Designation of Heirs A Modest Proposal to Diminish Will Contests

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DESIGNATION OF HEIRS: 
A MODEST PROPOSAL TO 
DIMINISH WILL CONTESTS

Calvin Massey*

Editors' Synopsis: This Article explores the topic of designation of heirs, particularly focusing on will contests that arise because of an abnormal distribution of a decedent's estate by means of a will that favors a beneficiary who is not an heir of the decedent. The Article proposes procedures that could be employed to implement designation of heirs and analyzes the problems with and utility of each procedure.

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Will contests function ideally to expose testamentary incapacity or distortions of testamentary intention produced by deceit or duress. Our tradition has been to rely on the adversarial process to discover and prove such instances, by permitting disinherited heirs and beneficiaries under a prior will to contest the validity of a will offered for admission to probate.

* Professor of Law, University of California, Hastings College of the Law. Visiting Professor, Boston College Law School, 2000-2002. I thank Fred Yen and Boston College Law School and Jack Beerman and Boston University Law School, both of which schools afforded me the opportunity to deliver an earlier version of this paper at faculty colloquia, and the participants in those colloquia, who provided valuable commentary, criticism, and suggestions. I also thank my colleagues Gail Boreman Bird, Ray Madoff, and Mary Bilder for their helpful comments. However, I claim all responsibility for the paper's deficiencies.
But the motives of such claimants are not always pure.

John Langbein observed nearly a quarter-century ago that "the odor of the strike suit hangs heavily over this field."\(^1\) And why not? Disinherited heirs or expectant devisees thwarted by a will leaving the bulk of the testator's estate to an unloved beneficiary—a charity, a second spouse, a same-sex partner, a paramour—often hire an aggressive and skilled trial lawyer who threatens to expose every unseemly or eccentric trait about the testator and the loathsome beneficiary in an effort to persuade a jury that the testator was incompetent or coerced, or both. To avoid the uncertain prospect of losing all, and in any case to avoid the diminution of the estate by legal fees, the beneficiary will settle the claim, thus "overriding the disposition desired by the testator and rewarding the contestants for threatening to besmirch his name."\(^2\)

This is not to say that all will contests lack merit. We do not want elderly Alzheimer's victims who cannot remember their names, let alone their property or their loved ones, to make binding testamentary dispositions. Nor do we want to permit anxious, dependent, elderly people facing death in lonely, and often institutional, circumstances to be "guided" to disavow their true intentions in favor of an unscrupulous adventurer on whom they may be dependent. The problem, of course, is how to improve the method by which we separate the meritorious claims from the bogus ones.

Ante-mortem probate has been suggested as one method,\(^3\) but it has

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2 Id.
3 Ante-mortem probate is claimed to be better suited to disposing of the issues commonly raised in post-mortem will contests because testamentary capacity and, to a lesser extent, undue influence, can be more accurately resolved with a living testator instead of a dead one. See Langbein, *supra* note 1, at 67, 84. Michigan enacted an ante-mortem probate law in 1883 that was poorly drafted and declared inoperative two years later by the Michigan Supreme Court in Lloyd v. Wayne Circuit Judge, 23 N.W. 28 (1885). The Michigan statute is reproduced in Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 Ark. L. Rev. 131, 185-86 (1990). The idea remained alive in academic circles, however. See David Cavers, *Ante-Mortem Probate: An Essay in Preventive Law*, 1 U. Chi. L. Rev. 440 (1934); Langbein, *supra* note 1, at 64 n.6. Three forms of ante-mortem probate have been advanced by the commentators: (1) the contest model, which envisions ante-mortem probate as akin to a post-mortem will contest (see Howard Fink, *Ante-Mortem Probate Revisited: Can An Idea Have a Life After Death?*, 37 Ohio St. L.J. 264 (1976)), (2) the conservatorship model, which envisions a court-appointed guardian *ad litem* to protect the interests of disinherited heirs and displaced
never caught on with either legislators or the bar. Perhaps this is because the three states that have adopted ante-mortem probate follow the "contest" model of ante-mortem probate. In this model, the testator initiates an adversarial proceeding against excluded heirs and beneficiaries under a prior will and eventually obtains a declaratory judgment that the testator, while possessing testamentary capacity and not acting under undue influence, validly executed the will offered for ante-mortem probate. Moving a will contest into the testator's life is an unattractive, expensive proposal for the living testator and is no more attractive for excluded heirs, who must incur the wrath of the testator by openly challenging the testator's capacity or the nature of relationships between the testator and the beneficiaries under the proffered will.

Perhaps ante-mortem probate also lacks appeal because it may not provide the certainty that is desired. If a testator's will is declared to be invalid, he may simply execute a new will, raising new and unadjudicated issues of capacity or undue influence. Even if a testator obtains a declaratory judgment of validity, he may still lack certainty that post-mortem will contests will be precluded if some of his property is sited in another jurisdiction that may not be required to recognize the ante-mortem probate decree. In any case, ante-mortem probate decrees remain open for post-mortem attack alleging fraud in the ante-mortem proceeding.

Nonprobate transfers, especially via the revocable inter vivos trust, may offer an effective method of discouraging, although not eliminating, the prospect of a contest to one's estate plan. As with a will, a revocable trust can be contested on grounds that the settlor lacked capacity or was under the undue influence of a beneficiary. However, a revocable trust fully funded during life with all the settlor's assets is difficult to attack successfully. This is because of the administrative nightmare of unwinding hundreds or thousands of transactions of the settlor-trustee, who is subse-


5 All of these criticisms have been made in Fellows, supra note 3.
quently adjudged to have lacked capacity or to have been in the thrall of undue influence exerted by a contingent beneficiary of the trust.

Another impediment to contesting a fully funded revocable trust is that the decedent’s heirs, the likely contestants, are not entitled to see the trust instrument because it is not a public document. Thus, the heirs must choose to contest the trust without adequate information to appraise the merits of the suit, a risky gamble at best. Finally, even if these practical obstacles deter contests of fully funded revocable trusts, few people of modest means or minimal sophistication are likely to employ the revocable trust as their estate planning tool. Unfortunately, if they employ an attorney at all, many of these people will select counsel of modest understanding and minimal competence in estate planning.

Other forms of nonprobate transfer may be effective means of avoiding will contests, but none is without problems. Insurance, for those who can afford to make the investment, provides a mechanism for conferring death benefits on a designated beneficiary, but is of no help in insulating a specific asset, such as a home, from a contest. Joint accounts have other benefits and risks. A true joint tenancy account gives the beneficiary access to the account during the donor’s life, thus making the donor dependent on the beneficiary’s honor if the real intention is merely to confer a death benefit. A payable-on-death account avoids that problem, but raises others. A payable-on-death account may be voided in some jurisdictions as a testamentary disposition that fails to meet the formal requirements of a valid will. Even if the payable-on-death account is treated as nontestamentary, and thus valid,\(^6\) other uncertainties persist. It is not always clear whether a beneficiary under a payable-on-death account must survive the donor to take,\(^7\) nor is it always clear whether the death beneficiary may be changed by will.\(^8\)

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7 Section 6-101 of the Uniform Probate Code does not address the point. Other portions of the Uniform Probate Code, however, presume that a death beneficiary must survive the donor to take and speak with clarity to that eventuality. Section 1-201 defines a “beneficiary designation” as including virtually all written nonprobate transfers at death, and section 2-706 provides an anti-lapse rule for such “beneficiary designations,” the protections of which apply if the deceased beneficiary is a “grandparent, a descendant of a grandparent, or a stepchild of the decedent” donor. Of course, the Uniform Probate Code is not universally adopted.

Even if these or other problems are inapplicable or overcome, most such payable-on-death accounts are effective only to transfer money. To transfer specific nonfinancial assets, such as real property or valuable tangible personal property, via a payable-on-death provision that is nontestamentary, one must rely, in a Uniform Probate Code jurisdiction, on the enigmatic terms of the final clause of the first sentence of section 6-101(a): "or other written instrument of similar nature." Even if counsel is confident that a written agreement to transfer such property at death to a beneficiary likely to be contested by the decedent's heirs is within section 6-101, it is unlikely that unsophisticated clients will locate and retain such skilled and knowledgeable counsel.

I offer an alternative approach, one that is supplemental to existing law and a partial solution at best, but which offers the prospect of real benefits for people with modest estates. I propose that states amend their intestacy laws to enable people to designate their heirs, to the partial or total exclusion of those persons who would otherwise be the actor's heirs absent the designation. This proposal is not new. The Romans recognized such a right, and two American states—Arkansas and Ohio—permit designation of heirs.

2002), which explicitly provides that a beneficiary of a payable-on-death bank account may not be changed by will. Insurance contracts produce the same result.

The Roman version of this right differs from my proposal by being broader in some respects and more constrained in others. Roman law of intestate succession evolved through three distinct periods: the *jus civile*, the praetorian law of *bonorum possessio*, and the imperial law of Justinian. Throughout these three periods, intestate succession generally was governed by kinship and marriage, not by designation, except regarding the effect of adoption. See, e.g., William L. Burdick, The Principles of Roman Law and Their Relation to Modern Law 546-76 (1938). Romans, however, permitted testamentary succession, a late development in English law, and perceived "the fundamental purpose of a will [to be] to appoint... an heir." *Id.* at 581. According to Gaius "a will derives its validity by the [appointment] of an heir." *Id.* (internal citation omitted). Professor Burdick suggested that wills arose among the Romans to enable a person lacking an heir in intestacy to appoint one. *Id.* Because the Roman law of succession was one of universal succession, a Roman heir took "the place of the deceased, inheriting all the rights and all the liabilities of the deceased, the assets and also the debts, even though the deceased left nothing but debts... The heir was not only the personal representative of the deceased, his administrator or his executor, but he was also, in many respects, legally identical with the deceased." *Id.* Thus, the Roman law of testamentary succession combined elements of our notions of testamentary succession with the idea of designating an heir.

See Ark. Code Ann. § 28-8-102 (1987); Ohio Rev. Code Ann. § 2105.15 (2001). The Arkansas statute has unbroken antecedents to 1853; the Ohio law dates from 1854. The Arkansas statute provides:
However, designation of heirs has not been discussed seriously as a partial solution to the post-mortem will contest produced by an "abnormal" distribution of a decedent’s estate by means of a will favoring a beneficiary who is not an heir of the decedent. Part I of this Article frames the issue and explains the benefits obtainable by designating heirs. Part II discusses the alternative procedures that could be employed to implement designation of heirs, examines some problems with each procedure, and explains why none of those problems is an insuperable barrier to widespread adoption of designation of heirs. Part III is a brief examination of some of the problems presented by the proposal. The Conclusion is a reflection upon its utility.

I. THE PROPOSAL AND ITS BENEFITS

Designation of one's heirs is a simple idea. Rather than rely exclu-

(a) In all cases, when any person desires to make a person an heir at law, it shall be lawful to do so by a declaration in writing in favor of the person, to be acknowledged before any judge, justice of the peace, clerk of any court, or before any court of record in this state.

(b) Before the declaration shall be of any force or effect, it shall be recorded in the county where the declarant may reside, or in the county where the person in whose favor such declaration is made may reside.

The Ohio statute provides:

A person of sound mind and memory may appear before the probate judge of his county and in the presence of such judge and two disinterested persons of such person’s acquaintance, file a written declaration declaring that, as his free and voluntary act, he did designate and appoint another, stating the name and place of residence of such person specifically, to stand toward him in the relation of an heir at law in the event of his death. Such declaration must be attested by the two disinterested persons and subscribed by the declarant. If satisfied that such declarant is of sound mind and memory and free from restraint, the judge thereupon shall enter that fact upon his journal and make a complete record of such proceedings. Thenceforward the person designated will stand in the same relation, for all purposes, to such declarant as he could if a child born in lawful wedlock. The rules of inheritance will be the same between him and the relations by blood of the declarant, as if so born. A certified copy of such record will be prima-facie evidence of the fact stated therein, and conclusive evidence, unless impeached for actual fraud or undue influence. After a lapse of one year from the date of such designation, such declarant may have such designation vacated or changed by filing in said probate court an application to vacate or change such designation of heir; provided, that there is compliance with the procedure, conditions, and prerequisites required in the making of the original declaration.

Designation of Heirs

withstanding upon the state’s designation of an intestate decedent’s heirs (a scheme that attempts to mimic prevailing cultural expectations concerning distribution of a decedent’s estate), any person with testamentary capacity would be permitted to name an exclusive heir or heirs or to name one or more persons who will share pro rata with heirs designated by the state. The only limitation upon this principle would be that designation of an heir could not operate to reduce or eliminate spousal inheritance rights or the spousal elective share.

But why would anyone wish to designate heirs? Why not simply make a will that produces the distributional scheme one desires and disinherits one’s heirs in the process, if that is the testator’s intent? The short answer is that disinherited heirs—whether they are children who feel wrongly deprived of an expected inheritance or remote collaterals who hanker for a windfall—have standing (and often motivation) to contest the will that deprives them of what they wish to be theirs. Those contests may prove to be successful. Professor Melanie Leslie, in an examination of will contests based on undue influence and claimed defective execution, concluded that:

courts impose upon testators a duty to provide for those to whom the court views as having a superior moral claim to the testator’s assets, usually a financially dependent spouse or persons related by blood to the testator. Wills that fail to provide for those individuals typically are upheld only if the will’s proponents can convince the fact-finder that the testator’s deviation from normative values is morally justifiable. This unspoken rule, seeping quietly but fervently from the case law, directly conflicts with the oft-repeated

\[11\] Intestate succession statutes vary from state to state, but the general theme is to distribute the intestate decedent’s assets first to his children and surviving spouse (sometimes to the spouse to the exclusion of the children); in the absence of such takers, to the parents; lacking parents, to the decedent’s siblings; and failing siblings, to more remote collateral kindred.

\[12\] Were Louisiana to adopt the proposal, an additional limit would be that no designation of heirs could reduce or eliminate the *legitime*, a Louisiana civil law institution that bars disinheritance of disabled or mentally infirm children and all children under the age of 23. See *LA. Civ. Code Ann.* art. 1493(A) (West 2002); see also art. 1494 (providing that a forced heir cannot be deprived of the *legitime*, the forced heir’s portion of the decedent’s estate, without cause); art. 1495 (establishing the amount of the *legitime*, either one-fourth or one-half, depending on the number of forced heirs). See also Ralph C. Brashier, *Protecting the Child From Disinheritance: Must Louisiana Stand Alone?*, 57 *LA. L. Rev.* 1 (1996); Katherine S. Spaht, *Forced Heirship Changes: The Regrettable Revolution Completed*, 57 *LA. L. Rev.* 55 (1996).
axiom that testamentary freedom is the polestar of wills law.\textsuperscript{13}

While a fully funded revocable inter vivos trust may be a reasonably effective remedy to the problem,\textsuperscript{14} this and other standard remedies are likely to remain the province of the sophisticated and affluent who employ equally sophisticated and affluent estate planners. The purpose of this article is to explore whether designation of heirs can be an effective way of increasing estate planning options for the vast majority of people with modest assets and who lack effective access to sophisticated estate planning.

To illustrate the benefits of the designated heir proposal, imagine a same-sex couple living in a state that denies the status of marriage to such couples. Each member of the couple wishes to devise his entire estate to his partner, and has executed a valid will to do so. But the couple is aware that each has relatives who disapprove of the relationship or who refuse to acknowledge its existence. They anticipate a will contest based on undue influence, and the homosexual nature of the relationship may be used in part to establish the existence of undue influence.\textsuperscript{15} Fearful of the expense and


\textsuperscript{14} But see supra text following note 5.

\textsuperscript{15} Cultural attitudes toward same-sex relationships have changed greatly in recent years, but one cannot wholly discount the possibility of egregious cases such as In re Kaufmann's Will, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964), aff'd, 205 N.E.2d 864 (N.Y. 1965). In that case, Robert Kaufmann, a young man made wealthy through inheritance, lived together in a stable relationship with Walter Weiss, a slightly older man of no significant wealth, for eleven years until his untimely death at age forty-five. Robert devised the bulk of his substantial estate to Walter. By a letter attached to his will, Robert described his enduring love and admiration for Walter and credited Walter for helping Robert to accept his homosexuality. During life, Robert painted and exhibited his work; Walter managed the couple's financial and domestic affairs. They maintained an extensive social life as a couple and, although in the course of the ensuing will contest brought by Robert's brother Walter denied a sexual relationship with Robert, it is apparent that they were a committed and loving gay couple. Nevertheless, two juries in separate trials found undue influence and those verdicts were affirmed on appeal. Robert's letter expressing his love and gratitude toward Walter was regarded by one appellate court as "cogent evidence" of Walter's domination of Robert. \textit{Id.}, 247 N.Y.S.2d at 683.


For cases presenting similar facts but finding no undue influence, see Estate of Sarabia, 270 Cal. Rptr. 2d 560 (Cal. Ct. App. 1990) (codified and supplemented by statute); Evans
uncertainty of a will contest, they may well seek to employ some device to foreclose a will contest. Consider the standard approaches to this problem and compare them to the designated heir proposal.

The couple could add a no-contest clause to their wills. While such clauses generally are enforceable, most jurisdictions permit will contests despite such clauses, so long as probable cause exists for the contest. Probable cause may not be difficult to establish. The burden of proving the absence of undue influence shifts to the proponent of the will once the contestant has established both a confidential relationship between the testator and the beneficiary and suspicious circumstances surrounding the execution of the will. A contestant should easily be able to prove the confidential relationship, and cultural prejudice (as in Kaufmann’s Will) may well skew the fact-finder’s view of suspicious circumstances. Accordingly, many jurisdictions permit and, indeed, encourage a will contest under these circumstances.

Further, regardless of the applicable law, for a no-contest clause to be effective, the anticipated contestants must be devised a sum sufficient to tempt them to forego the will contest. This is an unpalatable choice for many testators who regard such devises as, at best, expensive and uncertain.

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A minority of jurisdictions enforce no-contest clauses unless the clause is claimed to be a forgery or the contestant attacks a devise that benefits the will drafter or any witness. See, e.g., Burch v. George, 866 P.2d 92 (Cal. 1994); Rudd v. Sears, 160 N.E. 882 (Mass. 1928); Commerce Trust Co. v. Weed, 318 S.W.2d 289, 301-02 (Mo. 1958); Elder v. Elder, 120 A.2d 815 (R.I. 1956).

17 See supra note 15.
insurance premiums, and, at worst, a form of extortion. Nor can it be assumed that contestants motivated by a desire to punish the beneficiary as wicked and undeserving will be deterred from a contest by a generous bequest conditioned upon foregoing a will contest.

A more drastic approach is adult adoption. Many American states permit adult adoptions, even when the purpose of the adoption is simply to frustrate a will contest, but adoption is hardly a perfect solution to the concerns of the same-sex couple. First, some jurisdictions may object to adoption of an adult by his or her homosexual partner. Emblematic of this approach is In re Adoption of Robert Paul P., in which the New York courts denied adoption by a fifty-seven year old man of his fifty year old male lover on the ground that their sexual relationship was not compatible with the proposed parent-child relationship. Such concerns have not, however, deterred courts from approving adult adoptions involving heterosexual lovers. Second, and even more problematic, is the fact that while one partner might be able to adopt the other, courts are not likely to permit mutual adoption. It is one thing to become the legal parent of one’s life partner; it is another, and a quite unlikely, thing to become both the parent and the child of one’s life partner. Finally, adoption is irrevocable. In the event that the couple should terminate their partnership, they are saddled for life with the consequences of adoption. Of course, after separation the adoptive parent could disinherit his former partner and

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18 See, e.g., In re Adoption of Swanson, 623 A.2d 1095 (Del. 1993) (upholding adoption of a fifty-one year old man by his sixty-six year old male companion of seventeen years); Greene v. Fitzpatrick, 295 S.W. 896 (Ky. 1927) (upholding a male bachelor’s adoption of his female secretary, a married woman, amid allegations of a sexual relationship between them); Collamore v. Learned, 50 N.E. 518 (Mass. 1898) (upholding adoption of three adults by their seventy year old uncle).


20 See, e.g., Greene, supra note 18.

21 Under some circumstances, the inheritance consequences of adult adoption may extend no further than the property of the adoptive parent. Compare Harper v. Martin, 552 S.W.2d 690 (Ky. App. 1977) (holding that an adult adoptee could inherit from the adoptive parent’s sibling by right of representation), with In re Trust of Duke, 702 A.2d 1008 (N.J. Super. Ct. Ch. Div. 1995) (holding that Chandi Heffner, the adult adopted child of billionaire Doris Duke, was not the child of Duke for purposes of a trust created by James Duke, Doris Duke’s father, for the benefit of Doris Duke and her children) and Minary v. Citizens Fidelity Bank & Trust Co., 419 S.W.2d 340, 344 (Ky. 1967) (holding that an adult adoptee may not be considered a child of the adoptive parent when the purpose of the adoption is to bring the adoptive child within the class of takers under “a preexisting testamentary instrument when he clearly was not intended to be so covered”).
adoptive child, but such disinheritaance invites yet another will contest, albeit one that is likely to have little merit absent unusual particularized circumstances.

Nonprobate transfers offer another possible strategy, but most of the available options have significant limitations. Inter vivos gifts accomplish little unless one partner is markedly wealthier than the other. Additionally, the irrevocable nature of gifts, and the limitations of the federal gift tax, operate as powerful disincentives to employing this strategy. Insurance requires the ability to afford the premium investment and is effective only to transfer money, not specific and unique assets such as real property. Similar problems attend the use of joint accounts to accomplish nonprobate transfers.\(^2\) Perhaps the best alternative, and surely the one most attractive in the absence of a designated heir option, is the use of a revocable inter vivos trust or trusts. If the couple is willing to pool their assets, they may establish and fund a revocable trust with themselves as trustees and life beneficiaries, with a remainder in the survivor. If they are unwilling to pool their assets, they may establish separate revocable trusts, each naming himself as the trustee and life beneficiary, with the remainder in his partner. Although the establishment of these trusts is susceptible to attack on grounds of testamentary capacity or undue influence, the practical ability to challenge these trusts is limited. First, their establishment is unlikely to be known to potential challengers. Second as transactions occur over time under these trusts, declaring them invalid and unwinding those past transactions becomes ever more difficult.

While the revocable trust may be an adequate solution to the problem of the same-sex couple, many such couples will be disinclined to use this option. There is a common misconception that trusts are complex. Even if that canard is dismissed, the fact remains that the trust instrument (or a certified summary sufficient to prove its existence and the identity and powers of the trustees) must be furnished to various entities with which the trustees transact business. While this is not especially onerous, many people are frightened away from the revocable trust by ignorance of the nature of the administrative burden it represents. A great many people, especially those with poor or no legal advice, will dismiss this option without serious consideration.

By contrast, if the partners are able to designate each other as their sole heir, it will become considerably more difficult for disappointed displaced

\(^{22}\) See supra text accompanying notes 6 and 7.
heirs to contest the estate plan. Unless the contestants can set aside the designation, they will lack standing to mount a will contest. Assuming the designation procedure provides a strong, perhaps conclusive, presumption of testamentary capacity and lack of undue influence, the only grounds for contesting the designation would be fraud, which is difficult to prove. Should the partners separate, their estate plans may be altered with relative ease. The designation of one's partner as heir may be revoked by the same procedure necessary for designation, and even if that prudent step were not undertaken, each member of the sundered pair could simply execute a new will.

Designation of an heir is not a complete cure for the estate planning problems of the same-sex couple. Were the couple married, they would be entitled to a host of status benefits germane to estate planning. The most obvious benefits are community property (where applicable), the spousal elective share, and the unlimited marital deduction for federal estate tax purposes. However beneficial or important reform of the legal methodology of conferring such status benefits may be, my focus is on the narrow topic of enhancing freedom of testation by designation of heirs.

A partner in a same-sex relationship is not the only testator likely to benefit from designation of heirs. Many of the same observations apply to the testator, married or not, who wishes to include a step-child, an illegitimate child, a remote relative, a friend, or even a charity, as either his sole heir or on a par with his children. The following is a consideration of these scenarios.

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23 See discussion infra Part II.
24 Of course, a new will made without alteration of the designated heir would leave the new will open to contest by the former partner and still designated heir.
25 The appropriate scope of freedom of testation is an important and large normative question that is outside the limited focus of this paper. Plainly, we circumscribe freedom of testation by such devices as estate and inheritance taxes (including the generation skipping transfer tax), the spousal elective share, Louisiana's forced share that extends to certain children, and the rule against perpetuities. A diverse set of policies motivates those limitations. Inasmuch as a fertile source of will contests is the disinherited child, one way to diminish will contests is to limit testamentary freedom further by establishing forced shares for children, whether minors or adults. But this, of course, raises normative issues about the state's role with respect to family dynamics, issues that if discussed here thoroughly would swallow this paper as completely as the whale that engulfed Jonah. Alas, if that is the paper you would prefer to read, you must turn elsewhere. For extended discussion of the Louisiana forced share approach, the scope of which has been curtailed in recent years, see Symposium, 57 LA. L. REV. 1 (1996); Symposium, 43 LOY. L. REV. 1 (1997).
Unless adopted by their step-parents, step-children are not intestate heirs of the step-parent, yet, many parents may wish to treat their step-children the same as their natural children. Short of a will, adoption is the obvious solution, but sometimes adoption is not an option because the natural parent refuses to consent to the adoption. Absent a specific statute permitting such a step-child to be treated as an intestate heir of the step-parent, the step-parent must make a will to pass property at death to the step-child. This may prove problematic as will contests are often triggered by sibling jealousies. Therefore, a will that treats the step-children of the testator on a par with his natural children is a will contest waiting to happen. However, if the testator could designate his step-children as heirs on a par with his natural children, the incentive to contest the will is removed, for the natural children can derive no benefit by forcing an intestate distribution.

Imagine the testator with an illegitimate child whose parentage he does not wish to acknowledge during his life, but who wishes to treat the child equally with the children of his marriage. Assuming (perhaps quite unrealistically) that such a person both wishes to leave a bequest to his illegitimate child and is willing to reveal the existence of some relationship after death, the testator has two options. He might simply include the illegitimate child in his will, although such inclusion might trigger a will contest by jealous and surprised children of the marriage. Alternatively, he might designate the illegitimate child as an heir on a par with his adult children. This approach would not diminish the jealousy and surprise of his marital children but might preclude a contest to his will.

These principles discussed above are readily adaptable to a variety of circumstances. A testator who wishes to disinherit one or more of his children in favor of the remainder need only designate the favored child, or children, as his sole heir(s), thus cutting off the possibility of a contest by the disinherited child or children. The same principle enables a testator to designate a friend or remote relative as his heir, thereby supplanting his children entirely or replacing a disfavored child with the remote relative. There is no reason to limit the designation to natural persons. Should a testator desire to bequeath a disproportionate amount of his estate to a charity, there is no obvious reason why he should not be able to designate

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27 See, e.g., Cal. Probate Code § 6454.
In any case, the success of any such designation to stifle an incipient will contest depends on the legal effect of the designation. If a designation of heirs is subject to contest on the same grounds as a will, the contest simply shifts to focus upon a different moment at which the testator has made a testamentary decision. Any diminution in contests that occurs from such a shift is entirely the result of such a shift in focus. For example, if contests over designation are required to occur during the life of the designator, many of the factors associated with contest of ante-mortem probate will also apply. On the other hand, if designation of an heir produces a presumption of capacity and against undue influence, and that presumption is difficult to overcome, the designator will have achieved significant added security that his testamentary plan will withstand challenge. The possible procedures and circumstances that might trigger presumptions favoring designation of heirs is the theme of Part II.

II. ALTERNATIVE PROCEDURES FOR DESIGNATION OF HEIRS

The devil lurks in the details of implementing designation of heirs, partly because there is a cornucopia of possible designs. A thorough taxonomy of possible procedural models mimics the procedural proposals for ante-mortem probate, providing for designation of heirs by a wholly nonadversarial process, a fully adversarial one, or a procedure somewhere in between. The nonadversarial processes may be further divided into a ministerial and an administrative process. The adversarial processes may be divided into a quasi-adversarial, "conservatorial" process and a fully adversarial procedure. Each of these four possibilities will be discussed but, before doing so, a few preliminary observations are in order.

As noted earlier, the revocable living trust may be as effective as designation of heirs to discourage contests, but only the relatively affluent and sophisticated are likely to employ a revocable inter vivos trust. For less sophisticated people to designate heirs, the procedure must be cheap, simple, and conducive to accurate results with respect to testamentary capacity, undue influence, and fraud. It must be cheap, simple, and easy to understand, or it will not be used by people of modest means with a rudimentary grasp of the law surrounding testamentary dispositions. Inasmuch as the concept of designation is foreign to lay understanding, it

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28 It would be necessary to apply the cy-pres doctrine to designations of charities as heirs.

29 See supra text accompanying notes 3-5.
must be simple and easy or it will be unable to take root in the popular culture. The designation procedure must produce reasonably accurate results—neither false positives nor false negatives for undue influence, fraud, or lack of testamentary capacity—without compromising simplicity and economy. If some form of adversarial or quasi-adversarial procedure is necessary to produce an acceptable level of accuracy, the idea of designation will remain entirely theoretical.

Nevertheless, I discuss the full range of options to provide a decent assessment of the incremental benefits of accuracy that might intuitively be thought to correspond with increasing levels of complexity and adversarial conflict. I think it is impossible to know the accuracy of the current highly adversarial will contest system regarding these issues. The system is not perfect, and indeed, if the sentiments of the commentators is any gauge of the matter, the level of error may be uncomfortably high. Thus, the appropriate evaluation of any hypothetical designation procedure is not whether the error rate is likely to be “high” or “low” in absolute terms, but whether it is likely to produce significantly more or fewer errors than the present adversarial will contest system.

A. Ministerial Procedure

A ministerial procedure would be accomplished simply by filing in a central registry in the state of the declarant’s domicile a signed declaration designating the person or persons as heirs, either exclusively or in addition to existing heirs. No notice to any party would be required. The registry would be open to public access unless the declarant indicated he desired confidentiality, in which case the fact and substance of the declaration would be kept confidential until the declarant’s death.

This procedure would be easy, cheap, and provide reliable evidence of

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30 A notarial acknowledgment might be a prudent additional requirement, simply to ensure that the declarant’s designation is not forged by an unscrupulous imposter. To make the process especially simple, a form could easily be prescribed for the purpose, enabling a declarant to make the necessary choices by means of checking the appropriate boxes. Something similar to this occurs with statutory forms for durable powers of attorney relating to medical care after incapacity.

31 Confidentiality, if afforded, would cease at the moment a declarant chooses to notify displaced heirs of the designation. See infra text following note 34. To administer such a scheme of confidentiality, it would be necessary to require the declarant to notify the central registry of his waiver of confidentiality at the same time he notifies displaced heirs of the designation. Failure to notify the central registry would toll the limitations statute otherwise triggered by notice to displaced heirs. See text and notes following note 35.
heir designation, but it does have disadvantages. Because a declarant need do nothing more than file the designation, there would be no impartial check on undue influence or testamentary capacity. An attestation requirement similar to that required for execution of a will might provide some evidence of testamentary capacity, but the regular occurrence of will contests challenging the capacity of a testator to execute a duly attested will suggests that this approach to proof of capacity is not promising. Because attestation is of almost no relevance to claims of undue influence, an attestation requirement for designation of heirs seems almost pointless for this purpose.

Attestation of wills serves a ritual or cautionary function, impressing upon the testator the finality and importance of his testamentary dispositions; an evidentiary function, supplying excellent proof of the testator’s intentions; a protective function, safeguarding the testator from undue influence; and a channeling function, providing a presumptive safe harbor that the testator’s wishes will be executed. In the context of designation of heirs, however, attestation would serve only the ritual function. The evidentiary and channeling functions of attestation are fully advanced by an heir designation that is notarized but unattested, and the protective function, which is poorly served by attestation even with respect to wills, is neither advanced nor retarded by a ministerial system of designating heirs.

The ministerial system would not afford notice to statutory heirs displaced by the designated heir. Lack of such notice poses no constitutional problem. Heirs apparent have no legally cognizable interest in the assets of the prospective decedent; accordingly, a secret designation of heirs does not infringe upon any interest to which the guarantee of due process attaches. The lack of such notice would, however, pose a practical problem to a person who wishes to employ designation of heirs as a device to foreclose his next of kin from contesting his will. Because the heir designation could be procured by fraud or undue influence, or occur at a moment when the declarant lacked testamentary capacity, ordinary principles of the

32 See Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 3-6 (1941) (identifying the ritual, evidentiary, and protective functions of attestation); John H. Langbein, Substantial Compliance with the Wills Act, 88 HARR. L. REV. 489, 494 (1975) (identifying the channeling function).

33 See Gulliver & Tilson, supra note 32, at 9-10 (speculating that attestation served a protective function when wills were primarily deathbed instruments, a moment when a testator might be peculiarly susceptible to undue influence, but contending that attestation is irrelevant to the protective function when most wills are executed “in the prime of life and in the presence of attorneys”).
law of wills should dictate an opportunity for displaced heirs to contest the
designation on those grounds which, of course, is precisely what the
declanant seeks to avoid.

The effect of the ministerial filing with respect to possible contests of
the designation should depend on two variables: whether the declarant has
notified displaced heirs and whether the designation is confidential or a
public record. If a declarant chooses to notify displaced heirs, this notice
should trigger a limitations statute of the same length within which a will
contest could be brought on grounds of fraud, undue influence, or lack of
testamentary capacity. If the declarant chooses not to notify displaced
heirs, a limitations statute should begin to run only if the designation is a
matter of public record. Ordinarily, constructive notice from the public
record in real estate transactions is premised upon the responsibility of a
purchaser to examine the record to be certain that his vendor actually has
and can deliver marketable title. The public record of real estate title
transactions is maintained for the benefit of purchasers, and it is equitable
to insist that a purchaser take with constructive notice of its contents, but
that principle is not transportable to designation of heirs. There is no
purchaser for whose benefit the public record is maintained and there is no
logical moment when one might expect the record to be examined, as is the
case with real estate transfers. However, the moment that such a record
begins to be compiled, it is inevitable that profit-seeking data base operators
will quickly make those records readily available at the click of a computer
mouse. Even so, why should one examine the record to see if one’s parent
or grandparent has designated heirs that exclude you? The short answer is
that those who are likely to mount a contest are the most anxious to monitor
any indication of the soon-to-be-decedent’s testamentary dispositions, and
those who are disinterested in the matter will not make such an examina-
tion. After a long enough period of time, perhaps the people who lack
interest in the testator-declanant’s estate plan should be precluded from
challenging the designation. If the declarant is willing to place his designa-

34 The declarant could give notice by personal service, or perhaps by certified mail, to
an address the declarant affirms to be the last known address of the displaced heir or heirs.
If the location of a displaced heir is unknown, perhaps notice by publication in a newspaper
of general circulation in the community in which the missing heir was last known to reside
would be sufficient.

35 Perhaps because the legal consequences of heir designation are not as culturally
recognized as the legal consequences of probate, it might be advisable to require that notice
to displaced heirs include a statement that the opportunity to contest the designation
judicially will expire within the specified period after notice is provided.
tion in the public record, but just does not want to rub the disinheritance in the faces of his former heirs by giving them notice, at some point the sleeping heir ought to lose the ability to challenge a designation.

The harder problem is deciding the length of such a limitations period. As a rough cut at the problem, I propose a limitations period two or three times the length of the applicable period if notice had been given. If designation were to become a familiar option and the existence of such public records widespread, it would be no hardship for an heir apparent who suspects his ancestor might have a testamentary plan that excludes him to check the record. Few will contests are the product of utter surprise, and those who bring contest litigation are surely among the most likely to inspect public records of designated heirs.

Finally, if no notice is given and the declarant has requested that the designation be kept confidential, any limitations statute relevant to contests of the designation should not begin to run until the declarant’s death. However, execution and filing of the designation should produce a presumption of capacity and lack of undue influence or fraud. This presumption could be overcome, as in most civil trials, by a preponderance of the evidence. On the other hand, designating certain persons as heirs (such as the declarant’s attorney, unrelated to the declarant by blood or marriage) should produce a presumption of undue influence.36

The ministerial procedure, augmented by an optional notice procedure, would be cheap, simple, relatively easy to administer, and afford significant additional protection to the person choosing to designate his heirs. Almost all contests of an heir designation would occur while the declarant is alive,37 thus improving the accuracy of resolution of issues such as undue influence and testamentary capacity. Of course, as is true of ante-mortem probate, displaced heirs may be loath to challenge a living declarant’s designation of heirs. The testator whose will is successfully challenged in ante-mortem probate on any ground other than testamentary capacity is likely to draft a new will that specifically disinherits the contestants, and that testament will be carefully framed to avoid the defects of the challenged will. That fact is a significant disincentive to will contests in ante-mortem probate. Simi-

36 This disfavored category of designated heirs should also be denied the benefits of the limitations period otherwise applicable to the designation.

37 Some declarants will die before the limitations period for contesting the designation has expired and, of course, with respect to designations in which confidentiality is obtained, the limitations period would not begin to run until the declarant’s death. Thus, at least some contests of designation would occur after the declarant’s death.
larly, a displaced heir who successfully challenges an heir designation on any grounds other than testamentary capacity is likely to be rewarded by a new designation of heirs that carefully avoids the tainted grounds of the prior designation, but firmly excises the contestant from the class of the declarant’s heirs.

While it cannot be known with any certainty, some indicators suggest that a ministerial procedure will produce marginally greater accuracy with respect to capacity, undue influence, and fraud. Declarants who seek confidentiality may be more likely to be victims of undue influence, and such designations, like wills, would be open to challenge after the declarant’s death. Conversely, if the declarant’s acts are truly those of a superbly cunning testamentary ventriloquist, the designation might be placed in the public record on the theory that the limitations statute will cut off the possibility of challenges before the displaced heirs are aware of the undue influence. However, heirs apparent are usually aware of the existence of testamentary predators and, in a system in which heir designation is known to exist and a public record available, reasonable expectations dictate that the prudent and concerned heir apparent might check the public record to determine if the suspicious “friend” of one’s ancestor has managed to secure designation as the heir. If the limitations statute is long enough (say, four to six years), there is ample opportunity for concerned relatives to make periodic inquiry of the record to determine whether a challenge to an heir designation might be merited. Finally, the declarant who truly wishes to achieve certainty, whether or not the victim of undue influence, will notify displaced heirs and challenges. To the extent that the reluctance of displaced heirs to challenge the designation made by a living declarant increases the risk of error, the risk may well be offset by the increased reliability of results that will occur with respect to those contests that do occur.

Designation of heirs through a ministerial filing procedure thus seems to afford some increase in certainty of testamentary disposition without any material increase in the risk of erroneous dispositions. Recall that risk of error means either (1) the failure to detect lack of capacity, undue influence, or fraud, or (2) the false detection of lack of capacity, undue influence, or fraud. Contest litigation can produce either error, but systemic disincentives to institute contest litigation can produce only the former error. Compared to conventional will contests, heir designation by the ministerial system outlined here would produce a slight increase in the first type of risk, attributable to deterrence of some meritorious contests, but it would also probably produce modest decreases in both types of risk, attributable
to more reliable outcomes of contests that do occur with respect to living declarants. Any net change in risk of error is not likely to be large, and would thus seem to be inconsequential, while ministerial heir designation would augment testamentary freedom for people who by economics or imperfect understanding are not users of revocable inter vivos trusts as an estate planning tool.

Though I think the ministerial procedure is preferable to the alternatives and doubt that the alternative procedures, if adopted, would be much used, it is useful to explore the details of alternative procedures, if only to make a fair comparison of the various options.

B. Administrative Procedure

A close cousin to the ministerial process would be the administrative procedure, a procedure by which a person seeking to designate his heirs makes application in the probate court of the jurisdiction of his domicile. The application is referred to a magistrate or other administrative hearing officer who undertakes an examination of the applicant and, if necessary, the designated heir or heirs to determine that the applicant possesses testamentary capacity and that the proposed designation does not appear to be tainted by fraud or undue influence. This administrative finding would be incorporated in an approval of the application to designate heirs, and an administrative order to that effect would be filed in a central registry in the jurisdiction. As with the ministerial procedure, this central registry could be maintained as a public or confidential record, subject to the same provisos. No notice to displaced heirs would be provided, unless the applicant desires to trigger a limitations period applicable to contests of the designation.

What, then, would the administrative procedure add to the ministerial procedure? First, it would provide a presumption, perhaps conclusive, of testamentary capacity and a rebuttable presumption that the designation of heirs was unaffected by fraud or undue influence. The burden of proving undue influence or fraud would fall squarely upon the contestant, and the burden of proof of undue influence is not uniformly upon the contestant in will contests. Some states shift the burden of proof to the proponent of the will when the proponent was in a confidential relationship with the testator, received most of the estate, and the testator's mental state was diminished. Some states also require proof that the proponent actively facilitated the making of the will in order to shift the burden of proof concerning undue influence. See WILLIAM M. MCGOVERN, JR., SHELDON F. KURTZ & JAN ELLEN REIN, WILLS, TRUSTS AND ESTATES 279-82 (1988). A presumption of undue influence arises in many states if a lawyer not related to the testator drafts a will in which
evidentiary burden might be increased to a clear and convincing standard from the ordinary preponderance of the evidence standard. Second, an applicant could be afforded the following three options that bear upon elimination of contests to the designation of heirs: (1) no notice to displaced heirs, producing only the benefits of the presumptions in contests that might later emerge, (2) notice to displaced heirs of the completed and approved designation, triggering a limitations period equal in length to the period for initiating will contests, or (3) notice to displaced heirs of the pendency of the administrative proceeding, triggering a shorter period within which a displaced heir could either (a) intervene, and thus transform the administrative proceeding into an adversarial one, or (b) accept the appointment by the probate court or administrative hearing officer of a guardian ad litem to represent the interests of the notified displaced heir, and thus transform the administrative proceeding into a “conservatorial” process.

The administrative approach would provide some additional protection to the person seeking to designate heirs, in the form of the presumptions discussed above, at a relatively modest additional cost. Moreover, by providing an option for converting the administrative procedure into a conservatorial one, applicants would be better able to select the degree of insulation they desire from later challenges to their designation of heirs.

C. Conservatorial Procedure

In the conservatorial model, the person desiring to designate heirs would apply to the probate court of the applicant’s domicile for an order designating heirs. The order would be issued only after the court had determined that the applicant possessed testamentary capacity and that the proposed designation was free from undue influence or fraud. Unlike the administrative approach, however, the burden of investigation would not be lodged with the hearing officer, but would be shifted onto lawyers. The court would be required to appoint a guardian ad litem to represent the

39 The wisdom of doing so might be related directly to the degree to which the magistrate is charged with a civil law-style duty of independent investigation and empowered to discharge that duty effectively. It is not likely that many American states would import the civil law magistrate model, even in this administrative setting.

40 Should such notice include a statement of the approximate value of the estate, on the theory that displaced heirs might not contest the designation out of ignorance of the size of the estate? Notice of value makes the decision of whether to contest the designation more informed, but such notice is not usually required for other proceedings pertaining to testamentary dispositions.
interests of the displaced heirs, presumably at the expense of the applicant, but without the consent or knowledge of the displaced heirs. Only after a hearing following investigation by the guardian ad litem, and determinations by the court that the applicant possesses testamentary capacity and that the application is not procured by fraud or undue influence would an order designating heirs be issued.

The point of this more cumbersome, expensive, and time-consuming feature would be to ensure a more accurate determination of the issues while still shielding the applicant from a direct confrontation with, and likely wrath of, displaced heirs. The effect of the order would, at least, be to provide a conclusive presumption of testamentary capacity and a rebuttable presumption of absence of fraud or undue influence. The reliability of these presumptions would be greater than their invocation following the administrative procedure previously described, and thus more justifiable. Moreover, to the extent that the conservatorial model is thought to produce particularly reliable results (at least by comparison to the administrative model), it might be acceptable to provide that the rebuttable presumption of no fraud or undue influence may only be overcome by clear and convincing evidence. It would be inappropriate to cut off any opportunity for the displaced heirs to litigate these issues, however, because they would not have received either notice or opportunity to contest the matters. Thus, the applicant seeking to designate heirs might be given the option to notify displaced heirs of the conservatorial procedure, informing them that if within a specified period they fail to object to their representation by the guardian ad litem they would be bound by the outcome.

The conservatorial model increases the accuracy of determination of the issues presented by a designation of heirs. When coupled with either presumptions that may not be overcome save by clear and convincing evidence or with an “opt-out” notice mechanism that would bind displaced heirs that fail to opt out of the conservatorial process, the increased certainty of the conservatorial system might justify its expense. On the other hand, if a jurisdiction is committed to the creation of a civil-law-style magistrate

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41 The conservatorial method represents a middle ground between the model of the investigating magistrate and the adversarial process as the best mechanisms for determining truth. The burden of investigation is shifted onto the guardian ad litem, whose interests are adverse to the applicant, though perhaps the zealfulness of the representation might not be as sharply adversarial as would the work of an attorney retained directly by displaced heirs.

42 This procedure is materially similar to that afforded members of a class in class action litigation under Rule 23 of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 23.
endowed with broad investigative powers, and such a magistrate takes seriously the responsibility entrusted to him, the administrative model might perform as well as the conservatorial model at less cost.

D. Adversarial Procedure

The adversarial procedure is at once familiar, very costly in terms of time, money, and emotional resources, and calculated to produce a final, reasonably accurate determination of the underlying issues. The applicant desiring to designate heirs would file suit in the probate court of the jurisdiction of his domicile, requesting a declaratory judgment designating his heirs, and naming as parties his heirs to be displaced. Personal service of summons and complaint upon the displaced heirs would be required and adjudication of the matter would proceed as in ordinary civil actions. The principal benefits of this approach are finality and the enhanced accuracy of fact-finding that is presumed to result from the zealous advocacy of sharp adversaries. These benefits are very costly, however, and it is difficult to justify a system in which a person seeking to designate heirs is confined to the adversarial model.

On the other hand, the adversarial model can be incorporated readily into the other procedures as an available option. A sensible combination, though perhaps overly complex, would be a ministerial procedure coupled with an administrative option that could be converted by the applicant's election into a conservatorial procedure offering the notice options described earlier. The adversarial procedure would always remain an option. Thus, persons seeking to designate heirs could have a wide range of options, producing a spectrum of increasing certainty of binding effect as the cost, complexity, and adversarial nature of the chosen procedure increases. However, as indicated earlier, because the benefits of heir designation are most likely to be reaped by people who wish to use heir designation as a simple will substitute, the only procedure that is apt to be used much is the ministerial system.

III. PROBLEMS WITH THE PROPOSAL

A variety of problems might be anticipated were designation of heirs to become widely available and frequently used. I make no claim of having anticipated all such problems; rather, I attempt in this Part III to discuss the issues that seem most obvious and likely to occur. If the proposal meets a human need and finds a friendly reception in popular demand, no doubt the fecund legal imagination will amply expose and discuss whatever deficiencies of foresight I may exhibit.
A. Revocation

Unlike adoption, designation of an heir would not be irrevocable.\textsuperscript{43} Circumstances germane to inheritance change, a fact recognized by the law of wills. Because designation of heirs would primarily be a device to prevent will contests, and because it represents introduction into intestate succession of the well-established principle of testamentary freedom, there is no conceptual reason to deny a person the power to revoke the completed designation of heirs.

Of course, revocation raises some of the same issues previously discussed regarding the procedure of designating one's heirs. The designated heir whose status as such is about to be revoked is as much a displaced heir as any other. Accordingly, the same procedural mechanisms that would be available for designation of an heir should be available to revoke such a designation. Similarly, a later designation of heirs that is manifestly inconsistent with a prior designation should be treated as a revocation of the former to the extent of the inconsistency. For example, if the first designation stated that "my exclusive heirs shall be John Adams and the National Trust for Historic Preservation," and a second designation proclaimed that "my exclusive heirs shall be Abigail Adams and the National Trust for Historic Preservation," the second designation clearly

\textsuperscript{43} Consider the celebrated 1988 adoption by seventy-five year old heiress Doris Duke of a thirty-five year old Hare Krishna, Chandi Heffner. The relationship promptly soured. When Doris Duke died in 1993 she left her billion dollar estate to charity. Duke was the life beneficiary of two trusts created by her father, James Duke, which created a remainder in favor of Doris Duke's issue, and in default of such issue, to charity. Because Doris Duke had no natural children and she deeply regretted her adoption of Heffner, she stated that regret in strong terms in her will: "I am convinced that I should not have adopted Chandi Heffner. I have come to the realization that her primary motive was financial gain." She also recited her belief that her father would never have considered Heffner her child and would not want her to benefit from the trusts. For the litigation that ensued between Heffner, the trusts, and Duke's estate, see \textit{In re Trust of Duke}, 702 A.2d 1008 (N.J. Super. Ct. 1995); \textit{In re Duke}, 663 N.E.2d 602 (N.Y. Ct. App. 1996). After losses in the trial courts, Heffner settled with the trusts for sixty million dollars and with Duke's estate for five million dollars. For news accounts of the affair, see Don Van Natta, Jr., \textit{Accord Clears the Last Will of Doris Duke for Probate}, N.Y. TIMES, May 16, 1996, at B8; David Stout, \textit{Bernard Lafferty, the Butler for Doris Duke, Dies at 51}, N.Y. TIMES, Nov. 5, 1996, at B8; Matthew Purdy, \textit{Lawyers are Feeding on an Heiress's Vision}, N.Y. TIMES, Jan. 24, 1997, at B1. \textit{See also supra} note 21 and accompanying text. Had a designated heir procedure been available to Doris Duke and that procedure been used in lieu of adoption, Duke could have revoked the designation and preserved for the charitable beneficiaries an additional sixty-five million dollars plus attorneys' fees.
revokes the earlier designation of John Adams as an heir. But if the second designation stated that "my heirs shall include Abigail Adams," no revocation would occur because it is consistent with the prior designation to add Abigail Adams as an heir. Problems emerge when the second designation is more ambiguous, as when it states that "Abigail Adams is my heir." The statement's literal meaning is that she is the declarant's sole heir, but in the context of a prior designation, it may be that the declarant intended merely to add Abigail as an additional heir. This problem is familiar; the law of wills holds that a later will revokes an earlier will to the extent of the inconsistency between the two, and a later will that does not expressly revoke an earlier will but that makes a complete disposition of the testator's property is presumed to revoke the earlier will entirely because of the inconsistency.

Unlike wills, however, these issues are more easily avoided in the context of designation of heirs. In any of the administrative, conservatorial, or adversarial procedures, the opportunity exists for counsel or a court to insist that the designation be entirely free of ambiguity. While the ministerial model would seem to be wholly within the control of the declarant, the unfortunate effects of ambiguity could be minimized by providing a standard form that must be used for the purpose of designation of heirs, and incorporating specific questions within that form that must be answered by the declarant for the designation to be accepted for filing.

B. Pretermitted Heirs

All states provide some form of protection for the child born to a testator after the execution of his will, usually in the form of an intestate

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44 See, e.g., UNIF. PROBATE CODE § 2-507(a) (amended 1993), 8 U.L.A. 151 (Supp. 2002): "A will or any part thereof is revoked (1) by a subsequent will which revokes the prior will or part expressly or by inconsistency . . . ."

45 See § 2-507(c) (stating a "testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate"). See also Blake's Estate v. Benza, 587 P.2d 271 (Ariz. Ct. App. 1978); RESTATEMENT (SECOND) PROP., Donative Transfers § 33.2, cmt. b (1990). Cf. Lamb v. Lamb, 28 Mass. 371 (1831) (involving wills and inconsistent codicils); In re Peck's Estate, 144 A. 686 (Vt. 1929).

46 For example, the form might specifically require the declarant to check and initial a yes or no box in response to the question, "Do you want the person or persons designated here as your heir or heirs to be your exclusive heirs, thus replacing all other people as your heirs?" Additional such questions could be devised to ensure maximum clarity of the declarant's intentions.

share. The premise of these statutes is that the testator’s omission is likely to have been inadvertent. The same premise suggests that if a person should designate heirs such that his children are partially or entirely displaced as heirs, a later-born child of the designator ought to be treated as an heir, despite the designation, unless the designator has explicitly stated in his designation that he intends to displace later-born children as heirs. If the designator fails to make this explicit statement, he could always make a new designation after the birth of any later-born child.

C. Collateral Effects on Intestate Succession

Should a designated heir be permitted to inherit through the person designating him as an heir? Should the heirs of a designated heir who predeceases the designator be permitted to inherit from the designator by representation? The Ohio Supreme Court, the only court to have occasion to answer these questions, concluded that the answer to both questions is no, but those conclusions are interpretations of the Ohio designated heir statute, which deems the designated heir to be a child of the designator for inheritance purposes. A better answer is that a designated heir generally should not be permitted to inherit through the designator, but the heirs of a designated heir who predeceases the designator generally should be able to inherit from the designator through the predeceased designated heir.

In Blackwell v. Bowman, a designated heir was denied standing to contest the will of the deceased designator’s brother. The Ohio court ruled that the designated heir’s legal status as the child of the designator for inheritance purposes was a legal status that applied only to the designator and the designated heir, having no effect on strangers to the designation. The court’s rationale was that a child is adopted to establish a genuine parent-child relationship, but that designation of an heir is an instrumental maneuver designed to produce succession benefits only between the two parties to the designation. In Kirsheman v. Paulin, the children of a designated heir who had predeceased the designator were denied standing to contest the designator’s will. The Ohio court reasoned that the desig-

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48 80 N.E.2d 493 (Ohio 1948).
49 See id. at 498.
50 Under Ohio law at the time Blackwell was decided, adopting an adult was impossible. Ohio now permits limited adult adoption. See OHIO REV. CODE ANN. § 3107.02 (2000).
51 98 N.E.2d 26 (Ohio 1951).
nated heir’s legal status as a child of the designator for inheritance purposes was not fixed for all time by designation, but was determined at the death of the designator. Thus, a designated heir who predeceases the designator is no heir at all, and his own heirs may not inherit from the designator through him.

The real issue in both cases is whether a “stranger-to-the-designation” rule should be created and applied. With the advent of adoption laws in the latter part of the nineteenth century, courts initially developed the “stranger-to-the-adoption” rule. This rule presumptively barred an adoptive child (whether or not adopted as an adult and regardless of whether the adoption was an instrumental succession device) from taking under a will or trust made by anyone other than the adoptive parent. Exceptions designed to account for the probable intentions of the testator soon developed, particularly with respect to wills. However, the inequity of the rule, despite the exceptions that were grafted onto it, became apparent as adoption became more widespread and socially accepted. In most jurisdictions today, the stranger-to-the-adoption rule has been abandoned, but because abandonment of this rule occurred haphazardly, through judicial decisions and legislation that often did not make the elimination of the rule retroactive, inclusion or exclusion of an adoptive child may turn today on the state of law at the time of the testator’s death.

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52 See id. at 32. The Ohio Supreme Court contrasted this with adoption, when the adoptive child’s status as a child is irrevocably fixed at the moment of adoption.

53 Adoption was not possible under the common law. See Leo Albert Huard, The Law of Adoption: Ancient and Modern, 9 Vand. L. Rev. 743 (1956); Stephen B. Presser, The Historical Background of the American Law of Adoption, 11 J. Fam. L. 443 (1971).


55 One exception permitted the adoptive child to take under the will of a testator who was a stranger to the adoption so long as the adoption occurred prior to the testator’s death. This exception was based on the theory that the testator had an opportunity to excuse the adoptive child from the class of takers and the testator’s failure to do so was an indication of his intent that the adoptive child should share in the bequest. Another exception was to interpret bequests to “A’s children” as including A’s adoptive children, whether or not adopted prior to the testator’s death, but to read a bequest to “A’s issue,” “A’s descendants,” or “the heirs of A’s body” as referring to natural lineal descendants. A bequest to “A’s heirs” is, of course, ambiguous under this doctrine.

56 See Dukeminier & Johanson, supra note 54, at 759-60.

Given this history, one might think it surprising that Ohio has judicially declared a stranger-to-the-designation rule as an analogue to the discarded stranger-to-the-adoption rule, but there is a plausible rationale for applying the stranger-to-the-designation rule to inheritance by a designated heir through the designator. Intestate succession law flows from the premise that the system of statutory heirs mimics, by and large, the testamentary intentions of most people. The intestate system of per stirpes distribution to heirs of a predeceased heir also is based on the presumption that most people do not wish to exclude from inheritance the heirs of their own predeceased heirs. This makes the most sense, of course, when a child of the intestate decedent has predeceased the decedent, survived by grandchildren of the decedent. This presumed intent becomes far less certain, however, when a stranger is substituted for the lineal descendants of the predeceased heir. When adoption was new, most people likely would have regarded the adopted child of their kinfolk as a stranger to the family. People might well have thought of an adopted nephew, niece, or even grandchild as an outsider, artificially daubed with the colors of family. Those feelings are neither common nor socially acceptable today, a fact recognized by the nearly universal rejection of the stranger-to-the-adoption rule. Even so, I suspect most people today would regard some versions of adult adoption as nothing more than instrumental succession devices that should have no legal significance outside the adoptive pair, a fact of some import because the relevant analogue is between designation of heirs and adult adoption.58

In brief, the argument for applying the stranger-to-the-designation rule to the problem of a designated heir inheriting through the deceased designator is that this rule is more likely to comport with the presumed intention of intestate decedents than is the converse rule. However dysfunctional families may be, most people likely would prefer their kinfolk as heirs over people designated by their kinfolk. As with adoption of children, attitudes on this point may change, but in the absence of any evidence to support a presumption that intestate decedents would wish to bequeath their property

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58 This view apparently undergirds section 2-705 of the Uniform Probate Code, which includes adoptive children within class gifts to heirs, but also provides that in construing a dispositive provision of a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent. UNIF. PROBATE CODE § 2-705 (amended 1993), 8 U.L.A. 187 (Supp. 2002).
to strangers selected by their heirs, the stranger-to-the-designation rule should apply.59 This would not interfere in any way with the primary purpose of designation—ensuring a testamentary disposition from designator to designee without interference from the "natural" heirs of the designator.

On the other hand, the stranger-to-the-designation rule has much less to commend it when applied to the problem of the heirs of the designated heir inheriting the designator's estate through the designated heir. This case will arise only when the designator has failed to make a complete testamentary disposition. Once an heir is designated, the designator is presumed to know that his property will pass to his designated heir, or through him if he should predecease the designator. A designator who fails either to revoke the designation or make a testamentary disposition after his designated heir has predeceased him has manifested, albeit inferentially, his desire that his property should pass to the heirs of his designated heir by right of representation. Moreover, if the heirs of the designated heir were not permitted to inherit by right of representation, the possibility of escheat would rise dramatically. Whenever a person designates another as his sole heir and dies after the sole heir has died, the failure to permit inheritance by right of representation will result in escheat.60 Abandonment of the stranger-to-the-designation rule in this context would not impede the primary purpose of designation and would comport more closely with the presumed intention of the designator.

D. Collateral Effects on Wills and Trusts

What effect, if any, should a person's designation of an heir have on a will or trust created by someone other than the declarant? An analogous problem occurs when a person adopts an adult for the purpose of making him an adoptive child and thus a beneficiary under another's will or trust. Accordingly, states wishing to permit designation of heirs would be wise to introduce designation through legislation that clearly addresses the following issues: (1) whether, and under what conditions, a designated heir is

59 A caveat to this conclusion is in order. When the deceased kin of the designator have had actual notice of the heir designation made by their relative, there is much less reason to presume that inheritance of their property by the designated heir through the designator is contrary to their intentions.

60 If the jurisdiction applied the principle that a designation of heirs is effective only at the death of the designator, then upon death of the designator after the designated heir ordinary principles of intestate succession would apply, which would rarely produce escheat.
included in a class gift by another to the designator's "heirs," and, if so, (2) whether the inclusion operates retroactively with respect to wills that became effective or trusts created prior to the legislation?

An analogous problem is presented by the phenomenon of adult adoption, a practice engaged in almost exclusively for instrumental inheritance purposes, such as including the adult adopted child within a class gift to children of the adoptive parent. The Uniform Probate Code takes the position that people adopted as adults without having been a part of the adopting parent's household while a minor are to be excluded from such class gifts when they are phrased to refer to "children," "issue," or "heirs."\textsuperscript{61} The judicial view of this matter is mixed.\textsuperscript{62} The use of adoption as the device to enlarge a class of beneficiaries under another person's donative instrument may be a source of the problem because it is sound public policy to treat adopted children as undifferentiated children. When a designated heir is substituted for an adult adopted child, the problem is easier to resolve. First, there is no dispute that a class gift to the "children" or "issue" of the designator does not, genetically speaking, include a designated heir.\textsuperscript{63} Second, when the class gift is to the "heirs" of the designator, and the gift is made under an instrument that was known and in existence at the time of the designation, it is a reasonable inference that the designation was motivated in part by the designator's desire to appoint someone as


\textsuperscript{63} This assumes that the jurisdiction, in enacting legislation to permit designation of heirs, would not follow the Ohio model of making the designated heir a child of the designator for purposes of inheritance. The Ohio courts have dealt with the issue by reading the Ohio statute to mean that the designated heir is a child only for purposes of inheritance directly from the designator and only if the designated heir survives the designator. See supra notes 10, 48 and accompanying text.
a taker under that instrument. Third, there are multiple reasons to think that the creator of such an instrument would not likely have intended to confer a benefit on someone appointed by the designator. The donor could have created a power of appointment in the designator but did not. Designation of an heir in this context is tantamount to the exercise of a special power of appointment. It would be a subversion of the donor's intent to allow another person effectively to exercise a power of appointment that never was created by the donor.

Moreover, it is not altogether fanciful to think that the power to designate an heir, if construed to confer the power to bring the designated heir into a class gift to "heirs," might cause the corpus of that gift to be included in the taxable estate of the designator. If any person or entity could be designated an heir, the designator presumably would be able to designate his estate, his creditors or the creditors of his estate as his heir. This possibility might be enough to cause the power to designate an heir to be treated as a general power of appointment. It would be poor public policy indeed to saddle unknowing donors and beneficiaries of trusts with tax consequences that are created inadvertently by operation of law, especially when that law is produced by a jurisdiction not levying the tax.

Thus, it would a better choice to declare that the designation of an heir has no effect on any other donative instrument created by a person other than the designator. Third-party donors wishing to benefit the designated heir remain free to do so either explicitly or by necessary implication from the terms of a donative instrument created after the designation has occurred and is known to the donor.

E. Disclaimer

As with other property interests transmissible at death, a designated heir should be free to disclaim his interest. The usual effect of disclaimer, under the disclaimer laws of most states, is to treat the disclaimant as having predeceased the decedent. This situation highlights the importance of dealing correctly with the problem of whether the heirs of the designated

64 Federal tax law includes within the taxable estate the value of property over which the decedent at the time of his death held a general power of appointment. See I.R.C. § 2041 (1988). Internal Revenue Code ("Code") section 2041(b) defines a general power of appointment to be "a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate." Code section 2514(c) uses the same definition for purposes of the gift tax.

heir may inherit from the designator by representation. The ability to disclaim bequests and inheritances is an important, albeit relatively minor, part of post-mortem estate planning and is of great importance to an insolvent heir. There is no sound reason why these benefits should be denied to designated heirs.

IV. CONCLUSION

Academic scholarship may be divided into works of theory and works of application. Of course, some people think scholarship equals theory, and others think theory equals scholarship. Neither equation is universally true. This is a work of application, not a work of over-arching theory, concerning accommodation within our system of inter-generational wealth transmission of the multiplicity of ways in which we choose to live our lives entwined with others. Theory, at its best, can be ground-breaking, even, in the trite phrase, paradigm shifting, but many theories plow well-traveled furrows without turning up anything new. In any case, it often takes awhile for even the most brilliant of legal theories to work substantial change in the daily lives of people. None of this is to deride the manufacture of theories, a practice in which I have participated as much as any active scholar, but rather to suggest that sometimes a modest change in the application of existing structures might have significant and immediate benefits. That, I believe, is the case with designation of heirs.

Consider the application of this concept to the facts of In re Will of Moses. Fannie Moses married three times, survived three husbands, and had no children. She was a successful, capable woman of business, owning and managing commercial property and four apartment buildings in Jackson, Mississippi, as well as a 480 acre farm. She consumed more alcoholic beverages than is prudent, but her fondness for alcohol apparently never impeded her business judgment. She suffered from breast cancer and heart disease, and underwent a mastectomy in treatment of the cancer. At age fifty-seven, after the death of the last of her three husbands, she sought solace and comfort in the company of her attorney, Clarence Holland, a man fifteen years her junior. Holland and Moses became lovers, a relationship that was apparently suitable to them, but not to Moses’s next of kin, her elder sister. Unbeknownst to Holland, Moses retained another lawyer, Dan Shell, to draft her will devising most of her property to Holland. Fannie

67 227 So. 2d 829 (Miss. 1969).
Moses lived for nearly three years after that will was executed. A month before her death, she called W.R. Patterson, "an experienced, reliable and honorable attorney who was a friend of hers," and entrusted him with the original of her will, adding that "Dan Shell drew my will for me two or three years ago... It's exactly like I want it... I had to go to his office two or three times to get it the way I wanted it, but this is the way I want it." Unfortunately for Moses, and Holland, her wishes were repudiated in a hail of allegations of undue influence sustained by the Mississippi Supreme Court, ostensibly on the ground that Shell had failed to provide "meaningful independent advice or counsel" concerning her intended bequest to her lawyer and lover, Holland. The court's decision was more likely based on the ground that "this aging woman, seriously ill, disfigured by surgery, and hopelessly addicted to alcoholic substances, was completely bemused by the constant and amorous attentions of Holland, a man 15 years her junior [and] she entertained the pathetic hope that he might marry her."

Suppose that Mississippi had afforded Fannie Moses a ministerial procedure to designate Clarence Holland her sole heir, coupled with the option to trigger the limitations period for contesting the designation by notifying her displaced heirs. Had she provided actual notice of the designation to her elder sister, the ultimate contestant of her will, the limitations period would have expired nine months before her death. Had Fannie's sister challenged the designation during Fannie's lifetime, the courts would have found it harder to declare Fannie to be under the control of Clarence Holland because she was in poor health, drinking too much, and finding love in all the court's wrong places.

Suppose that Mississippi had also afforded Fannie Moses the option of an administrative procedure. She might then have been required to reveal to Holland her intentions (in order to satisfy the magistrate of the absence of any undue influence), but it is possible that her own testimony and that of Dan Shell would have sufficed to overcome Mississippi's presumption of undue influence when the beneficiary is in a confidential relationship with the testator. Of equal if not more importance, such testimony would

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68 Id. at 843 (Robertson, J., dissenting).
69 Id. (emphasis in original, internal quotations omitted).
70 Id. at 834.
71 Id. at 833.
72 In Mississippi, a will contest may be brought within two years after the will is offered for probate. See Miss. Code Ann. § 91-7-23 (1972). The same period ought to apply to actions to contest the validity of designations of an heir.
73 As do many states, Mississippi presumes the existence of undue influence in
have established a presumption of an *absence* of undue influence under the proposal made here. Under either of these procedures, Fannie Moses would have been far more likely to succeed in leaving her property to Clarence Holland, the last good friend and lover of her life, rather than to her sister. One cannot read *Moses* without acquiring the impression that Fannie Moses's freedom of testamentary disposition was thoroughly eviscerated by a legal system that viewed her life as of "dubious" morality, to quote the chancellor in the resulting will contest.\(^7\)

Small changes at the margin of the law's design may make a big difference in people's lives. Designation of heirs increases the certainty of estate planning available to people who exist in nonstandard living arrangements or who wish to make disposition of their property in a manner that is disadvantageous to their statutory heirs. While not a panacea, particularly for the same-sex couple who remain denied very significant status benefits, it does offer immediate benefits that for some people can be especially valuable. We should not slight incremental advantages simply because they are not the product of over-arching shifts in the way we view our world. To paraphrase the hoary old adage that every journey begins with a single step, improving the human condition through legal change is not always produced by superhuman leaps and bounds.

\[^7\] *Moses*, 227 So. 2d at 832.