

AU REVOIR, WILL CONTESTS: COMPARATIVE LESSONS FOR PREVENTING WILL CONTESTS

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I. INTRODUCTION

Despite the continuous evolution of American probate law, will contests remain common and there is no assurance that a will, once executed, will ultimately be upheld.¹ In fact, it is not clear that will contests have even been effectively minimized. The most common grounds for will contests are undue influence, testamentary capacity, and fraud,² allegations of which invalidate many wills today. Such contests have significant costs, which include the failure to give effect to the testator's intent,³ high litigation and decision costs,⁴ and the use of limited judicial resources. As a result, one of the most significant

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¹ In many state jurisdictions, people may also bring a tort action for the interference with expectancy. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 320 (9th ed. 2013). The number of will contests continues to be a problem, even though it has been addressed in the literature for decades. See, e.g., John H. Langbein, *Will Contests*, 103 *YALE L.J.* 2039, 2042 (1994) (book review).

² Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 *REAL PROP. PROB. & TR. J.* 607, 647–48 (1987) (finding that 74 percent of will contests involved allegations of undue influence or lack of testamentary capacity versus 14 percent of will contests that questioned the adherence to required formalities).

³ “[T]he testator’s intent is the polestar and must prevail.” *In re Estate of Houston*, 201 A.2d 592, 595 (Pa. 1964). See also generally Nicole M. Reina, Note, *Protecting Testamentary Freedom in the United States by Introducing into Law the Concept of the French Notaire*, 46 *N.Y.L. SCH. L. REV.* 797 (2003) (showing how judges use undue influence to undo a testator’s intent). “The guiding principle of inheritance law is one of testamentary freedom, holding that the owner of property during life has the power to control its disposition at death.” Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 *B.C. L. REV.* 877, 877 (2012).

⁴ Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 *U. MICH. J.L. REFORM* 855, 894 (2012).

Because they often involve open-ended standards, will contests based on undue influence or fraud can be especially difficult for courts to adjudicate, which may result in higher litigation and decision costs. Consequently, there is also a concern that a disinherited child or other contestant may impose, or threaten to impose, such costs by filing a negative expected value suit to extract a settlement from the estate.

Id. A no-contest clause—that would disincentivize beneficiaries from contesting the will—is not valid in all states, but even if it is, there are costs to it, as well. *Id.*

challenges in American probate law is the frequent inability to honor testamentary intent due to will contests brought by disgruntled relatives and friends.

In contrast, France's legal system has nearly eliminated will contests on the grounds of undue influence and fraud.⁵ In French wills law, very few cases arise involving litigation of the validity of a will,⁶ and, of those that do, all concern issues of conformity with formalities rather than lack of capacity, fraud, or undue influence.⁷ While France is currently addressing other issues in its wills law,⁸ those related to will contests have largely been resolved.

In general, French wills law is far more dynamic in comparison to its American counterpart, largely due to the influence of those who draft wills, known as *notaires*.⁹ Notaires raise substantive legal issues at annual conventions arising from their work with clients, contributing to the development of the law.¹⁰ This process has contributed to the near elimination of will contests based on fraud and duress.¹¹

The introduction of a separate system of professionals like the notaires would be difficult given the role of American attorneys and the federalist system that facilitates the development of state wills law.¹² Nevertheless, there are several key elements of the French system that could be introduced to decrease the number of American will contests.¹³ These insights can provide guidance for the states to improve their wills law.¹⁴

In exploring how the American probate system could benefit from certain aspects of its French counterpart, Part II of this article addresses the current American law that facilitates will contests despite efforts to prevent them. Part III analyzes France's more successful efforts to prevent will contests. Finally, Part IV considers the lessons from a comparative analysis of American and French wills law for the prevention of will contests.

II. WILL CONTESTS IN THE UNITED STATES

Will contests in the United States affect up to 3 percent of all wills, which, given the high number of wills executed every year, is a significant number.¹⁵

⁵ "The United States is the home of capacity litigation. Claims of undue influence or unsound mind, which occupy so prominent a place in American probate law, are virtually unknown both on the Continent and in English and Commonwealth legal systems." Langbein, *supra* note 1, at 2042.

⁶ See Reina, *supra* note 3, at 809–11.

⁷ See discussion *infra* Part III.

⁸ For example, see *Why Do Probates in France Take So Long and What Can Be Done to Speed Them Up?*, SYKES ANDERSON, http://www.sykesanderson.com/Service_France/service_france_probate_faql.asp (last visited Nov. 27, 2013) (noting the notaire system's lengthy probate process, which creates issues for international heirs).

⁹ For extensive treatment of the French notaire system, see *infra* Part III.

¹⁰ See *infra* Part III.C.

¹¹ *Id.*

¹² See *infra* Part IV.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ David Horton, *Testation and Speech*, 101 GEO. L.J. 61, 86 n.189 (2012).

Studies have shown that the number of probates that lead to will contests range between three percent to one percent to one quarter of one percent . . . These statistics may not seem striking

There are many problems associated with will contests,¹⁶ such as the undermining of the testator's intent, the protection of which is the overarching theme of American wills law.¹⁷ Furthermore, the financial cost of the litigation depletes the estate.¹⁸

A. *Grounds for Will Contests in American States*

Generally, only interested parties, those considered to be heirs at law or devisees under a previous will, have standing to pursue will contests.¹⁹ Practically speaking, this results in mostly relatives, caretakers, or close friends of the decedent having standing.²⁰ These parties often have a personal interest in validating their theory that the decedent's particular bequest, or lack thereof, would have been different if not for the alleged fraud or undue influence.²¹ Sentimentalism may often drive these contests, as small estates are often as highly contested as major ones.²²

The grounds for American will contests include testamentary capacity, fraud, and, most commonly, undue influence.²³ In many states, undue influence is defined as an influence exerted on the testator that overpowers the testator's mind and free will, which produces a will that would not have been executed but for that influence.²⁴ Many state codes find presumptive undue influence if a confidential relationship, such as a doctor-patient or attorney-client relationship, exists between the testator and the beneficiary accused of undue influ-

at first, but because there are millions of probates per year, one-in-a-hundred litigation patterns are very serious.

Id. (citations omitted) (internal quotations marks omitted).

¹⁶ See, e.g., Irene D. Johnson, *There's a Will, But No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 *EST. PLAN. & COMMUNITY PROP. L.J.* 105, 106–07 (2011) (noting that difficulties arise when testamentary dispositions deviate from social norms); Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should be Abolished*, 58 *U. KAN. L. REV.* 245, 245 (2010) (noting that the doctrine of undue influence “fails to meet any standard of clarity, fairness, or predictability that a legal doctrine should satisfy”).

¹⁷ “When individuals exercise the right of testamentary freedom, courts make every effort to adhere to the testator's expressed or construed intent.” Weisbord, *supra* note 3, at 885.

¹⁸ Taren R. Lord-Halvorson, Note, *Why Wait Until We Die? Living Probate in a New Light*, 37 *OKLA. CITY U. L. REV.* 543, 545 (2012) (“If your will is found valid, your disposition of property will stand and your intent will be carried out, but your estate will remain depleted due to the attorney's fees and court costs from the will contest, unless the court determines that the contest was frivolous.”).

¹⁹ See, e.g., *IND. CODE* § 29-1-7-17 (2013) (limiting contests to interested persons).

²⁰ “Heirs at law and devisees under a will are interested persons with standing to contest a will [see] *TEX. PROB. CODE ANN.* § 3(r) (Vernon 2003).” *In re Estate of Blankenship*, No. 04-08-00043-CV, 2009 WL 1232325 (Tex. Ct. App. May 6, 2009). For an overview of standing and related matters, see Joyce Moore, *Will Contests: From Start to Finish*, 44 *ST. MARY'S L.J.* 97, 109–10 (2012).

²¹ Horton, *supra* note 15, at 86.

²² “[S]maller estates generate at least as much, if not more, controversy than larger estates.” Schoenblum, *supra* note 2, at 615.

²³ EUNICE L. ROSS & THOMAS J. REED, *WILL CONTESTS* § 7:19 (2d ed. 2013) (noting that “[u]ndue influence is the most commonly asserted ground for invalidating a will”).

²⁴ *DUKEMINIER & SITKOFF*, *supra* note 1, at 283.

ence; the will's disposition seems unnatural; or if the will favors the person who allegedly exercised undue influence.²⁵ According to one commentator:

The distinction between permissible influence and impermissible undue influence is that the latter involves the substitution of the mind of the person exercising the influence for the mind of the person executing the instrument, causing him to make an instrument that he otherwise would not have made. According to the dominant paradigm, courts should not give effect to this instrument because it does not accurately reflect the wishes of the testator.²⁶

For every reported case of undue influence litigated, many more cases settle pre-trial.²⁷ Although undue influence is the most common ground for a will contest, it is rarely successful.²⁸ Nonetheless, many judicial and private litigants' resources are wasted in these will contests in the United States. Neither England, which has a common law tradition that is the foundation of American wills law, nor France, which has a civil law system, encounters a similarly high volume of undue influence will contests.²⁹ Louisiana, which has a civil law tradition, is the only exception to the prevalence of undue influence cases in the United States, likely because it is the only American jurisdiction in which children receive a forced share of their parents' estate, which decreases their need to contest their parents' will.³⁰

²⁵ In Indiana, for example, this presumption may be rebutted by clear and convincing evidence that the beneficiary acted in good faith, did not take advantage of the position of trust, and that the transaction was fair and equitable. *Scribner v. Gibbs*, 953 N.E.2d 475, 484–85 (Ind. Ct. App. 2011). In other words, the burden shifts to the proponent of the will to prove that it was not the product of undue influence. *Id.* Presumptions in wills law address the evidentiary difficulties in such cases. By its nature, undue influence is difficult to detect and prove, often requiring circumstantial evidence. Some courts may look for objective evidence to determine whether or not undue influence is present, including the existence of a relationship of confidence, the age and mental state of the testator at the time the will was executed, and whether an abnormal disposition occurred. Nonetheless, there is no certain way to detect when undue influence actually resulted in the will's provisions, as the only individual who knew of the intentions has passed away.

²⁶ Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 578–79 (1997).

²⁷ *Id.* at 574.

²⁸ Schoenblum, *supra* note 2, at 647–48, 654–55.

²⁹ Ronald J. Scalise Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMP. & INT'L L. 41, 99 (2008).

Given the similarity in English and American common law systems, one would expect to find a similarly sparse number of undue influence claims in America, but such is not the case. In the United States, undue influence remains *the* most common ground for attacking a will. The most likely reason is that a number of incentives for suing exist in American law outside of the merits of the litigation itself.

Id. For an analysis of French civil law on this topic, see *infra* Part III.A.

³⁰ “What is important for present purposes is that the American rule, by allowing liberal disinheritance of children, creates the type of plaintiff who is most prone to bring these actions.” Langbein, *supra* note 1, at 2042. See also John A. Lovett, *Love, Loyalty and the Louisiana Civil Code: Rules, Standards and Hybrid Discretion in a Mixed Jurisdiction*, 72 LA. L. REV. 923, 983–84 (2012).

Before Louisiana began the lengthy process of re-conceptualizing the institution of forced heirship in the 1980s and early 1990s (a process that was finally completed in 1995 as the result of a state-wide referendum amending the Louisiana Constitution), Louisiana law generally did not allow disappointed heirs to challenge a will on the ground of undue influence. It is true that a disappointed heir could always challenge a will on the ground that the testator lacked the necessary testamentary capacity at the time of execution.

Wills are also contested on the basis of the testator's alleged lack of capacity.³¹ However, the bar to prove adequate mental capacity to make a will is low. The testator must only know and understand the following and their relation: the value and extent of his property, the natural objects of his bounty, and the nature of the property disposition he is making.³² In practice, issues of capacity often relate to undue influence.³³

Fraud and duress are additional grounds for a will contest.³⁴ A court will find fraud when the testator makes a disposition as a result of a deliberate misrepresentation made by someone with the intent to deceive the testator in order to influence the testamentary disposition.³⁵ Fraud may occur in the inducement or in the execution of the will. "Fraud in the inducement occurs when a misrepresentation causes the testator to execute or revoke a will, to refrain from executing or revoking a will, or to include particular provisions in the wrongdoer's favor."³⁶ Fraud in the execution, meanwhile, occurs when someone "intentionally misrepresents the character or contents of the instrument signed by the testator, which does not carry out the testator's intent."³⁷ A will provision resulting from fraud is invalid, and the remainder of the will stands, unless the fraud affects the entire will or the affected provisions are inseparable from the remainder of the will.³⁸

Duress, meanwhile, occurs when undue influence becomes overtly coercive.³⁹ Examples of duress include threats of physical, financial, or psychologi-

Id.

In order to protect family members from being totally disinherited, forced heirship ensures that descendants receive some share of their family member's estate. In France, this only exists for descendants (up until 2006 ascendants were included in forced heirship provisions when the decedent had no children). Scalise, *supra* note 29, at 84. Under the forced heirship provision, all estates are divided into two portions. The reserved portion is the portion that cannot be disposed of by an inter vivos gift or will other than to descendants, ascendants or the surviving spouse. The disposable portion is that which the testator is free to dispose of to whomever he chooses and depends on the number of his children. Ryan McLearn, *International Forced Heirship: Concerns and Issues with European Forced Heirship Claims*, 3 *EST. PLAN. & COMMUNITY PROP. L.J.* 323, 325 (2011). By implementing forced heirship, France is able to prevent family members from being fully disinherited—which would result in will contests—while still allowing the decedent's wishes to be fulfilled. *See infra* Part III.

³¹ See generally Pamela Champine, *Expertise and Instinct in the Assessment of Testamentary Capacity*, 51 *VILL. L. REV.* 25 (2006) (providing background on testamentary capacity grounds for will contests and suggesting evidentiary reform).

³² *DUKEMINIER & SITKOFF, supra* note 1, at 266.

³³ "[I]ssues of capacity and undue influence are inextricably intertwined. In fact, many claims for undue influence are accompanied by allegations of lack of capacity and vice versa." Scalise, *supra* note 29, at 99–100.

³⁴ See, e.g., Christian Turner, *Law's Public/Private Structure*, 39 *FLA. ST. U. L. REV.* 1003, 1037 (2012) (noting that wills are "[t]hought to be unusually prone to fraud and coercion").

³⁵ *DUKEMINIER & SITKOFF, supra* note 1, at 317.

³⁶ *Id.* at 318.

³⁷ *Id.*

³⁸ *DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES* 207 (8th ed. 2009).

³⁹ *DUKEMINIER & SITKOFF, supra* note 1, at 313.

cal violence, any of which prevent the true testamentary intent of the testator from appearing in the will.⁴⁰

Finally, will contests may also involve challenges regarding whether a particular will meets the requisite formalities.⁴¹ Each state has different requirements for will formalities, but generally there are three requirements: (1) witnesses not receiving a bequest must attest to the will,⁴² (2) the testator must sign the will, and (3) in some states, there must be a writing.⁴³ Some states permit holographic wills—handwritten wills without attestation—as an exception to these strict formalities.⁴⁴ The goal of such formalities, however, is to ensure that the will is authentic in order to give full effect to the testator's intent.⁴⁵ If a will fails to meet even one of the statutory formalities, it is subject to a will contest.⁴⁶

⁴⁰ Lawrence A. Frolik, *The Biological Roots of the Undue Influence Doctrine: What's Love Got to Do with It?*, 57 U. PITT. L. REV. 841, 848 (1996). For an excellent distinction of duress from undue influence, see Scalise, *supra* note 29, at 69.

⁴¹ See, e.g., Wayne M. Gazur, *Coming to Terms with the Uniform Probate Code's Reformation of Wills*, 64 S.C. L. REV. 403, 405–06 (noting that special execution formalities makes a will different from other legal instruments).

⁴² “[C]ase law is replete with examples of will contests in which the testator failed to comply with the witness attestation requirement.” Weisbord, *supra* note 3, at 907. “Any gift in a will to a person who has witnessed the signature of the testator in that will is invalid” Dawn Watkins, *The (Literal) Death of the Author and the Silencing of the Testator's Voice*, 24 L. & LITERATURE 59, 68 (2012). However, some state jurisdictions permit such an interested witness to take the amount to which he or she would be entitled under intestacy law. See, e.g., IND. CODE § 29-1-5-2 (2013).

⁴³ DUKEMINIER & SITKOFF, *supra* note 1, at 148.

⁴⁴ Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 166–67 (2012).

A holographic will is a testamentary document that is handwritten by the testator and is valid without attestation. . . . Both the drafters of statutes that authorize holographic wills and probate courts that determine their validity have explained that the purpose of this reduced formality is to provide those who are unable or unwilling to engage an attorney an opportunity to validly exercise testamentary power.

Id. Nonetheless, “[a]s practitioners are well aware, the statutory requirements for the creation of a valid formal witnessed will or holographic will are quite stringent.” Dawn Hall Cunneen, *The Impact of Changing Trends and Laws on the Estate Planning Process*, in BEST PRACTICES FOR STRUCTURING TRUSTS AND ESTATES (2013 ed. 2012), available at 2012 WL 4964461, at *3. For a list of states allowing holographic wills, see DUKEMINIER & SITKOFF, *supra* note 1, at 197.

⁴⁵ Glover, *supra* note 44, at 149 (“The primary purpose of these formalities is to ensure that the will accurately and reliably reflects the testator's true testamentary intent.”). See DUKEMINIER & SITKOFF, *supra* note 1, at 168 & n.24 (stating that almost all states require formalities to recognize wills as valid, with the exception of Pennsylvania (which does not require witnesses), and that if the formalities are followed, “the instrument will be valid in all states”); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 572 (1990) (“Attestation by witnesses is a poor means to an end. It's supposed to protect testators from the imposition of others, but it's mainly a trap for the unwary. Wills lacking attestation are not usually tainted by fraud or undue influence. And wills with attestation are not necessarily freely made.”). Furthermore, “[t]oo many required formalities frustrate the wishes of testators who fail to meet them. Too few formalities do not give us reliable enough evidence of what the testator wanted.” *Id.* at 546.

⁴⁶ See, e.g., Sean P. Milligan, Comment, *The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court*, 36 ST. MARY'S

In sum, American law offers numerous grounds for will contests. Although will contests can vindicate the testator's intent if the will fails to reflect that intent due to fraud or undue influence, will contests have significant costs.⁴⁷ Therefore, American states have endeavored to curtail will contests through various methods.

B. Efforts to Prevent Will Contests in the United States

To the extent that will contests undermine the testator's intent by invalidating his will, the aim of a system seeking to protect testator's intent, such as American wills law, is to avoid will contests. In particular, this includes frivolous contests that stem from people's unhappiness rather than a sincere concern for the testator's intent. American law has a few mechanisms to safeguard testamentary intent against will contests.

One protection is to avoid the execution of a will entirely.⁴⁸ If there is no will, there can be no will contest. For partly this reason, the will substitute industry has thrived.⁴⁹ Will substitutes, which facilitate by contract the transfer of assets upon a person's death to specified beneficiaries, include life insurance; pension accounts; bank, brokerage, and mutual fund accounts; and the revocable inter vivos trust.⁵⁰ A popular will substitute is the revocable trust,⁵¹ but trust contests have now replaced will contests, suggesting that more substantial solutions are needed to prevent beneficiaries from contesting the property arrangements chosen by others.⁵² More importantly, abandoning the will

L.J. 787, 788 (2005) (noting strict judicial adherence to statutory formalities, resulting in the invalidation of wills with even harmless technical errors).

⁴⁷ See *supra* notes 4, 15–17 and accompanying text.

⁴⁸ See Patricia A. Cain, *Tax and Estate Planning for Same-Sex Couples: Overview and Detailed Analysis*, AM. L. INSTITUTE (2012). Describing the benefits of trusts as opposed to wills, Cain writes:

Protection against will contests. While a revocable trust can be challenged on grounds of undue influence, duress or fraud, the fact that the trust arrangement was a completed transfer of property at the time it was created and funded makes it a bit more difficult to challenge. If a challenge seems imminent, it probably makes sense to use a trust department as trustee or some other independent trustee.

Id.

⁴⁹ “For 2006 the banks that are part of the federal reserve system reported holdings of \$760 billion in roughly 1.25 million accounts. In 2007, trusts that must file Form 1041, which excludes revocable trusts, reported \$142.5 billion in gross income on more than 2 million returns.” Kirsten Franzen & Bradley Myers, *Improving the Law Through Codification: Adoption of the Uniform Trust Code in North Dakota*, 86 N.D. L. REV. 321, 323 n.6 (2010).

⁵⁰ DUKEMINIER & SITKOFF, *supra* note 1, at 435.

⁵¹ “Perhaps no single person has done more to advance the rise of the revocable trust than Norman F. Dacey, author of a runaway bestseller, *How to Avoid Probate!*” DUKEMINIER & SITKOFF, *supra* note 1, at 467.

A *trust* is, functionally speaking, a legal arrangement created by a *settlor*, in which a trustee holds property as a *fiduciary* for one or more *beneficiaries*. The trustee takes *legal title* to the trust property, which allows the trustee to deal with third parties as owner of the property. The beneficiaries have *equitable title* to the trust property, which allows them to hold the trustee accountable for breach of the trustee's fiduciary duties.

Id. at 385.

⁵² “As the revocable living trust became the dominant estate planning technique of the last 20 years, will contests predictably declined. They have been replaced, however, by even

entirely is unnecessary if it is possible to reduce the number of will contests through legal reforms.

Another protection against will contests is the common presumption that the testator was competent to make a will.⁵³ This presumption places the burden of proving the contrary on the contestant of a will.⁵⁴ However, some states apply a presumption of undue influence to will contests, which provides a strong counterweight to the presumption of competency.⁵⁵

An additional presumption favoring the testator is that a will that is lost or destroyed without the testator's consent, or destroyed with the testator's consent but not in compliance with the revocation statute, can be admitted into probate if its contents are proved, such as by a copy from the attorney's office.⁵⁶ This allows the court to give effect to the testator's intent despite the loss of a will in certain circumstances.⁵⁷

Many, but not all,⁵⁸ jurisdictions also permit testators to include no-contest clauses in their wills. No-contest clauses state that beneficiaries who contest the will lose their bequest under the will.⁵⁹ Statutory permission of such clauses aims to avoid unnecessary contests and "reduce delays in the probate process."⁶⁰ On the other hand, judicial enforcement of these clauses may potentially preclude certain meritorious claims because beneficiaries do not want to lose the provisions made by the will.⁶¹

There are also several techniques that drafting attorneys may use to guard against future will contests. For example, attorneys may retain copies of a will. Furthermore, attorneys may include a self-proving affidavit in a will.⁶² An attorney may also videotape the testator to show that the testator had capacity⁶³

greater numbers of trust litigation matters. An estimated 15 million lawsuits will be filed in the United States this year." Richard E. Llewellyn II, *Selecting a Successor Trustee—Why the Usual Suspects May Not Be Your Best Choice*, 27 PROB. & PROP. 46, 47–48 (2013).

⁵³ ROSS & REED, *supra* note 23, at § 7:9 ("[M]ost states presume that every will proved to be duly executed is valid.").

⁵⁴ J. Edward Spar, *Attorney's Guide to Competency and Undue Influence*, 13 NAELA Q. 7, 8 (2000). Even "[w]hen one has a mental disorder in which there are lucid periods, it is presumed that his will has been made during a time of lucidity." *In re Estate of Goetz*, 61 Cal. Rptr. 181, 186 (Cal. Ct. App. 1967).

⁵⁵ See, e.g., FLA. STAT. § 733.107 (2013) ("The presumption of undue influence implements public policy against abuse of fiduciary or confidential relationships and is therefore a presumption shifting the burden of proof . . .").

⁵⁶ See DUKEMINIER & SITKOFF, *supra* note 1, at 227–28.

⁵⁷ *Id.* at 228.

⁵⁸ See, e.g., IND. CODE § 29-1-6-2 (2013); DUKEMINIER & SITKOFF, *supra* note 1, at 307 (noting that a minority of states do not enforce no-contest clauses).

⁵⁹ See, e.g., UNIF. PROBATE CODE § 2-517 (amended 2010).

⁶⁰ Omar T. Mohammadi, *Sharia-Compliant Wills: Principles, Recognition, and Enforcement*, 57 N.Y.L. SCH. L. REV. 259, 282 (2012–13).

⁶¹ Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 894 (2012).

⁶² DUKEMINIER & SITKOFF, *supra* note 1, at 170.

⁶³ Langbein, *supra* note 1, at 2046.

Sometimes counsel advises the testator to write this explanation in a letter, or counsel works with the testator to prepare an affidavit. Sometimes it is arranged for the testator to be video taped reading from a script or speaking from notes. Another variant is for the lawyer to interview the

or instruct the testator to explain his intentions in a separate letter.⁶⁴ These tools may be used by lawyers to prevent or defend against will contests after the testator's death.

Finally, and equally noteworthy, a minority of American states deter will contests by permitting probate of the will during the testator's lifetime through antemortem probate. Only Alaska, Arkansas, Nevada, North Dakota, and Ohio have such antemortem probate statutes, which authorize a person to initiate, during life, "an adversary proceeding during the testator's life to declare the validity of a will. All beneficiaries named in the will and all the testator's heirs apparent must be made parties to the action."⁶⁵ This is an effective procedure, which allows the court to evaluate the testator's capacity, intent, and freedom from undue influence or fraud during the testator's lifetime, which has the obvious benefit of the presence of the testator at the proceedings.⁶⁶

Therefore, recognizing the need to limit will contests, many state jurisdictions provide certain safeguards against will contests. However, will contests continue to flourish in the United States on a significantly greater scale than in France.

III. WILL CONTESTS IN FRANCE

Like Americans, the French avoid contemplating their own deaths by procrastinating in writing their wills.⁶⁷ Due to the existence of the forced share for children under French law, the French are accustomed to public policy dictating that estates should pass to their descendants,⁶⁸ and they therefore write fewer wills than Americans to change such a disposition.⁶⁹ In fact, less than 10 percent of people in France die with a will (testate).⁷⁰

testator for a stenographic transcript or video record, asking the testator to explain the will, and giving him the opportunity to show his deliberation and volition.

Id.

⁶⁴ *Id.*

⁶⁵ DUKEMINIER & SITKOFF, *supra* note 1, at 312.

⁶⁶ Compare *infra* Part III.B.

⁶⁷ See DUKEMINIER & SITKOFF, *supra* note 1, at 64 ("Some people procrastinate to avoid the unpleasantness of confronting mortality.").

⁶⁸ Aaron Schwabach, *Of Charities and Clawbacks: The European Union Proposal on Successions and Wills as a Threat to Charitable Giving*, 17 COLUM. J. EUR. L. 447, 457 (2011) ("French law provides forced heirship rights for a testator's spouse and descendants, or, in the absence of issue, the testator's ancestors.").

⁶⁹ *Les Français et L'héritage*, CHAMBRE DES NOTAIRES DE PARIS (Jan. 11, 2011), http://www.bva.fr/data/sondage/sondage_fiche/957/fichier_tp365-_20_minutes_-_heritage4111b.pdf.

More than 3 million French have already written their wills (8% of those aged 18 and over). More likely to have done are retired (12%), 50–64 years (12% to 4% of 25–34 year olds), the CSP+ (6% to 3% of CSP-) and rich (14% of those earning more than 3,500 euros per month, for 6% of those earning less than 1,500 euros).

Id. (translated to English).

⁷⁰ Compare Ashlea Ebeling, *Americans Lack Basic Estate Plans*, FORBES (Mar. 1, 2010, 6:22 PM), <http://www.forbes.com/2010/03/01/estate-tax-living-will-schiavo-personal-finance-no-estate-plans.html> ("Of those surveyed, only 35% have a will directing who gets their assets."), with *Les Français et L'héritage*, *supra* note 69 ("Over 3 and a half million

Furthermore, French wills encounter proportionately fewer contests than American wills.⁷¹ This is due to the policies of the French state; namely, its legislation protecting vulnerable testators,⁷² the existence of the notaire⁷³ (a particular type of lawyer dealing exclusively with trust and estate matters in France), and the notarial will.

A. *Grounds for French Will Contests*

French law recognizes four types of wills: (1) the holographic will (*testament olographe*), entirely written, dated, and signed by the hand of the testator;⁷⁴ (2) the authentic will (*testament authentique*), also known as the public will or notarial will, dictated by the testator in the presence of the notaire and two witnesses or two notaires who draw up the will on his behalf; (3) the secret will⁷⁵ (*le testament mystique*), which is not much used, written by the testator and given to the notaire who seals the envelop in the presence of witnesses;⁷⁶ and finally, (4) the international will (*testament international*), established by the Convention Providing a Uniform Law on the Form of an International Will in 1973, whereby the testator declares in the presence of two witnesses and a notaire that he has made a will and acknowledges the contents of the docu-

French have already written their wills (8% of those aged 18 and over.)” (translated to English).

⁷¹ In 2012, the Cour de cassation heard just five cases relating to wills. COUR DE CASSATION, http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568 (last visited Nov. 27, 2013) (providing a searchable case history in French). The five cases are case numbers 10-31.129, 10-27.332, 11-20.702, 09-68.276, and 10-17.365/10-30.845. See *infra* notes 86–88 and accompanying text.

⁷² Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 117 (1994). Brashier notes how the French system “ensures protection for the children of a testator” and, by contrast, does not force heirship to the less vulnerable, such as a surviving spouse, who would be “protected through recognition of her ownership of one-half of the community property and through retention of her separate property.” *Id.* Also, notably, French opinion polls have indicated support for forced heirship, with participants also favoring increased protection for surviving spouses. *Id.* at 117 n.114 (citing MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 248–49 (1989)).

⁷³ For additional background on the French notaire system, see N. L. BROWN, *The Office of the Notary in France*, 2 INT’L & COMP. L.Q. 60 (1953); PETER HERZOG & MARTHA WESER, *CIVIL PROCEDURE IN FRANCE* 102–09 (1967); John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 65 (1978) (describing the notaire as a “quasi-judicial officer . . . a legally qualified and experienced officer of the state . . .”).

⁷⁴ CODE CIVIL [C. CIV.] art. 970 (Fr.) (“An holographic will is not valid unless it is entirely written, dated and signed by the hand of the testator: it is not subject to any other form.”).

⁷⁵ CODE CIVIL [C. CIV.] art. 976 (Fr.) (“Where a testator wishes to make a secret will, the paper which contains the dispositions or the paper used as an envelope, if there is one, shall be closed, stamped and sealed up.”).

⁷⁶ See *infra* Part III.C.

ment.⁷⁷ Public policy aiming to protect the authenticity of the will requires that all of these four types of wills be in writing and be made by only one testator.⁷⁸

It is possible to contest a will in France.⁷⁹ The grounds for such contests include the testator's lack of capacity based on error, fraud, or violence,⁸⁰ as well as the lack of will formalities or the contest of the testator's writing.⁸¹

There are a few noteworthy limitations on will contests. For example, the only people with standing for a will contest are the testate or intestate heirs. The *Cour de cassation*, the highest court in the French judiciary,⁸² has held that a third party cannot contest a will.⁸³ An additional limitation on will contests is that they are barred after five years⁸⁴ and left to the discretion of the trial judges.

Compared to the United States, where undue influence is the most common ground for a will contest,⁸⁵ France has fewer contests of this type. In 2012, for example, the *Cour de cassation* heard five cases relating to will contests: three regarding formalities,⁸⁶ one regarding a contest of the writing,⁸⁷ and only one relating to undue influence.⁸⁸ Undue influence claims are no doubt further limited in France by the government's role in protecting people from abuse and by prohibitions on certain people accepting bequests. The differing levels of protection for vulnerable testators, which protect the integrity of their wills, are considered next.

⁷⁷ Convention Providing a Uniform Law on the Form of an International Will, Oct. 26, 1973, 12 I.L.M. 1298, reprinted in S. DOC. NO. 99-385-17, at 28-32 (1986), available at <http://www.unidroit.org/english/conventions/1973wills/1973wills-e.htm>. For background on the emergence of international wills, see Peter Chase, *The Uniform International Will: The Next Step in the Evolution of Testamentary Disposition*, 6 B.U. INT'L L.J. 317.

⁷⁸ A joint will is void. CODE CIVIL [C. CIV.] art. 968 (Fr.) ("A will may not be made in the same instrument by two or several persons, either for the benefit of a third person, or as a mutual and reciprocal disposition.").

⁷⁹ Meanwhile, some American states do not permit testators to write no-contest clauses, which would disincentivize beneficiaries from contesting the will. See, e.g., IND. CODE § 29-1-6-2 (2013).

⁸⁰ CODE CIVIL [C. CIV.] art. 901 (Fr.) ("To make an inter vivos gift or a will one must be of sound mind."). See also CODE PÉNAL [C. PÉN.] art 223-15-2 (Fr.).

⁸¹ CODE CIVIL [C. CIV.] art. 976 (Fr.) (Modifié par Loi n°2006-728 du 23 juin 2006 - art. 9 JORF 24 juin 2006 en vigueur le 1er janvier 2007) (describing the formal requirements of will making and the notaire's role).

⁸² *About the Court*, COUR DE CASSATION, http://www.courdecassation.fr/about_the_vcourt_9256.html (last visited Nov. 27, 2013).

⁸³ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 4, 2010, Bull civ. I, No. 980 (Fr.).

⁸⁴ CODE CIVIL [C. CIV.] art. 1304 (Fr.) ("In all cases where an action for annulment or rescission of an agreement is not limited to a shorter time by a special statute, that action lasts five years.").

⁸⁵ See *supra* Part II.

⁸⁶ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 1, 2012, Bull civ. I, No. 24 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 10, 2012, Bull civ. I, No. 201 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 21, 2012, Bull civ. I, No. 1330 (Fr.).

⁸⁷ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Feb. 29, 2012, Bull civ. I, No. 45 (Fr.).

⁸⁸ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Oct. 24, 2012, Bull civ. I, No. 1171 (Fr.).

B. French Legislation Protecting Vulnerable Testators

French civil law is based on the codification, beginning in 1804, “generated by the spirit of the French Revolution which sought to eradicate the feudal institutions of the past and to implant in their place the natural law values of property, freedom of contract, family, and family inheritance.”⁸⁹ The general spirit of the Civil Code is individualistic, liberal, and was defended by the philosophers of the 18th Century. French law penalizes a person who abuses the weakness of another. The Cour de cassation has held that undue influence is a seriously prejudicial offense that should be punished.⁹⁰ French penal code punishes the act by three years of imprisonment and a fine of €375,000.⁹¹ However, the French civil code did not recognize that one mentally weakened should be protected until 1838,⁹² and the protection of those with a mental illness was not developed until 1968.⁹³ Now the law distinguishes between the medical treatment and the protection of the estates. Specifically, the law created three types of protection for an adult testator, depending on the severity of the condition of his mental illness: *sauvegarde de justice*, *curatelle* and *tutelle*.

The first, *sauvegarde de justice*, is a temporary measure intended to protect the adult against a risk of dissipation of his assets and acts opposed to his interest. The second strictest grade of protection, *curatelle* or “curatorship”, may apply in a situation where the person has a need of being advised or supervised in civil transactions, while otherwise being able to act for himself.⁹⁴ People protected by either *sauvegarde de justice* or *curatelle* measures can make a will without the assistance of the administrator, but the testator may only dispose of that part of the assets not reserved to the heirs by the forced share required by French law.⁹⁵ This is in contrast to the regime of *tutelle*, which is the third and strictest level of protection, applied to a person who needs to be

⁸⁹ KONRAD ZWEIGERT & HEIN KÖTZ, Introduction to Comparative Law 74 (Tony Weir trans., 3d rev. ed. 1998).

⁹⁰ Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 15, 2005, Bull. crim., No. 6098 (Fr.).

⁹¹ CODE PÉNAL [C. PÉN.] art. 223-15-2 (Fr.).

⁹² Loi du 30 juin 1838 sur les aliénés [Law of June 30, 1838 regarding Mental Patients], COLLECTION COMPLÉTE, LOIS, DÉCRETS, ORDONNANCES, RÉGLEMENTS ET AVIS DU CONSEIL D'ÉTAT (DUVERGIER & BOCQUET) [Duv. & Boc.] [COMPLETE COLLECTION LAWS, DECREES, ORDERS, RULES, AND NOTICES OF THE COUNCIL OF STATE], July 6, 1838, p. 490 (Fr.). For details about the 1838 legislation, see CHRISTIAN DADOMO & SUSAN FARRAN, FRENCH SUBSTANTIVE LAW: KEY ELEMENTS 29 (1997).

⁹³ Loi 68-5 du 3 janvier 1968 portant réforme du droit des incapables majeurs [Law 68-5 of January 3, 1968 reforming the Law regarding Incompetent Adults], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Jan. 4, 1968, p. 114 (providing protection of adults).

⁹⁴ *Property Owned by Vulnerable Family Members*, NOTAIRES DE FRANCE, <http://www.notaires.fr/notaires/en/property-owned-by-vulnerable-family-members> (last visited Nov. 27, 2013).

While simple situations require straightforward help to ensure that people have the necessities of everyday life (housing allowance, income provided as cash benefits, allowances or services, support, insurance), other situations mean that people need real legal protection. Depending on the seriousness of the person's physical or mental health, judicial protection (*sauvegarde de justice*), supervision (*curatelle*) or guardianship (*tutelle*) may seem the most appropriate solution.

Id.

⁹⁵ CODE CIVIL [C. CIV.] art. 470 (Fr.); CODE CIVIL [C. CIV.] art. 912 (Fr.).

protected continuously in acts of civil life. In order for this level of protection to be invoked, the testator must suffer from a serious deterioration of mental or bodily faculties, such as Alzheimer's disease.⁹⁶ A will made by a person under *tutelle* protection is void, unless the will has been authorized by a *juge des tutelles*' order or a family agreement.⁹⁷

These protections can be requested either by the vulnerable person, his spouse, partner, relatives, or the state. The state intervenes in such a case by empowering a specific judge, the *juge des tutelles* (guardianship judge) to more precisely consider and control the possible existence and degree of disability. The judge and the guardian act together on behalf of the adult, and the guardian must annually report the accounts to the judge.⁹⁸

When it comes to the execution of such wills, the legal protection afforded by this protection process prevents will contests. As previously mentioned, since the legal reform of 2007,⁹⁹ a will made by one under *tutelle* protection is void unless the will was authorized by a *juge des tutelles*' order or a family agreement.¹⁰⁰ As a neutral party, the judge can decide whether or not the testator had the mental capacity to make a will. In practice, in order to protect the authenticity of the will, the judge will allow the incapable person to make a will through both the expertise of the notaire¹⁰¹ and the authentic act.

It is important to note that the guardianship's decision related to mental capacity is published on a specific registry called the *repertoire civil*.¹⁰² The registration is mentioned in the margin¹⁰³ of the birth certificate, which helps lawyers ensure the ability of their clients by simply requesting a copy of the birth certificate.

French law goes further to protect against will contests by voiding wills made in favor of particular persons or professions.¹⁰⁴ Inabilities to receive have been enacted to prevent theft from the estate and undue influence. These inabil-

⁹⁶ Protected adults account for nearly 800,000 people in France, more than 1% of the population. Presumably, most of them are elderly. *Observatoire National des Populations "Majeurs Protégés"*, UNION NATIONALE DES ASSOCIATIONS FAMILIALES (Feb. 20, 2012), <http://www.unaf.fr/spip.php?rubrique178>.

⁹⁷ CODE CIVIL [C. CIV.] art. 476 (Fr.).

⁹⁸ John Bell, *Path Dependence and Legal Development*, 87 TUL. L. REV. 787, 805 (2013). *Tutelle* is more severe. It is set up by a judge who decides that an adult has such grave difficulties that they cannot manage ordinary acts of civil life. The tutor manages a budget approved by the judge. The judge also decides whether the person is fit to vote and on whether to approve a marriage or civil partnership.

Id.

⁹⁹ Loi 2006-728 du 23 juin 2006 portant réforme des successions et des libéralités [Law 2006-728 of June 23, 2006 on the Reform of Inheritance and Gifts], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 24, 2006, p. 9513 (reforming succession and protecting adults).

¹⁰⁰ CODE CIVIL [C. CIV.] art. 476 (Fr.).

¹⁰¹ See *infra* Part III.C.

¹⁰² CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1057 (Fr.).

¹⁰³ Marriage, divorce, partnerships, guardianship, change of marital regime, and death are, since 1897 and several modified laws, indicated in the margin of a person's birth certificate to inform third persons and avoid conflicts as polygamy or mental capacity matters.

¹⁰⁴ CODE CIVIL [C. CIV.] art. 911 (Fr.) ("Any disposition in favor of a person under a disability is void, whether it is disguised under the form of a contract for value, or is made under the names of intermediaries.") (translated to English).

ities are related to functions or activities exerted on the testator during the period of time that he is supposed to be psychologically fragile. This incapacity is limited by this goal, and only certain people need to be protected. For this reason, the civil code invalidates a will made in favor of doctors, pharmacists, and health officers who have treated the testator during the disease.¹⁰⁵ The inabilities are also extended to legal representatives to protect the adults and corporations on whose behalf they exercise their functions. The same rule is applied to ministers of worship, but only if the testator was directed to draft a will in accordance with the worship and the will was made in response to the disease from which the testator ultimately died;¹⁰⁶ and also to guardians, unless clearance of accounts to the judge has been made.¹⁰⁷ The Civil Code has also restricted anyone working in an institution housing the elderly or a psychiatric institution from being a beneficiary.¹⁰⁸ Other professionals, such as notaires, cannot become beneficiaries of their clients' will. Additionally, notaires cannot intervene in any deeds involving their parents, descendants, collaterals, or any other family members unless the familial degree is of uncle or nephew and beyond.¹⁰⁹ Some other beneficiaries also need to have specific authorization from the State to be able to receive through a will, which is the case with charities or associations. A will made in favor of charities will not be voided if the charity is a public-utility institution authorized by Decree.¹¹⁰ This type of regulation prevents sectarian influence.

The number of will contests is reduced by these efforts of French lawmakers to protect vulnerable persons. The state has commissioned these protections through the representation and control of the notaire and through the use of the authentic testament.

C. *Existence of the Notaire and the Authentic Will*

Even if duress, fraud, and undue influence might be found in the execution of a French will, these issues mainly arise when dealing with holographic wills, which are written by the testator himself in his own handwriting.¹¹¹ For other types of wills, however, French law—as that of many civil law countries—relies on the notaire and the notarial will to reduce the number of will contests.

¹⁰⁵ CODE CIVIL [C. CIV.] art. 909 (Fr.).

¹⁰⁶ Appeal court of Angers [Appeals court of civil and criminal matters], Jan. 5, 1970.

¹⁰⁷ CODE CIVIL [C. CIV.] art. 907 (Fr.).

¹⁰⁸ CODE CIVIL [C. CIV.] art. 1125-1 (Fr.).

¹⁰⁹ Décret 71-941 du 26 novembre 1971 relatif aux actes établis par les notaires [Decree 71-941 of November 26, 1971 on the Establishment of Acts by Notaries], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 3, 1971, p. 11795, *modified by* Décret 2005-973 du 10 août 2005 modifiant le décret 71-941 du 26 novembre 1971 relatif aux actes établis par les notaires [Decree 2005-973 of August 10, 2005 Modifying Decree 71-941 of November 26, 1971 on the Establishment of Acts by Notaries], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 11, 2005, p. 13096.

¹¹⁰ Loi du 1 juillet 1901 relative au contrat d'association [Law of July 1, 1901 on Partnership Agreements], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 2, 1901, p. 4025 (emphasis on articles 6 and 11 relating to the creation of an association).

¹¹¹ *See supra* Part III.A.

Appointed by the Minister of Justice, notaires are vested with prerogatives of official authority that they receive from the state,¹¹² but they are not employees of the state. The notaires “operate[] on a self-employed basis and [are] responsible for their own office, thereby providing a modern type of public service at no cost to the state.”¹¹³ They are paid by their clients on the basis of a rate fixed by the state for the services they provide, and are only paid when a file is signed.¹¹⁴ This strict regulation of fees, reassessed every year,¹¹⁵ discourages malpractice in the area of family law, a notaire’s traditional area of law practice.¹¹⁶

The notaire, “quite unknown in the Anglo-American legal family,”¹¹⁷ is, in other words, a particular type of lawyer who has a high level of legal education¹¹⁸ and who draws up authenticated contracts on behalf of his clients.¹¹⁹

¹¹² Under the terms of Article 1 of the Order dated November 2, 1945, notaires are public officers authorized to record any instrument or contract to which the parties wish to invest the type of authenticity associated with public authority instruments. Ordonnance 45-2590 du 2 novembre 1945 relative au statut du notariat [Order 45-2590 of November 2, 1945 Concerning the Status of Notaries], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Nov. 3, 1945, p. 7160.

¹¹³ See *The Role of the Notaire*, NOTAIRES DE FRANCE, <http://www.notaires.fr/notaires/en/role-of-the-notaire> (last visited Nov. 29, 2013).

¹¹⁴ Décret 78-262 du 8 mars 1978 portant fixation du tarif des notaires [Law 78-262 of March 8, 1978 Fixing the Rates of Notaries], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 10, 1978, p. 995.

¹¹⁵ See *id.* See also *Notaires’ Fee*, NOTAIRES DE FRANCE, <http://www.notaires.fr/notaires/en/notaires-fee> (last visited Nov. 30, 2013).

¹¹⁶ *The Main Areas Where the Notaires Intervene*, NOTAIRES DE FRANCE, <http://www.notaires.fr/notaires/en/main-areas-where-the-notaires-intervene> (last visited Nov. 30, 2013); see also *Notaires’ Fee*, *supra* note 115 (concerning the discouragement of malpractice).

¹¹⁷ ZWEIGERT & KÖTZ, *supra* note 89, at 368 (“[W]ith the result that the Common Law has nothing comparable to the . . . ‘acte authentique’ (art. 1312 Code civil) . . . [t]he American ‘Notary Public’ has nothing in common with the Continental notary except the name.”). While Louisiana is the only civil law state in the United States, “Louisiana, originally a pure civil-law jurisdiction, still retains much of its civilian tradition, . . . the function of the notary has diminished in importance over the years. Indeed, the truly civilian notary has substantially disappeared.” Pedro A. Malavet, *Counsel for the Situation: The Latin Notary, A Historical and Comparative Model*, 19 HASTINGS INT’L & COMP. L. REV. 389, 427 (1996) (citing D. Barlow Burke, Jr. & Jefferson K. Fox, *The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 TUL. L. REV. 318, 328 (1976)).

¹¹⁸ Reina, *supra* note 3, at 811–12. Reina describes the education of a notaire in detail:

In order to enter the Notaire profession, one must earn a law degree in a general study of law. Upon completion of the four-year study, the student earns a maitrise en droit, and upon graduation, a person aspiring to become a notaire must pass an exam in order to gain entrance to the notaire’s specialized training program. This program combines theoretical and practical instruction and may be taken at a University or at a Center for Professional Development. Following the completion of this year of training, the “clerc” must take another exam to secure the notaire’s apprenticeship, where he or she will serve for two subsequent years. After the apprenticeship is completed, and the cleric is given a satisfactory assessment by the government, the cleric is certified to become a notaire assistant. Finally, when an opening in one of the limited 7,800 notary posts becomes free, as a result of retirement or death, and the notaire purchases his notarial predecessor’s practice, the notaire can begin to practice in the legal monopoly.

Id. However, currently, a “maitrise en droit” has been changed in favor of “master 1 en droit.” From January 1, 2014 a Master is needed to access the *Centre de Formation Professionnelle des Notaires*. Arrêté du 8 août 2013 fixant les modalités de la sélection des dossiers pour l’accès aux centres de formation professionnelle de notaires [Decree of 8 August 2013

These authenticated contracts, which include wills, provide significant protection against the possibility of subsequent will contests. As Professor Langbein notes:

Continental legal systems provide a valuable defensive device for the testator who fears a capacity contest: the authenticated will. The testator can execute his or her will before a quasi-judicial officer, who has a duty to be satisfied of the testator's capacity. The resulting presumption of capacity makes the authenticated will practically immune to a post-mortem challenge on grounds of incapacity or undue influence.¹²⁰

“The fact that an instrument is drawn up by a notaire, [a public officer,] is a guarantee of its legality and authenticity.”¹²¹ For that probative purpose, the notaires should respect various personal and formal obligations.

One of the most valuable characteristics of the French notaires is the probative value of their signature, which in itself decreases the chances of will contests. The notaire's main duty is to authenticate the will document, which becomes “ ‘an instrument with a high evidential value or probative force derived from its form and authority by whom it is prepared.’ ”¹²² A document authenticated by a notaire holds great weight in the French legal system, and challenging it is a very tedious and costly process, unlike challenging a will in the American probate system.¹²³ Additionally, if one challenges an authenticated document and fails, he is potentially “subject to heavy civil damages in addition to criminal liability.”¹²⁴

After having authenticated the documents by his signature, the notaire must keep the deeds and respect the client's professional confidentiality until the communication is made public to the heirs.¹²⁵ The professional responsibil-

laying down the procedures for the selection of applications for access to vocational training of notaires] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 8, 2013, p. 14344.

¹¹⁹ For an excellent background on the French notaire, see Reina, *supra* note 3, at 806–12.

¹²⁰ Langbein, *supra* note 1, at 2044. Professor Langbein further notes:

Only three American jurisdictions (Arkansas, Ohio, North Dakota) have any counterpart—a declaratory judgment procedure that allows the testator to obtain a determination of capacity while still alive. Elsewhere, our probate procedure follows a ‘worst evidence’ rule. We insist that the testator be dead before we investigate the question whether he had capacity when he was alive.

Id.

¹²¹ *Role of the Notaire*, *supra* note 113. See also Reina, *supra* note 3, at 806. “These documents are then authenticated by the notaire, which means that the document is given the utmost credibility and is presumed to be free from undue influence or fraud.” *Id.* (citing EZRA SULEIMAN, *POWER AND CENTRALIZATION IN FRANCE* (Princeton Univ. Press 1987). “[G]iven [this] great credibility . . . [the document] is difficult to invalidate in post-mortem proceedings.” *Id.* at 811.

¹²² Reina, *supra* note 3, at 809 (quoting L. Neville Brown, *The Office of the Notary in France*, 2 INT'L & COMP. L.Q. 61, 66 (1953)).

¹²³ *Id.* at 810.

¹²⁴ *Id.*

¹²⁵ “The Notaire is subject to professional confidentiality: as a public officer he may under no circumstances disclose confidential information revealed to him. In addition to the criminal and disciplinary action taken against the Notaire, he is also liable to be ordered to pay damages.” *Check and Recourse*, NOTAIRES DE FRANCE, <http://www.notaires.fr/notaires/en/check-and-recourse> (last visited Nov. 30, 2013).

ity of the notaire can be implicated by his or her non-compliance with the role's obligations.¹²⁶

Because of its authenticity,¹²⁷ the probative value of the notarial deed is most certain since it cannot be disputed.¹²⁸ The *acte authentique* is presumed to be valid until someone challenges the act for falsity (*inscription de faux*), which is rare in practice and the challenger is subjected to "heavy civil damages in addition to criminal liability" if incorrect.¹²⁹ The Cour de cassation has held that the action of a nullity request constitutes a challenge to the integrity of the notaire.¹³⁰

The notarial will¹³¹ therefore guarantees the proper and secure application of the testator's wishes. It is made by the notaire, whose important professional responsibility occurs at different stages, from the respect of the formalities to the determination of the testator's capacity. The instrument of the notarial will mentions the date, the place, the identity, and the testator's signature,¹³² as well as the identification and signature of the notaire and witnesses.¹³³ If any one of these provisions is missed, the entire notarial will is void.

¹²⁶ *Id.*

The Notaire has a duty of integrity and thoroughness as concerns legal requirements, particularly authenticity. . . . The Notaire has a duty to advise: the client expects a Notaire to explain the various options open to him as well as the consequences of the instruments/documents he signs.

This duty to advise implies that the Notaire is neutral and impartial: a Notaire chosen by one client has an obligation of fairness towards him and towards the other co-contracting parties.

Id.

¹²⁷ CODE CIVIL [C. CIV.] art. 1317 (Fr.) ("An authentic instrument is one which has been received by public officers empowered to draw up such instruments at the place where the instrument was written and with the requisite formalities.").

¹²⁸ Scalise, *supra* note 29, at 96 ("[T]he will authenticated by a civil-law notary benefits from an 'extremely strong (although nominally rebuttable) presumption of validity' and is thus very difficult to challenge.").

¹²⁹ See Reina, *supra* note 3, at 810.

In the former instance, such acte is fully proved until impeached; however the impeachment procedure is very tedious and costly. In addition to these deterrents to impeaching an acte, if one challenges an acte for falsity, and fails, that challenger is subject to heavy civil damages in addition to criminal liability. Thus, it is very risky and extremely difficult to challenge and invalidate a document created by a French Notaire.

Id.

¹³⁰ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Nov. 14, 2000, Bull. civ. I, No. 1710 (Fr.).

¹³¹ CODE CIVIL [C. CIV.] art. 971 (Fr.) ("A will by public instrument shall be received by two notaires or by one notaire attended by two witnesses.").

¹³² See, e.g., Décret 71-942 du 26 novembre 1971 relatif aux créations, transferts et suppressions d'offices de notaire, à la compétence d'instrumentation et à la résidence des notaires, à la garde et à la transmission des minutes et registres professionnels des notaires [Decree 71-942 of November 26, 1971 on the Creation, Transfer, and Deletion of Notaries' Offices in the Jurisdiction of Instrumentation and Residence of Notaries, and the Custody and Transfer of Minutes and Professional Registries of Notaries], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Dec. 3, 1971, p. 11796.

¹³³ CODE CIVIL [C. CIV.] art. 975 (Fr.) ("Legatees, in whatever class they may be, their relatives by blood or marriage up to the fourth degree inclusive, or clerks of the notaires by whom the instruments are received, may not be taken as witnesses of a will by public instrument.").

The notarial will is specific, as it should be dictated by the testator to the notaire, who personally drafts the will.¹³⁴ The Cour de cassation recently annulled a will because a notaire prepared the deed in advance, after meeting his clients in a previous meeting.¹³⁵ The Cour held that the notaire breached the rule of dictation when he prepared the will outside the presence of the testator and witnesses.¹³⁶ Because the notaires do not bring their printer everywhere they go, and because they traditionally had prepared deeds in advance, the 108th Congrès de Notaires de France on September 2012 suggested removing this obligation of dictation by the testator.¹³⁷ The Congrès argued that the dictation procedure creates disputes and is no longer appropriate in practice in respect to the notaire's duty to inform the clients.¹³⁸

Through their practices, and because of their effective organization,¹³⁹ notaires have a significant effect on legal reform. For example, at the last Congrès de Notaires de France, they proposed a law that would create the possibility for a deaf or mute person to acknowledge the will by his own reading.¹⁴⁰ A reform of formalities in authentic wills, per the notaires' wishes, may be expected to strengthen the authentic will.¹⁴¹

As in the United States, the testator must be competent to make a will: namely, he must be an adult¹⁴² and be sound of mind.¹⁴³ He enjoys a presumption of mental capacity.¹⁴⁴ The notaire has a duty to check his client's mental

¹³⁴ CODE CIVIL [C. CIV.] art. 972 (Fr.)

Where a will is received by two notaires, it shall be dictated to them by the testator; one of those notaires shall write it himself or shall have it written by hand or mechanically. Where there is only one notaire, it must also be dictated by the testator; the notaire shall write it himself or shall have it written by hand or mechanically. In either case, it must be read over to the testator. All of which shall be expressly mentioned.

Id.

¹³⁵ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2011, Bull. civ. I, No. 704 (Fr.).

¹³⁶ *Id.*

¹³⁷ *Les Propositions*, LA TRANSMISSION, <http://2012.congresdesnotaires.fr/1-ouvrage-du-108eme-congres> (last visited Nov. 30, 2013).

¹³⁸ *Id.*

¹³⁹ See Reina *supra* note 3, at 812.

The French Notarial Profession is organized in a three-tiered structure. The three tiers are represented by the Chambres de Discipline, the Conseil Régional, and the Conseil Superior. The Conseil Superior was created in 1941, confirmed by the ordonnance of 2 November 1945, and represents the national and legal representative of the Notarial Profession. The purpose of these tiers is presumably to act as checks and balances on each other.

Id.

¹⁴⁰ CODE CIVIL [C. CIV.] art. 972 (Fr.).

¹⁴¹ See Reina *supra* note 3, at 812.

¹⁴² Eighteen or over; French law also recognizes emancipation by court order at the age of sixteen. CODE CIVIL [C. CIV.] art. 907 (Fr.).

¹⁴³ CODE CIVIL [C. CIV.] art. 901 (Fr.) ("To make an inter vivos gift or a will one must be of sound mind.")

¹⁴⁴ CODE CIVIL [C. CIV.] art. 489 (Fr.) ("In order to enter into a valid transaction, it is necessary to be of sound mind. But it is for those who seek annulment on that ground to prove the existence of a mental disorder at the time of the transaction.")

capacity as it is elementarily prudent to do so.¹⁴⁵ If the notaire fails in this duty, his or her professional responsibility will be implicated.¹⁴⁶

This issue was the main topic of the 102nd Congrès de Notaires de France in 2006, which addressed vulnerable persons and the notaires' evaluation of testators' mental capacities for the purposes of drafting wills.¹⁴⁷ At the center of this issue is the debate over what precautions notaires should take. Despite the fact that drawing up a deed is his duty,¹⁴⁸ if the notaire is not satisfied by his client's mental capacity, he must refuse to draw up the deed.¹⁴⁹ Unlike American law, where testamentary freedom is considered more important,¹⁵⁰ the notaire must not take the risk of assisting a client whose testamentary capacity is uncertain. In practice, notaires prefer referring to medical certifications from family doctors, who are the most appropriate people to attest the mental capacity of a testator. This use reinforces the notaire's belief regarding the capacity of the testator, and is a way to exonerate the notaire from allegations of a breach of professional responsibility.¹⁵¹

In addition, the responsibility of the notaire encompasses a duty to advise clients on the possibility of the testator's wishes in regards to the relevant legal terms and their application in practice. The notaire should, for example, inform the client about the relevant law of the child's forced share in France—which statutorily entitles the child to a portion of her parents' estate—and the resulting impossibility for the testator to disinherit a child.¹⁵² On the other hand, the

¹⁴⁵ Cour d'appel [CA] [regional court of appeal] Montpellier, 1e ch., June 20, 1995, No. 89-3733 (Fr.).

¹⁴⁶ *Id.* The notaire received the will of the testatrix who was in a retirement home. *Id.* Although the testatrix seemed to enjoy the fullness of her intellectual faculties, the notary, by failing to check the mental capacity of the 81-year-old or consider the necessity of possible guardianship measures, lacked the most elementary prudence and thereby failed to fulfill his duty as a public officer. *Id.*

¹⁴⁷ Propositions available in French: *Les Propositions du 102e Congrès des Notaires de France*, CONGRÈS DES NOTAIRES DE FRANCE, http://www.congresdesnotaires.fr/fr/precedents-congres/propositions-adoptees-de-1996-a-2012/102estrasbourg_2006.pdf (last visited Nov. 30, 2013).

¹⁴⁸ Loi du 16 mars 1803 contenant organisation du notariat [Law of March 16, 1803 concerning the Organization of the Profession of Notaries], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 16, 1803, No. 2440.

¹⁴⁹ National Agreement of the Notaires Art.9, approved by the Justice Minister March 3rd, 2004; Cass. 1e civ. Mai 4, 1868, Bull. civ. 5, No. 85 (Fr.) (“Incapacity is a real motivation to refuse to draw up a deed.”) (translated into English).

¹⁵⁰ DUKEMINIER & SITKOFF, *supra* note 1, at 1–20.

¹⁵¹ Cour de cassation [Cass.] [supreme court of judicial matters] 1e civ., Dec. 18, 1984, Bull. civ. I, No. 339 (Fr.).

¹⁵² Nancy E. Muenchinger, *French Law: Reforms in Real Property and Estate Law*, 59 R.I. B.J. 23, 25 (2010).

French private international law applies the law of the *situs* (location) of property to the disposition of immovable assets or real property. French law on inheritance is, therefore, the only law that will apply to determine the distribution of the rights to property located in France. French law on inheritance is restrictive in that it imposes limits on what is available to be left by will by the owner of real property. In particular, it imposes a *réserve* or ‘hereditary forced share’ in favor of children, the amount of which is determined by Article 913 of the Civil Code which reads as follows: ‘Gratuitous transfers, either by inter vivos acts or by wills, may not exceed half of the property of a disposing person, where he leaves only one child at his death; one-third, where he leaves two children; one-fourth, where he leaves three or a greater number’ In certain

surviving spouse, who does not have an elective share, can be completely disinherited through the notarial will.¹⁵³

The notarial will, also known as the authentic will, can be criticized as lacking confidentiality because of the presence of witnesses. In practice, notaires prefer to use each other as witnesses in lieu of two other individuals. Like American attorneys, French lawyers are bound by professional confidentiality.¹⁵⁴ This practice prevents the risk of a divulgence of information, which is sanctioned by disciplinary¹⁵⁵ and/or criminal sanctions.¹⁵⁶ Recently, in a case extensively covered in the media called “L’affaire Bettencourt,” which concerned Liliane Bettencourt¹⁵⁷ and her capacity to execute certain actions, Notaire Christian Lefevre underscored that the *Chambre des Notaires de Paris* expressed its outrage on the disclosure of the last will of a person still alive.¹⁵⁸ He penalized those who had disclosed information about the will of Mrs. Bettencourt.¹⁵⁹ In October 2012, two different notaires from Paris testified before the Justice on their role in that case.¹⁶⁰

Will contests based on fraud in execution or the loss of the original will are also absent in France due to the role of the notaire as custodian of the will.¹⁶¹ After the will is authenticated by a notaire’s signature, it should be kept in the notaire’s office. The notaire has a role of preservation of the instrument,

circumstances, set forth below, it may also create a *r serve* in favor of a spouse, but this *r serve* is always subject to the children’s forced shares, and can be set aside by will, whereas the forced share of the children may not be.

Id.

¹⁵³ CODE CIVIL [C. CIV.] art. 764 (Fr.):

Save intention to the contrary expressed by the deceased in the way provided for in Article 971, a spouse entitled to inherit who actually occupied, at the time of the death, as his or her main habitation, a lodging belonging to the spouses or fully depending upon the succession, has on this lodging, until his or her death, a right of habitation and a right of use on the furniture, included in the succession, with which it is fitted.

¹⁵⁴ See *Check and Recourse*, *supra* note 125.

¹⁵⁵ Ordonnance 45-1418 du 28 juin 1945 relative   la discipline des notaires et de certains officiers minist riels, Art. 2 [Ordonance 45-1418 of June 28, 1945 relating to the Discipline of Notaries and Certain Ministerial Officers, Art. 2], JOURNAL OFFICIEL DE LA R PUBLIQUE FRAN AISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 29, 1945, p. 3926 (declaring that the divulcation of a secret constitutes a breach of professional duties and also a breach to honor and probity).

¹⁵⁶ CODE P NAL [C. P N.] art. 226-13 (Fr.).

¹⁵⁷ Liliane Bettencourt is one of the principal shareholders of L’Oreal. *Liliane Bettencourt*, N.Y. TIMES, http://topics.nytimes.com/topics/reference/timestopics/people/b/liliane_bettencourt/index.html (last visited Nov. 30, 2013).

¹⁵⁸ Christian Lefevre is a notaire in Paris, and the past President of the *Chambre des Notaires de Paris*. *Notaires*, LBMB-NOTAIRES, <http://www.lbmb-notaires.com/index.php?page=notaires> (last visited Nov. 30, 2013).

¹⁵⁹ Press Release, *Chambre des Notaires of Paris, Secret Professionnel* (Oct. 12th, 2010), available at, http://www.paris.notaires.fr/sites/default/files/communiqu s/communiqu _vie_priv _octobre_2010.pdf.

¹⁶⁰ Deux Notaires de Liliane Bettencourt Entendus   la Brigade Financi re, RTL (Oct. 10, 2012, 6:39 PM), <http://www.rtl.fr/actualites/info/article/deux-notaires-de-liliane-bettencourt-entendus-a-la-brigade-financiere-7753355809>.

¹⁶¹ Compare *supra* Part I.

called “la minute,” and only one copy is given to the testator.¹⁶² In addition, the notaire has the obligation to record the will in a database, *Fichier Central des Dispositions de Dernieres Volontes* (FCDDV).¹⁶³ The lawyer subsequently in charge of a succession file then has a duty to consult this database to know whether the decedent had made a will or not.¹⁶⁴ Furthermore, the registration cost is low¹⁶⁵ and the will database is an effective guarantee that the testator’s wishes will be respected. The database has been recently enlarged to include documents from all the European states that are members of The European Network of Registers of Wills Association, following a request from the European notaires.¹⁶⁶ Today, as a result, a notaire in France can consult the database in Belgium or Poland through the European Network of Registers of Wills Associations.¹⁶⁷ In a world where people are mobile and living in different countries, this register is an efficient and effective way to guarantee that wills are correctly executed after the testator’s death, and should be further expanded to an international database. At a time when the Internet has revolutionized worldwide exchanges, creating an international database should not be difficult. If each continent creates this type of database, then an international one may be generated.

IV. LESSONS FOR AMERICAN PROBATE LAW

If the goal of the American probate system is to minimize will contests, then it is worth evaluating the French system, which has managed to avoid a high number of will contests.¹⁶⁸ There are many useful characteristics of the French system that may be easily adaptable to the American system.

The first aspect of the French system that could be imported to the United States is a national registry for wills. The registry would consist of a centralized

¹⁶² Deeds are kept for 75 years in the notaire’s office, and then are held by the National Archives. CODE DU PATRIMOINE art. R212-15 (Fr.). See also *France: Registering and searching for wills*, ASSOCIATION DU RÉSEAU EUROPÉEN DES REGISTRES TESTAMENTAIRES, <http://www.arert.eu/France-EN.html?lang=fr> (last updated June 26, 2012).

¹⁶³ *France: Registering and searching for wills*, *supra* note 162. FCCDV was created after approval of the Convention of the Council of Europe signed in Basle on May 16th, 1972 that related to the wills database. The notaire provides to the database the name, the date of birth, the place of birth of the testator, as well as the date of the will. Convention on the Establishment of a Scheme of Registration of Wills, Council of Eur., May 16, 1972, available at <http://conventions.coe.int/Treaty/en/Treaties/Html/077.htm>. The registration is secret until the death of the testator. *France: Registering and searching for wills*, *supra* note 162.

¹⁶⁴ *France: Registering and searching for wills*, *supra* note 162. Today, consultation of will database is made electronically, and the notaire receives the result in several minutes. *Id.*

¹⁶⁵ The cost of the registration is €10.70 per will. *Id.*

¹⁶⁶ See *Members and Partners*, ASSOCIATION DU RÉSEAU EUROPÉEN DES REGISTRES TESTAMENTAIRES, <http://www.arert.eu/Members.html?lang=fr> (last visited Nov. 30, 2013); Convention on the Establishment of a Scheme of Registration of Wills, *supra* note 163.

¹⁶⁷ *Members and Partners*, *supra* note 166.

¹⁶⁸ Professor Langbein has offered several excellent arguments from a comparative analysis explaining why will contests are far more prevalent in the United States than in Europe, including the lack of a forced share for children under wills, the jury trial system that favors sympathetic and disinherited children, the “loser pays” allocation of the costs of litigation, the lack of anticipatory relief, and the difficulty of staffing the probate bench. Langbein, *supra* note 1, at 2042–44.

location to deposit official wills upon their execution to ensure that they do not disappear or encounter tampering.¹⁶⁹ Officials registering the wills could check the will to ensure its compliance with statutory formalities before its registration. For example, officials could check for the testator's signature and the requisite number of witnesses.

Furthermore, the French state's involvement during the life of the testator to ensure his testamentary capacity¹⁷⁰ could be integrated in the United States by expanding the antemortem probate process, which currently only exists in a few states.¹⁷¹ As previously discussed, this probate process seeks to preserve the testator's intent by administering the will during the testator's lifetime and opening his will to challenges while he is still alive, notifying all possible heirs who might contest the will.¹⁷² At the probate hearing, if the testator is proved to have the necessary capacity and there is no fraud or undue influence, then the will stands as valid and can no longer be subject to attacks after the testator's death.¹⁷³ This early intervention of a judge in the probate process permits the involvement of a testator in determining his capacity, resolving the issue before the evidence of capacity no longer exists due to the testator's death. This is similar to the French judges' intervention in determining testator capacity and protecting those testators without capacity.¹⁷⁴

However, one aspect of the French system that cannot easily be imported into the American landscape is the notaire system.¹⁷⁵ This is primarily because the federalist system in the United States leaves the subject of wills to the

¹⁶⁹ Such wills registration does exist in certain American states, but is not widely used. *See, e.g.*, N.Y. Surr. Ct. Proc. Act Law § 2507 (McKinney 2013). Such registration is also available in some jurisdictions for premarital agreements. In certain European countries, furthermore, premarital agreements must be registered to protect creditors. Margaret Ryznar & Anna Stepien-Sporek, *To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context*, 13 CHAP. L. REV. 27, 50 (2009).

¹⁷⁰ *See* discussion *supra* Part III.B (describing the protections afforded to vulnerable testators in France).

¹⁷¹ *See supra* notes 65–66 and accompanying text.

¹⁷² *See* ARK. CODE ANN. § 28-40-202 (2013); N.D. CENT. CODE § 30.1-08.1-01 (2013); OHIO REV. CODE ANN. § 2107.081 (2013).

¹⁷³ Dara Greene, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 663 (1999). There are, however, a few drawbacks to antemortem probate, including the necessity of the testator to confront contestants in court (creating discomfort and family disunity), the openness of the process to the public, and the litigation costs that may deplete the funds of the estate. *Id.* at 671–72.

¹⁷⁴ *See* discussion *supra* Part III.B. One author has also urged the use of the concept of the French notaire in an antemortem probate system that utilizes a mediator, arguing that the notaire already has similar functions to that of the American mediator. The author seeks to incorporate the expertise of the notaire into the American mediation system, particularly in transactional and probate situations. Greene, *supra* note 173, at 678–79.

¹⁷⁵ *See* Reina, *supra* note 3, at 815 (arguing for the introduction of an American notaire system similar to the French one); *but c.f.* Celeste M. Hammond & Ilaria Landini, *The Global Subprime Crisis as Explained by the Contrast between American Contracts Law and Civil Law Countries' Laws, Practices, and Expectations in Real Estate Transactions: How the Lack of Informed Consent and the Absence of the Civil Law Notary in the United States Contributed to the Global Crisis in Subprime Mortgage Investments*, 11 J. INT'L BUS. & L. 133, 168–69 (2012) (suggesting that American transactional attorneys could learn how to better serve their clients from understanding the Civil Law notary system).

states,¹⁷⁶ which results in the localization of wills laws. Although the Uniform Probate Code¹⁷⁷ has prompted many states to standardize certain aspects of wills law,¹⁷⁸ each state has promulgated its own wills law. Furthermore, will attorneys in the United States do not separate themselves from the rest of the legal field; they are not organized as a specialized subset of American attorneys and do not receive additional education or receive state authority in their work, which makes them less organized as a group than notaires.¹⁷⁹

Although it is not realistic to give wills attorneys powers equivalent to those of French notaires, it is possible for drafting attorneys to take certain measures to guarantee testamentary intent of their clients, such as videotaping the client or having the client write letters explaining her intent. An American attorney can also closely document a wills drafting case as it progresses such that in the event of a will contest, the attorney may provide evidence of testamentary intent retrospectively.¹⁸⁰ These changes can be accomplished by simply communicating to American attorneys the best practices in documenting testamentary intent. Furthermore, drafting attorneys can counsel their clients about the risk of will contests, and advise them of ways to alleviate them, such as by informing heirs of the testator's plans or by using no-contest provisions in the will.¹⁸¹

In sum, there are certain lessons that American wills law can take from its French counterpart to minimize will contests. Any resulting progress in guaranteeing testamentary intent in the United States would be an improvement in reducing the number of will contests in the United States.

V. CONCLUSION

Will contests are a complex matter. On the one hand, they have the potential to vindicate testator's intent by revealing undue influence or fraud. On the other hand, they may lack merit and serve as personal vendettas for the disinherited. In the case of frivolous will contests, the estate risks depletion and prolonged probate. Any jurisdiction's probate law must balance these various concerns in formulating the appropriate approach to will contests.

¹⁷⁶ Louise Weinberg, *Fear and Federalism*, 23 OHIO N.U. L. REV. 1295, 1326 (1997).

We can all recognize some of the subject-matters that recur in the three categories set up in this familiar (wrong) account of American federalism. Matters governing land, wills and estates, family law, education – these are all traditionally said to be within exclusive state governance, or at least 'traditionally for the states.' In this thinking, it would be wrong and even unconstitutional if Congress or the Supreme Court purported to make law on the subjects of land, wills, divorce, or schooling.

Id.

¹⁷⁷ Kelly, *supra* note 4, at 855 (noting that the Uniform Probate Code has been influential as a model statute since the 1960s).

¹⁷⁸ On the required number of witnesses to attest a will, compare *DeHart v. DeHart*, 986 N.E.2d 85, 94 (Ill. 2013); *In re Estate of Holmes*, 101 So. 3d 1150, 1154 (Miss. 2012) (Pierce, J., dissenting); *Whitley v. Md. State Bd. of Elections*, 55 A.3d 37, 55 (Md. 2012).

¹⁷⁹ Lisa Penland, *What a Transactional Lawyer Needs to Know: Identifying and Implementing Competencies for Transactional Lawyers*, 5 J. ASS'N LEGAL WRITING DIRECTORS 118, 127–28, 130 (2008).

¹⁸⁰ See *supra* notes 62–66 and accompanying text.

¹⁸¹ See *supra* notes 58–62 and accompanying text.

Nevertheless, it is important for probate law to deter frivolous will contests, which the American system has been failing to do. French law has managed to significantly reduce will contests by comparison. While the creation of a system identical to that of the French notaires may be unrealistic for the American landscape, it is possible to implement smaller reforms resulting from a comparative approach: a registry of wills could be created, the antemortem probate system could be expanded, and American lawyers could be more diligent in recording testator's intent. In the meantime, however, testator's intent continues to be undermined in the United States due to the proliferation of will contests in the American probate system.