Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests

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

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American probate law has not yet managed to prevent will contests and not every will executed will be ultimately upheld. The most common grounds for will contests are undue influence, testamentary capacity, and fraud. These will contests have significant costs, which include failing to give effect to testator’s intent and high litigation and decision costs. In fact, the most significant challenge that exists in American probate law today is the frequent inability to honor testamentary intent due to will contests brought by disgruntled relatives. On the other hand, a legal system that has nearly eliminated will contests on the grounds of undue influence and fraud is in France. This Article seeks to extract lessons from the French probate system to minimize will contests in the United States.

I. INTRODUCTION

The wrought-iron will disposing of a testator’s estate has not yet evolved in the United States: American probate law has not managed to completely eliminate will contests.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 accusations of which invalidate so many wills today. These contests have huge costs, which include

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1 In many state jurisdictions, people may also bring a tort action for the interference with an expectancy. JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 215 (2009). 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 I. Langbein, Will Contests, 103 Yale L.J. 2042 (1994) (book review).

2 Jeffrey A. Schoenblum, Will Contests—An Empirical Study, 22 REAL PROP. PROB. & TR. J. 607, 646–52 (1987) (finding that 74% of will contests involved allegations of undue influence or lack of testamentary capacity versus 14% of will contests that questioned the adherence to required formalities).
failing to give effect to testator’s intent and high litigation and decision costs, as well as the use of limited judicial resources. In fact, the most significant challenge that exists in American probate law today is the frequent inability to honor testamentary intent due to will contests brought by disgruntled relatives and friends.

On the other hand, a legal system that has nearly eliminated will contests on the grounds of undue influence and fraud is in France. French wills law encounters very few cases litigating the validity of a will, and of these, all concern issues of sufficient will formalities instead of lack of testator’s capacity, fraud, and undue influence. Therefore, while France is currently addressing other issues in its wills law, those related to will contests have largely been resolved.

In general, France’s wills law is far more dynamic in comparison to its United States counterpart, in large part due to the influence and annual conventions of will drafters, known as notaires. Notaires raise substantive legal issues at these conventions and effect change in the legal substance based on their daily

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3 “The testator's intent is the polestar and must prevail.” In re Houston's Estate, 414 Pa. 579, 102 A.2d 592 (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 (2002-03) (showing how judges use undue influence to undo a testator’s intent).

4 “‘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.’” Daniel B. Kelly, Toward Economic Analysis of the Uniform Probate Code, 45 U. Mich. J.L. Reform 855, 894 (2012). A no-contest clause—that would disincentivize beneficiaries from contesting the will—is not valid in all states, but even if when it is, there are costs to it, as well. Id.

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 generally Reina, supra note 3, at 809–811. See also discussion infra Part III.

7 For example, see SYKES ANDERSON, http://www.sykesanderson.com/Service_France/service_france_probate_faq1.asp (last visited Feb. 27, 2013) (noting the notaire system’s lengthy probate process, which creates issues for international heirs).

8 For extensive treatment of the French notaire system, see infra Part III.
experience with their clients. This process has contributed to the very substantive legal changes in French wills laws that have nearly eliminated will contests based on fraud and duress.

Introducing a separate system of transactional lawyers who deal with wills and influence the field of wills law, such as the notaires, is unrealistic given the structure of American attorneys and the federalism that facilitates states to undertake their own wills law. Nonetheless, there are elements of the French system that can be introduced to minimize American will contests. These insights can provide guidance for the states to improve their approaches to wills.

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 facilitating will contests based on undue influence, testamentary capacity, and fraud, as well as the American efforts to prevent them. Part III analyzes France’s more successful efforts to prevent such will contests. Finally, Part IV considers the implications of 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 somewhere between 3% and 5% of all wills, which, given the number of will contests, is a significant number. The costs of these contests have prompted

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9 See infra Part III.C.
10 Id.
11 See infra Part IV.
12 Id.
13 Id.
14 “Studies have shown that the number of probates that lead to will contests range between three percent, see Jeffrey P. Rosenfeld, Will Contests: Legacies of Aging and Social Change, in Inheritance and Wealth in America 173, 174 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998), to one percent, see Jeffrey A. Schoenblum, Will Contests—An Empirical Study, 22 REAL PROP. PROB. & TR. J. 607, 611 (1987), to one quarter of one percent, see Edmond Nathaniel Cahn, Undue Influence and Captation: A Comparative Study, 8 Tul. L. Rev. 507, 518 & n.58 (1934) (examining data from New York courts in the early 1930s). These statistics may not seem striking at first, but because ‘there are millions of probates per year, one-in-a-hundred litigation patterns are very serious.’ John H. Langbein, Will Contests, 103 YALE L.J. 2039, 2042 n.5 (1994) (book review).” David Horton, 101 GEO. L.J. 61, 86 n.189 (2012).
calls for reform. The most significant cost is the undermining of the testator’s intent, the protection of which is the overarching theme of American trusts and estates law. However, the financial cost of the litigation depletes the estate, as well. Before turning to the resulting efforts to curtail will contests, it is important to first consider the law facilitating such contests.

A. Grounds for Will Contests in American States

Generally, only interested parties have standing to pursue will contests, generally understood as heirs at law and devisees under a previous will. Practically speaking, this results in mostly relatives, caretakers, or close friends of the decedent having standing, who 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 fraud or undue influence. This desire may have a significant sentimental component, as small estates are as highly contested as major ones.

16 “When individuals exercise the right of testamentary freedom, courts make every effort to adhere to the testator’s expressed or construed intent.” Reid Kress Weisbord, Wills for Everyone: Helping Individuals Opt Out of Intestacy, 53 B.C. L. REV. 877, 885 (2012).
17 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.”).
18 See, e.g., IND. CODE § 29-1-7-17 (2013) (limiting contests to interested persons).
20 Horton, supra note 14, at 86–87.
21 “[S]maller estates generate at least as much, if not more, controversy than larger estates.” Schoenblum, supra note 2, at 615.
The most common grounds for will contests are testamentary capacity and fraud, but most of all, undue influence. In many American jurisdictions, undue influence is recognized to occur when an influence was exerted on the testator that overpowered the testator’s mind and free will, and produced a will that would not have been executed but for the influence. Many state jurisdictions have a presumption that there was undue influence if a confidential relationship, such as doctor-patient or attorney-client, existed between the testator and the beneficiary exercising undue influence, and the will’s disposition seems unnatural and favors the person exercising undue influence. 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.

For every reported case of undue influence, many more cases settle pre-trial. Although undue influence is the most common

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22 Eunice L. Ross & Thomas J. Reed, Will Contests § 7:21 (2d ed. 1999) (noting that undue influence is the most commonly asserted ground for invalidating a will).
23 DukeMinier, supra note 1, at 180–85.
24 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 (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 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 Id. at 574.
ground for a will contest, it is rarely successful. Nonetheless, many judicial and private litigants’ resources are wasted in these will contests in the United States. Neither the English common law tradition, which underlies American wills law, nor the French civil system encounters a similarly high volume of undue influence will contests. Louisiana, which has a civil law tradition, is a singular exception to the American popularity of undue influence, likely because only in this American jurisdiction do children receive a forced share of their parents’ estate, which decreases their need to contest their parents’ will.

Another ground for will contests is the alleged lack of capacity by the testator to create a will. However, the bar for 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

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27 Schoenblum, supra note 2, at 647.
28 “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.” Ronald J. Scalise Jr., Undue Influence and the Law of Wills: A Comparative Analysis, 19 D.U.K. J. COMP. & INT’L L. 41, 99 (2008). For an analysis of French civil law on this topic, see infra Part III.A.
29 “What is important for present purposes is that the American rule, by allowing liberal disinherance 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 L.A. 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.”).
the property disposition he is making. In practice, issues of capacity are often related to undue influence. Fraud and duress are additional grounds for a will contest. Fraud is found when the testator makes a disposition due to a deliberate misrepresentation made with the intent to deceive the testator and to influence the testamentary disposition. Fraud may occur in the inducement or in the execution of the will: the former is when a misrepresentation causes a testator to execute or revoke the will, to refrain from executing or revoking a will, or to make provisions in the wrongdoer’s favor. Fraud in the execution, meanwhile, occurs when someone intentionally misrepresents the character or the contents of the document signed by the testator, which does not carry out the testator’s intent. A will provision resulting from fraud is invalid, and the remaining will stands unless the fraud affecting the entire will or the affected provisions are inseparable from the remainder of the will. Duress, meanwhile, is when undue influence becomes overtly coercive. Finally, will contests may also challenge whether a particular will met the requisite formalities. Each state has different requirements for will formalities, but generally, witnesses not receiving a bequest need to attest to the will. the testator must sign

31 DUKE MINIER, supra note 1, at 159.
32 “Issues 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 28, at 99–100.
33 See, e.g., Christian Turner, Law’s Public/Private Structure, 39 FLA. ST. U. L. REV. 1003, 1037 (2012) (noting that wills are “thought to be unusually prone to fraud and coercion”).
34 DUKE MINIER, supra note 1, at 207.
35 Id. at 208.
36 Id.
37 Id. at 207.
38 Id. at 210.
39 See, e.g., Wayne M. Gazur, Essay, 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).
40 “[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 16, 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 LAW & LITERATURE 59, 68 (2012). However, some state jurisdictions permit such an interested witness to take the amount to
the will, and in some states, there must be a writing. Some states permit holographic wills as an exception to these strict formalities. The goal of such formalities is to ensure that the will is authentic in order to give effect to the testator’s intent. If a will fails to meet even one of the statutory formalities, then the will is subject to a will contest.

In sum, American law offers numerous grounds for will contests. Although will contests can vindicate testator’s intent if the will fails to reflect it due to fraud or undue influence, will contests also have significant costs. Therefore, American states have

which he or she would be entitled under intestacy law. See, e.g., IND. CODE 29-1-5-2 (2013).

41 DUKEMINIER, supra note 1, at 227.
42 “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.” Mark Glover, The Therapeutic Function of Testamentary Formality, 61 U. KAN. L. REV. 139, 166–67 (2012). 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 (Aspatore 2013), available at Westlaw 2012 WL 4964461 at *3. For a list of states allowing holographic wills, see DUKEMINIER, supra note 1, at 269.
43 Glover, supra note 42, at 149 (“The primary purpose of these formalities is to ensure that the will accurately and reliably reflects the testator’s true testamentary intent.”). But see DUKEMINIER, supra note 1, at 264 (“Since the 1700s, Pennsylvania has not required attestation for formal wills, yet there is no evidence that fraud has run wild in Pennsylvania.”); 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.
44 See, e.g., Sean P. Milligan, Note, The Effect of a Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court, ST. MARY’S L.J. (2005) (noting strict judicial adherence to statutory formalities, resulting in the invalidation of wills with even harmless technical errors).
45 See supra notes 4, 15–17 and accompanying text.
endeavored to curtail will contests through various techniques, considered next.

B. Efforts to Prevent Will Contests in the United States

To the extent that will contests undermine testator’s intent by invalidating a proper will, the aim of a system seeking to protect testator’s intent, such as American wills law, is to avoid will contests, particularly frivolous ones that stem from people’s unhappiness rather than a sincere concern for testator’s intent. American law has a few mechanisms to safeguard testamentary intent against will contests, considered in turn.

One protection against will contests is to avoid executing a will entirely. If there is no will, there can be no will contest. As a result of this observation, the will substitute industry has thrived. 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. The most prominent will substitute is the revocable trust, which serves the same purpose of disposing of a testator’s property. However, trust contests have

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46 “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.” Patricia A. Cain, *Tax and Estate Planning for Same-Sex Couples: Overview and Detailed Analysis*, American Law Institute - American Bar Association Continuing Legal Education (2012).

47 “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).

48 *Dukeminier, supra* note 1, at 394–95.

49 “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, supra* note 1, at 436. “A trust is, functionally speaking, an arrangement whereby a trustee manages property in a fiduciary capacity for one or more beneficiaries. The trustee holds legal title to the property and the beneficiaries hold equitable title. The trustee can be one of the beneficiaries of the
now replaced will contests, suggesting that more substantial solutions are needed to prevent beneficiaries from contesting property arrangements made by their older generation.\textsuperscript{50} More importantly, it is odd to suggest abandoning the will entirely, if it is instead possible to reduce the possibility of will contests through legal reforms.

Another protection against will contests is the common presumption that the testator was competent to make a will.\textsuperscript{51} This presumption places the burden of introducing contrary evidence on the contestant of a will.\textsuperscript{52} On the other hand, there is a presumption of undue influence in certain states, which is a strong counterweight to the favorable presumption of competency.\textsuperscript{53}

An additional presumption favoring the testator is that a will that is lost, 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.\textsuperscript{54} This allows the testator’s intent to be given effect despite the loss of a will in certain circumstances.\textsuperscript{55}

Many jurisdictions also permit testators to include a no-contest clause in their wills, which state that beneficiaries who contest the will lose their bequest under the will.\textsuperscript{56} Statutory trust, but the same person cannot be the sole trustee and sole beneficiary, because then the trustee would owe no duties to anyone except himself.”\textsuperscript{Id.} at 397.

\textsuperscript{50} “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 greater numbers of trust litigation matters. An estimated 15 million lawsuits will be filed in the United States this year.” Richard E. Llewellyn II, \textit{Selecting a Successor Trustee—Why The Usual Suspects May Not Be Your Best Choice}, PROB. \& PROP., Jan.–Feb. 2013, at 47–48.

\textsuperscript{51} \textsc{Will Contests} § 7:9 (2d ed.) (“[M]ost states presume that every will proved to be duly executed is valid.”)

\textsuperscript{52} J. Edward Spar, M.D., Attorney’s Guide to Competency and Undue Influence, 13-SUM NAELA Q. 7, 8 (2000). Even “when 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.” Estate of Goetz, 253 Cal. App. 2d 107, 114 (1967).

\textsuperscript{53} 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 . . . .”).

\textsuperscript{54} Dukeminier, supra note 1, at 289.

\textsuperscript{55} However, state statutes may change this approach. Id. at 290.

\textsuperscript{56} See, e.g., UNIF. PROBATE CODE § 2-517 (amended 2011).
permission of such clauses aims to avoid unnecessary contests and reduce delays in the probate process. 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. For this clause to have effect, nonetheless, the testator would have to necessarily leave the beneficiary an amount worth not contesting. Furthermore, not all jurisdictions permit no-contest clauses. However, the valid and legal use of no-contest clause in state jurisdictions allowing such clauses does result in a testator’s ability to disincentivize beneficiaries from launching a will contest.

There are also several techniques that drafting attorneys may use to guard against future will contests. For example, attorneys may retain copies of the will and include a self-proving affidavit in a will. Furthermore, an attorney may videotape the testator to show that the testator had capacity. An attorney may also instruct the testator to explain his or her intentions in a separate letter. These tools may be used by lawyers to prevent will contests after the testator’s death.

Finally, another noteworthy approach of a minority of American states to deter will contests is to permit probate of the will during the testator’s lifetime through ante-mortem probate. Only Arkansas, North Dakota, and Ohio permit such ante-mortem probate statutes, which authorize a person to initiate during life “an adversary proceeding to declare the validity of a will and the testamentary capacity and freedom from undue influence of the person executing

59 See, e.g., IND. CODE § 29-1-6-2 (2013). For mention of the states that prohibit no-contest clauses in wills, see DUKEMINIER, supra note 1, at 199 (noting that Indiana and Florida do not enforce no-contest clauses).
60 DUKEMINIER, supra note 1, at 244.
61 “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 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.” Langbein, supra note 1, at 2046.
62 Id.
the will. All beneficiaries named in the will and all the testator’s heirs apparent must be made parties to the action.”

This is an effective procedure to allow the court to evaluate the testator’s capacity, freedom from undue influence or fraud, and intent during the testator’s lifetime, which has the obvious benefit of the presence of the testator at the proceedings.

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, whose wills law is considered next.

III. WILL CONTESTS IN FRANCE

Like Americans, the French avoid contemplating their own deaths by procrastinate writing their wills. 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, and they therefore write fewer wills than Americans to change such a disposition. In fact, less than 10% of people in France die with a will (testate).

Nonetheless, French wills encounter proportionately fewer contests than American ones. This is due to the policies of French state; namely, its legislation protecting vulnerable testators, as well

64 Compare infra Part III.B.
65 DUKEMINIER, supra note 1 (“One reason is that unpleasantness of confronting mortality invites procrastination.”)
66 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) (citing CODE CIVIL [C. CIV.] art. 913-914-1 (Fr.)) (“French law provides forced heirship rights for a testator’s spouse and descendants, or, in the absence of issue, the testator’s ancestors.”)
68 In 2012, the Cour de cassation heard just five cases relating to wills. COUR DE CASSATION, http://www.courdecassation.fr/jurisprudence_2 (last visited Feb. 27, 2013) (providing a searchable case history available in French).
as the existence of the notaire\textsuperscript{70} (in France—a particular type of lawyer dealing with trust and estate matters) and the notarial will.

\textbf{A. Grounds for French Will Contests}

French law knows four types of wills: the holographic will\textsuperscript{71} (\textit{testament olographe}) entirely written, dated, and signed by the hand of the testator; the authentic will,\textsuperscript{72} also known as the public will or notarial will (\textit{testament authentique}), dictated by the testator in the presence of the notaire and two witnesses or two notaires who draw up the will on his behalf; and the secret will\textsuperscript{73} (\textit{le testament mystique}) not much used, written by the testator and given to the notaire who seals the envelope in the presence of witnesses. Finally, there is the international will\textsuperscript{74} (\textit{testament international}) permitted by the Washington Convention of 1973,\textsuperscript{75} 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 document. Public policy aiming to protect the authenticity of the will requires that all of these

\textsuperscript{70} For additional background on the French notaire system, see Neville L. Brown, \textit{The Office of the Notary in France}, 2 Intl. & Comp. L.Q. 60 (1953). \textit{See also} Peter E. Herzog & Martha Weser, \textit{Civil Procedure in France} 102 (1967); John Langbein, \textit{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”).

\textsuperscript{71} CIVIL CODE [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.”).

\textsuperscript{72} See infra Part III.C.

\textsuperscript{73} 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.”

\textsuperscript{74} For background on the emergence of international wills, see generally Peter Chase, \textit{The Uniform International Will: The Next Step in the Evolution of Testamentary Disposition}, 6 B.U. INT’L L.J. 317.

four types of wills need to be written and must be made by only one testator.\(^7\)

It is possible to contest a will in France but such contests are governed by the law.\(^7\) The grounds for will contests in France are the testator’s lack of capacity based on error, fraud, violence,\(^7\) as well contest of the testator’s witting and the lack of will formalities.\(^7\)

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, which is the French equivalent to the United States Supreme Court, has held\(^8\) that a third party cannot contest a will. An additional limitation on will contests is that they are barred after five years\(^9\) 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,\(^10\) France has fewer contests of this type. In 2012, for example, the Cour de cassation heard five cases relating to wills: three regarding formalities, one regarding a contest of the writing, and only one relating to undue influence.\(^11\) Meanwhile, will contests based on undue influence are very common in the United States.\(^12\)

Undue influence claims are no doubt further limited in France by the government’s role in protecting people from abuse and the prohibition of certain persons to accept bequests. The differing levels of protection for vulnerable testators, which protect the integrity of their wills, are considered next.

\(^7\) The oral will and Joint will are void. 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.”)

\(^7\) 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).

\(^7\) C. Civ. art. 901 (Fr.) (“To make an inter vivos gift or a will one must be of sound mind. Liberality is void when the consent was vitiated by error, fraud or violence.”)

\(^7\) Id.

\(^8\) Cassation Court, 1ere chambre civile, November 4th 2010.

\(^8\) 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.”)

\(^10\) See supra Part II.

\(^11\) See COURS DE CASSATION, supra note 59.

\(^12\) See supra Part II.
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.” The general spirit of the Civil Code is individualistic, liberal, and defended by the philosophers of the 18th Century. The Code, however, forced a traditional family by its structure, which is evidenced in the Book 1, entitled “The Persons,” that includes more than 500 articles.

French law penalizes a person who abuses the weakness of another. The Cassation Court has held that undue influence is an offence that should be sentenced by three years’ imprisonment and a fine of € 375,000. However, the French civil code did not recognize that one mentally weakened should be protected until 1838, and the protection of those with a mental illness was developed in 1968, when the law separated the medical treatment and a protection of the estates. Specifically, the law created three types of protection of the adult, depending on the severity of the condition of his mental illness: sauvegarde de justice, curatelle and tutelle.

The first is sauvegarde de justice, which is a temporary measure intended to protect the adult against a risk of dissipation of his assets and acts opposed to his interest. Curatorship “Curatelle,” the 2nd grade, may apply in a situation wherein the person has a need of being advised or supervised in civil transactions, while otherwise being able to act for himself. 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

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86 1 C. CIV. (Fr.)
87 Cassation Court, November 15th, 2005.
88 FR. PENAL CODE, Art 223-15
89 Act of June 30, 1838. For details about the 1838 legislation, see CHRISTIAN DADOMA & SUSAN FARRAN, FRENCH SUBSTANTIVE LAW, KEY ELEMENTS 29 (1997).
required by French law. 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 protected continuously in acts of civil life. This level of protection requires a serious deterioration of mental or bodily faculties, such as Alzheimer’s disease.\textsuperscript{91} 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.\textsuperscript{92}

These protections can be requested either by the vulnerable person; his spouse, partner, or relatives; or the State. The State intervenes in such a case by empowering a specific judge, le juge des tutelles,\textsuperscript{93} 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.

When it comes to the execution of such wills, the legal protection afforded by this protection process prevents will contests. As mentioned, since the legal reform of 2007,\textsuperscript{94} 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. As a neutral party, the judge could decide whether or not the testator has the mental capacity to make a will. In practice, the judge will allow the incapable person to make a will through the expertise of the notaire\textsuperscript{95} and the act authentic in order to protect the authenticity of the will.

It is important to note that the guardianship’s decision related to mental capacity is published on a specific registry called the “repertoire civil.” The registration is mentioned in the margin\textsuperscript{96} of the birth certificate, which helps the lawyers involved to ensure the ability of their clients by simply requesting a copy of the birth certificate.

\textsuperscript{91} Protected adults account for nearly 800,000 people in France, more than 1\% of the population. Most of them are elderly. Observatoire National des Populations “Majeurs Protégés,” union national des associations familiales
\textsuperscript{92} C. Ctv. art. 476 ¶2.
\textsuperscript{93} This is a single judge at the tribunal d’Instance.
\textsuperscript{94} Law 2006-728 of June 23rd, 2006 (reforming succession and protecting adults).
\textsuperscript{95} See infra Part III.B.
\textsuperscript{96} 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.
French law goes further to protect against will contests by voiding wills made in favor of particular persons or particular professions.\textsuperscript{97} Inabilities to receive have been enacted to prevent theft from the estate and undue influence. They 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 concerned 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,\textsuperscript{98} but also 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 they had the direction of the soul of the person they managed, and if the will was made for the disease from which the testator died;\textsuperscript{99} and also to guardians, unless clearance of accounts to the judge has been made.\textsuperscript{100} The civil code extended this inability to receive under a will to everyone working in an institution housing the elderly or psychiatric.\textsuperscript{101} Other professionals such as notaires also cannot become a beneficiary of a will from their clients, as they cannot intervene in any deeds involving their parents, descendants, collaterals and any other family members until the familial degree of uncle or nephew.\textsuperscript{102} Some other beneficiaries also need to have specific authorization from the State to be able to receive through a will, which is the case of 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.\textsuperscript{103} This type of regulation prevents sectarian influence.

Will contests are therefore reduced by these efforts of French law to protect vulnerable persons. The State has commissioned this protection through the representation and control of the notaire and the use of the authentic testament.

\textsuperscript{97} 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. C. Civ., art. 911 (Fr.).
\textsuperscript{98} C. Civ. art 909 (Fr.).
\textsuperscript{99} Appeal court of Angers, January 1st, 1970.
\textsuperscript{100} C. Civ. art. 905 (Fr.).
\textsuperscript{101} C. Civ. art. 1125-1 (Fr.).
\textsuperscript{103} Art. 6 and 11, Law of July 1st, 1901 (relating to the creation of an association).
C. Existence of the Notaire and the Authentic Will

Even if duress, fraud, and undue influence could be found in the execution of a will, these issues will mainly concern the holographic will, which is that type of will written by the testator himself in his own handwriting. 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 will contests.

Appointed by the Minister of Justice, Notaries are vested with prerogatives of official authority that they receive from the State, 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. They are self-employed professionals who are paid by their clients on the basis of a rate fixed by the State for the services they provide, and only paid when a file is signed. This strict regulation of fees, controlled every year, discourages the notaires’ malpractice in the matter of family law, their traditional area of law practice.

The notaire, “quite unknown in the Anglo-American legal family,” is, in other words, a particular type of lawyer who has a high level of legal education and who draws up authenticated

104 See supra Part III.A.
105 Under the terms of Article 1 of the Order dated November 2nd 1945, “Notaries are public officers authorized to record any instrument or contract the parties to which are obliged, or may wish, to invest with the type of authenticity associated with public authority instruments.”
106 Decree 78-262 of March 8th 1978.
107 Id.
108 “With the result that the Common Law has nothing comparable to the ‘acte authentique’ (art. 1312 Code civil)” “The American ‘Notary Public’ has nothing in common with the Continental notary except the name” ZWEIGERT & KOZT, AN INTRODUCTION TO COMPARATIVE LAW, 368 (1998). 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.”
109 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
contracts on behalf of his clients. These authenticated contracts, which include wills, provide significant protection against 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.”

The fact that an instrument is drawn up by a notaire, a public officer, is a guarantee of its legality and authenticity. For that probative purpose, the notaires should respect various personal and formal obligations. 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. On this aspect, the professional responsibility of the notaire can be implicated by his or her non-compliance with the role’s obligations.

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, since 2004, a “maitrise en droit” has been changed in favor of “Master 1 de droit.”

For an excellent background on the French Notaire, see Reina, supra note 3.

Professors 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. See also supra note 63 and accompanying text.

Reina, supra note 3, at 806. A notaire-authenticated “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 University Press 1987). “[G]iven [this] great credibility . . . [the document] is difficult to invalidate in post-mortem proceedings.” Id. (citing John H. Langbein, Substantial Compliance with the Wills Act, 88 HARV. L. REV. 150–51 (1975)).
Because of its authenticity, the probative value of the notarial deed is most certain since it cannot be disputed. The “acte authentique” is presumed to be valid until one challenges the act for falsity (inscription en faux), which is rare in practice and is subjected to “heavy civil and also criminal damages to the challenger.” The Cour de Cassation held that the action of a nullity request constitutes a challenge to the integrity of the notaire.

The notarial will 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 capacity of the testator. The instrument of the notarial will mentions the date, the place, the identity and signature of the testator, and the identification and signature of the notaire and witnesses. If one of these provisions is missed, the notarial will is void.

The notarial will is specific as it should be dictated by the testator to the notaire, who writes it up by himself. The Cour de

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113 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.”)
115 See Reina, supra note 3, at 811. “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.
117 C. Civ., art. 971 (Fr.) (“A will by public instrument shall be received by two Notaires or by one Notaire attended by two witnesses.”).
118 Art.6 decree 71-942 of November 26th, 1971.
119 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.”)
120 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.
Cassation recently\(^\text{121}\) annulled a will because a notaire prepared the deed in advance, after meeting his clients in a previous meeting. The Court held that the notarial will, prepared in advance, breaches the rule of dictation by the testator to the notaire and the witnesses. Because the notaires do not bring their printer everywhere they go, and because they traditionally had prepared deeds in advance, the 108\(^{\text{th}}\) Annual Convention of notaires of September 2012 suggested removing this obligation of dictation by the testator.

The Annual Convention has argued that dictation procedure is no more appropriate in practice in regards to the notaire’s duty to inform the clients, and also because it creates disputes.

Through their practices, and because of their effective organization,\(^\text{122}\) notaires tend to reform the law. For example, they also proposed, at the last Annual Convention of notaires, the possibility for a deaf or mute person to acknowledge the will by his own reading.\(^\text{123}\) A reform of formalities in authentic wills, per the notaires’ wishes, is expected to strengthen the authentic will.

As in the United States, the testator must be competent to make a will, namely to be an adult\(^\text{124}\) and be sound of mind.\(^\text{125}\) He enjoys a presumption of mental capacity.\(^\text{126}\) The notaire has a duty to check his client’s mental capacity as it is elementarily prudent to

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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.”


\(^\text{122}\) See supra note 3, at 812 n.127 (“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.”)

\(^\text{123}\) Notaire Convention.

\(^\text{124}\) Eighteen or over; French law also recognizes emancipation by court order at the age of sixteen.

\(^\text{125}\) C. Civ. art. 901 (Fr.) (“To make an inter vivos gift or a will one must be of sound mind.”)

\(^\text{126}\) 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.”)
do so. If the notaire failed this duty, his or her professional responsibility will be implicated.\textsuperscript{127} This issue has been the main topic of the 102\textsuperscript{d} Annual Convention of the French notaires in 2006 relating to vulnerable persons and the notaires’ evaluation of the insanity for the purposes of making a will. At the center of this issue are the precautions that the notaire should take. Even if drawing up a deed is a duty,\textsuperscript{128} if the notaire is not satisfied by his client’s mental capacity, he must refuse to draw up the deed,\textsuperscript{129} and this refusal is the right decision.\textsuperscript{130} Unlike American law, where testamentary freedom is important,\textsuperscript{131} the notaire will not take the risk of assisting clients whose testamentary capacity appears to be borderline. In practice, notaires prefer referring to a medical certification from the family doctor, who is the most appropriate person to attest the mental capacity of the testator. This use forges the notaire’s belief regarding the capacity of the testator and is a way to exonerate him from allegations of a breach of professional responsibility.\textsuperscript{132} 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 lawyer should, for example, instruct the client on 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. On the other hand,\textsuperscript{127} Montpellier, Court of Appeal, June 20th, 1995 (“[T]he Notary has received the will of the testatrix in her retirement home noting “that she seemed to enjoy the fullness of his intellectual faculties. The notary lacks the most elementary prudence, while he has the duty as a public officer to check the mental capacity of the testator aged of 81 years and the existence of a possible guardianship measures, that a precedent Notaire made in another files with this testator. In addition, a simple conversation with the testator would show him the incoherence of the testator’s talks.”)
\textsuperscript{128} Law of 25 Ventose an XI, March 18th 1803, Art. 3.
\textsuperscript{129} National Agreement of the Notaires Art.9, approved by the Justice Minister March 3rd, 2004.
\textsuperscript{130} Cassation Court, May 4th, 1868: Incapacity is a real motivation to refuse to draw up a deed.
\textsuperscript{131} DUKEMINIER, supra note 1, at 1–20.
\textsuperscript{132} Cassation Court, civ.1, December 18th, 1984.
the surviving spouse, who does not have an elective share, can be completely disinherited through the notarial will.\textsuperscript{133}

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 individuals. Like American attorneys, French lawyers are bound by the professional confidentiality. This practice prevents the risk of the divulgence of information, which is sanctioned by disciplinary\textsuperscript{134} and/or criminal sanctions.\textsuperscript{135} Recently, in a case heavily covered in the media called the “L’affaire Bettencourt” and which concerned Liliane Bettencourt\textsuperscript{136} and her capacity in performing some acts, Christian Lefevre\textsuperscript{137} underscores that the Chambre des Notaires de Paris expressed its outrage on the disclosure of the last will of a person still alive. He penalizes those who have disclosed information about the will of Mrs. Bettencourt.\textsuperscript{138} In December 2012, two different notaires from Paris have been heard by the Justice to understand their role in that case.\textsuperscript{139}

Will contests based on fraud in execution or the loss of the original will are also absent due to the role of the notaire as custodian of the will.\textsuperscript{140} 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, called “la minute,” and only a copy is

\textsuperscript{133} C. Ctv. 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.

\textsuperscript{134} Art. 2 Order n. 45-1418 of June 6th 1945: the divulagation of a secret constitutes a breach of professional duties and also a breach to honor and probity.

\textsuperscript{135} CRIMINAL CODE art. 226-13 (Fr.).


\textsuperscript{139} Accurate as of January 1, 2013.

\textsuperscript{140} Compare supra Part I.
In addition, the notaire has the obligation to record the will in a database, *Fichier Central des Dispositions de Dernieres Volontes* (FCDDV). 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. Furthermore, the registration cost is low, and the will database is an effective way in matters of wills and estates to guarantee that the testator’s wishes will be respected. The database has been recently enlarged to all the European States following such a request from the European notaires. 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. 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 applied after the testator’s death, and should be further expanded to become an international database.

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 high numbers of will contests. While the most notable characteristic of the French approach is the notaire system, there are also many other useful characteristics of the French system that may be more easily adaptable to the American system.

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141 Deeds are kept for 100 years in the notaire’s office, and then are held by the National Archives. Decree 79-1037 of December 3rd, 1979, Art. 17.

142 FCDDV was created in 1973 after approval of the European Council Convention 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, place of birth of the testator, as well as the date of the will. The registration is secret until the death of the testator.

143 Today, consultation of will database is made electronically, and the notaire receives the result in several minutes.

144 The cost of the registration is € 10.70 per will.


146 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 5, at 2042.
No doubt, the professional organization of the French notaires offers many lessons to the American system. The use of the notaire in the French probate system greatly alters the way that wills are both executed and administered. Despite the efficiency of the French notaire system, it is not easily transferrable to the United States.  

First, the French notaire system cannot easily be imported into the American landscape because of the federalist system, which leaves the subject of wills to the states. This results in the localization of wills practitioners and each state’s promulgation of differing wills laws. To some extent, however, the local nature of American wills practice is offset by the adoption of many states of the Uniform Probate Code either in part or in its entirety. Many states have also standardized certain will formalities, such as the required number of witnesses to attest the will. Nonetheless, wills attorneys practice locally and do no participate in national conversations aimed at resolving the inefficiencies in wills law, as the French notaires do.

Second, a notaire system in the United States would be difficult to implement because transactional attorneys 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 special education or receive state authority in their work. This therefore also prevents them from being as organized as the notaires, who meet at

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147 But see generally 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 (exploring the notion of a European notary in the context of American consumer protection); Reina, supra note 3 (arguing for the introduction of an American notaire system similar to the French one).

148 But see 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.”).

149 See Kelly, supra note 4, at 855 (noting that the Uniform Probate Code has been influential as a model statute since the 1960s).
annual conferences and contribute to the development of French wills law. American wills lawyers do not have annual conferences or a national conversation on wills, as the French notaires do.\footnote{150}

Therefore, importing the notaire feature of a civil law system may not be practicable or desirable—and given the importance of testamentary freedom, forced shares for children are also unlikely\footnote{151}—but certain other protections can be potentially imported from the French system to improve the American probate system’s protection of testator intent by minimizing will contests. Of course, these protections cannot be too burdensome on the testator’s freedom to dispose of her property as she desires, which would then be counterproductive to the goal.\footnote{152}

The first import to the American system from the French once could be a registry system for wills. This would be a centralized location to deposit official wills upon their execution to ensure that they do not disappear or encounter tampering.\footnote{153} Officials registering the wills might also provide a check of the will before its registration to ensure its compliance with formalities. For example, officials can check for the testator’s signature and the requisite number of witnesses.

\footnote{150} See supra notes 122–123 and accompanying text.
\footnote{151} 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 28, 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 McLearen, 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 supra Part III.
\footnote{152} “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.” Weisbord, supra note 16, at 877.
\footnote{153} 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 Stepień-Sporek, To Have and to Hold, for Richer or Richer: Premarital Agreements in the Comparative Context, 13 CHAP. L. REV. 27, 50 (2009).
Furthermore, the French state’s involvement during the life of the testator to ensure his testamentary capacity\textsuperscript{154} can be mimicked in the United States by expanding the antemortem probate process, which currently only exists in three states: Ohio, Arkansas, and North Dakota.\textsuperscript{155} Such probate 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. 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 without potential attacks after the testator’s death.\textsuperscript{156} This early intervention of a judge in the probate process permits the involvement of a testator in determining his or her capacity, avoiding the issue when the evidence of capacity no longer exists due to testator’s death. This is similar to the French judges’ intervention in determining testator capacity.\textsuperscript{157}

Finally, 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 a document, which becomes “an instrument with a high evidential value or probative force derived from its form and authority by whom it is prepared.”\textsuperscript{158} 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.\textsuperscript{159} Additionally, if one challenges an

\textsuperscript{154} Compare supra Part III.B (describing the protections afforded to vulnerable testators in France).
\textsuperscript{155} See supra notes 63-64 and accompanying text.
\textsuperscript{156} Dara Greene, Antemortem Probate: A Mediation Model, 14 OHIO ST. J. ON DISP. RESOL. 663, 671-2 (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.
\textsuperscript{157} See supra Part III. 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 154, at 677.
\textsuperscript{158} Reina, supra note 3, at 809.
\textsuperscript{159} Id. at 810.
authenticated document and fails, he is potentially subject to heavy civil damages as well as criminal liability.\textsuperscript{160}

Although it is not realistic to give drafting attorneys as much weight as to the French notaires because of the differing professions, 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 is happening so that in the event of a will contest, the attorney may provide evidence of testamentary intent retrospectively.\textsuperscript{161} These changes can be accomplished by simply informing American attorneys of best practices in documenting testamentary intent. Furthermore, drafting attorney can counsel their clients about the risk of will contests, and inform them of ways to alleviate them, such as by informing heirs of the testator’s plans or using no-contest provisions in the will.\textsuperscript{162}

In sum, although it is unrealistic to import the French notaire system to the American probate system, there are certain cues 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 to the continuing popularity of wills contests in the United States.

\textbf{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 a personal vendetta of a disinherited person. In the case of such 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.

Nonetheless, it is important for probate law to deter frivolous will contests, which the American system has thus failed to do. However, French law has managed to significantly reduce will contests by comparison, thus providing lessons in how to do so. While the creation of the notaire system of French lawyers is

\textsuperscript{160} Id.

\textsuperscript{161} See supra notes 60-62 and accompanying text.

\textsuperscript{162} See supra note 56 and accompanying text.
unrealistic for the American landscape, it is possible to implement smaller reforms resulting from a comparative approach: a registry of will 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.