

## ANTE-MORTEM PROBATE IN NEW JERSEY—AN IDEA RESURRECTED?

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“Where there’s a will, I want to be in it.” –Anonymous

Planning for one’s own demise can be an undertaking with significant legal and social repercussions.<sup>1</sup> To that end, numerous individuals make substantial efforts and shoulder significant costs to ensure that their assets are disposed of in the manner they deem appropriate. New Jersey’s current probate law only contemplates post-mortem probate, resulting in numerous costly and time-consuming probate disputes, which are potentially disruptive to the testator’s desired scheme of disposition. Promulgation of an ante- or pre-mortem probate provision could potentially afford New Jersey residents maximum flexibility in planning their estate and provide peace of mind that their final wishes will be faithfully executed.

## I. BACKGROUND

The New Jersey Law Revision Commission (“NJLRC”) is an independent legislative commission serving the State of New Jersey and its citizens by identifying areas of New Jersey law that can be improved with changes to the New Jersey statutes and by preparing and recommending changes to the Legislature.<sup>2</sup> The NJLRC’s statutory mandate is to “promote and encourage the clarification and simplification of the law of New Jersey and its better adaptation to social needs, secure the better administration of justice[,] and carry on scholarly legal research and work.”<sup>3</sup> The NJLRC is charged with conducting a continuous review of the general and permanent statutes of the state, the judicial decisions construing those statutes, and the recommendations from other learned bodies such as the Uniform Law Commission (“ULC”) and submitting to the legislature bills designed to remedy defects, reconcile the conflicting provisions found in the law, clarify confusing provisions, and excise redundancies.<sup>4</sup> Additionally, the NJLRC is authorized to conduct such

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<sup>1</sup> See generally LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009).

<sup>2</sup> NEW JERSEY LAW REVISION COMMISSION ANNUAL REPORT at 9 (27th ed. 2013), available at <https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/30877/NJLRC%202013%20Annual%20Report.pdf?sequence=1> (last visited Sept. 6, 2014).

<sup>3</sup> N.J. STAT. ANN. § 1:12A-8 (West 2013).

<sup>4</sup> *Id.* In compliance with its statutory obligation to conduct a continuous review of the general and permanent statutes of the state and the judicial decisions construing those statutes,

scholarly research as may benefit New Jersey's statutory scheme.<sup>5</sup>

In January of 2014, the NJLRC authorized a project inspired by a *New Jersey Law Journal* article entitled "Ante-Mortem Probate: Why Wait Until It's Too Late?," which described an approach taken by several states to allow testators to probate the validity of their wills prior to death.<sup>6</sup> The Commission recognized that this type of approach could potentially reduce the number of will contests in New Jersey and authorized NJLRC staff to thoroughly research this area, as well as contact various interested members of the legal community seeking input and commentary.

## II. INTRODUCTION

Freedom of testation is the girding principal of trusts and estates law.<sup>7</sup> Indeed, one of the foundations of the Uniform Probate Code is "to discover and make effective the intent of a decedent in distribution of his [or her] property."<sup>8</sup> However, a testator's desired distribution can often come under attack after his or her death.<sup>9</sup> Will contests are prevalent and often, dramatic legal proceedings fraught with emotion and frustrations.<sup>10</sup> Stories abound regarding wealthy testators whose heirs have engaged in years of contentious litigation challenging the decedent's last will and testament presumably in pursuit of their own self-interest.<sup>11</sup> Naturally,

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the NJLRC considers recommendations from the American Law Institute, the ULC (formerly the National Conference of Commissioners on Uniform State Laws), and "other learned bodies, and from judges, public officials, bar associations, members of the bar and from the public generally." *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Glenn Kazlow et al., *Ante-Mortem Probate: Why Wait Until It's Too Late?*, 214 N.J.L.J. 1051 (2013).

<sup>7</sup> See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 (1975).

<sup>8</sup> UNIF. PROBATE CODE § 1-102(b)(2) (amended 2008).

<sup>9</sup> Gerry W. Beyer & Claire G. Hargrove, *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U. L. REV. 865, 866 (2007) (stating that a will is "more likely to be the subject of litigation than any other legal instrument"); Jonathan G. Blattmachr, *Reducing Estate and Trust Litigation Through Disclosure, In Terrorem Clauses, Mediation and Arbitration*, 9 CARDOZO J. CONFLICT RESOL. 237, 239 (2008) ("Failure to be treated as one believes he or she should have been with respect to sharing an inheritance or gift often triggers litigation.").

<sup>10</sup> Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 725 (2011) (recognizing that "[j]ust as the estate planning process is emotionally difficult for the individual, the result of the estate plan can be emotionally difficult for those left behind").

<sup>11</sup> See *Chase v. Raymond & Rosa Parks Inst. for Self-Dev.*, 807 N.W.2d 306 (Mich. 2012); *In re Estate of Hendrix*, 134 Wash. App. 1007 (2006), *cert. denied*, 161 P.3d 1027

these will contests can prove expensive as well as frustrating to those involved. While high-profile, large dollar-value will contests garner the vast majority of press and public interest, many more families endure estate litigation outside of the spotlight and under less glamorous circumstances. Moreover, the perceived prevalence of this issue may be underestimated by the fact that many suits are designed to compel a pretrial settlement and therefore, are never reported.<sup>12</sup> Unfortunately, these types of cases exist within a type of evidentiary paradox in which the testator's own death becomes the obstacle to fulfilling his or her last wishes.<sup>13</sup>

These cases can present troubling outcomes. In a worst-case scenario, a court's view of societies' mores can ultimately redistribute the testator's estate in a way that ultimately frustrates the testator's intent.<sup>14</sup> Claims surrounding testamentary capacity, undue influence, and testamentary fraud permit fact-finders to potentially rewrite the last will to more adequately conform to deeply held societal values.<sup>15</sup> Testators at particular risk of having their final wishes marginalized include those who exclude one person of a group of similarly situated individuals or those who make non-traditional bequests.<sup>16</sup> This imposition of societal norms runs deeply contrary to the stated intent and purpose of trust and

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(2007); *infra notes* 109–13.

<sup>12</sup> John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 66 (1978) (stating that “[t]he odor of the strike suit hangs heavily over this field”).

<sup>13</sup> See John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2044 (1994) (stating that the American probate system utilizes what can only be described as the “Worst Evidence” rule).

<sup>14</sup> See *In re Will of Ranney*, 589 A.2d 1339 (N.J. 1991); *Hickman v. Hickman*, 244 S.W.2d 681 (Tex. App. 1951) (holding that testator's failure to provide for wife and child demonstrated insufficient mental capacity despite witness testimony to the contrary).

<sup>15</sup> Blattmachr, *supra* note 9, at 554 (“Outright fraud was (and still is) not uncommon with respect to the preparation of an individual's Will.”). To be sure, “[t]he attack on the testator's mental capacity is often a mere litigative trapping which the contestants assume to give them a pretext for challenging the will, since the law presently provides no procedure by which they can argue the real basis of their claim – i.e., that the will is unfair to them and they are unhappy with the provisions made for them in it.” Edwin M. Epstein, *Testamentary Capacity, Reasonableness and Family Maintenance: A Proposal for Meaningful Reform*, 35 TEMP. L.Q. 231, 241 (1962); E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 283 (1999).

<sup>16</sup> Spitko, *supra* note 15, at 282 (noting that “the ‘abhorrent’ testator who disinherits her legal spouse or close blood relations in favor of, for example, a non-mainstream religion, a radical political organization, or a same-sex romantic partner is especially at risk for having her estate plan discarded”) (footnotes omitted).

estate law.<sup>17</sup> Throughout the years, practitioners and legal scholars have proposed various methodologies to resolve the glaring evidentiary problem and to most accurately determine and honor testator's final wishes. In furtherance of this ideal, the concept of ante-mortem probate began to evolve into a viable option.<sup>18</sup> Specifically,

[Ante-mortem] probate is addressed to the predicament of a testator who fears that after his death his estate may be subjected to a will contest in which it will be alleged that he lacked the mental capacity to execute his will. [Ante-mortem probate] legislation would permit the testator to bring suit against potential contestants in order to obtain an adjudication regarding his capacity while he is alive and best able to inform the determination."<sup>19</sup>

With a living testator, the evidentiary paradox plaguing traditional post-mortem will disputes disappears.

### III. HISTORY OF ANTE-MORTEM PROBATE

The earliest attempt at enabling ante-mortem probate occurred when the Michigan legislature passed legislation in 1883.<sup>20</sup> The Michigan statute allowed a testator to petition the probate judge requesting for the judge to admit the testator's will document as a last will and testament.<sup>21</sup> To succeed, the testator needed to assure that the will was executed "without fear, fraud, impartiality, or undue influence, and with a full knowledge of its contents."<sup>22</sup> Additionally, the testator had to allege that she or he was of sound mind and memory and possessed full testamentary capacity at the point of the will's execution.<sup>23</sup> Upon receipt of such a

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<sup>17</sup> See Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) (asserting that "[a] careful review of case law, however, reveals that many courts do not exalt testamentary freedom above all other principles). Notwithstanding frequent declarations to the contrary, many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent."). *Id.*

<sup>18</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 64 (stating "[t]he revival of living probate in the present day has been possible only because of the persistent refusal of American legal scholars to allow the underlying problem to go unsolved").

<sup>19</sup> *Id.* at 67; see also Forrest J. Heyman, Note, *A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in Light of Alaska's Recent Ante-Mortem Legislation*, 19 ELDER L.J. 385 (2012).

<sup>20</sup> 1883 Mich. Pub. Acts 17, *invalidated by* Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 29 (Mich. 1885).

<sup>21</sup> *Id.* § 2.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*; see also Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 152 (1990).

filing, the judge would issue citations to the parties named in the petition and publish the notice of hearing.<sup>24</sup> The statute further provided that upon a judge's finding that the testator's assertions were accurate, the judge would issue a decree as to the will's validity that would be conclusive with respect to the matters contained therein.<sup>25</sup> The testator was free, however, to revoke or modify a validated will in any manner possible under the law.<sup>26</sup>

The Michigan statute was tested in short order. In *Lloyd v. Wayne Circuit Judge*, a testator petitioned the court for ante-mortem probate of a will that effectively disinherited both his wife and his son.<sup>27</sup> The Michigan Supreme Court held the statute unconstitutional on several grounds, particularly on the fact that it enabled the testator to avoid the inchoate rights of a spouse and a child and failed to provide for finality of judgment.<sup>28</sup> Additionally, as the court adjudicated the case prior to the 1937 Federal Declaratory Judgment Act, specifically enabling courts to issue declaratory judgments, the court indicated that issuing such a validity decree during the testator's lifetime was beyond the existing authority of the judicial branch.<sup>29</sup> Commentators further assert that the notice by citation portion of the statute, which allowed the testator to proceed without providing notice to his wife, troubled the court.<sup>30</sup> Following the court's holding of unconstitutionality, Michigan has not revisited the concept of ante-mortem probate.<sup>31</sup>

Interest in the concept of ante-mortem probate began to again resurface in the 1930s, when the National Conference of Commissioners

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<sup>24</sup> 1883 Mich. Pub. Acts 17, § 3; *see also* Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 265–66 (1976); Leopold & Beyer, *supra* note 23, at 152.

<sup>25</sup> 1883 Mich. Pub. Acts 17, § 3; *see also* Fink, *supra* note 24, at 269–70; Leopold & Beyer, *supra* note 23, at 153.

<sup>26</sup> 1883 Mich. Pub. Acts 17, § 6; *see also* Fink, *supra* note 24, at 270.

<sup>27</sup> *Lloyd v. Wayne Circuit Judge*, 23 N.W. 28 (Mich. 1885).

<sup>28</sup> Leopold & Beyer, *supra* note 23, at 153–54.

<sup>29</sup> David F. Cavers, *Ante Mortem Probate: An Essay in Preventative Law*, 1 U. CHI. L. REV. 440, 444 (1934); Leopold & Beyer, *supra* note 23, at 155–56; *see also* Taren R. Lord-Halvorson, Note, *Why Wait until We Die? Living Probate in a New Light*, 37 OKLA. CITY U. L. REV. 543, 547 (2012).

<sup>30</sup> Cavers, *supra* note 29, at 444 n.13 (referencing an additional reason for invalidity espoused in a separate opinion); Leopold & Beyer, *supra* note 23, at 153; *see also* Fink, *supra* note 24, at 269.

<sup>31</sup> Cavers, *supra* note 29, at 444 (“Apparently the failure of this effort discouraged the proponents of remedial legislation; inertia wins many such easy victories.”).

on Uniform State Laws began investigating various methods of validating wills prior to a testator's death.<sup>32</sup> Evidently, its proposal was not met with a positive response and proposed draft language was abandoned in subsequent drafts.<sup>33</sup> The idea of ante-mortem probate again emerged in the early stages of drafting the Uniform Probate Code.<sup>34</sup> The initial draft provided for the possibility of obtaining a declaratory order as to a will's validity subject to revocation by withdrawal or subsequent will or codicil.<sup>35</sup> Yet, once again, the commissioners excluded ante-mortem probate language from subsequent drafts, leaving the initial vision of a guiding model for ante-mortem probate unrealized.<sup>36</sup>

In subsequent years, the academic community continued to have a substantial interest in the unique benefits of ante-mortem probate and have advocated differing methodologies regarding its implementation. Over time, scholarly articles discussing ante-mortem probate identified three principal models for how such a scheme could be most successfully structured and implemented.

#### A. *The Contest Model*

The most rudimentary model of ante-mortem probate simply moves a potential will contest into the testator's lifetime. As originally conceived by Ohio State University Professor Howard Fink, and as largely enacted in five jurisdictions, ante-mortem probate is contemplated as a declaratory judgment regarding testamentary capacity and freedom from undue influence.<sup>37</sup> As further envisioned, all named beneficiaries as well as any possible intestate heirs would be served notice of the proceeding and have the opportunity to dispute the testator's testamentary capacity and freedom from undue influence.<sup>38</sup> Upon the court's eventual satisfaction that the will has indeed been properly executed with requisite

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<sup>32</sup> See Leopold & Beyer, *supra* note 23, at 161 (citing *First Tentative Draft of Uniform Act to Establish Wills before Death of Testator* § 2(b), 9 A.L.I. PROC. 465 (1932)).

<sup>33</sup> *Id.* at 162.

<sup>34</sup> *Id.* at 165 (citing W. ROLLINSON, COMMENTARY ON THE UNIFORM PROBATE CODE 25 (1970)).

<sup>35</sup> *Id.* (citing UNIF. PROBATE CODE § 2-903 (Draft Summer 1967)).

<sup>36</sup> *Id.* at 152 (citing W. ROLLINSON, *supra* note 34).

<sup>37</sup> While the contest model postulated by Professor Fink serves as a conceptual basis for the enacted statutes, there are important differences between them as discussed further herein. Fink, *supra* note 24, at 274. Professor Fink notes that the concept of the declaratory judgment has been widely embraced in the years since the Michigan Supreme Court's decision in *Lloyd*. *Id.*

<sup>38</sup> *Id.* at 275.

capacity and freedom from undue influence, the court would declare the will binding and place it on file.<sup>39</sup> The validated will shall be considered binding and could only be revoked or modified through the institution of another ante-mortem proceeding.<sup>40</sup>

This model provides the general framework for the ante-mortem statutes currently in operation; nevertheless, critics find disadvantages to this methodology. In particular, critics believe that the acceleration of the will contest into the testator's life span could irreparably damage family harmony.<sup>41</sup> Additionally, to the extent a potential heir chooses to challenge the testator's ante-mortem probate petition, he would be required to bear the costs of the legal challenge even though the prospect of a monetary inheritance may be years or even decades away.<sup>42</sup> Also, while some evidence to the contrary exists, it is theorized that any new ante-mortem probate system would cause an avalanche of petitions to overburden already stretched probate courts.<sup>43</sup>

It also should be further noted that the Contest Model effectively reverses the roles of the parties in action. In a traditional will contest, the heirs present as plaintiffs; in contrast, in an ante-mortem probate filing, the testator is the plaintiff while contesting heirs become defendants.<sup>44</sup> The accompanying shift in the burden of proof should be considered.

#### *B. The Conservatorship Model*

In 1977, North Dakota became the first state to enact an ante-mortem statutory scheme based in large part on the Contest Model.<sup>45</sup> In an effort to resolve some of the perceived difficulties encountered in the application of the Contest Model, Professor John H. Langbein fashioned an alternative that he deemed the Conservatorship Model.<sup>46</sup> Under this

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<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 73; *see generally* Sneddon, *supra* note 10, at 724 (discussing the importance of family harmony in trust and estates matters).

<sup>42</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 75. In New Jersey, this would be in contrast to the cost allocation in place for traditional post-mortem will contests. *See infra* note 106.

<sup>43</sup> Gerry W. Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, 23 ACTEC NOTES 83, 87–89 (1997); Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 73.

<sup>44</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 73.

<sup>45</sup> *Id.* at 72.

<sup>46</sup> *Id.*



method, a testator would petition the court for a declaration as to his or her capacity to properly execute the will and attach the executed will to the petition.<sup>47</sup>

Similar to the Contest Model, the Conservatorship Model would require notice to all apparent heirs and named beneficiaries as well as beneficiaries named in any former will(s) that may have their interests in the estate modified.<sup>48</sup> However, the Conservatorship Model contemplates the appointment of a guardian ad litem to act as representative of all apparent heirs, as well as potential unborn or unidentified heirs.<sup>49</sup> Professor Langbein hypothesizes that this allows heirs to decline to confront the petition in their own name, but still have their interests represented by the appointed guardian.<sup>50</sup> Additionally, the guardian ad litem would have the authority to conduct discovery during the course of the guardian's investigations.<sup>51</sup> The testator would bear the costs associated with the guardian ad litem in the interest of fairness and to prevent the overuse of the process.<sup>52</sup> Upon presentation of any relevant evidence, the court would be able to make the declaration that the testator had adequate testamentary capacity and was free from undue influence.<sup>53</sup> This model does not contemplate imposing requirements for revocation or modification of a successfully adjudicated ante-mortem probate action.<sup>54</sup>

While this model may avoid the confrontational issues involved in the Contest Model, it still requires public disclosure of the will—a fact that can create its own disincentives and repercussions.<sup>55</sup> Critics maintain that the loss of confidentiality and costs associated with the notice provisions make the Conservatorship Model an unattractive option for most testators.<sup>56</sup>

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<sup>47</sup> *Id.* at 77.

<sup>48</sup> *Id.* at 78.

<sup>49</sup> *Id.*

<sup>50</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 78–79. Professor Langbein notes that this “would permit full development and ventilation of evidence of incapacity without requiring family members to step forward and assert that the testator lacked capacity.” *Id.* at 78.

<sup>51</sup> *Id.* at 79.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 84.

<sup>54</sup> *Id.* at 81.

<sup>55</sup> Leopold & Beyer, *supra* note 23, at 168.

<sup>56</sup> Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 95

*C. The Administrative Model*

Yet another model of ante-mortem probate proposed by Professor Gregory S. Alexander and Professor Albert M. Pearson has been termed the Administrative Model.<sup>57</sup> This model recasts ante-mortem probate as an administrative proceeding that is neither adjudicative nor adversarial. Similar to the Conservatorship Model, upon petition, the court would appoint a guardian ad litem responsible for investigating the testator's capacity.<sup>58</sup> In the Administrative Model, however, the guardian ad litem will act as an investigator for the court rather than as a fiduciary for the future heirs. In further contrast to the Conservatorship Model, the will's contents would remain confidential and only be reviewed by the court, *in camera*.<sup>59</sup> Most significantly, this model dispenses with the notice and opportunity to appear provisions of the other two models with the conclusion that "expectant heirs and legatees have no constitutional right to notice."<sup>60</sup> Critics disagree with this assertion and maintain that the lack of notice inherent to this model would create insurmountable due process concerns.<sup>61</sup> While viewing notice provisions as unnecessary may be an appealing premise, any legislation enacted using this model would surely be subjected to potentially troublesome due process scrutiny. Critics also maintain that any investigations by the guardian ad litem would necessarily alert prospective heirs to the petition and invite the same family discord.<sup>62</sup> Similar to the other models, a successful petition would result in a declaration of the will's validity and estop future legal challenges.<sup>63</sup>

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(1979).

<sup>57</sup> *Id.* at 91.

<sup>58</sup> *Id.* at 113–14.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 115. Professors Alexander and Pearson maintain that the due process requirements regarding trust arrangements established in *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950), should not be applied to probate proceedings as heirs' interest in a testator's will is no more than a "hope or expectancy of a legal right." Alexander & Pearson, *supra* note 56, at 101.

<sup>61</sup> Dara Greene, Note & Comment, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 675 (1999); Heyman, *supra* note 19, at 408–09.

<sup>62</sup> See Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, *supra* note 43, at 86; Heyman, *supra* note 19, at 409.

<sup>63</sup> Alexander & Pearson, *supra* note 56, at 116–17.

Increasingly, authors have postulated a mediation model of ante-mortem probate that would borrow from the administrative model.<sup>64</sup> In this manner, the creation of a will and the determination of testator's capacity could be handled in a confidential and cost efficient manner, while still reaping the substantial evidentiary benefits inherent to living probate.<sup>65</sup>

Five United States jurisdictions have promulgated statutes that permit a testator to validate his or her will prior to death. North Dakota, Nevada, Arkansas, Alaska, and most recently, New Hampshire have statutory schemes in place with varied approaches; a chart detailing relevant provisions of each state's statute is included at the end of this Article as a reference; each is also discussed more fully below.

#### *D. North Dakota*

Almost one hundred years after Michigan's failed experiment with ante-mortem probate, in 1977, North Dakota became the second state to attempt an ante-mortem probate scheme.<sup>66</sup> The result is a streamlined and concise statute that is instructive in its simplicity. Similar to the structure conceived by Professor Fink, North Dakota permits a testator to petition for a declaratory judgment declaring the validity of the will as to "the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will."<sup>67</sup> Under the North Dakota statute, any named beneficiary and all of the testator's intestate successors are named parties to the proceeding and are served notice in accordance with the standard of the North Dakota Rules of Civil Procedure.<sup>68</sup> Upon the determination that the will was indeed properly executed and that the testator had the required testamentary capacity and freedom from undue influence, the court shall declare the will valid and binding in North Dakota, unless and until the testator executes a new will and institutes a new judicial procedure for ante-mortem probate.<sup>69</sup> As the

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<sup>64</sup> See Lord-Halvorson, *supra* note 29, at 544 (hypothesizing that with the adoption of mediation-like ante-mortem probate "Americans may accept living probate because of the greater flexibility and communication between the court, testator, and presumptive heirs"); see also Greene, *supra* note 61, 679.

<sup>65</sup> Lord-Halvorson, *supra* note 29, at 557; see Blattmachr, *supra* note 9, at 247.

<sup>66</sup> N.D. CENT. CODE §§ 30.1-08.1-01-04 (1977).

<sup>67</sup> *Id.* § 30.1-08.1-01.

<sup>68</sup> *Id.* § 30.1-08.1-02.

<sup>69</sup> *Id.* § 30.1-08.1-03.

ante-mortem proceeding is limited to determining a will's validity, facts found during this proceeding are inadmissible in any other proceeding.<sup>70</sup>

Despite the seeming advantage of being the nation's oldest ante-mortem statute, there are indications that the North Dakota statute is rarely used:

In a 1994 survey of ACTEC fellows and judges in the relevant jurisdictions, only thirty percent of the responding North Dakota practitioners reported ever having been involved in an ante-mortem probate proceeding. Remarkably, the survey also showed that this thirty percent has somewhat aggressively utilized the procedure. One fellow reported participating in six ante-mortem proceedings and the average ante mortem user was involved with over four proceedings each. Despite the fact that most respondents lacked significant experience with the technique, ninety percent agreed that the ante-mortem option enhanced the state's probate practice.<sup>71</sup>

Regardless of its actual usage, the fact that practitioners view the allowance of ante-mortem probate as an enhancement to the state's probate practice is illuminating, suggesting that it is perceived as an additional tool that estate planning attorneys can utilize to safeguard their clients' interests.

#### *E. Ohio*

Ohio followed North Dakota's lead, adopting its own ante-mortem probate statute in 1979, also largely incorporating the concepts set forth in the contest model.<sup>72</sup> Ohio law contains similar provisions to those found in North Dakota's statute, but adds further detail and clarifications. The most notable differences are: (1) significantly more detailed notice and service of process requirements; (2) the requirement that the will and its declaration of validity be kept on file in a sealed envelope available only to the testator during his lifetime; and (3) permitting the testator to modify the will by codicil if the codicil is declared valid in the same process as the will or revoke the will in any method otherwise permitted pursuant to Ohio law.<sup>73</sup> Similar to North Dakota, the Ohio statute permits a declaration of validity if the court finds the will was properly executed with the requisite testamentary capacity and freedom from restraint.<sup>74</sup>

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<sup>70</sup> *Id.* § 30.1-08.1-04.

<sup>71</sup> Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, *supra* note 43, at 87.

<sup>72</sup> OHIO REV. CODE ANN. §§ 2107.081–085 (West 1979); OHIO REV. CODE ANN. §§ 2107.0842–084 (West 1979).

<sup>73</sup> Leopold & Beyer, *supra* note 23, at 172.

<sup>74</sup> *Id.*

The Ohio statute has survived court scrutiny. An Ohio court of appeals held that the statute was constitutionally sound, and several other cases have carved the contours of the law's application.<sup>75</sup> According to the most recent survey of Ohio judges and practitioners, among North Dakota, Arkansas and Ohio, the Ohio ante-mortem law has been the most utilized.<sup>76</sup> One judge participating in a survey recognized ante-mortem probate's unique advantage: "[b]efore becoming a probate judge, I represented a widow who wanted to disinherit one side of her family. It was a very effective way to avoid a will contest. They couldn't look her in the eye and say she was incompetent."<sup>77</sup> Others acknowledged that its use was limited, but that the statute remains valuable stating "[t]here are very few situations where this is appropriate, but I believe it is important to have such authority. . . ."<sup>78</sup>

#### F. Arkansas

In 1979, Arkansas also enacted its own Ante-Mortem Probate Act.<sup>79</sup> This brief act is similar to the North Dakota statute and permits the court to declare a will valid if it was properly executed with the requisite testamentary capacity and freedom from undue influence at the time of execution.<sup>80</sup> The most significant difference between the North Dakota and Arkansas statutes lies in the fact that Arkansas permits validated wills to be revoked, modified or superseded by subsequent testamentary instruments regardless of whether such testamentary instruments are

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<sup>75</sup> Cooper v. Woodard, No. CA-1724, 1983 WL 6566 (Ohio Ct. App. July 27, 1983); see Hayes Mem'l United Methodist Church v. Artz, No. S-10-033, 2011 WL 3368497 (Ohio Ct. App. Aug. 5, 2011) (holding that a church named as a beneficiary of testator's prior irrevocable inter vivos trust was not a beneficiary of testator's will entitled to notice of testator's pre-mortem probate proceeding); Horst v. First Nat'l Bank in Massillon, No. CA-8057, 1990 WL 94654 (Ohio Ct. App. June 25, 1990) (holding that aggrieved heirs were estopped from bringing action to set aside will admitted to probate as they neither participated in the ante-mortem probate proceeding nor filed a timely appeal); Corron v. Corron, 531 N.E.2d 708, 711 (Ohio 1988) (holding that "only the testator himself may have a judgment rendered as to the validity of his will").

<sup>76</sup> Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, *supra* note 43, at 88. The fact that Ohio presents the most utilized ante-mortem statute is perhaps unsurprising given that Ohio is the most densely populated state of those that have enacted ante-mortem legislation.

<sup>77</sup> Gerry W. Beyer, *Ante-Mortem Probate Survey Results* 17 (June 13, 1994) (on file with author).

<sup>78</sup> *Id.* at 6.

<sup>79</sup> ARK. CODE ANN. §§ 28-40-201–203 (West 1979).

<sup>80</sup> *Id.* § 28-40-203.

validated pursuant to the ante-mortem statute.<sup>81</sup>

Arkansas' statute seems to be rarely utilized, and a majority of surveyed practitioners did not feel that the ante-mortem probate statute has been beneficial.<sup>82</sup> In fact, none of the Arkansas judges in the most recent survey available had ever presided over an ante-mortem petition.<sup>83</sup>

### G. Alaska

In 2010, Alaska reinvigorated the promise of ante-mortem probate through the adoption of its own statutory provision.<sup>84</sup> Alaska expanded upon other ante-mortem probate laws by permitting the pre-validation of both trusts and wills.<sup>85</sup> Also, Alaska expressly detailed what must be contained within the petition for the establishment of validity.<sup>86</sup> Like other enacted ante-mortem statutes, the Alaska statute requires that notice is given to the spouse, children and heirs of the testator and requires a hearing.<sup>87</sup> Interestingly, the Alaska statute also allows non-Alaskan

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<sup>81</sup> *Id.*

<sup>82</sup> See Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, *supra* note 43, at 89.

<sup>83</sup> *Id.*

<sup>84</sup> ALASKA STAT. ANN. § 13.12.530–590 (West 2010).

<sup>85</sup> *Id.*

<sup>86</sup> “A petition under Alaska Statute section 13.12.530 must contain “(1) a statement that a copy of the will has been filed with the court; (2) a statement that the will is in writing; (3) a statement that the will was signed by the testator, or was signed in the testator’s name by another person in the testator’s conscious presence and at the testator’s direction; (4) in the case of a witnessed will, a statement that the will was signed by at least two individuals, each of whom signed within a reasonable time after witnessing the signing of the will or the testator’s acknowledgment of the signature on the will; (5) in the case of a holographic will, a statement that the signature and material portions of the will are in the testator’s handwriting; (6) a statement that the will was executed with testamentary intent; (7) a statement that the testator had testamentary capacity; (8) a statement that the testator was free from undue influence and duress and executed the will in the exercise of the testator’s free will; (9) a statement that the execution of the will was not the result of fraud or mistake; (10) the names and addresses of the testator, the testator’s spouse, the testator’s children, the testator’s heirs, the personal representatives nominated in the will, and the devisees under the will; (11) if minors, the ages of the testator’s children, the testator’s heirs, and the devisees under the will, as far as known or ascertainable with reasonable diligence by the petitioner; (12) a statement that the will has not been revoked or modified; and (13) a statement that the testator is familiar with the contents of the will.”

*Id.* § 13.12.545. Alaska Statute section 13.12.546 contains parallel requirements for establishing the validity of a trust but modified as necessitated by the nature of the instruments. *Id.* § 13.12.546.

<sup>87</sup> *Id.* § 13.12.565.

residents to pre-validate a will in any judicial district of the state.<sup>88</sup> Alaska courts are also given broader declaratory powers than are courts in other jurisdictions: the court is permitted to “declare a will or trust to be valid and make other findings of fact and conclusions of law that are appropriate under the circumstances.”<sup>89</sup> Finally, the Alaska statute makes provisions for confidentiality; while the notice of the petition and summaries of proceedings and orders are available for public inspection, all other information, including the specifics of the testamentary bequests, remains confidential.<sup>90</sup>

#### H. *New Hampshire*

In 2014, New Hampshire became the most recent state to enact ante-mortem validation of both trusts and wills through a sweeping new trust law intended to reinforce the protection of testator and settlor intent.<sup>91</sup> An individual domiciled or owning property in New Hampshire may petition to determine the validity of his or her will and is required to notify devisees and executors of the will as well as those individuals standing to inherit if the testator died intestate on the filing date.<sup>92</sup> The statute deems those having an interest in the will as being in possession of inchoate property rights.<sup>93</sup> The petitioner is charged with notifying each of the interested parties, and these persons may represent and bind other individuals similarly situated in accordance with the concept of “virtual representation.”<sup>94</sup> After a hearing, the court shall declare the will either valid or invalid and make other findings of fact or conclusions of law that

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<sup>88</sup> *Id.* § 13.12.540 (West 2010). It is unclear whether other jurisdictions would be inclined to enforce a resident testator’s will to the extent it was pre-validated in Alaska.

<sup>89</sup> *Id.* § 13.12.555.

<sup>90</sup> ALASKA STAT. ANN. § 13.12.585.

<sup>91</sup> N.H. REV. STAT. ANN. § 564-B:4-406(d) (LexisNexis 2014); N.H. REV. STAT. ANN. § 552:18 (LexisNexis 2014); New Hampshire Trust Council, *New Hampshire Enhances its Trust Laws*, July 28, 2014, available at <http://www.nhtrustcouncil.com/wp-content/uploads/2014/07/New-Hampshire-Enhances-Its-Trust-Laws.pdf>; see also S. 289, 163d Sess. Gen. Ct., 2d year (N.H. 2014) (stating “[T]his act further reinforces this state’s tradition of protecting settlor intent, it further enhances modern trust design, and it further facilitates the efficient administration of trusts”).

<sup>92</sup> N.H. REV. STAT. ANN. § 552:18.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (referencing N.H. REV. STAT. ANN. § 564-B:3-304). This statutory codification of an existing common law doctrine is an elegant solution to potential due process concerns involving unknown or unborn beneficiaries.

are appropriate.<sup>95</sup> A will that is declared valid pursuant to this procedure is conclusively proved upon the testator's death and may be modified or revoked in any manner permitted by law.<sup>96</sup>

### *I. New York*

Ante-mortem probate has been considered in jurisdictions neighboring New Jersey. In 2009, New York entertained the idea of pre-mortem probate. However, the New York City Bar's Committee on Trusts, Estates and Surrogate Courts sharply opposed this plan on the basis that pre-mortem proceedings: (1) could potentially waste judicial resources; (2) prove moot to the extent a testator dies without an estate; (3) cause issues if the distributees are ultimately different than those given notice of the pre-mortem proceeding; (4) prevent a person with valid objections from voicing concerns for fear of offending the testator; (5) could still be challenged after the death if there is a claim the testator is acting under undue influence; and (6) may prove unenforceable to the extent the testator moves to another state.<sup>97</sup> It appears that the Bar Committee's reservations were persuasive, as New York has not appeared to have taken further steps in this area.

NJLRC staff anticipates that any determination by the Commission regarding ante-mortem probate legislation in New Jersey will incorporate feedback from the New Jersey State Bar Association and other organizations that may represent practitioners in this area.

## **IV. CURRENT STATE OF NEW JERSEY LAW**

New Jersey's probate law is modeled upon the 1969 version of the Uniform Probate Code ("UPC") and was revised to reflect subsequent amendments to the UPC in 1990.<sup>98</sup> While the UPC was amended in 2008, to address intestate succession and electronic signatures and records, New Jersey has neither proposed nor enacted the most recent amendments.<sup>99</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Press Release, N.Y.C. B. Ass'n, Comment on Permitting Pre-Mortem Probate in the State of New York (Jan. 15, 2009), available at [http://www.nycbar.org/pdf/report/Pre\\_Mortem\\_Probate.pdf](http://www.nycbar.org/pdf/report/Pre_Mortem_Probate.pdf).

<sup>98</sup> See *Senate Judiciary Committee Statement on S.B. 708*, S.B. 708, 211th Leg., Reg. Sess. (N.J. 2004).

<sup>99</sup> In particular, the 2008 UPC amendments propose certain cost of living adjustments, expand and update provisions dealing with intestate succession and address the use of electronic signatures and records. *Legislative Fact Sheet – Probate Code Amendments*, UNIF.



At the time of writing, a bill is pending in the New Jersey Legislature that would supplement and revise New Jersey's existing trust laws in accordance with the Uniform Trust Code. While the bill more thoroughly addresses revocable trusts used as will substitutes, it does not address the issue of pre-mortem challenges.<sup>100</sup>

Similar to forty-five other states, New Jersey only permits the probate of a will after the testator's death.<sup>101</sup> In New Jersey, the post-mortem probate of wills can be challenged on a variety of bases. Those seeking to manipulate the terms of the will can raise, among other things, undue influence, fraud, and a lack of testamentary capacity in attempts to recast the testator's intent and reallocate the estate's bounty.<sup>102</sup> The

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L. COMM'N (2015), *available at* [http://www.uniformlawcommission.com/LegislativeFactSheet.aspx?title=Probate Code Amendments \(2008\)](http://www.uniformlawcommission.com/LegislativeFactSheet.aspx?title=ProbateCodeAmendments(2008)(lastvisitedJan.5,2015)) (last visited Jan. 5, 2015).

<sup>100</sup> Assemb. B. 2915, 216th Leg., Reg. Sess. (N.J. 2014); S.B. 2035, 216th Leg., Reg. Sess. (N.J. 2014). Similar to New Jersey's existing law regarding will instruments, these proposed trust provisions would allow an individual to challenge a revocable trust upon settlor's death upon similar grounds and upon the same timelines applicable to will challenges. Perhaps the most interesting provision is contained in proposed New Jersey Statute section 3B:31-16, which permits what has been termed "virtual representation:" "Unless otherwise represented, a minor, incapacitated, or unborn individual, or a person whose identity or location is unknown and not reasonably ascertainable, may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented." Assemb. B. 2915, 216th Leg., Reg. Sess. (N.J. 2014). Upon passage, applying the concept of virtual representation to will instruments, this provision could provide comfort that an ante-mortem probate process would bind unknown or unborn beneficiaries and allay concerns regarding the adequacy of notice provisions. This is the approach that has been adopted by New Hampshire. N.H. REV. STAT. ANN. § 553:18 (LexisNexis 2014); N.H. REV. STAT. ANN. § 564-B:3-304 (LexisNexis 2014).

<sup>101</sup> Pursuant to New Jersey Court Rule 4:80-1, applications to Surrogate's Court for Probate or Administration "shall be accompanied by a certificate of death or other competent proof thereof."

<sup>102</sup> "Undue influence" has been defined by New Jersey courts as "mental, moral or physical' exertion which has destroyed the 'free agency of a testator' by preventing the testator 'from following the dictates of his own mind and will and accepting instead the domination and influence of another.'" *Haynes v. First Nat'l State Bank of N.J.*, 87 N.J. 163, 176 (1981) (internal citations omitted). The New Jersey Supreme Court has further held that undue influence is "a mental, moral, or physical exertion of a kind and quality that destroys the free will of the testator by preventing that person from following the dictates of his or her own mind as it relates to the disposition of assets." *In re Estate of Stockdale*, 196 N.J. 275, 302-03 (2008) ("While undue influence embraces fraud, fraud by no means embraces every species of undue influence, since it is quite supposable that one may readily exercise a degree of influence over the testator in producing the testamentary act, which upon every just ground is fairly entitled to be considered extreme and unreasonable, either in character or degree, without its being really fraudulent." *Lynch v. Clements*, 24 N.J. Eq. 431, 435 (Ch. 1874)).

adjudication of these contests involves with some frequency the evidentiary issue discussed above, as the testator is no longer capable of testifying as to his or her intent regarding bequests.

The process of challenging a will in New Jersey is well established and straightforward: individuals having the requisite standing may file a caveat before the probate is completed, which will effectively arrest any further action by the surrogate.<sup>103</sup> The will contest is then moved to the superior court through the filing of a complaint and an Order to Show Cause for determination pursuant to Court Rules.<sup>104</sup> If a challenge is not raised during the probate process, a New Jersey litigant has four months, and an out-of-state litigant has six months, to initiate an application to have the probate set aside.<sup>105</sup>

It is worth noting that New Jersey litigants are potentially encouraged or enabled by New Jersey Court Rule 4:42-9(a)(3), which allows for a challenger's legal fees to be paid from the estate regardless of the ultimate disposition of the case if it appears that "the contestant had a reasonable cause for contesting the validity of the will or codicil."<sup>106</sup> This shift in what is commonly referred to as the "American Rule" of fee allocation can remove some of the financial risk involved in bringing a

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New Jersey Statute section 3B:3-1 provides that "any individual 18 or more years of age who is of sound mind may make a will." As applied, the legal presumption favors a finding of sufficient testamentary capacity. See *In re Hoover's Estate*, 21 N.J. Super. 323, 325 (App. Div. 1952), cert. denied, 11 N.J. 211 (1953). The guiding precept of testamentary capacity in New Jersey is "whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of the factors to the others, and the distribution that is made by the will." *In re Livingston's Will*, 5 N.J. 65, 73 (1950).

<sup>103</sup> N.J. Ct. R. 4:82, cmt. 2.1 (referencing *In re Stockdale*, 196 N.J. 275, 301-02 (2008) states that "[c]learly, the Surrogate Court may not act where a will is contested"). Historically in New Jersey, an individual will have standing to contest a will's terms if "the person [is] injured by the probate of the will he [or she] contests." N.J. Ct. R. 4:26-1, cmt. 3 (citing *In re Myers' Will*, 20 N.J. 228, 235 (1955)); see also *Estate of Evelyn v. Lewis*, No. CP-0162-2011, 2014 WL 6090395, at \*5 (N.J. App. Div. Nov. 17, 2014).

<sup>104</sup> N.J. Ct. R. 4:83. "The act of lodging, or filing, the caveat prevents the Surrogate from issuing letters that otherwise would operate so as to authorize a particular individual or entity to begin the administration of the estate and causes the matter to be pursued, generally in a summary manner, by way of an order to show cause and formal complaint, in the Probate Part." *In re Stockdale*, 196 N.J. 275, 302 (2008).

<sup>105</sup> N.J. Ct. R. 4:85-1.

<sup>106</sup> *In re Probate of Will & Codicil of Macool*, 416 N.J. Super. 298, 313 (App. Div. 2010); *In re Reisdorf*, 80 N.J. 319, 326 (1979). See generally Charles Huberty, *No Good Deed Goes Unpunished: The Impact of New Jersey Court Rule 4:42-9(a)(3) on Attorney's Fees in Estate Litigation*, 60 RUTGERS L. REV. 769, 770 (2008) (noting that the contestant may invade the corpus to pay his attorney fees even in instances where his claim is ultimately unsuccessful).

will contest.<sup>107</sup> Though the application of this Rule 4:42-9(a)(3) is theoretically limited by equitable principles, “except in a weak or meretricious case, courts will normally allow counsel fees to both proponent and contestant in a will dispute.”<sup>108</sup>

## V. PROBATE DISPUTES IN NEW JERSEY

Over the years, New Jersey has had a number of high profile will contests. Courts and journalists alike documented the ferocious battle over the Johnson & Johnson family fortune.<sup>109</sup> The dispute was so divisive and protracted that it spawned numerous lawsuits, and ultimately, New York and New Jersey courts adjudicated it in various capacities.<sup>110</sup>

Most recently, *In re the Matter of the Estate of Robert B. Cohen*<sup>111</sup> presented a high profile will contest involving multiple litigations and multiple jurisdictions, culminating in a trial spanning eighty-five days, fifty witnesses, and “gargantuan layers of trial evidence.”<sup>112</sup> Ultimately,

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<sup>107</sup> The American Rule generally requires each party to an action to bear their own fees. See Huberty, *supra* note 106, at 770 (noting “that the American rule, which increases access to the judiciary for plaintiffs in many areas of the law, has the unfortunate effect of providing contestants with a disincentive to engage in litigation in the probate context”). See generally Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 65; John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984).

<sup>108</sup> *In re Reisdorf*, 80 N.J. at 326. An unsuccessful contestant is entitled to costs when he or she shows “reasonable cause” for bringing a probate challenge, defined as a belief that “rested upon facts or circumstances sufficient to excite in the probate court an apprehension that the testator lacked mental capacity or was unduly influenced[.]” *In re Will of Caruso’s*, 18 N.J. 26, 35 (1955); accord *In re Will of Eddy*, 33 N.J. Eq. 574, 578 (E. & A. 1881). This requirement “works no hardship upon the contestant and affords some protection to the estate from speculative and vexatious litigation.” *In re Will of Caruso’s*, 18 N.J. at 35 (quoting *In re Sebring’s Will*, 84 N.J. Eq. 453, 455 (Prerog. Ct. 1915)).

<sup>109</sup> DAVID MARGOLICK, *UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE* (1993).

<sup>110</sup> *In re Trust Created by Agreement Dated Dec. 20, 1961*, 194 N.J. 276 (2008) (resolving whether Johnson trust should make distributions to surviving spouse of one of the trust’s original beneficiaries). The lawsuit filed in New York centered on whether J. Seward Johnson was under undue influence when executing his last will and testament six weeks prior to his death, which left the entirety of his estate to his third wife and disinherited his six children. See Frank J. Prial, *Accord Reached on Johnson Will*, N.Y. TIMES, June 3, 1986, at B4. Ultimately, an out-of-court settlement was reached in which the children were each awarded a portion of the estate. *Id.*

<sup>111</sup> *Cohen v. Perelman*, Nos. BER C-94-12, BER P-211-12 (N.J. Super. Ct. Ch. Div. June 24, 2014), available at <http://s3.documentcloud.org/documents/1208367/perelman-cohen-decision.txt>.

<sup>112</sup> *Id.*

the court found no evidence of the undue influence alleged, but it nevertheless did find a reasonable basis for challenging the will and accordingly, required legal fees to be paid from the estate as provided by New Jersey Court Rule 4:42-9(a)(3).<sup>113</sup> While these high profile and well-documented cases involve estates much larger than those the average testator conveys, the financial and family issues remain the same. Ante-mortem probate could potentially be used in New Jersey to avoid, or at least mitigate, some of these disputes.

## VI. ALTERNATIVE METHODS FOR SAFEGUARDING TESTATOR INTENT

In the absence of an ante-mortem probate statute, New Jersey attorneys who fear the prospect of a will contest involving a client's estate presently have some tools at their disposal to assist with the planning process. Although videotaping technology has been available for decades, the modern prevalence of cameras on all forms of portable digital equipment makes videotaping a will execution an attractive and accessible option in New Jersey as in elsewhere. The admissibility and effect of a videotaped will execution vary by jurisdiction.<sup>114</sup> In New Jersey, a videotaped will execution is not valid as a will substitute but, once properly authenticated pursuant to New Jersey Rule of Evidence 901, courts treat it as evidentiary with respect to a testator's testamentary capacity and freedom from undue influence. Even though it provides courts with additional evidence regarding the testator's intentions, critics allege that a videotaped will execution is still less valuable than ante-mortem probate by virtue of the fact that the testator in a videotaped will execution is not available for actual examination by the court and the contestants.<sup>115</sup> Additionally, while practitioners agree that videotaping a will execution could prove useful in some circumstances, others note:

[h]owever, in practice, videotaping should be used with great caution. Taping the execution invariably leads to questions about why the lawyer chose to videotape that act—was she suspicious that the client might not be competent? In addition,

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<sup>113</sup> *Id.*

<sup>114</sup> See NEV. REV. STAT. § 132.119 (2007) (providing for electronic wills); IND. CODE ANN. § 29-1-5-3.2 (West 2005) (providing that a videotape is admissible as evidence regarding proper execution of a will, as well as the mental state and intentions of the testator). See generally Joseph Carl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 106–07 (2008) (noting that a videotape would not be admitted to probate as a will in any jurisdiction with the exception of Nevada).

<sup>115</sup> Kaslow, *supra* note 6, at 1051; Leopold & Beyer, *supra* note 23, at 148.

people often may not come across well on videotape, so this evidence may actually help the contestant. And if a videotape is missing or destroyed, there will be an obvious inference that it was harmful for the side defending the will.<sup>116</sup>

Similarly, a videotaped will execution does not bring a testator certainty during his or her lifetime that the testator's wishes will be honored in the same manner that ante-mortem probate adjudication might.

Inter-vivos, or "living," trusts are another mechanism practitioners may use in estate planning. In this structure, a testator creates a revocable trust into which he or she deposits the bulk of his or her assets. The testator may name themselves as trustee and a trusted individual as a successor trustee. Upon the settlor's death, control of the trust and its corpus passes to the successor trustee without the necessity of probate. The successor trustee would subsequently distribute the trust corpus to beneficiaries as the trust document instructed. Unfortunately, this type of estate planning is also subject to challenge for lack of capacity or undue influence.<sup>117</sup>

Though inter-vivos transfers are another potential way to forestall estate litigation, they are a poor substitute for ante-mortem probate because they are irrevocable and can be easily challenged in a manner similar to challenging traditional post-mortem probate.<sup>118</sup> As in traditional post-mortem probate, these inter-vivos transfers are subject to an analysis of whether undue influence was applied.<sup>119</sup> Indeed, in some instances, these types of transfers become subject to litigation during the grantor's lifetime forcing an individual into court to defend against legal

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<sup>116</sup> Steven K. Mignogna & Robert N. Sacks, *Estate Litigation: What Every Estate Planner Should Know About Probate Litigation*, AM. B. ASS'N SECTION OF REAL PROP., PROBATE & TRUST LAW 14TH ANN. REAL PROP. ESTATE PLAN. SYMPOSIA (Apr. 3–4, 2003); see also Erin E. McKee, *Ante-Mortem Probate: Considering a New Tool for Estate Planning in North Carolina*, GRAY MATTERS: THE OFFICIAL PUBLICATION OF THE NCBA ELDER AND SPECIAL NEEDS LAW SECTION (July 2014) (on file with author).

<sup>117</sup> See *In re Niles Trust*, 176 N.J. 282 (2003); *In re Buscavage Living Trust*, No. 07–01452, 2010 WL 5510140 (N.J. App. Div. Aug. 25, 2010).

<sup>118</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 67; Leopold & Beyer, *supra* note 23, at 144–45.

<sup>119</sup> *Pascale v. Pascale*, 113 N.J. 20, 29–31 (1988). "In respect of an intervivos gift, a presumption of undue influence arises when the contestant proves that the donee dominated the will of the donor . . . or when a confidential relationship exists between the donor and the donee[.]" *Id.* at 30 (internal citations omitted); see also *In re Estate of Stockdale*, 196 N.J. 275 (2008) (affirming, *inter alia*, trial court's determination that real estate contract disposing of certain of decedent's assets were "invalid as the product of undue influence and 'sharp dealing.'").

actions filed by those seeking to prove undue influence.<sup>120</sup>

Finally, in some jurisdictions, a common preventative estate planning measure is the use of a “no contest” or “in terrorem” clause. This type of provision stipulates that a person will receive a bequest only if the person refrains from challenging the will. In this manner, a potential challenger will be disincentivized from raising a contest to the will’s probate.<sup>121</sup> However, this is not a valuable planning technique in New Jersey as New Jersey Statute section 3B:3-47 provides that “a provision in a will purporting to penalize any interested person for contesting the will . . . is unenforceable if probable cause exists for instituting proceedings.”<sup>122</sup> Thus, New Jersey residents are foreclosed from influencing their heirs from beyond the grave.

## VII. PROBATE ISSUES IN THE CONTEXT OF GUARDIANSHIP PROCEEDINGS

The growing demographic of elderly citizens who are living longer creates a population that may face more extended periods of infirmity and through their longevity, may delay the disposition of their assets. Among legal practitioners, there is some indication that individuals proactively attempt during the testator’s life to secure access to the testator’s assets or estate; in some instances, potential heirs utilize the guardianship process to effectively litigate estate documents.<sup>123</sup> Generally speaking, a successful guardianship appointment can present two hypothetical risks to the testator’s estate. The first risk, the possibility that the guardian will exercise his or her authority to inappropriately allocate or dispose of

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<sup>120</sup> *Casternovia v. Casternovia*, 82 N.J. Super. 251 (App. Div. 1964). While this is the only published opinion addressing this issue, some commentators maintain that it in effect creates a tortious claim for interference with an expected inheritance. See Diane J. Klein, *A Disappointed Yankee in Connecticut (Or Nearby) Probate Court: Tortious Interference with Expectation of Inheritance—A Survey with Analysis of State Approaches in the First, Second, and Third Circuits*, 66 U. PITT. L. REV. 235, 273–74 (2004); see also *In re Niles Trust*, 176 N.J. at 290–91 (indicating that the trial court invalidated trust documents as a result of undue influence at the conclusion of its bench trial on January 10, 2000, prior to testator’s death on February 8, 2000).

<sup>121</sup> See Leopold & Beyer, *supra* note 23, at 146.

<sup>122</sup> Even in disputes predating New Jersey’s legislative enactment regarding in terrorem clauses, the New Jersey Supreme Court declined to enforce such a clause in a will or trust “where there is probable cause to challenge the instrument.” *Haynes v. First Nat’l State Bank of N.J.*, 87 N.J. 163, 176 (1981).

<sup>123</sup> Rachel Emma Silverman, *Latest Custody Battle: Who Gets Mom*, WALL ST. J., Aug. 17, 2006, available at <http://www.wsj.com/articles/SB115577005459137719>.

future assets of the estate during the testator's lifetime. The second, particularly when heirs are located in different jurisdictions, is the threat that the guardian will take advantage of his or her proximity to, and perceived authority over, a presumably vulnerable testator to urge the modification of the testator's proposed plan of disposition. New Jersey Statute section 3B:12-27 addresses this threat by providing that a will executed after the commencement of guardianship proceedings is invalid. However, in the case *In re the Guardianship of Lillian Glasser*,<sup>124</sup> New Jersey courts invalidated a will executed *prior* to the guardianship proceedings on the basis of undue influence and breach of fiduciary duty—Ms. Glasser, the testator, was alive for the entirety of the litigation. This indicates an interesting new battlefield for probate disputes and may also indicate courts' greater willingness to adjudicate these matters prior to the testator's death. In discussions of estate planning in the context of guardianship proceedings, it has been noted that "questions of pre-death probate disputes are beginning to bubble to the surface, in particular in the context of conservatorship and/or guardianship proceedings."<sup>125</sup> This developing trend may also indicate that an ante-mortem probate statute would be desirable for New Jersey practitioners and testators.

### VIII. CONCLUSION

Professor Langbein noted that "[i]f living probate is to be fairly resisted, it must be on the ground that the gain is not worth the cost."<sup>126</sup> While this is true with respect to the advanced academic formulations of ante-mortem probate, it is equally evident that the true cost-benefit analysis must ultimately lie with the testator. It is important to recognize that an ante-mortem probate proceeding will necessarily be a voluntary event; each testator must make his or her own determination whether the potential pitfalls of an ante-mortem proceeding outweigh the benefits of finality and certainty.<sup>127</sup> Arguably, any legislation that New Jersey may

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<sup>124</sup> *In re Glasser*, Nos. 209568 & 209568-2, 2011 WL 2898956 (N.J. App. Div. July 21, 2011) (affirming trial court's determination that daughter exercised undue influence over her mother's estate by inducing her to sign a will benefiting the daughter and her family).

<sup>125</sup> Gerard G. Brew et al., Symposium, *Heirs in Waiting? Pre-Mortem Probate Disputes in the Context of Guardianships*, CONSERVATORSHIPS, POWERS OF ATT'Y, & FAM. BUS. ENTITIES at 11 (May 1-2, 2008) (discussing pre-death guardianship/estate disputes in various jurisdictions).

<sup>126</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12, at 72.

<sup>127</sup> Indeed, "[t]he function of our testamentary law is to provide an efficient procedure for the transmission of property upon death in accordance with the will of its owner. Since its

decide to promulgate should be designed not to supplant, but rather, to supplement New Jersey's current traditional form of probate and to provide individuals and their legal advisors with another tool in their arsenal to ensure that final wishes are carried out after death.

Some of the opponents of an ante-mortem probate scheme allege that probating during the decedent's lifetime would create instances of family strife or argument.<sup>128</sup> However, this seemingly paternalistic argument potentially denies those citizens, who wish to have clarity in their final disposition of assets regardless of the familial ramifications—a valuable estate-planning tool. Indeed, while representing its own distinct canon of law, probate law should provide flexibility similar to that given the nature of family interactions and the laws that govern them. An apt analogy can be drawn between a pre-mortem probate and a prenuptial agreement; both seek certainty on important issues of family and financial concern in the present day—irrespective of whether or not these potential issues will inevitably occur at some point in the future.

In light of the various compelling arguments both for and against ante-mortem probate, the NJLRC will carefully consider this area of the law and conduct outreach to various members of the legal community to determine whether an ante-mortem probate statute might prove useful for New Jersey's testators and legal practitioners. It is anticipated that the NJLRC will issue a tentative report detailing their findings and recommendations about this project.

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employment is optional, it can discharge that function only if it is generally regarded as satisfactory by those who may use it." Cavers, *supra* note 29, at 440.

<sup>128</sup> Langbein, *Living Probate: The Conservatorship Model*, *supra* note 12 at 73; cf. Heyman, *supra* note 19, at 405.



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	<b>Alaska</b>	<b>Ohio</b>	<b>North Dakota</b>	<b>Arkansas</b>	<b>New Hampshire</b>
Action	Petition to determine will validity prior to testator's death.	Proceeding for judgment declaring will's validity prior to testator's death.	Proceeding for judgment declaring will's validity prior to testator's death.	Action in circuit court for a declaratory judgment establishing will's validity prior to testator's death.	Petition to determine validity of will during life.
Named Parties	The spouse, children and heirs of the testator or settler.	All beneficiaries and all of the persons entitled to inherit pursuant to Ohio statute.	All beneficiaries and all present intestate successors.	All beneficiaries and all existing intestate successors.	Spouse, all beneficiaries, the executor(s), the director of charitable trusts (if applicable), all present intestate successors, anyone else who would be interested party at testator's death.
Trust Provisions	Trustee of trust may petition to determine trust validity.				Settlor of trust may petition to determine trust validity.
Eligibility	Any person	Person domiciled or with real property in state.		Any person executing will disposing of all or part of an estate located in Arkansas.	Person domiciled or owning property in the state.
Procedure	Detailed provision listing	Detailed service of process	Valid will shall be kept on file.	Valid will shall be kept on file.	Detailed notice provision.

	statements that must be contained in the petition.	<p>provision.</p> <p>Court shall conduct an adversarial hearing.</p> <p>Declaration of validity shall be in sealed envelope held with court and only available to testator during his lifetime.</p> <p>If filed will is removed by testator, declaration of validity is ineffective.</p>			
Court Evaluation	Court shall determine validity of will or trust and other findings of fact and conclusions of law that may be appropriate.	Validity declared upon finding will was properly executed and that testator had requisite testamentary capacity and was not under restraint.	Upon finding that will was properly executed and testator had requisite testamentary capacity and freedom from undue influence.	Upon finding that will was properly executed and testator had requisite testamentary capacity and freedom from undue influence it shall declare the will valid.	Court shall determine validity of will and make other findings of fact and conclusions of law that are appropriate.
Revocation/Modification	Validated will or trust may be modified by later will or codicil and	Validated will may be revoked or modified upon court filing in	Validated will remains in effect unless and until testator executes a	Validated will may be modified or superseded by subsequently executed valid	Validated will may be modified or revoked in same manner as non-

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	may be revoked, terminated or modified pursuant to statute.	<p>same manner as initial complaint.</p> <p>Any codicils must be declared valid by the same procedure as the will.</p> <p>Will may be revoked by any method proscribed by statute (tearing up, etc.).</p>	new will and executes a new proceeding under this chapter.	wills or codicils whether or not validated using the same procedure.	validated will.
Effect			Shall constitute an adjudication of probate.	Shall constitute an adjudication of probate.	
Admissibility in Other Action		<p>Failure to file complaint for judgment of validity not evidence that will was not properly executed.</p> <p>Findings of facts not admissible in any other proceeding.</p>			
Confidentiality	Information contained in				

	court records shall remain confidential except as to petitioner and interested persons who have appeared in the proceedings.				
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