe the manner by which persons in this State may adopt illegitimate children and others, and make them their Heirs at Law." Act of Jan. 12, 1853, § 1 [1853] Ark. Acts, *quoted in* Reed v. Billingslea, 226 Ark. 489, 489, 291 S.W.2d 497, 497 (1956), where the court noted that although the specific intent of the statute was directed at legitimating bastards for inheritance purposes, the statute in fact authorized the designation of anyone as a legal heir. The Ohio statute similarly originated as an adoption statute, but no special relationship or age is specified as a requirement. See *In re Estate of Gompf*, 175 Ohio St. 400, 194 N.E.2d 806 (1964).

maining expectant heirs at law — those whose heirship status derives from the statutes of descent and distribution — neither of the designated-heir statutes requires that notice be given to any person.¹⁰⁸ They require only a determination by the court that the declarant is of sound mind and is acting voluntarily. The designation proceeding consequently amounts to an *ex parte* exercise of testamentary authority.¹⁰⁹

The designated-heir procedure has limits, however, that prevent it from being a complete answer to the problem of will contests. For example, the designated heir may receive nothing if the year's allowance or the surviving spouse's exempted share consumes the entire estate. Furthermore, the designation is not absolutely binding: It may be set aside on the same grounds that are available in a will contest, although given the judicial participation in the designation, challenges are unlikely to succeed.¹¹⁰ Nevertheless, the statutes do provide a precedent for *ex parte ante-mortem* probate. The designated-heir statutes attempt to accommodate the same objectives — confidentiality and security — as our proposal.¹¹¹

4. *Order and the Right to Contest*

If the court were persuaded of the petition's accuracy, it would issue an order declaring that the will has been duly executed and is free from testamentary defects. To ensure that this determination will be conclusive, the existing statutes providing the right to contest at post-mortem probate proceedings should be amended. Typically,

108. ARK. STAT. ANN. § 61-302 (1947) provides, however, that the designation shall not become effective until recorded. The result is that, although no notice need be given to the other heir at law or to the designee, the transaction is a matter of public record.

Recording is not required under the Ohio statute, but the court must keep a record of the proceeding. The no-notice feature of the proceeding was recognized and sustained in *Bird v. Young*, 56 Ohio St. 210, 46 N.E. 819 (1897), and *Laws v. Davis*, 34 Ohio App. 157, 170 N.E. 601 (1929).

109. *Horine v. Horine*, 16 Ohio L. Abs. 155 (1934). Under the Ohio statute, the designation of an heir may be set aside on the same grounds that are available in will contests: incapacity and undue influence. However, the designation seems less vulnerable than a will since an attack against the probate judge's order must be levelled in the same court that granted the order.

At least in Ohio, the designation of heirship procedure has been used as one of the principal methods of securing protection against post-mortem will contests. Rippner, *Wills Can Be Made "Unbreakable,"* 6 CLEV.-MAR. L. REV. 336, 337-42 (1957). The testator may designate as an heir any beneficiary under the will. If the will is subsequently set aside, the designated heir still inherits as a child of the decedent.

110. Another limitation on the designation route is the possibility that the declarant may have made a will prior to the one under attack. If the designated heir is not provided for in that will and it is admitted to probate, the designated heir would not be protected.

111. One other similarity between the designation procedure and ante-mortem probate is the absence of any jury role in the court's approval of an exercise of testamentary authority.

those statutes restrict contests to “interested”¹¹² or “aggrieved”¹¹³ persons, and courts generally hold that the limiting language refers to those individuals who have some legal or equitable property interest that would be adversely affected by the will’s validity.¹¹⁴ The existence of an adverse property interest does not necessarily entail, however, a constitutional right to contest. The authority to contest is purely statutory,¹¹⁵ and it may be — and has been¹¹⁶ — modified and limited by subsequent legislative measures. Like statutes of descent and distribution, many of which have been altered to reduce the range of potential heirs,¹¹⁷ statutes authorizing will contests could be amended to make the ante-mortem determination binding at the post-mortem stage on all persons except those specifically granted the right to contest. The authorizing statute would specifically prohibit post-mortem contest actions against wills that have been certified in ante-mortem probate. Heirs at law and disappointed legatees need not be given an opportunity to contest because, again, their interests, being only derivative of the testator’s, are bound by the testator’s actions.¹¹⁸ They possess no independent property interests and consequently no constitutional right to challenge. However, for prudential reasons that we shall examine later,¹¹⁹ a state might extend authority to contest at post-mortem proceedings to members of the testator’s nuclear family.

Although this is a substantial restriction of the authority to contest, we leave unaltered the conventional exception for persons injured by fraud in the probate proceedings. Probate decrees ordinarily may be set aside after a showing of fraud upon the court,¹²⁰ and relief would continue to be available in post-mortem

112. *E.g.*, ILL. REV. STAT. ch. 3, § 90 (1973).

113. *E.g.*, CONN. GEN. STAT. ANN. § 45-288 (West 1958).

114. *See, e.g.*, *Bazo v. Siegel*, 48 Ohio St. 2d 353, 390 N.E.2d 807 (1979).

115. *See, e.g.*, *Doran v. Wurth*, 475 S.W.2d 49, 50-51 (Mo. 1971); *Dibble v. Winter*, 247 Ill. 243, 252, 93 N.E. 145, 149 (1910).

116. *See, e.g.*, *McQueen v. Conner*, 385 Ill. 455, 53 N.E.2d 435 (1944).

117. Influenced by MODEL PROBATE CODE, *supra* note 1, § 22(b), a number of states amended their statutes of descent to limit the outer range of heirs to the descendants of the decedent’s grandparents. Earlier statutes had permitted relatives tracing through more remote ascendants. IND. CODE ANN. § 29-1-2-1(c)(6) (Burns 1976) (enacted 1955, amending Law of May 14, 1852, ch. 27, § 5, 1852 IND. REV. STAT. 248-49). *See Simes, The Indiana Probate Code and the Model Probate Code: A Comparison*, 29 IND. L.J. 34 (1954). U.P.C. § 2-103 follows that trend.

118. The notion of binding derivative interests and denying subsequent opportunity to challenge determinations finds analogies in other areas, such as divorce. *See Johnson v. Meulberger*, 340 U.S. 581 (1951).

119. *See* notes 126-30 *infra* and accompanying text.

120. T. ATKINSON, *supra* note 16, § 96, at 500. For a recent case discussing “extrinsic fraud,” *see Ivancovich v. Meier*, 595 P.2d 24, 26-27 (Ariz. 1979).

proceedings by the heirs. Their standing to raise such matters derives from the testator's right to raise them, and they are bound by the ante-mortem determination to the same extent as the testator. Since the testator would not be bound by a proceeding that was fraudulently induced, the heirs may raise the matter during post-mortem proceedings to probate the will.¹²¹ Although the heirs could not challenge any ante-mortem determinations regarding formalities of execution, capacity, undue influence, and any other issue that could have been raised ante-mortem, they would retain access to the traditional remedies for fraudulent concealment of evidence of invalidity, including equitable relief through a constructive trust.¹²² Such evidence of invalidity, which there was no opportunity to present earlier, is not subject to the usual rules of *res judicata*, and our proposed restraint on standing to contest would not affect those established principles.¹²³

5. Revocation

The prediction¹²⁴ that testators who use ante-mortem probate will rarely wish to revoke or modify their certified wills may well hold true. Nevertheless, we want to be clear about the availability of revocation and its procedure if only to avoid the appearance of making the will irrevocable through court approval.

Three alternative rules on revoking a will that is probated ante-mortem are plausible. First, purely informal revocation of the will

121. Effectuating the testator's presumed interest in remedying fraud should not lead to a broader exception for post-mortem challenges to an ante-mortem determination of validity. That interest is already accommodated through the work of the guardian ad litem and the court's supervision. The concern for fraud on the court is not satisfied by those features, however, and permitting heirs to raise such objections after death is necessary to respond to that concern.

122. U.P.C. § 1-106 similarly retains "[t]he usual rules for securing relief for fraud on a court." U.P.C. § 1-106, Comment.

123. Relief may be granted, notwithstanding a decree of probate, where, for example, a beneficiary who knows of other legal heirs fails to disclose their existence to the probate court, *e.g.*, *Hewitt v. Hewitt*, 17 F.2d 716 (9th Cir. 1927); *In re Bailey's Estate*, 205 Wis. 648, 238 N.W. 845 (1931); *In re O'Neil*, 55 Conn. 409, 11 A. 857 (1887); or alleged in a petition for probate that the decedent left no heirs, *e.g.*, *Zaremba v. Woods*, 17 Cal. App. 2d 309, 61 P.2d 976 (1936); *Weyant v. Utah Sav. & Trust Co.*, 54 Utah 181, 182 P. 189 (1919); Annot., 113 A.L.R. 1235 (1938). A constructive-trust remedy has also been held available where the sole beneficiary under a will, who was the putative surviving spouse of the decedent, effectively prevented a legal heir of the decedent from contesting the will on the grounds of fraud and undue influence by deliberately concealing her true identity and prior marital status. *Caldwell v. Taylor*, 218 Cal. 471, 23 P.2d 758 (1933). Other instances of fraud on the court that have warranted setting aside a decree of probate include destruction of subsequent wills by the executor or a beneficiary under the probated will. *Ellis v. Schwank*, 37 Wash. 2d 286, 223 P.2d 448 (1950), noted in 50 MICH. L. REV. 348 (1951).

124. Langbein, *supra* note 2, at 81.

might be permitted; that is, the testator could subsequently revoke the approved will without even notifying the court that approved it. Second, at the opposite extreme, revocation might require formal action requesting judicial approval of the revocation or modification.¹²⁵ Finally, we might steer a course between no judicial participation and formal supervision by requiring only that notice of the revocation or the modification be submitted to the court.

That statement of the alternatives reveals our preference for the third position. Requiring *some* formality assures that the testator seriously intends the change, but limiting that formality keeps the cost of the procedure under control and thus eliminates a potential disincentive to ante-mortem probate. Court-supervised revocation and alteration would impose such a disincentive on any persons considering ante-mortem probate who value continued flexibility for their testamentary plans. The simple notice requirement is a satisfactory compromise between protection and flexibility.

B. *Policy Considerations: Excepting the Nuclear Family*

Through the foregoing account of the procedure for ante-mortem probate, we suggested that members of the nuclear family might be excepted from the operation of the ante-mortem proceeding. Specifically, notice might be given to the testator's spouse and children, and they might be authorized to appear in the hearing. They might also be given the right to contest at post-mortem proceedings. We emphasized that such exceptions for the nuclear family are not constitutionally compelled; nonetheless, prudential concerns might move a legislature to adopt them. In this Section, we explore the arguments for the nuclear-family exception. We find that the original concern that prompted the proposal in earlier drafts of a Uniform Ante-Mortem Probate Act loses force in our procedural context, and hence we reject the exception.

A nuclear-family exception would limit the scope of our ante-mortem probate system, continuing the preferential treatment that the common law has traditionally accorded family property matters.¹²⁶ The exemption distinguishes between those expectant heirs

125. The North Dakota statute adopts this position. N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1977).

126. Most states have enacted, for example, forced share statutes that guarantee the surviving spouse a portion of the decedent's estate. R. WELLMAN, L. WAGGONER & O. BROWDER, *supra* note 1, at 354. Although there is generally no comparable protection against disinheritance for the testator's children, nearly all states have enacted pretermitted-heir statutes to protect children from unintended disinheritance. *Id.* at 351. Family-maintenance legislation is generally discussed in LeVan, *Alternatives to Forced Heirship*, 52 TUL. L. REV. 29 (1977).

who are the closest to the testator, *i.e.*, the nuclear family, and remote heirs. Although close family members, as expectant heirs, possess no property interests for constitutional purposes, they do have a somewhat stronger claim to protection based on their financial dependence on the testator. The need for support, of course, cannot be determined until the testator's death, and thus the probability of dependence by the nuclear family gradually falls as the testator grows older. Nevertheless, heirs within the nuclear family are much more likely to depend on support from the testator's legacy than are remote heirs. Of course, not all nuclear families will be dependent on the testator,¹²⁷ but if a state adopts the exception, nuclear-family members should not have to prove dependence to participate in the proceeding. Exceptions to the presumption of dependence do not make a distinction between the immediate family and remote heirs irrational. That presumption possesses sufficient empirical validity to render the nuclear family a legitimate legislative classification.¹²⁸

Moreover, the nuclear-family exception not only remedies actual dependence but also protects the expectation of support that members of the testator's family may have. It assures those persons closest to the testator that they suffer no risk of financial deprivation from ante-mortem probate. Other substantive rules limiting freedom of testation recognize the legitimacy of such expectations.¹²⁹ To assure protection of the family's expectations, a state might choose not to enable testators to bind their dependents by a judicial proceeding¹³⁰ that they have no opportunity to participate in or challenge later.

Despite those admitted advantages of a nuclear-family exception, we ultimately conclude that it should not be implemented. For, balanced against the policy considerations just mentioned, the nuclear-

127. Dependence will vary even within families. As the testator advances in age, the children are less likely to be dependent than the surviving spouse. But again, as against remote heirs, the probability of dependence by all family heirs is sufficiently high to justify the distinction between family and remote heirs. Moreover, further refinements might be suggested through experience; for example, a state may choose to exempt only the spouse.

128. Forced share statutes similarly create a legislative classification that is premised on the general social experience of dependence by surviving spouses. See Haskell, *Restraints Upon the Disinheritance of Family Members*, in *DEATH, TAXES AND FAMILY PROPERTY* 105, 110-14, 116-18 (E. Halbach ed. 1977); Haskell, *The Premarital Estate Contract and Social Policy*, 57 N.C. L. REV. 415, 423-27 (1979).

129. See note 126 *supra*.

130. We do not mean to attack the revocable inter vivos trust as a device used to defraud family members. Whether such trusts ought to be subject to the same limitations against disinheritance that apply to testamentary devices is a much larger issue than that involved in our discussion. It is sufficient to note that, although successful attacks on revocable living trusts are relatively infrequent, they are possible where the property interests of a surviving spouse are at stake. See Schuyler, *supra* note 23, ¶ 74.1301.

family exception would partially sacrifice the objective of no-notice ante-mortem probate: security with confidentiality. To maximize the efficacy of ante-mortem probate, no exception should be made for any category of expectant heirs. The nuclear-family exception is especially unjustifiable in the context of an administrative, nonadversarial procedure such as we propose. The exception was originally suggested for a proposed ante-mortem procedure using the adversarial format of a declaratory judgment proceeding. In that context, the exception was a justifiable effort to avoid the undesirable effects of casting closely related family members as adversaries. If the testator's immediate family were removed from the operation of the ante-mortem proceeding, such a procedure would not threaten family harmony and consequently would be more attractive to testators. But when the procedure makes an administrative, nonadversarial determination, the threat of an unseemly spectacle between family members is removed, and the gap in protection against post-mortem attack is no longer justified.

Protecting the testator's spouse against disinheritance, which may also prompt the nuclear-family exception, is better accommodated by forced share or other family-maintenance legislation. Forced share statutes provide a more direct method of responding to spousal disinheritance and would probably impair the testator's plan less seriously than a post-mortem attack upon the will. Finally, the exception would risk converting an administrative, nonadversarial proceeding into an adversarial adjudication. To maintain a relatively simple ante-mortem determination of capacity, we reject any nuclear-family exception from the operation of the ante-mortem probate.

IV. CONCLUSION

The strong movement of modern succession law toward probate alternatives has resulted, in general terms, from the delay and cost of probate. Various innovations have been introduced to eliminate probate's disincentives and thereby to restore probate as the primary institutional means of wealth succession.¹³¹ The reasons for this goal

131. The Uniform Probate Code incorporates a variety of features that are directed at motives for avoiding probate. *See generally* U.P.C. art. 2, pt. 5, General Comment. Among these are changes in formal requirements for executing wills, including a liberalized provision on holographic wills, *see* U.P.C. § 2-503; limitations on opportunities for attacks on wills by disinherited spouses, *see* U.P.C. art. 2, pt. 2, and afterborn or omitted children or grandchildren, *see* U.P.C. §§ 2-108, 2-302; and opportunities to avoid court supervision through informal probate and informal appointment of personal representatives, *see* U.P.C. art. 3, pt. 3. Furthermore, recently offered proposals, especially one that would require only substantial compliance with the formalities of execution, should also reduce the unattractiveness of the

will not be detailed here; one need only draw attention, however, to the disadvantages of many of the more common will substitutes to suggest why probate avoidance is an undesirable development. Joint ownership of property with a survivorship feature, for example, is flawed by its attendant diminution in control and increased risk of loss of private management ability.¹³² More generally, a highly diffused, non-orderly system of wealth distribution obviously introduces costs that do not prevail under probate's orderly, unified system.

Along with other recently developed procedures, ante-mortem probate may play a significant role in the restoration of the probate process. It effectively removes one of the specific disincentives to using the probate system, namely, the threat of compromise-seeking will contests. Its efficacy in that rôle, however, depends heavily upon its format. If developed according to the conventional adjudicative design with broad provision for notice and opportunity to appear, ante-mortem probate will probably have only a slight effect, as testators are deterred from using it by its costs and by the loss of privacy. We hope to have provided an alternative format that avoids these costs and enhances its prospects for success as a probate-revitalizing device.

Beyond this immediate objective, we hope to have incidentally aided other efforts at reforming the probate process by clarifying the constitutional due process limitations on probate procedures. Probate has been made unattractive in part by its formality, which aggravates delay and costs, and many of the recent changes in the probate system have been aimed at reducing the level of formality.¹³³ The indiscriminate imposition of procedural due process provisions will seriously impair the development of new, efficient systems for transferring wealth at death. We have attempted to distinguish between those situations in which due process features are constitutionally compelled and those in which the procedural restraints may be dispensed with. Such potential simplification of probate should decelerate the rush to probate alternatives.

formal probate process. See Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

132. R. WELLMAN, L. WAGGONER & O. BROWDER, *supra* note 1, at 13.

133. See U.P.C. art. 2, pt. 5, General Comment.