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Protecting Testamentary Freedom in the United States By Introducing Into Law the Concept of the French Notaire

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PROTECTING TESTAMENTARY FREEDOM IN THE
UNITED STATES BY INTRODUCING INTO LAW
THE CONCEPT OF THE FRENCH NOTAIRE

I. INTRODUCTION

The most fundamental principle of the law of wills in the United States is effectuation of the testator's intent.¹ Yet testamentary freedom is disregarded by courts that decide cases in ways that ensure that testators devise their estates in accordance with "prevailing normative views."² These prevailing normative views play a predominant role when blood relatives are disinherited for non-blood relatives.³ Consequently, courts frequently impose upon testators a duty to provide for those it views as having a moral claim to the testator's assets,⁴ or in other words, for providing for the blood relatives. This imposed moral duty, synthesized from prevailing case law, has been labeled the "unspoken rule."⁵ Courts have thus manipulated the doctrines of undue influence, fraud, and capacity⁶ to legally frustrate what should have been held a perfectly valid will.⁷ To remedy this problem, this Note proposes the adoption of concepts that are fundamental to the role of the French Notaire⁸ into the American legal system.

Part II of this Note explores the ways in which courts have used the undue influence doctrine to invalidate unconventional dispositions.⁹ *Carpenter v. Horace Mann Life Insurance Co.*,¹⁰ an Arkansas Court

1. See *Fischer v. Heckerman*, 772 S.W.2d 642, 645 (Ky. Ct. App. 1989) ("the right of a testator to make a will according to his own wishes is jealously guarded by the court, regardless of a court's view of the justice of the chosen disposition.").

2. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996).

3. See *id.* at 247. See also Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 611 (1997).

4. See Leslie, *supra* note 2, at 236.

5. *Id.* at 236.

6. However, this Note deals only with the Doctrine of Undue Influence.

7. See Leslie, *supra* note 2, at 237.

8. Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 150 (1990). The authors define the French notaire as a French "judicial officer."

9. See Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 2 (1941).

10. *Carpenter v. Horace Mann Life Insurance Co.*, 730 S.W.2d 502 (Ark. Ct. App. 1987).

of Appeals case, will be examined as its facts are also particularly illustrative of the notion that courts disregard the testator's intent when they do not agree with a testamentary disposition.¹¹ Furthermore, American statistics on will invalidations in situations where blood relatives were disinherited for non-blood relatives, and instances where blood relatives challenged and succeeded in invalidating wills leaving devises solely to other blood relatives, will be compared.¹² Part III of this Note describes the history of French Notaire, and examines the relevant French Decrets and laws which set forth the professional guidelines that govern them. Part IV proposes the introduction of the concept of the French Notaire into the American Legal System as a means of enhancing testamentary freedom.¹³ Section A of Part IV outlines the issues involved in such a proposal, while Section B addresses potential drawbacks. Finally, Part V of this Note concludes that it would be advantageous to introduce the concept of the French Notaire into United States jurisprudence.

II. PROBLEMS IN UNITED STATES PROBATE

Undue influence has become the most frequently used ground to invalidate a will in the United States.¹⁴ While in certain cases invalidation of a will based upon these grounds will be entirely warranted, frequently it is not. After a thorough examination of case law, it is evident that many courts do not regard testamentary freedom as the primary principle of the law of wills.¹⁵ While the doctrines of fraud and duress have also been frequently used to invalidate wills, the law of undue influence has by and large swallowed these doctrines. This holds true since the undue influence doctrine is far easier to prove and does not require any "direct evidence of malfeasance by (or on behalf of) the named beneficiary."¹⁶

11. See Leslie, *supra* note 2.

12. See Leslie, *supra* note 2, at 243.

13. See generally, John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489 (1975).

14. See Madoff, *supra* note 3, at 574; See also, Jeffrey A. Schoenblum, *Will Contests: An Empirical Study*, 22 REAL PROP., PROB. & TR. J. 607, 647-49 (1987).

15. See Leslie, *supra* note 2, at 236.

16. Tithing is donating to a cause. See Madoff, *supra* note 3, at 581.

A. *Undue Influence*

The underlying purpose of the doctrine of undue influence has always been to protect testamentary freedom by invalidating testamentary documents when the will of a testator is trumped by the will of a person exercising undue influence.¹⁷ This result is necessary because a will procured by undue influence fails to represent the testator's intent, but rather reflects the coercive over-shadowing of the "influencer" on the testator.¹⁸

On the other hand, it has long been the rule that undue influence is not present if the facts reflect only evidence of mere persuasion, tactics that speak to testator's sympathy, or if there is evidence of favors performed, even with the intent to sway the disposition of the testator's will.¹⁹ This doctrine arose as a general rule to invalidate undue *coercion*, not to void testamentary bequests that were "merely unfair, a result of bad judgment, or offensive to the prevailing moral code."²⁰

Generally speaking, three basic elements are essential to establish undue influence.²¹ The contestant²² must prove that (1) a person has influenced the testator in the formation, preparation or execution of the will and that there was a confidential relationship²³ between the testator and the alleged "influencer;" (2) that the testator was indeed

17. See Leslie, *supra* note 2 at 244.

18. Porter v. Estate of Spates, 693 So. 2d 88, 89 (Fla. Dist. Ct. App. 1997) (holding "undue influence must constitute over-persuasion, duress, force, coercion, or artful or fraudulent contrivances to such degree that there is a destruction of free agency and willpower.").

19. Raimi v. Furlong, 702 So. 2d 1273, 1285 (Fla. Dist. Ct. App. 1997). The Court in *Raimi* held, "the undisputed record evidence, however, disclosed that the decedent had a long history of being generous to others and mere affection, kindness, or attachment of one person for another does not itself constitute undue influence."

20. See Leslie, *supra* note 2, at 244 - 245.

21. Most courts characterize undue influence with three elements, while presuming undue influence only in the existence of a confidential relationship, which can of course be overcome. Thus, a confidential relationship is not necessary to prove undue influence if the other factors are present. See generally Leslie, *supra* note 2.

22. *In re Estate of Grieff*, 92 N.Y.2d 341, 345 (1998) (holding "it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used, and that all was far, open, voluntary, and well understood.") (quoting *Cowee v. Cornell*, 75 N.Y. 91, 99-100 (1878)).

23. *In re Estate of Flohl*, 764 So. 2d 802, 804 (Fl. Dist. Ct. App. 2000) (holding there is a presumption of undue influence "if a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in procuring the contested will, the presumption of undue influence arises") (quoting *In re Estate of Carpenter*, 253 So.2d 697, 701 (Fla. 1971)).

susceptible to undue influence; and (3) that the testator ultimately made a gift to the "influencer" that may be seen as an unnatural disposition.²⁴

1. The Role of the Alleged Influencer in the Creation or Execution of the Will and the Legal Effects of Establishing a Confidential Relationship

The role of the alleged influencer in the creation or execution of the will is most clearly illustrated when an attorney drafts a bequest to him or herself, though this direct involvement is not mandatory for courts to find the existence of undue influence.²⁵ Instead it would suffice if the person allegedly exerting coercion has recommended the testator to the drafting attorney, made the appointment for the testator, or was merely aware of the contents of the will.²⁶ Courts are reluctant to find undue influence when family members participate in the execution or procurement of a will.²⁷ Rather, without more, participation of family members is presumed by the courts to be "natural."²⁸

In *Summit Bank v. Quake*, the Indiana Appellate Court, not unlike others, held that the existence of a confidential relationship, coupled with a gift to the alleged influencing party, was enough to raise a presumption of undue influence, which must then be rebutted by the person who shared the confidential relationship.²⁹ However, courts are not quick to find a confidential relationship between a spouse and a testator or between blood relatives and a testator; furthermore, a confidential relationship is not necessary in finding undue influence if the other elements are present.³⁰

2. Testator's Susceptibility

Often a testator will be held susceptible to undue influence if he or she is sick, elderly, or incapacitated due to mental illness. However, susceptibility may also be shown when a beneficiary has conferred

24. *In re Estate of Davis v. Cook*, 9 S.W.3d 288, 292 - 293 (Tex. App. Dist. Ct. 1999).

25. *See Estate of Auen*, 35 Cal. Rptr. 2d 557, 563 (Cal. Ct. App. 1994).

26. *See Madoff, supra* note 3, at 587.

27. *Id.*

28. *See Madoff, supra* note 3, at 588. *See also, Carter v. Carter*, 526 So. 2d 141 (Fla. Dist. Ct. App. 1988).

29. *Summit Bank v. Quake*, 631 N.E.2d 13 (Ind. App. Ct. 1994).

30. *See Madoff, supra* note 3, at 602.

upon the testator "unnatural" gifts during his or her lifetime, obviously in hopes of procuring a devise at the death of the testator.³¹

3. Unnatural Dispositions

The element of unnatural dispositions allows the courts to invalidate a will on the grounds of undue influence when someone is unexpectedly disinherited from a will;³² it is this element that allows courts to greatly manipulate the undue influence doctrine. While in some circumstances "foul play" may indeed be implicated,³³ it is not hard to imagine that a testator disinheriting a family member might not want to share this information with his soon to be disinherited family members. Notwithstanding this alternative explanation for the unexpected disinheritance, a family member's undue influence challenge is almost always based on the argument that a disposition to a non-family member or to a more remote relative is "unnatural."³⁴ Hence, the issue becomes what is considered natural for purposes of satisfying the requirement under the undue influence doctrine. Case law demonstrates that what is natural is not dependent on the point of view of the testator, but is amazingly defined as a disposition that provides for the testator's heirs at law.³⁵

B. *Statistics Evidencing the Manipulation of the Undue Influence Doctrine*

While these elements appear to be protective and rather straightforward,³⁶ the evolution³⁷ of the law clearly illustrates otherwise; in fact, many estates law professors claim that the undue influence doctrine "vibrantly illustrates the role a court's moral code often plays in limiting testamentary freedom."³⁸ Statistics also support the notion that courts manipulate the undue influence doctrine when a testator

31. *Carpenter v. Horace Mann Life Insurance Co.*, 730 S.W.2d 502, 507 (Ark. App. 1987).

32. *See* Madoff, *supra* note 3, at 589.

33. *Id.*

34. *Id.* at 590.

35. *In re Estate of Maheras*, 897 P.2d 268, 273 (Okla. 1995).

36. With the exception of the unnatural disposition element, being that the interpretation of this element generally seems not to protect testamentary intent, but rather to protect heirs that could be disinherited.

37. And, of course, current.

38. *See* Leslie, *supra* note 2, at 243.

disinherits blood relatives. A study³⁹ that examined each case noted in the West key topic number 409 (wills) and 154-66 (covering elements of undue influence) between 1984 and 1990⁴⁰ found that at least 70 cases during this period involved contestants and will beneficiaries that were related to the testator in "equal or substantially equal degree," such that the contestant and testator were siblings or nieces and nephews.⁴¹ The study showed that in only 18 of the 70 cases were the wills denied probate pursuant to the undue influence doctrine; the remaining 52 cases were held valid.⁴² On the other hand, of the 36 cases studied where a testator's relatives contested wills that disinherited them in favor of non-relatives, half of them were invalidated.⁴³

It is clear that when a testator disinherits a blood relative in circumstances not conforming to a court's perception of societal norms, the court is not hesitant to rewrite the bequest. It follows that the doctrine of undue influence has been abused to deny a testator of having his or her last wishes effectuated;⁴⁴ as such, the doctrine which was "created to serve the testator's wishes [has] the potential to undercut them."⁴⁵

A particularly illustrative case is *Carpenter v. Horace Mann Life Insurance Co.*⁴⁶ Monica, the testator, was the eldest of six children and was

39. Professor Melanie Leslie conducted this study and is an Estates professor at Cardozo Law School.

40. See Leslie, *supra* note 2, at 243.

41. *Id.*

42. *Id.*

43. *Id.*

44. See generally Leslie, *supra* note 2.

45. Jane B. Baron, *Intention, Interpretation, and Stories*, 42 DUKE L.J. 630, 635 (1992).

46. *Carpenter v. Horace Mann Life Insurance Co.*, 730 S.W.2d 502 (Ark. Ct. App. 1987). One well-known and highly criticized case in this area of law is the 1964 case of *In re Kaufmann's Will*, 20 A.D.2d 464 (1964), *aff'd*, 15 N.Y.S.2d 825 (1965). Robert Kaufmann, a multi-millionaire as a result of inheritance, moved away from his family and took up an independent life in New York City. He then met Walter Weiss, a man much less fortunate than himself financially. About a year after meeting each other, Walter moved into Robert's apartment. Robert had all of his records in the possession of his family shipped to New York, and soon after, Robert purchased an expensive townhouse, remodeling the top floor into an office for Walter. Walter took care of the home while Robert worked at his art gallery. The two men held themselves out as a couple, openly showing love and affection for one another. The two men lived together for 10 years, until 1959, when Robert unexpectedly died.

Starting in 1951, Robert began creating successive wills. While in the 1950 will most of his property was to be given to his brothers, thereafter, each will increased the devise to Walter, thus decreasing the bequests to Robert's siblings. In 1958, Robert had a prestigious law firm draft a will that left almost his entire fortune to Walter. In addi-

raised as a devout Catholic.⁴⁷ After completing high school, she went to college, successfully graduating as a registered nurse.⁴⁸ In 1965, she married Pat Johnson and together they had one son, Bryan.⁴⁹ Soon after, Monica decided to work in order to put her husband through

tion to this will, Robert drafted and signed a letter to his family clearly setting forth the reasons for which he wished to leave Walter his fortune. The letter alluded to the sexual relationship he shared with Walter, and referred to Walter as his "dearest friend" and "best pal." He gave all of his gratitude to Walter for being wonderful to him and concluded the letter with hopes that his family would "be comfortable with his self-determination." Furthermore, in 1951, Robert executed a document giving Walter the signature power that a legal spouse would have over business and personal matters, in addition to a power of attorney.

Robert's brother Joel challenged the validity of the will on grounds of undue influence. The appellate division set the 1958 will aside on undue influence grounds, noting among other things that there was a confidential relationship. The appellate division reasoned the instrument "was the end result of an unnatural, insidious influence operating on a weak-willed, trusting inexperienced Robert whose natural warm family attachment had been attenuated by false accusations" created by Walter. Both courts agreed that despite the presumption that successive wills solidify a testator's intent, that each will was the product of increasing amounts of undue influence and that Robert's letter to his family explaining his choice of disposition was further evidence of the domination that Walter had over Robert's mind.

The Court of Appeals of New York affirmed, similarly holding, "where, as here, the record indicates that testator was . . . easily taken advantage . . . that there was a long and detailed history of dominance and subservience between them . . . and proponent is willed virtually the entire estate, we consider that a question of fact was presented concerning whether the instrument offered for probate was the free, untrammelled and intelligent expression of the wishes and intentions of testator or the product of influence of the beneficiary."

Perhaps one of the most telling words used in the *Kaufmann* holding is that of "unnatural," a word used in the appellate division's decision. The appellate court used the unnatural element of undue influence with the presumption that anything given to non-blood relatives is unnatural. Furthermore, this wording may also reflect the courts' biased perception toward Robert's devise to his same sex lover, a devise which certainly in 1964 defied both socially acceptable norms and the courts' sense of norms. Nonetheless, while the devise arguably seemed unnatural to the courts in 1964, based on the facts of this case, it did not seem unnatural to Robert; in fact Robert's intention could not have been more clear, and it is his intention that should have been upheld. Thus, the *Kaufmann* case illustrates what the doctrine of undue influence has become "an imposition of societal norms as to appropriate testamentary behavior." See generally Kim Lane Scheppele, *Forward: Telling Stories, Legal Storytelling*, 87 MICH. L. REV. 2073 (1989); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. Pitt. L. Rev. 225 (1981). See also JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS AND ESTATES*, 193-196 (6th ed. 2000).

47. Carpenter, 730 S.W.2d at 503.

48. *Id.*

49. *Id.*

vocational school and college.⁵⁰ Arguably, Monica was a focused, intelligent, and giving person.

In the early 1970s, the Johnsons moved to Chicago, where Monica began to search for "something more" in the spiritual realm.⁵¹ Her husband, who had converted to Catholicism, proclaimed that he was really an atheist.⁵² Upon a recommendation from a friend, Monica attended a sermon given by Carey Carpenter, and soon after, Monica and Carpenter developed a friendly relationship.⁵³ Carpenter, founder of the High Foundation, characterized himself as a teacher, counselor and writer in the Metaphysical, a somewhat unconventional religious practice, where the Bible is not taught, but rather concentration is focused on meditation.⁵⁴ He advocated tithing,⁵⁵ just as almost all religious congregations do, to solicit from its followers. However, Monica, though wanting to tithe, was unable to because her husband did not accept the views and purposes of this sort of religion.⁵⁶ Eventually, Monica and Pat's marriage failed, she willingly surrendered custody of their son to Pat, moved to Arkansas to live with Carpenter and his "family," obtained a job as a nurse and donated a substantial amount of her earnings to the High Foundation.⁵⁷ In return, Monica was provided with a house, while Carpenter paid her utilities and gave her a car.⁵⁸

In 1976 and 1977, Monica purchased seven life insurance policies, of which all but one named the beneficiary as the High Foundation; the other was payable to her estate.⁵⁹ Soon after, Monica went to an attorney, who was not recommended by Carpenter, and executed her "Last Will and Testament" naming Carpenter executor.⁶⁰ It was never alleged that this attorney came recommended by Carpenter. Carpenter was not present at that time,⁶¹ and the court record did not indi-

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 504.

58. *Id.*

59. *Id.*

60. *See* Leslie, *supra* note 2, at n.80.

61. *Id.*

cate that he urged her to draft a will or purchase the life insurance policies.⁶²

In November of 1977, while traveling to Denver in search of a new office for Carpenter, Monica was killed in a car accident. At that time, Carpenter attempted to probate the will, and Pat Johnson contested the will on behalf of his son.⁶³ At trial, the judge heard testimony of two psychologists for the contestants which claimed that the letters exchanged between Monica and Carpenter were conclusive of the fact that Monica had a "very dependent personality, and was searching for a father figure."⁶⁴ Both psychologists testified that "it was not their belief that Carpenter had actually, knowingly attempted to extort money from Monica or other women."⁶⁵ Despite this statement, and in spite of the law of Arkansas that required the contestant to prove that any influence exercised by Carpenter was "specially directed toward the object of procuring a will" benefiting him, the court affirmed the trial court's ruling that Carpenter procured the will through undue influence.⁶⁶

Notwithstanding the legal standard of Arkansas and the factual basis, the court proclaimed,

Where the provisions of a will are unjust, unreasonable and unnatural, doing violence to the natural instinct of the heart, to the dictates of parental affection, to [the] natural justice, to [the] solemn promises, and to [the] moral duty, such unexplained inequality is entitled to great influence in considering the question of testamentary capacity and undue influence.⁶⁷

The Arkansas Court of Appeals went so far as to explicitly state that a testator has a moral duty to provide for relatives, among several other duties, though the undue influence doctrine makes no mention of such a consideration.⁶⁸ This case, hardly atypical, is symptomatic of United States courts' interpretation of the undue influence doctrine.

62. See generally, Madoff, *supra* note 3.

63. See Carpenter, 730 S.W.2d 502.

64. *Id.* at 504.

65. *Id.* at 505.

66. *Id.* at 505.

67. *Id.* at 507.

68. *Id.*

III. THE HISTORY AND THE ROLES OF THE FRENCH NOTAIRE

The French notaire is a public official who has the duty of drafting legal documents. These documents are then authenticated by the notaire, which means that the document is given the utmost credibility and is presumed to be free from undue influence or fraud.⁶⁹ This credibility given to a notaire's work product, makes the role of the notaire highly prestigious, as the binding effect of his or her work is comparable to that of the American Judge.⁷⁰

A. *Historical Roots of the French Notarial Profession*

The French notarial profession predates 803 A.D., when Emperor Charlemagne reintroduced the profession into France.⁷¹ At that time, the notaire was considered an ordinary official of the Royal or Seignorial courts, or "a person who took quick notes," faithfully transcribing what he was told.⁷² It was not until the year 1270 that the King of France officially seated the first sixty notaires for the purpose of advising his court.⁷³ From the fourteenth century on, a notaire could be found in any French town, performing such duties as noting bequests, drafting contractual instruments between parties, and recording the amounts of taxes to be collected.⁷⁴ Deemed superior in carrying out these duties, a notaire at this time was granted the right to "legalize a deed by attaching the Royal Seal."⁷⁵ Notably, hundreds of years later, this perception of the notaire is still in effect.⁷⁶ A document issued by the Conseil Superieur du Notariat in 1946 maintained that if the notaire's job were limited to merely certifying signatures,⁷⁷ it would be

69. EZRA SULEIMAN, *POWER AND CENTRALIZATION IN FRANCE* (Princeton University Press 1987).

70. *Id.*

71. Conseil Superieur du Notariat of France, *The French Notaire*, available at <http://www.notaires.fr> (last visited Sept. 22, 2001).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See Milton G. Valera, *The National Notary Association: A Historical Profile*, 31 J. MARSHALL L. REV. 971, 973 - 974, 985 (1998).

77. This basically constitutes the role of the American Notary. Here, in the United States, the notaries of the Notary Public engage in ministerial functions of witnessing signatures, identifying signatures and administering oaths. This position is available to "literate adult of demonstrable integrity," regardless of undergraduate and legal educational attainment. There is a 100 question comprehensive exam given to those

“easy to imagine him as a civil servant.”⁷⁸ The document concluded by stating “the notaire is much more and far better than that,”⁷⁹ as notaires were considered, as a result of the power emanating from their functions and authority, on a level comparable to a priest.⁸⁰

The basis of the notarial powers, function and duties was codified in March 1803, when the Law of 25 Ventose an XI (1803) was introduced.⁸¹ This law continues today to serve as the profession’s legal foundation.⁸² The Law of 25 Ventose an XI (1803) defines the notaire as a public official,⁸³ describes the notarial function of authentication of contracts, sets forth the conditions and procedures according to which one may become a notaire,⁸⁴ and additionally mandates the conditions under which the notaire may exercise his or her functions.⁸⁵ For instance, the notaire is always excluded from handling

who study a three-part video instruction program teaching notarization, and if passed, the person may become part of the notary public. *Id.*

78. CSN, “Discussion, en ce qui concerne le notariat, de la proposition de resolution no. 276 invitant le gouvernement a deposer un project de loi abolissant d’une maniere generale et en toute matiere la venalite des charges.” p. 1. (Mar. 1946).

79. *Id.*

80. See SULEIMAN, *supra* note 69, at 93.

81. *Id.* See also The Law of 25 Ventose an XI (1803) (Legifrance).

82. A. JEANNEST SAINT-HILAIRE, *DU NOTARIAT ET DES OFFICES* (Paris: Durnand, Librarie-Editeur, 1858). Also see generally SULEIMAN, *supra* note 69.

83. L. Neville Brown, *The Office of the Notary in France*, 2 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 61 (1953).

84. The six conditions for admission as a notary are that the applicant 1) is a French citizen, 2) has served his military obligation, 3) is over 25 years of age, 4) has served the necessary apprenticeship duty in a notaries office, 5) has passed the professional examination, and 6) has received favorable commendation from the President of the Chamber of Discipline on the applicant’s moral fitness. *Id.* at 62.

Moreover, the notary must have considerable wealth to begin his practice or buy an existing practice because every notary must have a separate charge. See Langbein, *supra* note 13. Finally, he cannot work in partnership or be employed by another. See Langbein, *supra* note 13.

85. *Id.* See also SULEIMAN, *supra* note 69, at 39.

This law also proclaims that the notaire receives “all actes and contracts which the law requires to the parties desire to be given the character of authenticity attached to the actes of a public authority, to establish their date, and to preserve their date . . . and custody and issue certified copies.” See generally Brown, *supra* note 83. Another mandated role and duty of the notaire, which is not directly relevant to this note but deserves some attention, is that of assuring the deposit and issuing certified copies of the actes which they preside over. The notaire must safeguard the custody of the originals of the actes which he receives “en minute.” See *infra* at note 89 for definition of “en minute.” The notaire must also keep a “reperoire,” or a chronological table of all the actes which he or she has received, which from time to time is audited by registration officials to ensure the notaire is complying with this duty. Thus, the notaire is also an

matters that will end up in litigation, for this is a duty left to the French avocat, who does not have a duty to be impartial.⁸⁶

It is well known that while the notaire is a representative of state authority, and his work bears the seal of the state,⁸⁷ in practice, the notaire is not exactly subject to "higher authority."⁸⁸ Instead, the state leaves control and authority of the profession "to the profession itself."⁸⁹ Provided that the notaire is not liable to his or her Chamber as a result of a breach of the notaire's professional conduct,⁹⁰ the notary

"archivist," and has to preserve these minutes for 125 years from the date they were authenticated. Once the minutes reach this age, they are delivered to the national or district archives. See Brown, *supra* note 83, at 67.

86. See generally Brown, *supra* note 83. The purpose of the Law of 25 Ventose an XI (1803) is stated at the outset of the law in the Expose des Motifs that accompanies it, which is "to establish, on firm foundations, the rights of property, civil liberty and domestic peace." It was through this Expose des Motifs that Conseiller d'Etat Real proclaimed the vision of the notarial system; that the notaire will serve as "disinterested counsels to the parties . . . drawing up . . . contracts . . . giving [the] documents a legal form and the force of judgment in the last resort." Expose des motifs du project de loi sur l'organisation du notariat par le Conseiller d'Etat Real, seance du 14 ventose an XI. This law has been modified by subsequent acts and decrees; however, for the purposes of this paper, these modifications are irrelevant, as they do not change the fundamental duties and roles of the notaire discussed herein.

87. See Conseil Superieur du Notariat of France, Notarised Instruments, available at <http://www.notaires.fr> (last visited Nov. 7, 2002).

88. Henri Mendras, *Les Contradictions du statut de notaire 3* (May 1983) (unpublished note). See also SULEIMAN, *supra* note 86, at 45.

89. See SULEIMAN *supra* note 69, at 45. It is only the notaire's conduct that is subject to supervision by the notaire's local Chamber of Discipline, a Chamber composed of none other than the notaire's own colleagues. See Brown, *supra* note 83, at 64.

90. The Notaires' ethical commitment includes the following: 1. "In order to invest contractual relations with a degree of public authority over which we have control, we restate our commitment to serve society and those citizens who have recourse to law. As conciliators we are the craftsmen of social peace. 2. Each of us renews his commitment to respect our ethical code, which in indissoluble from our professional status. Its rigor is the basis of legal security and it lends considerable strength to notarization. 3. As a united body, we confirm our commitment to provide our fellow citizens with the three fundamental guarantees that they expect from public service both now and in the future:

a. continuity, which requires that our service be established appropriately, b. equality of access, which means mandatory pricing, c. universality, which means a service open to all citizens, to remain faithful to our dual role as public officials and members of a liberal profession, which is the basis of our ethical code and guarantee of our capacity to change." See Conseil Superieur du Notariat de France, available at <http://notaires.fr>. (last visited Sept. 22, 2001).

Furthermore, it is argued that as a result of this broad discretion freedom enjoyed by the notaire, the Notarial system suffers from inherent flaws, the most significant of which is fraud, as a result of the notaires' abuse of their office. This problem, however,

practices within his district with ample freedom.⁹¹

The word “authenticity” deserves some attention, for it is through the power of authentication that the notaire possesses much of his or her power. This word has been described as “the attestation of a fact by a public authority whose declaration is conclusive without previous verification of the writing, until impeached for falsity.”⁹² Furthermore, the authentique is defined by Article 1317 of the Civil Code as the force of an instrument that has been drafted by a public officer, who is empowered to practice in the place where the instrument was received, and the document satisfies the required formalities.⁹³

An acte authentique⁹⁴ refers to a document or instrument that has been authenticated with a certificate of notary and is thus “an instrument with a high evidential value or probative force derived from its form and the authority by whom it is prepared.”⁹⁵ An acte authentique has two principal effects.⁹⁶ First, the acte is conclusive evidence until impeached for falsity. Second, an acte is executory in itself.⁹⁷ The former is an effect of all actes authentiques, but the latter only

is noted by the author of the argument to have been most predominant in the second half of the 19th Century, the government became concerned in response to the almost daily scandals surfacing in the profession. The cause of the “crisis” was that of the numerous dishonest notaires. Measures were taken against these notaires as a result of their breach of the code of ethics, and consequently, between 1880 and 1900, according to the Minister of Justice, M. Darman, in figures released in the Expose des Motifs, 498 notaires lost their ability to practice. However, it must be noted that the figures released showing fraud in the notarial system in the 1970s show a decline. Between 1971 and 1980, only 177 notarial licenses were revoked; furthermore, the author of the argument notes that “the notaires who have exercised their profession for the longest period (who are the oldest) tend to be the most fraudulent. . . one percent of the notaires under the age of thirty five are involved in fraudulent activities, [while] 39 percent of frauds are committed by those who are over sixty years old.” See SULEIMAN, *supra* note 69, at 65, 67. For figures pertaining to the 1970-1980 figures, See CSN, Groupe de Travail Livre Blanc, Compte-rendu no.7, p. 8 (Mar. 18, 1983).

91. See Conseil Superior du Notariat de France, available at <http://www.notaires.fr>; SULEIMAN, *supra* note 69, at 65, 67; CSN Groupe de Travail Livre Blanc, Compte-rendu no.7, p. 8 (Mar. 18, 1983).

92. See Brown, *supra* note 83, at 65.

93. Article 1317 of the French Civil Code.

94. There are four requirements of an acte authentique: a public authority presided in its making, the public officer has the power to make or receive it, that the public authority has jurisdiction to practice where and at the time the acte is drawn up or received, and finally that the acte has complied with formality. See Brown, *supra* note 83, at 65.

95. *Id.* at 66.

96. *Id.* at 65.

97. *Id.*

applies to the grosses of notarial actes.⁹⁸ Authenticating is a right that the notaire is privileged to share with the French Judiciary, and consequently, it is this right that grants the notaire extraordinary power.⁹⁹

The form and substance of the authenticated document must be distinguished. If an acte appears to be authentic on its face, it is presumed to be so.¹⁰⁰ However, when looking at the substance of a document, it must be noted that the probative value will vary depending on whether the acte was actually performed by the notaire, or carried out in his presence, such as with the execution of a will, or if the acte or events took place out of the notaire's presence.¹⁰¹ In the former instance, such acte is fully proved until impeached; however, the impeachment procedure is very tedious and costly.¹⁰² 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.¹⁰³ Thus, it is very risky and extremely difficult to challenge and invalidate a document created by a French Notaire.

Moreover, some actes must be passed before a notaire if they are to be given any validity and authentication at all,¹⁰⁴ while certain actes require for authentication the presence of either two notaires, or one notaire and two witnesses.¹⁰⁵ This is the case for an inter vivos gift and the revocation of a gift in a will.¹⁰⁶ In such cases, these documents are considered legal only when a notarial contract has been drawn up and authenticated.¹⁰⁷ Before any acte is signed, the notaire must fully instruct the parties on the relevant law and on the legal effect or repercussions of the transaction.¹⁰⁸ He has a moral obligation to remain strictly impartial to the parties and to give sound legal advice; a breach of impartiality may result in negligence liability.¹⁰⁹ The scope of a cer-

98. *Id.* A *grosse* is a "certified copy of an acte and concludes with an executory formula identical with that appearing at the close of orders by a court."

99. *Id.* at 66. Note that it is here that an "abuse" of the notarial position is likely to arise.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at n. 21. This is also the case for a gift between spouses during marriage, the recognition of a natural child or a power of attorney.

107. See SULEIMAN, *supra* note 69, at 10.

108. See Brown, *supra* note 83, at 65.

109. *Id.* at 68.

tificate issued by a notaire, which bears his signature, his attestation and the official seal, is accepted in all countries that recognize actes.¹¹⁰

Today, the French notaire continues to function as a public official, vested with a judicial monopoly over the profession by the sovereign state.¹¹¹ The French notaire remains an important and prestigious functionary, drafting enforceable instruments¹¹² in probate and will matters, family matters, real property transactions and company formations.¹¹³ It is still the case that once a will is authenticated by a notaire, the document is given great credibility, and as such it is difficult to invalidate in post-mortem proceedings.¹¹⁴

B. Education

In order to enter the Notaire profession, one must earn a law degree in a general study of law.¹¹⁵ 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.¹¹⁶ This program combines theoretical and practical instruction and may be taken at a University or at a Center for Professional Develop-

110. *Id.* at 70.

111. See SULEIMAN, *supra* note 69. The monopoly the profession is consistently accused of possessing arises from the fact that the French legal profession is divided into three positions: the notaire, the *avocat* (the French Barrister), and the *avoue*. The notaire is restricted in number and in France, is the only public official who may partake in certain legal functions. He must, for instance, safeguard actes which he received "en minute." An original copy of a *acte en minute* must be held by the notaire for 125 years. Further only he can authenticate a document by issuing a certificate of notary. On the other hand, the *avocat* and *avoue* also enjoy their own monopolies. For instance, the *avocat* may litigate; neither the notaire nor the *avoue* may engage in oral advocacy. The *avoue* handles the written procedures in court, but only after the notaire has authenticated such written documents. See generally Brown, *supra* note 83.

112. CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 115, 123 (1993). See also, Philippe Fouchard, *The Judiciary in Contemporary Society: France*, 25 *Case W. Res. J. Int'l L.* 221, 236 (1995).

113. See Brown, *supra* note 83, at 68.

114. See Langbein, *supra* note 13, at 150-151.

115. *Conseuil Supereieur du Notariat de France*, available at <http://www.notaires.fr/cwsn/textes.nsf/FRAME+GB/Training+Frame+P?OpenDocument> (last visited Nov. 7, 2002).

116. Patrick R. Hugg, *Comparative Models for Legal Education in the United States: Improved Admissions Standards and Professional Training Centers*, 30 *VAL. U.L. REV.* 51, 221 (1995).

ment.¹¹⁷ Following the completion of this year of training, the "clerc" must take another exam to secure the notaire's apprenticeship, where he or she will serve for two subsequent years.¹¹⁸ After the apprenticeship is completed, and the cleric is given a satisfactory assessment by the government,¹¹⁹ the cleric is certified to become a notaire assistant.¹²⁰ Finally, when an opening in one of the limited 7,800¹²¹ 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.¹²²

C. Professional Organization of the Notarial System

The French Notarial Profession is organized in a three-tiered structure.¹²³ The three tiers are represented by the Chambres de Discipline,¹²⁴ the Conseil Régional, and the Conseil Superior.¹²⁵ 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.¹²⁶ The purpose of these tiers is presumably to act as checks and balances on each other.¹²⁷

IV. INTRODUCING THE FUNDAMENTAL CONCEPTS OF THE FRENCH NOTAIRE INTO THE AMERICAN LEGAL SYSTEM TO REMEDY WILL CONTEST ISSUES

Comparative law is not a body of rules and principles . . .
but rather a way of looking at legal problems, legal institu-

117. *Id.* At this institution, academics, judges, and practicing attorneys combine their efforts to provide educational supervision for the potential notaire. DADAMO & FARRAN, *supra* note 112, at 115-16.

118. *See* Hugg, *supra* note 116, at 89.

119. *Id.*

120. *Id.*

121. Conseil Superieur du Notariat de France, *available at* <http://www.notaires.fr/csn/textes.nsf/FRAME+GB/Profession+Frame+P?OpenDocument> (last visited Nov. 7, 2002).

122. *See* Hugg, *supra* note 116 at 89.

123. *See* SULEIMAN, *supra* note 69, at 148, 157.

124. In each of these departments, a Chamber of Notaries exists, which is also known as the Chamber of Discipline, this being its chief function, and the members of this Chamber are elected by all the notaries of the department. *See* Brown, *supra* note 83, at 62.

125. *Id.*

126. *Id.*

127. *See generally*, SULEIMAN, *supra* note 69.

tions, and the entire legal systems. [It is by using this method that makes it] possible to make observations, and to gain insights, which would be denied to one who limits his study to the law of a single country.¹²⁸

It is clear that reform is needed to bring United States jurisprudence back to the fundamental concept of preserving testamentary freedom.¹²⁹ However, to date, any mechanism imposed to preserve the testator's intent,¹³⁰ such as antemortem probate, has generally failed since the mechanisms are rarely used¹³¹ and face great criticism.¹³²

Antemortem probate seeks to preserve the testator's intent by allowing a testator to open his will to all allegations that would cause the will to be invalidated while he or she is still alive.¹³³ For instance, an antemortem statute that governs in the State of Ohio¹³⁴ provides that a will shall become part of the public record, that the testator must face his beneficiaries at the antemortem proceeding and, of more concern, that the testator must also face the family members he or she intends to disinherit in the mandatory court proceeding.¹³⁵ Also, antemortem probate often results in lengthy and costly litigation, with an end result being a "vicious feud that can only lead to feelings of resentment between family members."¹³⁶

128. Pedro A. Malavet, *The Foreign Notarial Legal Services Monopoly: Why Should We Care?* 31 J. MARSHALL L. REV. 945, 946.

129. See generally LANGBEIN, *supra* note 13.

130. David F. Cavers, *Anti Mortem Probate: An Essay in Preventative Law*, 1 U. CHI. L. REV. 440 (1934).

131. See Leopold & Beyer, *supra* note 8, at 170.

132. Only statutes in Arkansas, North Dakota and Ohio permit probating a will during the testator's lifetime. The statutes allow a person to institute during his or her life an adversary proceeding to declare the validity of the will. All beneficiaries named in the will and heirs apparent must be parties to the action. Ark. Code. Ann. §28-40-202 (1997); N.D. Cent. Code §30.1-8.1-01 (1997); Ohio Rev. Code Ann. §2107.081 (1998). However, there seems to be inherent problems with these statutes, namely, how would one know their heirs apparent until they die? Children are born, and if required to appear before the court in an adversary proceeding, there would be a problem; furthermore, family members may die. Consequently, one could go through the procedure of ante-mortem probate several times in their life, costing the testator significant amounts of money in legal fees.

133. Dara Greene, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663 (1999).

134. See Conseuil Supereieur du Notariat de France, *supra* note 121.

135. Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1073 (1980).

136. Howard Fink, *Antemortem Probate Revisited: Can an Idea Have a Life After Death?* 37 OHIO ST. L.J. 264, 289 (1976).

Implementation of a system comparable to that of the French Notarial system, which does not result in the problems of antemortem probate,¹³⁷ would alleviate the will contest issues that stem from the manipulation of the doctrine of undue influence in the United States. After all, it has been noted that the civil notarial system provides a valuable lesson to resolve the issues surrounding a testator who merely wants to exercise and preserve his testamentary freedom.¹³⁸

A. *Achieving the Implementation of the Comparative Model*

There are several ways in which a comparative notaire model may be adapted in the United States. For instance, the American codification should be modeled after the French Codification. The American scheme should try its best to achieve universality, the notaire's role must be carefully defined with precise limits and safeguards on this potential profession. Finally, the American counterpart must meet certain educational requirements.

1. The American Codification Should Track the French Codification

The new American statute should track the fundamental functions of the Law of 25 Ventose an XI (1803) so that the notaire would only be allowed to perform in certain capacities, namely those enjoyed by the French notaire, and mostly any other European notaire.¹³⁹ These roles include any transactional work that does not require advocacy and litigation. However, while they may be limited to certain capacities in France, one deviation from the French Law, and other notarial laws, would be that American notaires would not be *mandated* to perform any certain legal functions, thereby creating an illegal nota-

137. If a notaire drafts a will, the testator does not have to go before a judge to have the proceeding "probated" before his death; instead, in a sense, the notaire is acting like a judge, and the confidentiality of the will is preserved. Consequently, no family tensions will arise.

138. See LANGBEIN, *supra* note 13, at 151.

139. See Malavet, *supra* note 128. The Latin Notary is defined today as 1. a private legal professional performing non-advocacy counseling functions; 2. to whom the state entrusts the exclusive power to take a private transaction and give it proper legal form and to authenticate it in a public act (*publica fides* is the equivalent to an *acte authentique*); 3. who must maintain a permanent record of these transactions and issue certified copies of the public documents he prepares, to interested parties, upon request; 4. who is subject to professional, civil and criminal liability for miscarriage of his office. See also Malavet, *supra* note 128, at 952.

rial monopoly at the injury of the legal profession.¹⁴⁰ Instead, American citizens should always retain the ability to choose whether or not they would like to subscribe to the services of a notaire for their legal advice.

2. The American Counterpart Must Seek Universality

If the United States were to model its version of the notary after the French notaire, then the notion is that the profession must seek to establish universality, continuity and equality of access.¹⁴¹ The notarial profession in France works effectively because a notarized instrument is accorded full weight in all of France.¹⁴² One argument, therefore, might be that the American notaire should be introduced on a federal scale because if the individual states were free to accept or reject the concept of the notaire, uniformity may not be feasible. For instance, conservative states may reject such a statute, while liberal legislatures would likely adopt it. As a result, authenticated documents valid in one state would be invalid in others, creating more litigation and frustration, rather than relieving the problems the notaire seeks to solve.

On the other hand, it has been a major goal of the American judiciary to keep probate out of the federal court system,¹⁴³ and in light of this goal, a federally mandated system would likely meet great adversity. For a comparative system to work in the United States, the system would indeed necessitate a somewhat unified system with common threads stretched between the several states, but this goal could be achieved by introducing a statutory scheme at the state level. The American Law Institute,¹⁴⁴ an organization that drafts model legislation, would be qualified to draft a model statutory scheme for the notaire, as is evidenced by the fact that they are responsible for the Uniform Commercial Code and the Model Rules of Professional Responsibility.¹⁴⁵ Both of these schemes have been adapted by virtually all of the fifty states with minor deviations from the organization's originally drafted codes. Thus, based on this evidence, it would not be

140. See generally, SUILEMAN, *supra* note 69.

141. Conseil Supérieur du Notariat, available at <http://www.notaires.fr>

142. Article 19 of the Law of 25 Ventose an XI (1803) sets forth "All notarial acts will be taken in justice, and will be executory in all the extent of the Republic."

143. DAVID A. BAKER & MICHAEL R. CONWAY, JR., *ESTATE, TRUST, AND GUARDIANSHIP LITIGATION*, ch. 5 (2002).

144. See generally Alex Elson, *From the Trenches and Towers: The Case for an in Depth Study of the American Law Institute*, 23 *LAW & SOC. INQUIRY* 625 (1998).

145. *Id.*

infeasible to propose that each state adopt a similar statute to ensure similar roles and duties of the notaire in each of the states. As with the common law, there are minority and majority perspectives. Thus, even if a minority of the states declined to adopt the statutory scheme, the United States would still be better off than if no state adopted this concept because the role of the notaire would be effective in protecting testamentary freedom in at least many of the states. Once this is demonstrated, it is even more likely that those minority states would jump on the bandwagon and follow the majority's suit. Finally, the state notaire statutes could easily provide that documents authenticated by an American notaire will be recognized in other any other state, as long as that particular state recognizes the American notaire.

3. The Specific Role of the New American Notaire

The role of the "American Notaire" must be carefully defined so as not to create friction between a novel and helpful profession and an established, but in need of assistance, legal profession.¹⁴⁶ It will require some acclimation since the legal specialization in the United States is all a matter of practice and custom.¹⁴⁷ Pertaining to specific duties, the American notaire should be given power to authenticate and determine capacity for creating wills,¹⁴⁸ just as the French notaires.¹⁴⁹ The American notaire should be considered separate and distinct from the "rubber-stamping official,"¹⁵⁰ known as the American Notary, whose job is only ministerial and whose stamp is "not deemed to certify or guarantee the facts stated."¹⁵¹ The notaire should not be allowed to litigate in court, similar to the European counterparts,¹⁵² since this task is left to the advocate¹⁵³ and there are enough attorneys in the United States to continue handling litigation matters. The only real need the United States would have of the notaire is their power to

146. See generally Greene, *supra* note 133. The author recognizes that the legal profession needs assistance in effectuating their clients' intent, while arguing for her own mediation model to rectify the problem.

147. See Malavet, *supra* note 128, at 951-52.

148. See Greene, *supra* note 133, at 678.

149. See generally Malavet, *supra* note 128.

150. *Id.*

151. See Leopold & Beyer, *supra* note 8, at 151. See also Malavet, *supra* note 128, at 954.

152. See HENRY DEVRIES, CIVIL LAW AND THE ANGLO AMERICA LAWYER 61 (1976).

153. *Id.*

authenticate documents in order to preserve testamentary freedom, before it withers away to nothing.¹⁵⁴

A problem that occurred in implementing the antemortem probate model to preserve testamentary freedom was that there was a mandatory court proceeding which would often cause major tensions between the family members.¹⁵⁵ In France, however, the notaire is perceived by the French citizens who employ him or her as a "family friend" or the "trusted sharer of the innermost secrets of the family."¹⁵⁶ The notaire is often the peacemaker; the discouragement of arguments pertaining to possible will contests often occur in the daily routine of the notaire.¹⁵⁷ The American notaire should act and be perceived in the same way. They must, then, market themselves separate and distinct from litigators. Thus, one of the primary functions of the American notaire would be to avoid conflicts that arise in adversarial proceedings by retaining the duty of impartiality imposed on all European Notaires, while seeking to achieve the goal of providing the testator's will with validity and credibility.¹⁵⁸

In terms of the notaire's role in determining capacity,¹⁵⁹ perhaps a slightly different model should be implemented in the United States. For instance, while the French notaire can determine capacity on his or her own, in the United States it should be required that the testator be subjected to psychological scrutiny by a medical doctor trained in the area. This would ensure capacity, without taking away from the notaire's role, and allow for sound authentication;¹⁶⁰ for in determining capacity there could be more than meets the untrained eye.¹⁶¹ This added precaution will help to minimize any impeachments for falsity, and decrease costly litigation.¹⁶²

4. Limits and Safeguards on the Profession

The number of practicing notaires should be limited in the United States by the American Bar Association because it is such a

154. See generally Leslie, *supra* note 2.

155. See Leopold & Beyer, *supra* note 8, at 155.

156. See Greene, *supra* note 133, at 679.

157. See Brown, *supra* note 83, at 65.

158. See Langbein, *supra* note 13, at 151.

159. See Greene, *supra* note 133, at 678.

160. Conseil Supérieur du Notariat, available at <http://www.notaires.fr> (last visited Nov. 7, 2001).

161. See generally Leslie, *supra* note 2. See also Madoff, *supra* note 3.

162. See generally Brown, *supra* note 83.

prestigious and powerful position. On the other hand, there is an argument that notarial posts should be designated by the Government to limit the extraordinary power granted to such professionals and guard against abuse.¹⁶³ It is questionable that American notaires should necessarily be deemed governmental officials¹⁶⁴ to eliminate abuses of power.¹⁶⁵ For instance, while it may be found that a judge is less likely to engage in fraud than an attorney,¹⁶⁶ it does not necessarily follow that by giving a prestigious governmental title to the notaire, the Government would be creating a dignified and honorable profession, of which integrity and honesty would likely govern the extraordinary power that these professionals would be given.¹⁶⁷ Abuses of power are likely to occur regardless whether the notaire is a public or private official; it is only a matter of determining which sector has the better ability to safeguard against such abuses, and with governmental bureaucracy, perhaps the American notaire should find its novel regulation in the private sector.

Fraud is indeed somewhat of a problem in the French Notariat Profession.¹⁶⁸ However, after studies conducted by the French Minister of Justice in the 1970s and 1980s, it was found that the most fraud was committed by those notaires who had been practicing the longest.¹⁶⁹ If this is true, then it could potentially follow that the new implementation of a notarial system in the United States would be plagued with minimal fraudulent activity arising out of abuses of power.

5. Education

The educational requirements for the American notaire should be no less stringent than that of the French notaire. This person should still be required to have a Bachelor's degree, a law degree, do an apprenticeship and pass all the relevant exams. These requirements are necessary to combat incompetence in the profession, which at one

163. See generally SULEIMAN, *supra* note 69.

164. *Id.*

165. *Id.*

166. See generally SULEIMAN, *supra* note 69.

167. R. Schlesinger, *The Notary and the Formal Contract in Civil Law*, Appendix to Acts, Recommendation and Study relating to the Seal and to the Enforcement of Certain Written Contracts, *Report of the New York Law Revision Commission* (1941).

168. See SULEIMAN, *supra* note 69, at 63.

169. *Id.* at 67.

time occurred in the French Notariat.¹⁷⁰ Certainly incompetence could occur in the United States, being that most Americans are misinformed regarding the roles and functions of a notaire.¹⁷¹

The American notaire should also be subject to its own code of ethics, a violation of which would result in criminal and/or civil liability as a result of an abuse of their extraordinary power. Furthermore, in light of the fact that the American Notary Public is governed by a code, having only nominal power, it could easily be argued that the American notaire should similarly be ethically governed.¹⁷²

A clear advantage of this system would be that the testator who currently faces an uphill battle in probate because he or she chooses to leave his or her property to a new spouse, rather than their child,¹⁷³ will have a certain avenue of preserving their testamentary freedom.¹⁷⁴ Due to the assertion that "Testamentary Freedom" is a concept dubbed as a mythological idea,¹⁷⁵ a notarial system similar to that of the French will eventually bring back the true meaning of the term, erasing court imposed moral duties and unspoken rules.

Another advantage of this proposed system is that with notaires giving wills legitimate validation, they will thereby remove such matters from the realm of time consuming litigation, thus easing the dockets in the courts that would otherwise have been destined to hear these will contests.

B. *Disadvantages of the Implementation of A Notarial System in the United States*

With all legal and statutory schemes comes actual and potential shortcomings. A first concern might be the tension created between the notaire, holding "quasi-judicial power,"¹⁷⁶ and the trusts and estates lawyer who might feel threatened due to the possibility of a loss in profits, not only from drafting a will or trust document, but from liti-

170. See SULEIMAN, *supra* note 69, at 79. Incompetence arose in the profession as a result of the ability to inherit a notary post, in addition to a lack of educational requirements.

171. See Malavet, *supra* note 128, at 948.

172. See generally Valera, *supra* note 76; Deborah M. Thaw, *The Feminization of the Office of the Notary Public: From Feme Covert to Notaire Covert*, 31 J. MARSHALL L. REV. 703 (1998).

173. See generally Leslie, *supra* note 2.

174. See generally Brown, *supra* note 83.

175. See generally Leslie, *supra* note 2.

176. See generally Thaw, *supra* note 172.

gating it in will contests. First, it should be noted that in the American model, unlike the French model, the client would have the option of using a notaire, rather than an attorney. As such, only testators who are likely to face a tough battle in distributing their possessions after death will likely contact the notaire for his or her professional assistance. Furthermore, though perhaps somewhat unrealistic, an attorney should look to preserve the meaning of the law; as such, the profit motive should take a back seat to the need and effort to preserve testamentary freedom.

V. CONCLUSION

Americans in the legal profession are searching for a way of preserving testamentary freedom. Yet to date no intention-saving probate model has been implemented successfully, as such models, like antemortem probate schemes, have created too many additional conflicts above and beyond the original problems they set out to remedy.¹⁷⁷ Implementation of the concepts and roles of the French notaire do not carry the challenges created by antemortem probate. Instead, the problems it would seem to pose would pertain to job security for American litigators and American trusts and estates attorneys, all of which are inconsequential when the goal is to preserve the foundation upon which wills, trusts and estates law is built: preservation of the integrity of a testator's will. Finally, it has been noted that "at a minimum, the European experience with ante-mortem probate" is real evidence that these types of systems are effective and that safeguards that are not in existence with the post-mortem process are available.¹⁷⁸ As a result, the notaire should be implemented in the United States.

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177. See e.g. Greene, *supra* note 133; David Cavers, *Ante Mortem Probate: An Essay in Preventative Law*, 1 U. CHI. L. REV. 449 (1934); Timothy Donovan, Comment, *The Ante-Mortem Alternative to Probate Legislation in Ohio*, 9 CAP. U. L. REV. 717 (1980); Leopold & Beyer, *supra* note 8.

178. *Id.* at 152.