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# Trial and Heirs: Antemortem Probate for the Changing American Family

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# Trial and Heirs

## ANTEMORTEM PROBATE FOR THE CHANGING AMERICAN FAMILY

“It has been said . . . that a will is more apt to be the subject of litigation than any other legal instrument. To say the least, it is an instrument frequently made the subject of litigation. Usually it is the most important document executed in a person’s lifetime. This immediately suggests that a will representing the true wishes of a testator of sound mind should be so prepared and executed as to be invulnerable, if possible, to an improper attack.”<sup>1</sup>

### INTRODUCTION

The Pritchett-Dunphy-Tucker family<sup>2</sup> has brought the diversity of today’s modern American family center stage and has replaced the Bradys of the 1970s<sup>3</sup> and the Cleavers of the 1950s.<sup>4</sup> The notion of the traditional American family has changed dramatically due to the rise in divorce rates and remarriages, the growing popularity of cohabitating, and the increased acceptance of same-sex couples. Andrew J. Cherlin, a professor of public policy at Johns Hopkins University, acknowledged that “[the] turnover in our intimate partnerships is creating complex families on a scale we’ve not seen before,” and although families have undergone an enormous change, our society is very much still in the midst of a transformation.<sup>5</sup> But the law of succession

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<sup>1</sup> Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958).

<sup>2</sup> *About Modern Family*, ABC, <http://abc.go.com/shows/modern-family/about-the-show> [<http://perma.cc/KVR8-7RZS>] (last visited Mar. 8, 2016) (a television sitcom depicting a large and blended family that is “cementing itself as a culturally defining series”).

<sup>3</sup> *The Brady Bunch (TV Series 1969–1974)—Plot Summary*, IMDB, [http://www.imdb.com/title/tt0063878/plotsummary?ref\\_=tt\\_stry\\_pl](http://www.imdb.com/title/tt0063878/plotsummary?ref_=tt_stry_pl) [<http://perma.cc/Y3ZU-CUB9>] (last visited Mar. 8, 2016) (a classic comedy depicting a large blended family that must adapt to new stepparents, stepchildren, and stepsiblings).

<sup>4</sup> *Leave It to Beaver (TV Series 1957–1963)—Plot Summary*, IMDB, [http://www.imdb.com/title/tt0050032/plotsummary?ref\\_=tt\\_stry\\_pl](http://www.imdb.com/title/tt0050032/plotsummary?ref_=tt_stry_pl) [<http://perma.cc/3CZF-3A24>] (last visited Mar. 8, 2016) (a family sitcom depicting an “All-American Family” in the 1950s).

<sup>5</sup> Natalie Angier, *The Changing American Family*, N.Y. TIMES (Nov. 25, 2013), <http://www.nytimes.com/2013/11/26/health/families.html> [<http://perma.cc/L3MF-7HTR>].

has failed to keep pace with the emergent population of nontraditional families.

Freedom of disposition is a longstanding tenant of property law and inheritance law.

American society has long recognized the value inherent in protecting an individual's ability to acquire and transfer private property. Testamentary freedom is derived from this well-established property law right and is accordingly the governing principle underlying American succession law. Just as individuals have the right to accumulate, consume, and transfer personal property during life, individuals generally are, and should be, free to control the disposition of personal property at death. Thus, testamentary freedom can be viewed simply as one stick in the bundle of rights referred to as property rights.<sup>6</sup>

Freedom of disposition has always been important but is even more so in light of the changing American family. Intestacy statutes are antiquated and leave the right to freedom of disposition uncertain and vulnerable for a vast population. Antemortem probate is one technique that states can employ to protect freedom of disposition for members of nontraditional families.

A will is a legal document in which an individual expresses wishes for the disposition of his or her property after death.<sup>7</sup> A testator<sup>8</sup> will typically work with an attorney to draft a will that clearly and explicitly lays out those wishes. These efforts represent the testator's intent, which is the directing principle and must prevail.<sup>9</sup> Thus, a court's preference is that property be disposed of in accordance with a decedent's desires as expressed in a valid will. Despite these efforts, however, many wills are frequently contested under theories of "undue influence, testamentary [mental] [in]capacity, and fraud."<sup>10</sup> As a result,

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<sup>6</sup> Irene D. Johnson, *There's a Will, but No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105, 105 n.1 (2011) (citing Lee-Ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 280-81 (2010)).

<sup>7</sup> *Will*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>8</sup> A testator is a person who has made a will. *Testator*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>9</sup> *In re Estate of Burleigh*, 175 A.2d 838, 839 (Pa. 1961).

<sup>10</sup> Margaret Ryznar & Angeliqve Devaux, Au Revoir, *Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 1, 3 (2013). Additionally, about half of the states recognize a new tort called "tortious interference with an expectancy." See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS, AND ESTATES* 320 (9th ed. 2013). This new tort is not a challenge to the will but instead permits recovery for a wrongful interference when it occurs in conjunction with an expectation of inheritance. *Id.* at 324-25. Professor Robert H. Sitkoff finds this new tort troublesome because it "recognizes a primary right in a prospective donee to inherit, [and] it is in deep tension with the principle of freedom of disposition." Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS L.J. 643, 650 (2014). For more on the critique of this new tort, see

there is no guarantee that a court will uphold an executed will. This presents a major conflict in probate law because courts are unable to honor a testator's intent in the face of will contests brought by relatives or friends who believe that they are entitled to more than the will designates.

The probate system is the judicial process by which a testator's will is admitted to a court for proof of validity *upon the testator's death*.<sup>11</sup> In an attempt to prevent postmortem will contests, a handful of states have passed legislation permitting antemortem probate.<sup>12</sup> Unlike postmortem probate, antemortem probate would allow for the probate of a testator's will *before the testator's death*.<sup>13</sup> The most recent state to adopt antemortem probate is New Hampshire, which signed into law an antemortem probate statute on July 11, 2014.<sup>14</sup>

In light of the American family's changing dynamics, this note first explores how inheritance law could benefit from an antemortem probate statute that would protect a growing population of Americans. It then encourages the drafters of the Uniform Probate Code (UPC) to adopt antemortem probate procedures. Part I of this note considers the American family's changing structure and explains how current inheritance laws do not protect the changing American family. Part II discusses the background of antemortem probate, including its history and the proposed models for an antemortem statute. This part also describes the antemortem statutes currently in effect in five states and the arguments for and against the antemortem measure. Part III proposes implementing an antemortem probate statute that incorporates aspects of current state statutes and the Administrative Model (which proposes that a state implement an *ex parte* proceeding in which a decisionmaker considers the testator and the testator's particular factual circumstances in

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John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remediating Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335 (2013).

<sup>11</sup> *Probate*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>12</sup> Antemortem probate is also known as predeath, premortem, or living probate. See, e.g., N.D. CENT. CODE § 30.1-08.1-01 (2015); OHIO REV. CODE ANN. § 2107.081 (West 2015); ARK. CODE ANN. § 28-40-202 (West 2015); ALASKA STAT. § 13.12.530 (2015); N.H. REV. STAT. ANN. § 552:18 (2015).

<sup>13</sup> *Antemortem Probate*, BLACK'S LAW DICTIONARY (10th ed. 2014). Interestingly, the 9th edition, published in 2009, did not include a definition of antemortem probate. See BLACK'S LAW DICTIONARY (9th ed. 2009).

<sup>14</sup> N.H. REV. STAT. ANN. § 552:18; see also Paul Briand, *New Granite State Estate Law Designed to End Shenanigans*, SEACOAST ONLINE (Aug. 25, 2014, 2:00 AM), <http://seacoastonline.com/articles/20140825-NEWS-408250321> [<http://perma.cc/7YMB-5RVW>]; Amy Kanyuk, *New Hampshire Amends Its Trust Laws*, WEALTHMANAGEMENT.COM (Sept. 5, 2014), <http://wealthmanagement.com/estate-planning/new-hampshire-amends-its-trust-laws> [<http://perma.cc/FUW4-URE5>].

order to determine a will's validity). Lastly, Part IV proposes a statute that the drafters of the UPC could adopt.

## I. THE AMERICAN FAMILY

When a person dies without a will, intestacy statutes provide a distribution scheme for the decedent's estate based on a presumed donative intent, but these intestacy statutes are outdated given the evolving American family. U.S. Census Bureau data demonstrates the increased number of nontraditional families. It also shows the complexity of family relationships, which can make it difficult to apply intestacy statutes to a nontraditional family. Because the inheritance rights of a nontraditional family member are vulnerable, the law should protect these individuals when a testator prepares a will as a means of circumventing the intestacy statutes. Antemortem probate is one viable solution to address the shortcomings of intestacy statutes as applied to the nontraditional family.

### A. *The Changing American Family*

A traditional or nuclear family can be defined as one that includes a husband and a wife and their combined genetic children who were not conceived by means of reproductive technology.<sup>15</sup> Modern attitudes are also likely to consider adopted children as part of the traditional family, which is reflected in state probate laws that provide for a legal adoption to be the equivalent of a blood relationship.<sup>16</sup> In contrast, a nontraditional family encompasses all other familial structures, brought about through divorce and remarriage, and includes stepchildren, cohabitating couples and their children, and same-sex couples and their children. The nontraditional family is a rapidly growing trend, and, in fact, nontraditional families now outnumber traditional families. Based on U.S. Census Bureau data, in 2010, only 48% of American households were comprised of traditional families, a number which fell from 52% in 2000, 55% in 1990, and 78% in 1950.<sup>17</sup>

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<sup>15</sup> RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 3 (2004).

<sup>16</sup> *Id.* at 5; see N.Y. EST. POWERS & TRUSTS LAW §§ 1-2.10(a)(2), 4-1.1(d) (McKinney 2015); N.Y. DOM. REL. LAW § 117(1)(c) (McKinney 2015).

<sup>17</sup> DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, *HOUSEHOLDS AND FAMILIES: 2010*, at 5-6 (2012), <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> [<http://perma.cc/HA44-U9KP>]; David Port, *Estate Planning for the Modern Family*, LIFEHEALTHPRO (Sept. 25, 2014), <http://www.lifehealthpro.com/2014/09/25/estate-planning-for-the-modern-family> [<http://perma.cc/2UTN-AVXE>].

In 2010, 16.3 million Americans lived in unmarried cohabitating households.<sup>18</sup> The number of opposite-sex cohabitating households increased by 40% from 2000 to 2010.<sup>19</sup> The number of same-sex cohabitating households increased by 80% from 2000 to 2010.<sup>20</sup> In fact, 2010 marks the first time that husband-wife households made up less than 50% of all households in the United States.<sup>21</sup> Additionally, one in five children is now born into an unmarried cohabitating household, and two in five are likely to live in an unmarried cohabitating household by the age of 12.<sup>22</sup> The National Survey of Family Growth found that between 2006 and 2010, almost half (48%) of 15- to 44-year-old women had cohabitated prior to marriage.<sup>23</sup> The researchers concluded that cohabitation has become the first union formed among young adults in the United States and that cohabitation has led to the delay in first marriages for this population.<sup>24</sup>

In addition to changes in cohabitating households, the stability and longevity of marriages have eroded in recent decades. Today, around 50% of first marriages end in divorce,<sup>25</sup> which makes each nuptial feel like a proverbial coin flip. In fact, the national marriage and divorce rate between 2000 and 2011 consistently hovered around 50%, and in 2011, the divorce rate surpassed the 50% mark.<sup>26</sup> One study estimating the national average length of first and second marriages for women ages 15-44 found that one-fifth (20%) of first marriages

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<sup>18</sup> Rose M. Kreider, U.S. Census Bureau, Increase in Opposite-Sex Cohabitating Couples from 2009 to 2010 in the Annual Social and Economic Supplement (ASEC) to the Current Population Survey (CPS) tbl.1 (Sept. 15, 2010) (unnumbered working paper), <http://www.census.gov/population/www/socdemo/Inc-Opp-sex-2009-to-2010.pdf> [<http://perma.cc/8KB7-MCSH>] (2010 data shows 7,529,000 opposite-sex couples and 620,000 same-sex couples living in cohabitation).

<sup>19</sup> LOFQUIST ET AL., *supra* note 17, at 6.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 5.

<sup>22</sup> ROSE M. KREIDER & RENEE ELLIS, U.S. CENSUS BUREAU, LIVING ARRANGEMENTS OF CHILDREN: 2009, at 8 (2011), <http://www.census.gov/prod/2011pubs/p70-126.pdf> [<http://perma.cc/53SS-4G9U>].

<sup>23</sup> Casey E. Copen et al., *First Premarital Cohabitation in the United States: 2006-2010 National Survey of Family Growth*, NAT'L HEALTH STAT. REP., Apr. 4, 2013, at 1, <http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf> [<http://perma.cc/T5ZB-QX2N>].

<sup>24</sup> Casey E. Copen et al., *First Marriages in the United States: Data from the 2006-2010 National Survey of Family Growth*, NAT'L HEALTH STAT. REP., Mar. 22, 2012, at 2, 9, <http://www.cdc.gov/nchs/data/nhsr/nhsr049.pdf> [<http://perma.cc/HGD8-CJBR>]; see also Angier, *supra* note 5 ("For many cohabitating couples, there's a high bar for marriage, high expectations of where they should be at economically or emotionally, and if they don't meet that bar they'll put off getting married." (quoting Professor Kelly Musick's explanation of why cohabitation contributes to the delay in marriage)).

<sup>25</sup> Copen et al., *supra* note 24, at 1.

<sup>26</sup> *National Marriage and Divorce Rate Trends*, CTRS. FOR DISEASE CONTROL AND PREVENTION, [http://www.cdc.gov/nchs/nvss/marriage\\_divorce\\_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm) [<http://perma.cc/3HT8-N98R>] (last updated Feb. 19, 2013) (2011 marriage rate per 1,000 people of 6.8% compared with the 2011 divorce rate per 1,000 people of 3.6%).

ended within 5 years and one-third (33%) ended within 10 years.<sup>27</sup> The same study found that within 10 years, 75% of divorced women remarried.<sup>28</sup> Additionally, after 10 years of remarriage, 47% of remarriages dissolved for women under age 25 at the time of remarriage, and 34% of remarriages dissolved for women age 25 or older at the time of remarriage.<sup>29</sup> The study also compared its findings with the probability of marriage dissolution in 1973 and ultimately concluded that divorce is “more likely now than in the past for both first and second marriages.”<sup>30</sup> Additionally, according to a 2014 Pew Research Center report, 40% of all new marriages in the United States are remarriages for one or both of the partners.<sup>31</sup>

Given the current divorce rate and the likelihood of remarriage, stepfamilies are inevitable. Yet data for stepfamilies and stepchildren is tough to capture. First, the 2000 Census was the first to gather data on the type of relationship between the household parent<sup>32</sup> and child to determine whether the child was biological, step, or adopted.<sup>33</sup> Second, the U.S. Census surveys home addresses to determine who lives in each household, and relationships that cross household boundaries are not accounted for, such as those with children who have stepparents that live at another address.<sup>34</sup> Additionally, the term “step” has broadened to encompass relationships formed outside of marriage and includes cohabitating families.<sup>35</sup> For example, one member of an unmarried couple might identify their partner’s biological child as their stepchild. This more recent definition also exemplifies how

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<sup>27</sup> Matthew D. Bramlett et al., *First Marriage Dissolution, Divorce, and Remarriage: United States*, ADVANCE DATA, May 31, 2001, at 1, 5, <http://www.cdc.gov/nchs/data/ad/ad323.pdf> [<http://perma.cc/E9LN-LG3G>].

<sup>28</sup> *Id.* at 9.

<sup>29</sup> *Id.* at 11.

<sup>30</sup> *Id.* at 12.

<sup>31</sup> Gretchen Livingston, *Four-in-Ten Couples Are Saying “I Do,” Again*, PEW RES. CTR. (Nov. 14, 2014), <http://www.pewsocialtrends.org/2014/11/14/four-in-ten-couples-are-saying-i-do-again/> [<https://perma.cc/9XPZ-EGU8>]; see also Elizabeth Bernstein, *How Long Does it Take to Unite a Stepfamily?*, WALL ST. J. (Jan. 25, 2016, 3:46 PM), <http://www.wsj.com/articles/how-long-does-it-take-for-a-stepfamily-to-gel-1453754797> [<https://perma.cc/3S5K-S4LM>] (discussing the rise in remarriage rates and the stages of blending a family).

<sup>32</sup> The term “household parent” refers to the person whose name is on the lease or mortgage. The data collected is based on household address and the relationship between children and their coresident parents, thus the data does not take into account relationships between people who do not live in the same household. ROSE M. KREIDER & DAPHNE A. LOFQUIST, U.S. CENSUS BUREAU, *ADOPTED CHILDREN AND STEPCHILDREN: 2010*, at 1 & nn.2, 4 (2014), <http://www.census.gov/prod/2014pubs/p20-572.pdf> [<http://perma.cc/9N46-U7YZ>].

<sup>33</sup> *Id.* at 4.

<sup>34</sup> *Id.* at 3.

<sup>35</sup> *Id.* at 17, 19.

the American family is now defined by functional relationships, rather than formal relationships formed by marriage or blood.

Nevertheless, data collected from the 2010 Census, the 2009–2011 American Community Surveys, and the 2012 Current Population Survey show that nationally in 2010, 4.3% of children under age 18 were stepchildren.<sup>36</sup> Data from the Survey of Income and Program Participation shows that 5.6 million children under the age of 18 lived with at least one stepparent in 2009.<sup>37</sup> In 2009, out of 50.8 million children living with two parents, 10% lived with a biological parent and a stepparent, and approximately one in eight children living with two parents lived with a stepparent or adoptive parent.<sup>38</sup> And in 2010, 11% of children who lived with one biological or adoptive parent who cohabitated with a partner (who was not the child's other biological or adoptive parent) recognized the cohabitating partner as a stepparent.<sup>39</sup> Adding to the complexity of stepfamily data is the fact that most children in stepfamilies—about 85%—have siblings.<sup>40</sup> Out of 57.7 million children who lived with siblings in 2009, 11% lived with at least one half-sibling (sharing one biological parent), 2% lived with at least one stepsibling (no common biological parent), and 2% lived with at least one adopted sibling.<sup>41</sup>

Although recognition of same-sex families has increased in American culture, capturing data on same-sex families has been neither quick nor accurate.<sup>42</sup> First, the Census Bureau began collecting data on same-sex households when it added the category of “unmarried partner” to the 1990 Census.<sup>43</sup> But this category clearly captures *any* unmarried couple, whether same-sex or not. Second, the 2010 Census provided the first reports on same-sex married couples.<sup>44</sup> In the 2000 Census, same-sex couples were counted as unmarried couples because at the time, no state had legalized same-sex marriage.<sup>45</sup> The Census Bureau continues to work on improving the measurement of same-sex relationships.

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<sup>36</sup> *Id.* at 1, 3, 7.

<sup>37</sup> KREIDER & ELLIS, *supra* note 22, at 1, 6.

<sup>38</sup> *Id.* at 7.

<sup>39</sup> KREIDER & LOFQUIST, *supra* note 32, at 21, 31.

<sup>40</sup> *Id.* at 22.

<sup>41</sup> KREIDER & ELLIS, *supra* note 22, at 14, 17.

<sup>42</sup> For a more in-depth analysis of how same-sex couple relationships are misreported, see Jamie M. Lewis et al., U.S. Census Bureau, Measuring Same-Sex Couples: The What and Who of Misreporting on Relationship and Sex (May 2015) (unnumbered working paper), <http://www.census.gov/content/dam/Census/library/working-papers/2015/demo/SEHSD-WP2015-12.pdf> [<http://perma.cc/KKL2-SQMP>].

<sup>43</sup> U.S. CENSUS BUREAU, FREQUENTLY ASKED QUESTIONS ABOUT SAME-SEX COUPLE HOUSEHOLDS 1 (2013), [http://www.census.gov/hhes/samesex/files/SScplfactsheet\\_final.pdf](http://www.census.gov/hhes/samesex/files/SScplfactsheet_final.pdf) [<http://perma.cc/8XH8-QG2C>].

<sup>44</sup> *Id.*

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



Primarily, this entails modifying the relationship question, which “measures the changing composition of families and households in the United States.”<sup>46</sup> In 2010, the Census Bureau organized focus groups and cognitive interviews in order to learn how participants perceived the relationship question.<sup>47</sup> Based on the information collected, the Census Bureau developed revised answer choices for the relationship question, along with two additional follow-up questions related to the marital status question.<sup>48</sup> It is currently testing the revised relationship questions in several surveys, and it also plans to implement these new relationship questions in the 2020 Census.<sup>49</sup> Additionally, in 2005, the Census Bureau started compiling yearly estimates of the number of same-sex married households using data from the American Community Survey (ACS).<sup>50</sup> This process of modification reflects how the American family is changing and what is being done to accurately measure the composition of today’s American family.

Despite the limited data, the ACS data on same-sex couple households found that in 2010, there were about 594,000 same-sex couples living in the United States, making up about 1% of all couple households.<sup>51</sup> Of those households, 152,000 (25.7%) reported that they were spouses and 115,000 reported having children (biological, step, or adopted).<sup>52</sup> In the 2011 ACS, 605,472 households reported containing same-sex couples.<sup>53</sup> Of those households, 168,092 (27.8%) reported that the couples were spouses, and 16% reported that they had children (biological, step,

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<sup>46</sup> LOFQUIST ET AL., *supra* note 17, at 21; FREQUENTLY ASKED QUESTIONS ABOUT SAME-SEX COUPLE HOUSEHOLDS, *supra* note 43, at 3-4 (the modified relationship question will contain separate categories for opposite sex spouses and same-sex spouses or partners, and it will contain follow-up questions to account for cohabitation, domestic partnerships, and civil unions).

<sup>47</sup> FREQUENTLY ASKED QUESTIONS ABOUT SAME-SEX COUPLE HOUSEHOLDS, *supra* note 43, at 3-4. The primary findings of this work revealed that (1) respondents wanted “categories to reflect legal unions for same-sex couples,” (2) respondents wanted to “move the *unmarried partner* category next to *spouse* in the list,” and (3) some people interpreted the term “partner” to apply only to same-sex relationships, whereas some people in unmarried opposite-sex relationships were comfortable selecting the “unmarried partner” category. *Id.* at 4.

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

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

<sup>50</sup> *Id.* at 1.

<sup>51</sup> DAPHNE LOFQUIST, U.S. CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS 1 (2011), <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf> [<http://perma.cc/8JUV-KRZ5>]; see also *Same-Sex Couple Households: 2010 American Community Survey*, U.S. CENSUS BUREAU tbl.3, <http://www.census.gov/hhes/samesex/data/acs.html> [<http://perma.cc/75X9-XL52>] (follow “2010” hyperlink under “Characteristics of Same-Sex Couple Households”) (last visited Mar. 8, 2016).

<sup>52</sup> LOFQUIST, *supra* note 51, at 2.

<sup>53</sup> FREQUENTLY ASKED QUESTIONS ABOUT SAME-SEX COUPLE HOUSEHOLDS, *supra* note 43, at 1.

or adopted).<sup>54</sup> The 2012 ACS data showed 639,440 same-sex couple households, of which 28.5% reported that the couples were spouses.<sup>55</sup> And 34.6 % of the 726,000 same-sex household couples identified in the 2013 ACS reported that they were spouses.<sup>56</sup> In the 2014 ACS, 783,100 same-sex couple households were reported, of which 42.8% of the couples reported that they were spouses.<sup>57</sup> Even from this imperfect data, it is apparent that the number of reported same-sex households is increasing year after year, and the number of married same-sex couples is likely to rise following the Supreme Court's decision in *Obergefell v. Hodges* in which the Court ruled that same-sex couples nationwide have a constitutional right to marry.<sup>58</sup>

Overall, this data supports the general perception that the structure of the American family has changed from the traditional nuclear family and will continue to change in the future. In light of this, states need to revisit their inheritance laws to better protect the nontraditional family member's right to freedom of disposition.

### B. *The Changing American Family and Intestacy*

Despite the changing landscape of American households, modern inheritance laws have yet to provide for the treatment of these nontraditional families via default intestacy rules.<sup>59</sup> When a

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<sup>54</sup> *Id.* at 1, 3; *Tables 2 & 3: Same Sex Couple Households: 2011 American Community Survey*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/samesex/data/acs.html> [<http://perma.cc/24XT-SG65>] (follow "2011" hyperlink under "Characteristics of Same-Sex Couples") (last visited Mar. 8, 2016).

<sup>55</sup> *Table 3: Same-Sex Couple Households: 2012 American Community Survey*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/samesex/data/acs.html> [<http://perma.cc/7DN6-5BWH>] (follow "2012" hyperlink under "Characteristics of Same-Sex Couple Households") (last visited Mar. 8, 2016).

<sup>56</sup> *Table 3: Same-Sex Couple Households: 2013 American Community Survey*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/samesex/data/acs.html> [<http://perma.cc/B9RL-USN5>] (follow "2013" hyperlink under "Characteristics of Same-Sex Couple Households") (last visited Mar. 8, 2016).

<sup>57</sup> *Table 3: Same-Sex Couple Households: 2014 American Community Survey*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/samesex/data/acs.html> [<http://perma.cc/X6JL-V257>] (follow "2014" hyperlink under "Characteristics of Same-Sex Couple Households") (last visited Mar. 8, 2016).

<sup>58</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>59</sup> For further discussion of nontraditional families and current intestacy laws, see Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787 (2012) (proposing an intestacy statute that permits judicial discretion within a statutory framework to better serve current family circumstances); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877 (2012) (proposing a solution to the high rate of intestacy by attaching an optional form will to state income tax returns); Peter J. Harrington, *Untying the Knot: Extending Intestacy Benefits to Non-Traditional Families by Severing the Link to Marriage*, 25 J. CIV. RTS. & ECON. DEV. 323, 327 (2011) (arguing for the addition of "committed partner" to the intestacy statute due to the nature of today's family structure);

decedent does not use a will to dispose of property, the property passes via intestacy.<sup>60</sup> A 2014 survey found that 64% of Americans have not executed a will, and 55% of Americans with children also have no will in place.<sup>61</sup> Thus, for many Americans, the intestacy default rules will provide the disposition scheme for their property upon death.

Most states adopt their own intestacy statutes rather than follow the UPC, but overall, in most states an intestate estate is distributed to heirs in the following order: surviving spouse, descendants, parents, descendants of parents, grandparents, and descendants of grandparents.<sup>62</sup> This statutory scheme reflects a presumption that most individuals prefer property to pass to surviving family members by marriage or blood. After all, intestacy statutes are primarily aimed at carrying out a decedent's presumed intent by approximating how a typical individual would have distributed property during life.<sup>63</sup> This presumption is quite disadvantageous and unsuitable for members of nontraditional families, however, because those families may not fit the formal definition of family and may include functional relationships outside of marriage and blood lineage. Because the intestacy statutes exclude family members to whom a decedent may have preferred to leave property, the statutes fall short of their primary goal for a growing population of Americans—to carry out a decedent's intent.

A secondary goal of intestacy laws is to create a distribution system that is administratively feasible and “clear, fair, and simple.”<sup>64</sup> The current intestacy laws create a bright-line rule that makes it easy to delineate who is included or excluded from inheritance. Given the complexity of the American family structure, the many and potentially endless lists of functional family relationships to consider, and the likely variations of a decedent's wishes, changes to the intestacy statutes seem futile

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Terin Barbas Cremer, *Reforming Intestate Inheritance for Stepchildren and Stepparents*, 18 CARDOZO J.L. & GENDER 89 (2011) (proposing a statute consisting of factors to better suit blended families due to the shortcomings of intestacy statutes); Thomas P. Gallanis, *The Flexible Family in Three Dimension*, 28 L. & INEQ. 291 (2010) (asserting that the law should recognize and protect different kinds of families and focusing primarily on cohabitating couples); Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001) (arguing that inheritance law has failed to adapt to modern American society and providing three possible reforms).

<sup>60</sup> UNIF. PROBATE CODE § 2-101 (UNIF. LAW COMM'N 2010).

<sup>61</sup> *Rocket Lawyer Delivers No Excuses Estate Planning for April “Make-A-Will Month,”* ROCKET LAW. NEWS (Apr. 8, 2014), <https://www.rocketlawyer.com/news/article-Make-a-Will-Month-2014.aspx> [<https://perma.cc/5EFV-25AZ>].

<sup>62</sup> See, e.g., UNIF. PROBATE CODE §§ 2-102, 2-103 (UNIF. LAW COMM'N 2010); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2015).

<sup>63</sup> Harrington, *supra* note 59, at 330-31.

<sup>64</sup> See Gary, *supra* note 59, at 9; Harrington, *supra* note 59, at 332.

and next to impossible. Moreover, because the state legislature is responsible for adopting intestacy statutes, it would prove difficult for any legislature to come to a consensus on which nontraditional relationships should be recognized in intestacy without employing some sort of arbitrary line drawing that risks perpetuating the idea of an “accepted” or “proper” definition of family. Thus, altering the intestacy statutes may not be a viable or workable solution.

But the same laws permitting intestacy also permit members of nontraditional families to execute a will and take affirmative steps in directing the passage of property at death.<sup>65</sup> When testators in nontraditional families turn to will planning to effectuate their wishes and carry out their right to freedom of disposition, intestacy rules become irrelevant. So the natural argument is that the opportunity to execute a will reduces the ill effects of excluding the nontraditional family population from the intestacy default rules. However, considering that in the majority of states a will is validated in a postmortem probate process, should the will of a testator in a nontraditional family be deemed invalid following death, the testator’s wishes and intent will not be executed as planned. Instead, the state intestacy default laws, which fail to include nontraditional families or keep pace with the changing landscape of the American family, will govern the distribution of a testator’s property.

Nevertheless, the common (and possibly best) solution available to nontraditional family members is to execute a will.<sup>66</sup> And if estate planning is the favored solution for this population, it makes the need for ensuring that a will stands after a decedent’s death all the more important. With so many individuals in nontraditional family structures potentially turning to will planning<sup>67</sup> to ensure that their intent is provided for, the law needs to ensure that wills are given their rightful legal certainty in order to prevent an increase in will contests. Thus, antemortem probate can create the legal certainty that a nontraditional family member may seek when planning for the

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<sup>65</sup> UNIF. PROBATE CODE § 2-501 (UNIF. LAW COMM’N 2010).

<sup>66</sup> See, e.g., Gary, *supra* note 59, at 811 (“One solution is for more people to execute wills.”); Weisbord, *supra* note 59, at 891 n.66 (“[T]he best way to facilitate testamentary intent for . . . [nontraditional families] is to promote testacy rather than alter the rules of intestate distribution.”). See generally Kristine S. Knaplund, *Grandparents Raising Grandchildren and the Implications for Inheritance*, 48 ARIZ. L. REV. 1 (2006) (discussing the application of intestacy statutes to grandparents raising grandchildren and arguing that the simplest and best solution to avoid intestacy rules is for grandparents to write a will).

<sup>67</sup> A will is not the only form of estate planning that nontraditional family members can utilize. There are forms of nonprobate transfers such as trusts, which are still susceptible to similar challenges but may be more difficult to oppose. This note focuses, however, on testamentary will planning.

disposition of property upon death. This population is the most likely to take advantage of antemortem probate because it will keep those who are unaware or unaccepting of an individual's lifestyle at bay, and the procedure should give nontraditional family members satisfaction and confidence that their wishes will be respected. For this population, the expense is also likely worth the inevitable hassle an individual foresees based on their nontraditional family structure.

Essentially, there is a gap in how the inheritance laws will protect the evolving family structure in America that needs to be addressed, and one solution that can help fill that gap is antemortem probate. Part II examines the history of antemortem probate statutes and explores several models that could serve as a foundation for adopting an antemortem probate option.

## II. ANTEMORTEM PROBATE: HISTORY AND MODELS

Antemortem probate is a concept that has been contemplated by the courts, legal scholars, and several states. Such contemplation has led academics to develop three models for developing an antemortem probate statute. Thus far, the benefits of antemortem probate have persuaded five states to adopt the measure.

### A. *History of Antemortem Probate*

#### 1. The Courts

The earliest example of antemortem probate legislation appeared in 1883 when Michigan enacted a statute that allowed a testator to present the probate judge with a will and obtain a declaration of validity during the testator's lifetime.<sup>68</sup> In 1885, however, in the case of *Lloyd v. Wayne Circuit Judge*, the Michigan Supreme Court declared the statute unconstitutional on two grounds: (1) it failed to provide a testator's spouse and child with notice and the opportunity to be heard; and (2) it failed to provide for finality of judgment.<sup>69</sup> The finality of judgment was an issue because any determination of validity "will at all times be subject to . . . [a testator's] own discretion or caprice."<sup>70</sup> Because the statute allowed a determination of validity but also allowed the testator to retain the power to amend, revoke, or alter the

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<sup>68</sup> Act of April 11, 1883, No. 25, 1883 Mich. Pub. Acts 17 (providing for antemortem probate).

<sup>69</sup> *Lloyd v. Wayne Circuit Judge*, 23 N.W. 28, 28-29 (Mich. 1885).

<sup>70</sup> *Id.* at 29.

will,<sup>71</sup> any judgment of validity might never be final. The Michigan Supreme Court also found that allowing this type of determination would be akin to “issuing an advisory opinion which was prohibited by Michigan’s constitution.”<sup>72</sup> Justice Campbell, in his concurring opinion, flatly rejected the notion of antemortem probate for two reasons: (1) because of the well-settled common law that the living have no heirs, and (2) because judicial power is confined to controversies between interested parties, which cannot exist between a living testator and her potential heirs.<sup>73</sup>

Then, in 1916, the Washington Supreme Court was confronted with the issue of will validation during the life of a testator. Unlike in *Lloyd*, where a testator wanted to probate his will while alive, in *Pond v. Faust*, an incapacitated testator’s guardian brought an action to annul and cancel the testator’s will because she was insane and incompetent when she executed her will.<sup>74</sup> Citing *Lloyd*, the *Pond* court dismissed the guardian’s action based on the maxim that “[u]ntil a man dies he has no heirs.”<sup>75</sup> As in *Lloyd*, the *Pond* court also found that it had no jurisdiction over wills aside from following a will’s directions,<sup>76</sup> and to validate a will during a testator’s lifetime would mean issuing a declaratory judgment,<sup>77</sup> which was prohibited at the time.<sup>78</sup>

The idea that courts could not issue declaratory judgments came into question in 1937. The U.S. Supreme Court permitted declaratory judgments in the case of *Aetna Life Insurance Co. v. Haworth*, in which the Court upheld the Federal Declaratory Judgment Act (FDJA).<sup>79</sup> In so holding, the Court noted that the FDJA was a procedural mechanism to deal

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<sup>71</sup> § 6, 1883 Mich. Pub. Acts 18.

<sup>72</sup> Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 155 (1990); *Lloyd*, 23 N.W. at 29 (“[W]e know of no authority for requiring the circuit court to take cognizance of appeals in cases not properly judicial, and to give its time and attention to the making of order which are not judgments, and which the party seeking and obtaining them is under no obligation to leave in force for a day or an hour.”).

<sup>73</sup> *Lloyd*, 23 N.W. at 30-31 (Campbell, J., concurring).

<sup>74</sup> *Pond v. Faust*, 155 P. 776, 777 (Wash. 1916).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 778.

<sup>77</sup> “A binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement. Declaratory judgments are often sought . . . by insurance companies in determining whether a policy covers a given insured or peril.” *Declaratory Judgment*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>78</sup> Charles F. Gibbs & Brian Corrigan, *Pre-Mortem Probate: Has the Time Arrived?*, TR. & EST., Aug. 2007, at 28, 30.

<sup>79</sup> *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937) (“The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.”).

with controversies in the constitutional sense.<sup>80</sup> The Court laid out the requirements for a controversy that is appropriate for a judicial declaratory judgment:

The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests . . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.<sup>81</sup>

Hence, the courts did not have to wait until a situation transformed into a full-scale controversy before offering a prompt solution.

Although *Aetna Life Insurance Co.* kept the door open for antemortem declaratory judgments, other procedural hurdles remained before antemortem probate could be solved with declaratory judgments. Such hurdles included “1) the requirements of ‘ripeness, sufficiency and adversity of the parties;’ 2) an actual concrete controversy; and 3) finality of the judgment.”<sup>82</sup> Some states have bypassed these procedural hurdles by instituting antemortem legislation, thus giving a court jurisdiction to determine a will’s validity during the testator’s life.<sup>83</sup>

But in the meantime, in 1952, a Texas appellate court struck down the idea of using antemortem probate declaratory judgments.<sup>84</sup> In *Cowan v. Cowan*, two adult children brought an action to invalidate their incapacitated mother’s will because it disinherited both of them and left the residuary estate to the mother’s third adult child.<sup>85</sup> The children sought a declaration under the Texas Uniform Declaratory Judgments Act, which provided that “any person interested under a deed, will, or written contract may have determined any question of validity arising under the instrument.”<sup>86</sup> Although the statutory language appeared to authorize the court to make a determination of validity, the *Cowan* court refused to make such a finding, stating that because prior to the Act, no Texas court had the power to determine the validity of a living testator’s will, no Texas court had that power at the time of *Cowan*, either.<sup>87</sup> That is, the court would not read the Act as conferring the necessary authority to

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 240-41.

<sup>82</sup> Leopold & Beyer, *supra* note 72, at 156.

<sup>83</sup> See *infra* Section II.C (discussing the antemortem statutes of North Dakota, Ohio, Arkansas, Alaska, and New Hampshire).

<sup>84</sup> *Cowan v. Cowan*, 254 S.W.2d 862 (Tex. Civ. App. 1952).

<sup>85</sup> *Id.* at 862-63.

<sup>86</sup> *Id.* at 862.

<sup>87</sup> *Id.* at 863.

validate the will. The Act was not intended to (nor did it) create any substantive rights, and it did not “contemplate declarations upon matters where the interest of the plaintiff is contingent upon the occurrence of some future event.”<sup>88</sup> In the end, *Cowan* echoed *Lloyd* and *Pond* in finding that until the mother’s death, there would be no heirs, and the two adult children had no interest in the mother’s will.<sup>89</sup> Although *Aetna Life Insurance Co.* seemingly kept the door open for premortem probate declaratory judgments, some states have chosen to close that door, thus leaving intact the procedural hurdle requiring a controversy.

## 2. Legal Scholarship and State Statutes

Outside of the courts, there is a history of legal scholars pushing to include antemortem probate in legal doctrine. In the 1930s, the National Conference of Commissioners on Uniform State Laws established a special committee to draft a uniform act that would allow wills to be validated before a testator passes away.<sup>90</sup> Two methods were proposed: (1) allow a testator to file the will with the court clerk for safe keeping, and (2) provide for an antemortem probate proceeding.<sup>91</sup> The proposal was not approved, however, because at the time there were no state laws on antemortem probate, and the Commissioners were thus advocating for new legislation rather than for unifying current legislation.<sup>92</sup>

In 1946, the Model Probate Code’s drafters considered including an antemortem probate statute but ultimately concluded that “[t]he practical advantages of such a device are not great in view of the fact that few testators would wish to encounter the publicity involved in such a proceeding.”<sup>93</sup> Then, in 1967, the UPC’s drafters again considered inclusion of an antemortem probate statute that would allow a testator to petition the court for a declaratory judgment that a will is valid subject only to the testator’s revocation.<sup>94</sup> Commentary stated that although the procedure may not be used often, it is “recommended and of considerable attraction to the public”

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<sup>88</sup> *Id.* at 864-65.

<sup>89</sup> *Id.* at 865; see also Gibbs & Corrigan, *supra* note 78, at 30.

<sup>90</sup> Leopold & Beyer, *supra* note 72, at 161.

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

<sup>92</sup> NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE FORTY-FIRST ANNUAL CONFERENCE 143-45 (1931).

<sup>93</sup> LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 20 (1946).

<sup>94</sup> W.D. ROLLISON, COMMENTARY ON THE UNIFORM PROBATE CODE 25-26 (1st ed. 1970).



because it “offers . . . insurance against unwarranted [w]ill contests.”<sup>95</sup> Additionally, one commentator addressed the stated disadvantage of publicity, believing that despite most people’s preference to keep their will private, the availability of the procedure should not depend on the majority’s sentiments.<sup>96</sup> Ultimately, the Code included no mention of an antemortem statute.<sup>97</sup> Following the adoption of antemortem probate statutes in three states in the late 1970s,<sup>98</sup> the National Conference of Commissioners on Uniform State Laws once again considered including antemortem probate in the UPC based on one of two drafts.<sup>99</sup> One of the contemplated drafts was shaped by the Contest Model, and the other draft was based on the Administrative Model,<sup>100</sup> but in the end, the drafters were divided on the project and chose to discontinue their efforts.<sup>101</sup>

States did not begin adopting antemortem probate until 1977, when North Dakota passed its antemortem statute, followed by Ohio in 1978 and Arkansas in 1979.<sup>102</sup> In 1994, the Texas Real Estate, Probate and Trust Law Council looked into drafting an antemortem probate statute because of its belief that the procedure would be useful.<sup>103</sup> The Council chose not to pursue the project, however, because they determined that there were items of more pressing concern.<sup>104</sup> Since the 1970s, no state had passed an antemortem probate law until Alaska in 2010.<sup>105</sup> There was discussion of antemortem probate in New York in 2009, but the New York City Bar Committee on Trusts, Estates and Surrogate’s Courts opposed such a statute in any form, whether as “an actual probate proceeding, an action for declaratory

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<sup>95</sup> *Id.* at 26.

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

<sup>97</sup> *Id.*

<sup>98</sup> *See infra* Sections II.C.1-3; *see also* Leopold & Beyer, *supra* note 72, at 169.

<sup>99</sup> NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS NINETIETH YEAR 67 (1981); *see also* Leopold & Beyer, *supra* note 72, at 175-80.

<sup>100</sup> *See infra* Section II.B. The text of the two drafts considered by the National Conference of Commissioners on Uniform State Laws has been reprinted in Leopold & Beyer, *supra* note 72, at apps. E, F.

<sup>101</sup> Leopold & Beyer, *supra* note 72, at 175, 180-81; *see also* Gerry W. Beyer, Anticipating Will Contests and How to Avoid Them 31-32 (Sept. 20, 2012) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924906](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924906) [<http://perma.cc/4JVJ-DNRL>].

<sup>102</sup> *See infra* Sections II.C.1-3; *see also* Leopold & Beyer, *supra* note 72, at 169.

<sup>103</sup> Beyer, *supra* note 101, at 32.

<sup>104</sup> *Id.*

<sup>105</sup> *See infra* Section II.C.4; *see also* Beyer, *supra* note 101, at 31.

judgment that a will is valid, or any other type of proceeding.”<sup>106</sup> In January 2014, the New Jersey Law Revision Commission authorized a project, largely based on the publication of a law journal article,<sup>107</sup> to determine whether antemortem probate would be appropriate for the state.<sup>108</sup> The project staff has sought input from New Jersey legal associations and practitioners to assist in the determination and will eventually put together a report discussing the measure.<sup>109</sup> More recently, New Hampshire passed an antemortem probate statute that was signed into law in 2014, but it represents only one of two states to adopt such a law since the 1970s.

### B. Models

Over the years, three models have emerged for how an antemortem statute should be written and implemented in order to best combat the procedural hurdles that courts have identified. The three models have been developed by Howard Fink, John H. Langbein, and Gregory S. Alexander and Albert M. Pearson, and they seek to protect testamentary freedom of disposition.

The Contest Model statute proposes an adversarial proceeding for a declaratory judgment on testamentary mental capacity, proper execution procedures, and undue influence.<sup>110</sup> The interested parties who must be named in the proceeding include the will beneficiaries and intestate beneficiaries.<sup>111</sup> This gives the interested parties the opportunity to contest the will just as in a postmortem will contest, but this model instead “changes only the timing of the litigation.”<sup>112</sup> If the court determines that the will is valid, it will be filed with the court and deemed binding on all parties, and it can only be changed if the testator repeats the procedure and obtains another

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<sup>106</sup> COMM. ON TRS., ESTATES AND SURROGATE’S COURTS, N.Y.C. BAR, COMMENT ON PERMITTING PRE-MORTEM PROBATE IN THE STATE OF NEW YORK 3 (2009), [http://www.nycbar.org/pdf/report/Pre\\_Mortem\\_Probate.pdf](http://www.nycbar.org/pdf/report/Pre_Mortem_Probate.pdf) [<http://perma.cc/362K-95B9>].

<sup>107</sup> See Glenn R. Kazlow et al., *Ante-Mortem Probate: Why Wait Until It’s Too Late?*, 214 N.J.L.J. 1051 (2013).

<sup>108</sup> Memorandum from Jordan Goldberg to the N.J. Law Revision Comm’n 1-2 (Jan. 16, 2014) (on file with author); Memorandum from Susan G. Thatch to the N.J. Law Revision Comm’n 1 (Nov. 10, 2014) (on file with author).

<sup>109</sup> Memorandum from Susan G. Thatch, *supra* note 108. For more information related to antemortem probate in New Jersey, see Susan G. Thatch, *Ante-Mortem Probate in New Jersey—An Idea Resurrected?*, 39 SETON HALL LEGIS. J. 331 (2015).

<sup>110</sup> Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 275 (1976); Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1073 (1980).

<sup>111</sup> See Fink, *supra* note 110, at 275; Fellows, *supra* note 110, at 1073.

<sup>112</sup> Fellows, *supra* note 110, at 1073.

judgment.<sup>113</sup> The five states that have adopted antemortem legislation follow this model. The primary problem with this model is that the will's contents become public knowledge because they must be disclosed in the proceeding.<sup>114</sup> The other identifiable problems are the adversarial nature of the proceeding, which can create tension and strain familial relationships, as well as the expense of the proceeding.<sup>115</sup> The benefit this model provides is finality—a judgment finding validity is binding on all parties subject only to a subsequent judgment.<sup>116</sup>

The Conservatorship Model statute follows the adversarial nature of the Contest Model, as the testator must petition the court for a declaratory judgment on testamentary mental capacity and undue influence, but it seeks to dissuade the family conflict by appointing a guardian ad litem<sup>117</sup> to represent the interested parties who might be adversely affected by an erroneous determination of validity.<sup>118</sup> In this way, the guardian ad litem can communicate information between the interested parties and the testator.<sup>119</sup> The guardian ad litem would not be obligated to initiate a contest but rather would verify the testator's proof of capacity and the absence of undue influence or fraud.<sup>120</sup> In this capacity, the guardian ad litem has discovery rights, including to request document production and depose witnesses.<sup>121</sup> Thus, the guardian ad litem's role is to reduce the strain on familial relationships, although at least one commentator doubts the utility of this role because the testator and others are likely to recognize the sources from which the guardian ad litem has obtained information.<sup>122</sup> This model also suffers from the problem of disclosure because it causes a will's contents to become publicly available.<sup>123</sup>

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<sup>113</sup> Fink, *supra* note 110, at 275.

<sup>114</sup> Gerry W. Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, 23 ACTEC NOTES, 1997, at 83, 86, <https://www.actec.org/resources/publications/notes/PDFNotes/Notes-Summer97.pdf> [<http://perma.cc/QP49-LETR>].

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> A “guardian” is “[s]omeone who has the legal authority and duty to care for another’s person or property, esp[ecially] because of the other’s infancy, incapacity, or disability.” *Guardian*, BLACK’S LAW DICTIONARY (10th ed. 2014). A “guardian ad litem” is “[a] guardian, usu[ally] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.” *Guardian Ad Litem*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>118</sup> John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 77-78 (1978).

<sup>119</sup> *Id.* at 78.

<sup>120</sup> *Id.* at 79.

<sup>121</sup> *Id.*

<sup>122</sup> Fellows, *supra* note 110, at 1075.

<sup>123</sup> Beyer, *supra* note 114, at 86.

The Administrative Model takes a different approach. It departs from the judicial and adversarial approaches of the Contest Model and the Conservatorship Model. Instead of an accelerated will contest, the Administrative Model proposes an *ex parte* proceeding in which the state considers the testator's particular factual circumstances to determine the validity of a will.<sup>124</sup> This proposal puts forth a two-step process: (1) enact an antemortem statute; and (2) revise the statutory preconditions for contesting a will.<sup>125</sup>

As the first step in the Administrative Model, under an enacted statute, a testator would petition the court to determine whether the testator duly executed the will, had the requisite capacity to execute the will, and was not under any undue influence.<sup>126</sup> Only the trier of fact, presumably a judge, would have access to the will, and review would occur *in camera*<sup>127</sup> to preserve confidentiality.<sup>128</sup> A guardian ad litem would be appointed to serve as the court's agent and conduct interviews with the testator and interested parties, rather than to serve as a fiduciary for the interested parties as in the Conservatorship Model.<sup>129</sup> The guardian ad litem would not be privy to the will's contents, although the trier might maintain discretion to disclose the will's contents to the guardian.<sup>130</sup> In this way, the guardian would be responsible for looking for signs of probable undue influence or lack of capacity.<sup>131</sup> This model does not require notice to the interested parties based on the idea that expectant heirs do not possess a constitutional right to notice.<sup>132</sup> If the trier finds the will valid, it may order a declaration of validity.<sup>133</sup>

The second step in the Administrative Model involves amending the right-to-contest statutes, which create standing to contest a will in postmortem probate proceedings. In order to make the trier's order conclusive, the right-to-contest statutes would be amended to make an antemortem probate determination binding in the postmortem phase so that an heir could not challenge the will on the grounds of execution

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<sup>124</sup> Gregory S. Alexander & Albert M. Pearson, *Alternative Methods of Antemortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 112 (1979).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> "[I]n a judge's chambers or other private place." *In Camera Proceeding*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>128</sup> Alexander & Pearson, *supra* note 124, at 113.

<sup>129</sup> *Id.* at 113-14.

<sup>130</sup> *Id.* at 114.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 115.

<sup>133</sup> *Id.* at 116.

formalities, capacity, or undue influence; however, fraud would remain a permissible claim postmortem.<sup>134</sup> Although the Administrative Model may still strain familial relationships in the same way as the Conservatorship Model because of the guardian ad litem,<sup>135</sup> it is an innovative response to probate's disincentives and represents an effort to restore probate as a reliable mode of wealth succession that preserves testamentary freedom of disposition.

### C. *States with Antemortem Probate Statutes*

Five states have recognized the potential benefits of antemortem probate and have enacted legislation permitting it. Each of the statutes, in line with the Contest Model, allows a testator to petition a court to validate a will during the testator's life. Each statute, however, varies in the procedures it sets forth, including who may initiate the procedure and the relevance of the procedure if the will is later changed.

#### 1. North Dakota

In accordance with North Dakota law, a testator who executes a will disposing of an estate may commence a proceeding to seek a declaratory judgment of the will's validity.<sup>136</sup> The judgment may be made based on "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>137</sup> The testator must name will beneficiaries and present intestate beneficiaries to the proceeding;<sup>138</sup> these parties are considered to have "inchoate property rights."<sup>139</sup>

If the court determines that the will is valid, it must be placed on file with the court.<sup>140</sup> The will is declared adjudicated and is binding in North Dakota unless the testator executes a new will.<sup>141</sup> The facts in this proceeding are inadmissible as evidence in any other proceeding that does not relate to the validity of the will.<sup>142</sup> In the case of a newly executed will, the testator must

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<sup>134</sup> *Id.* at 117-18.

<sup>135</sup> Fellows, *supra* note 110, at 1077.

<sup>136</sup> N.D. CENT. CODE § 30.1-08.1-01 (2015).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* § 30.1-08.1-02.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* § 30.1-08.1-03.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* § 30.1-08.1-04.

commence a new proceeding for declaratory judgment to supersede the prior will.<sup>143</sup> As in the earlier proceeding, the testator must name new beneficiaries as parties to the new proceeding, as well as the beneficiaries from the old proceeding.<sup>144</sup>

The statute is seldom used, but in a survey of North Dakota practitioners, 90% found that the antemortem probate option enhances North Dakota's probate practice because it "prevents will contests, creates certainty of a will's validity, and permits the testator and witnesses to testify when their memories are fresh."<sup>145</sup>

## 2. Ohio

In accordance with Ohio law, a testator who executes a will may request a proceeding for a declaratory judgment, and the court will hold an adversarial hearing to determine the will's validity.<sup>146</sup> The testator's county of domicile determines proper venue, or if the testator is not domiciled in the state, then the venue is the county where the testator's real property is located.<sup>147</sup> As in North Dakota, the testator must name the will beneficiaries and intestate beneficiaries as parties to the proceeding.<sup>148</sup> A testator's failure to file a validation proceeding cannot serve as evidence of improper execution, lack of mental capacity, or undue influence.<sup>149</sup>

The will is valid if after the hearing, the court finds that the will was executed using proper procedures, the testator had the required testamentary capacity, and there was no undue influence.<sup>150</sup> A declaration of validity is binding in Ohio and must be sealed along with the will and filed with the court.<sup>151</sup> The facts in this proceeding are inadmissible as evidence in any other proceeding that does not relate to the validity of the will.<sup>152</sup> Only the testator may have access to the filed will, and if the testator removes the will from the court's possession, the declaration of validity is null and void.<sup>153</sup> A testator may commence a new

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<sup>143</sup> *Id.* § 30.1-08.1-03.

<sup>144</sup> *Id.*

<sup>145</sup> Beyer, *supra* note 114, at 88.

<sup>146</sup> OHIO REV. CODE ANN. §§ 2107.081(A), 2107.083 (West 2015).

<sup>147</sup> *Id.* § 2107.081(A).

<sup>148</sup> *Id.*; N.D. CENT. CODE § 30.1-08.1-02 (2015).

<sup>149</sup> OHIO REV. CODE ANN. § 2107.081(B).

<sup>150</sup> *Id.* § 2107.084(A).

<sup>151</sup> *Id.* § 2107.084(A), (B).

<sup>152</sup> *Id.* § 2107.085.

<sup>153</sup> *Id.* § 2107.084(B).

proceeding and repeat the above-mentioned process to revoke or modify the valid will.<sup>154</sup>

A survey of Ohio practitioners found that responding practitioners generally felt that the antemortem probate option was complicated, expensive, and created too much unwanted conflict.<sup>155</sup>

### 3. Arkansas

Under Arkansas law, a testator can commence a proceeding for a declaratory judgment in order to find a will valid, but only if the will disposes of “all or part of an estate located in Arkansas.”<sup>156</sup> Proper venue is the county where the estate is located.<sup>157</sup> Like in North Dakota and Ohio, the testator must name will beneficiaries and intestate beneficiaries as parties to the proceeding,<sup>158</sup> and these parties are deemed to possess “inchoate property rights.”<sup>159</sup>

The will is valid if the court finds that the will was properly executed, the testator had the required testamentary capacity, and there was no undue influence.<sup>160</sup> A valid will must be filed with the court.<sup>161</sup> A testator may modify or supersede the valid will, but unlike in North Dakota and Ohio, the modified or superseded will does not need to be validated via the above-mentioned process.<sup>162</sup>

Results from a survey of Arkansas practitioners revealed that more than half of the responding practitioners thought that antemortem probate was not beneficial because it violates a testator’s privacy, causes family disputes, and is an unnecessary expense.<sup>163</sup> On the other hand, more than one-third of respondents thought the procedure was beneficial because it prevents will contests, provides certainty, and gives the testator a sense of comfort.<sup>164</sup>

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<sup>154</sup> *Id.* § 2107.084(C), (D).

<sup>155</sup> Beyer, *supra* note 114, at 88.

<sup>156</sup> ARK. CODE ANN. § 28-40-202(a) (West 2014).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* § 28-40-202(b); N.D. CENT. CODE § 30.1-08.1-02 (2015); OHIO REV. CODE ANN. § 2107.081(A).

<sup>159</sup> ARK. CODE ANN. § 28-40-202(c).

<sup>160</sup> *Id.* § 28-40-203(a).

<sup>161</sup> *Id.*

<sup>162</sup> Compare *id.* § 28-40-203(b), with N.D. CENT. CODE § 30.1-08.1-03, and OHIO REV. CODE ANN. § 2107.084(C), (D).

<sup>163</sup> Beyer, *supra* note 114, at 89.

<sup>164</sup> *Id.*

#### 4. Alaska

Under Alaska law, a testator, nominated personal representative, or interested party (with the testator's consent) may petition the court for a determination that a will is valid.<sup>165</sup> The testator's county of domicile determines proper venue, or if the testator is not domiciled in the state, then venue is in any judicial district.<sup>166</sup> Through this venue provision, Alaska might be attempting to "market its legal benefits to nonresidents."<sup>167</sup>

Among other requirements, the petition must contain statements that a copy of the will is on file with the court; the will is in writing; the testator signed the will with testamentary intent, testamentary capacity, free will, without undue influence or duress, and without fraud or mistake; the will has not been modified or revoked; and the testator is familiar with the will's contents.<sup>168</sup> The petition must also contain the testator's name and address, as well as the names, addresses, and ages (if minors) for the following interested parties: testator's spouse, testator's children, testator's heirs, testator's nominated personal representative, and testator's devisees under the will.<sup>169</sup> Once the petition is filed, the court will set a time and place for the hearing, and the petitioner must notify the interested parties.<sup>170</sup> The petitioner carries the burden of proof as to the proper execution of the will, and an opponent carries the burden of proof as to the lack of capacity or intent, undue influence, duress, fraud, mistake, or revocation.<sup>171</sup>

If the court finds the will valid and it is not modified or revoked following the declaration, the will has "full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate" following the testator's death.<sup>172</sup> The declaration is binding on all people whether "known, unknown, born, or not born."<sup>173</sup> The testator, however, has the authority to subsequently modify or revoke the valid will.<sup>174</sup>

Additionally, the Alaska statute addresses confidentiality. All records are confidential except for a notice of the petition's

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<sup>165</sup> ALASKA STAT. § 13.12.530 (2015).

<sup>166</sup> *Id.* § 13.12.540(a).

<sup>167</sup> David L. Skidmore & Laura E. Morris, *Before the Party's Over: The Arguments For and Against Pre-Death Will Contests*, PROB. & PROP., Mar.-Apr. 2013, at 50, 53.

<sup>168</sup> ALASKA STAT. §§ 13.12.545(1)-(3), (6)-(9), (12), (13) (2015).

<sup>169</sup> *Id.* § 13.12.545(10), (11).

<sup>170</sup> *Id.* § 13.12.565(a), (b).

<sup>171</sup> *Id.* § 13.12.570.

<sup>172</sup> *Id.* § 13.12.555.

<sup>173</sup> *Id.* § 13.12.560.

<sup>174</sup> *Id.* § 13.12.575.



filing, a summary of the formal proceedings, and a modification or dispositional order, all of which are public.<sup>175</sup> The confidential records may be made available to selected persons as indicated in the statute.<sup>176</sup>

## 5. New Hampshire

Under New Hampshire law, a testator may commence a proceeding to determine a will's validity if the testator is domiciled in the state or owns real property within the state.<sup>177</sup> Unlike in Alaska, a testator's guardian, conservator, or attorney-in-fact cannot initiate the petition on the testator's behalf.<sup>178</sup> The following people are considered interested parties deemed to possess "inchoate property rights": testator's spouse, testator's heirs as of the filing date, legatees and devisees under the will, nominated executors, and a charitable organization, if named.<sup>179</sup> Each interested party must receive notice, and the court may order notice to other people.<sup>180</sup>

If the will is valid, it has "full legal effect . . . and . . . shall be admitted to probate," unless the will is modified or revoked following the declaration.<sup>181</sup> A testator's failure to commence a proceeding is inadmissible evidence of the will's validity.<sup>182</sup>

### D. *Benefits and Drawbacks of Antemortem Probate Statutes*

Utilizing antemortem probate may not be for everyone, but it provides concerned testators with certain benefits that are not available in most states under current probate procedures. Despite the disadvantages, antemortem probate might be the best route to protecting testators' intent, and the benefits could outweigh the apparent disadvantages, particularly for individuals in nontraditional families who cannot rely on intestacy as a disposition scheme.

#### 1. Advantages

The majority of states follow the rule that a will's validity is determined in a probate proceeding *after* the testator's death.

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<sup>175</sup> *Id.* § 13.12.585(a).

<sup>176</sup> *Id.* § 13.12.585(b).

<sup>177</sup> N.H. REV. STAT. ANN. § 552:18(I) (2015).

<sup>178</sup> *Compare id.*, with ALASKA STAT. § 13.12.530.

<sup>179</sup> N.H. REV. STAT. ANN. § 552:18(III)-(IV).

<sup>180</sup> *Id.* § 552:18(V).

<sup>181</sup> *Id.* § 552:18(VII).

<sup>182</sup> *Id.* § 552:18(IX).

The typical issues in a postmortem will contest involve mental capacity, undue influence, and fraud.<sup>183</sup> Because the testator is no longer available to attest to these claims, the evidence must necessarily come from secondhand sources. This gives rise to the “worst evidence rule of probate procedure whereby the best witness is dead by the time the question is litigated.”<sup>184</sup> In antemortem probate, however, the testator could participate in the will validation proceeding, thereby strengthening the quality of the evidence.<sup>185</sup> The testator could attest to mental capacity, intent, and free will, or could even be medically evaluated.<sup>186</sup>

Additionally, antemortem validation would help ensure that the testator’s wishes are followed after death. In the event that the will is deemed invalid in an antemortem validation proceeding, the testator has the ability to “cure the source of the invalidity or take alternative testamentary measures.”<sup>187</sup> These advantages help reinforce the freedom of disposition principle that underscores succession laws.

## 2. Disadvantages

Opponents of antemortem probate typically advance three arguments. First, the antemortem proceeding requires disclosure of the will’s contents, and thus there is no confidentiality. This disclosure may threaten family harmony and could impair personal relationships.<sup>188</sup> Additionally, upon receiving notice of an antemortem proceeding, a potentially interested party might not raise an objection in order to prevent disharmony with the testator or to maintain an inheritance under the will.<sup>189</sup> Disclosing the contents, however, could also provide potential heirs with valuable information to compile claims against the will.

Second, antemortem probate is an unnecessary expense that may end in fruitless litigation. Antemortem proceedings might be required more than once in a testator’s lifetime because the testator retains the right to modify or supersede the will.<sup>190</sup> And because the size of a testator’s estate can change, a testator might

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<sup>183</sup> Ryznar & Devaux, *supra* note 10, at 3.

<sup>184</sup> Sitkoff, *supra* note 10, at 649; *see also* John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2044 (1994) (book review); DUKEMINIER & SITKOFF, *supra* note 10, at 265 (noting the worst evidence rule of probate procedure).

<sup>185</sup> Skidmore & Morris, *supra* note 167, at 52.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Fellows, *supra* note 110, at 1073.

<sup>189</sup> *Id.* at 1073-74.

<sup>190</sup> Skidmore & Morris, *supra* note 167, at 55.

end up leaving no property or insufficient property to justify the proceeding.<sup>191</sup> Finally, because the judgment can only bind parties that were given proper notice, any defective notice permits a postmortem contest, despite the antemortem proceeding.<sup>192</sup>

Third, not all states permit antemortem probate. Thus, it is unclear what the legal effect would be for a will that is judged valid in a state that recognizes the right if a testator subsequently moves to a state that does not recognize the right.<sup>193</sup>

While these disadvantages should be considered, the doctrine of antemortem probate is a workable solution that can be molded to respond to some of these criticisms, as evidenced by the varying models that legal scholars have proposed thus far. What's more, some of these drawbacks—mainly those related to family disharmony and expense—should be reserved for the consideration of the testator, who is best positioned to assess those issues.

The following proposal responds to these criticisms and demonstrates how the advantages are likely to outweigh the stated disadvantages for individuals in nontraditional families.

### III. A FRAMEWORK FOR NO-NOTICE ANTEMORTEM PROBATE

American family life is complex and subject to individual and special circumstances. After considering the various models and the adversarial versions of antemortem probate that are implemented in five states, the most significant problem relates to disclosure and confidentiality. To address this problem, this note proposes a modified antemortem probate proceeding based on the Administrative Model that will protect confidentiality by not requiring notice to all interested parties. The proposal still contemplates the enactment of an antemortem statute but argues for shifting the burden of proving a will's validity to the testator as a means of preventing disclosure. The proposal outlined here is by no means the exclusive way to implement no-notice antemortem probate, but it is optimal because it accommodates both confidentiality and near certainty—two elements that make antemortem probate an attractive solution.

The proposed statute retains many features of the five state-enacted statutes, but it responds to the main criticism of confidentiality by modifying the testator's responsibilities in the proceeding. Most notably, this proposal modifies the *procedure* for

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<sup>191</sup> Fellows, *supra* note 110, at 1073.

<sup>192</sup> Skidmore & Morris, *supra* note 167, at 55.

<sup>193</sup> Fellows, *supra* note 110, at 1082.

an antemortem determination. The Contest and Conservatorship Models and current statutes adopt a procedure that looks like an accelerated will contest and involves formal notice requirements and participatory rights. Instead, as in the Administrative Model, the proposed statute outlines an *ex parte* proceeding<sup>194</sup> where the trier of fact must be satisfied with the factual circumstances of the testator's succession plan.

Under the proposed UPC statute, antemortem probate is still initiated with a petition to the court for a declaration that the testator duly executed the will, had the requisite capacity, and was free from undue influence. The petition would also include the will that the testator desires to certify so that the trier can accurately make a validity determination based on the specific testamentary disposition written in the will. This review would occur *in camera* so as to protect the confidentiality of the will document. Similar to the Alaska statute, only notice of the petition's filing, modification, or revocation would be available to the public. The rest of the information pertaining to the antemortem, *ex parte* proceeding would be confidential and privy only to the testator, the testator's attorney, the judge, and the judge's administrative staff, if necessary. Of course, the testator retains the discretion to disclose the will's contents to any other person in whom she wishes to confide.

This confidential approach adopts the view that because no one has heirs until death, potential heirs have no constitutional right to notice. Until a testator's death, a potential heir maintains only a mere expectancy rather than a legally ascertainable or pecuniary interest.<sup>195</sup> The no-notice requirement makes this proceeding *ex parte*, which is not wholly without precedent. Ohio currently has a "designated heir" statute by which any competent person (the designator) may appear before a probate judge and file a written declaration designating and appointing another person (the designee) as an heir at law in the event of the designator's death.<sup>196</sup> If the judge is satisfied that the designator is competent and free from restraint, he or she will make a complete record of the proceeding, and a certified copy of the record serves as conclusive evidence absent a showing of fraud or undue influence.<sup>197</sup> The Ohio Court of Appeals found this statute constitutional and held that it does not deprive

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<sup>194</sup> An *ex parte* proceeding is initiated by only one party and does not require notice to or argument from the adverse party. See *Ex Parte Proceeding*, BLACK'S LAW DICTIONARY (10th ed. 2014).

<sup>195</sup> *Martone v. Martone*, 509 S.E.2d 302, 305-06 (Va. 1999).

<sup>196</sup> OHIO REV. CODE ANN. § 2105.15 (West 2015).

<sup>197</sup> *Id.*

prospective heirs of any right because they had no vested right in the property at the time of the designation.<sup>198</sup>

Under this no-notice framework, the testator would have the burden of proving proper execution, requisite capacity, and freedom from undue influence. This evidence may include, but is not limited to, a self-proved will, a videotaped execution ceremony, a medical exam, or affidavits from advisors such as an attorney, a physician, an accountant, or another professional acquaintance who is in a position to attest to the testator's mental state or regular dealings. This places the burden of proof on the testator to present all relevant evidence in order to obtain a determination of validity. If the trier is satisfied with all the evidence provided, he or she may order the will valid and maintain the will on file.

Because this proceeding is *ex parte*, the determination is not permanent, but that is not to say the proceeding is for naught. The temporary nature of the *ex parte* determination fits with the no-notice framework in that upon the testator's death, an actual heir is entitled to bring a contest postmortem. In essence, this gives an heir constitutional due process. A trier's determination of validity antemortem serves as *prima facie* evidence of validity, however, and creates a rebuttable presumption that the will is valid. The contesting heir must rebut the presumption with clear and convincing evidence that the will was not a product of proper execution or capacity or that the will was a product of undue influence or fraud. If the contestor's evidence is not sufficient to surmount the testator's previously provided evidence, then the *ex parte* determination becomes permanently valid. This presumption merely shifts the burden of proof at the appropriate point in time. Thus, in addition to affording confidentiality, this technique also provides an answer to "the worst evidence rule" problem. A testator now has a voice in a postmortem contest via the evidence provided during life, should such a contest be permitted based on the newly furnished evidence.

Given that an individual has the right to revoke or modify a will, the proposed statute still permits such an action. In the case of modification, the testator will continue to bear the burden of proof for the modified will that is to supersede the previously validated will. This is in line with the statutes in place in North Dakota, Ohio, Arkansas, and New Hampshire. In the case of revocation, the testator must sign a statement that she no longer

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<sup>198</sup> *Davis v. Laws*, 27 Ohio N.P. (n.s.) 193, 208-09 (Ohio Ct. C.P. July 24, 1928), *aff'd*, 170 N.E. 601 (Ohio Ct. App. 1929).

wishes for the will to be valid and file it with the court that issued the original declaration.

Of course, there will be an expense related to any kind of proceeding. One assumption of the proposed antemortem probate solution is that testators who choose to exercise the antemortem probate option do so because the presented will is intended as the last will. Another assumption is that those testators who choose to utilize the antemortem probate option do so because the expense is less than the potential cost of full-blown postmortem litigation that may be more likely for a nontraditional family member. Additionally, the testator may find the expense worthwhile for the comfort and security that antemortem probate can provide given that the alternative of intestacy laws will likely destroy the testator's intended disposition scheme.

Unlike the statutes currently in effect, this proposed statute does not provide for total incontestability. But it may effectively prevent many potential contests that would otherwise occur if an antemortem proceeding were not available, because the determination creates a strong presumption of validity. Despite falling short of incontestability, this solution allows confidentiality to share center stage with near certainty. Notwithstanding its potential flaws, the advantages of antemortem probate for nontraditional family members cannot be overstated. Antemortem probate will provide nontraditional families with an alternative to the traditional postmortem probate process, which is currently flawed in its failure to recognize the fast-evolving population of nontraditional families. Thus, when nontraditional family members execute a will, they necessarily opt out of intestacy, and antemortem probate is one way to preserve their exercise of freedom of disposition.

#### IV. PROPOSED ANTEMORTEM PROBATE STATUTE

The proposed statute set forth below for incorporation in the UPC primarily combines features from the statutes enacted in the five states that have antemortem probate and the Administrative Model framework. The state statutes set a foundation for many provisions, while the Administrative Model helps incorporate the element of confidentiality into the procedure.

## Probate of Will Prior to Testator's Death

### *Section 1. Petition for Order Declaring Validity of Will Before Death*<sup>199</sup>

A testator, during his or her lifetime, may petition the court for an order declaring that the testator's will has been duly executed and is the testator's valid will subject only to subsequent revocation or modification. For purposes of this petition, the testator must be domiciled in the state or own real property located in the state.

### *Section 2. Venue*<sup>200</sup>

If the testator is domiciled in the state, then the venue for a petition under [statute] is the judicial district of this state where the testator is domiciled. If the testator owns real property in the state, then the venue for a petition under [statute] is the judicial district of this state where the real property is located.

### *Section 3. Contents of Petition*

- a) A petition under [statute] must contain the following statements:<sup>201</sup>
  - i. A statement that the testator executed the will in a form valid under the laws of this state;
  - ii. A statement that the testator properly executed the will with testamentary intent;
  - iii. A statement that the testator had testamentary capacity at the time he or she executed the will;
  - iv. A statement that the testator executed the will through an exercise of his or her free will and free from undue influence or duress;
  - v. A statement that the execution of the will was not the result of fraud or mistake; and
  - vi. A statement that the testator is familiar with the contents of the will.
- b) The original will shall be filed with the petition.

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<sup>199</sup> This section is based on N.H. REV. STAT. ANN. § 552:18(I) (2015).

<sup>200</sup> This section is based on the three current state statutes that permit venue if the testator is domiciled in the state or owns real property in the state, because a testator should have a physical connection to the state. See ARK. CODE ANN. § 28-40-202(a) (West 2015); N.H. REV. STAT. ANN. § 552:18(II); OHIO REV. CODE ANN. § 2107.081(A) (West 2015).

<sup>201</sup> This section is based on ALASKA STAT. § 13.12.545 (2015).

- c) A testator may present evidence in the following forms but is not limited to these forms:
- i. Self-proved will;
  - ii. Videotaped execution;
  - iii. Medical exam;
  - iv. Affidavits;
  - v. The trier may require evidence from physicians, psychologists, psychiatrists, and other persons of its own choosing in order to properly examine the testator and his or her specific factual circumstances.

#### *Section 4. Hearing on Validity of Will*<sup>202</sup>

When a petition is filed pursuant to this statute, the trier shall conduct an *ex parte* hearing on the validity of the will. The hearing shall be confidential in nature and shall be conducted *in camera*. A testator has the burden of establishing prima facie proof of the execution of the will, the requisite testamentary capacity, and freedom from undue influence and fraud.

#### *Section 5. Declaration of Validity*<sup>203</sup>

The trier may declare a will valid and make other findings of fact and conclusions of law that are appropriate under the circumstances. The trier shall declare the will valid if, after conducting a proper inspection of the will and related evidence provided by the testator, the trier is satisfied that the testator duly executed the will under the laws of this state in effect at the time of execution, that the testator had the requisite testamentary capacity, and that the testator was free from undue influence.

#### *Section 6. Effect of Declaration*

If a testator presents satisfactory evidence of execution, capacity, and freedom from undue influence and fraud, then upon death, unless a contester establishes to the contrary, the will shall be presumed valid and given full legal effect for the purposes of this statute. If a challenge arises, a contester can rebut the presumption only by clear and convincing evidence.

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<sup>202</sup> This section is based on the first step of the Administrative Model, which proposes an *ex parte* proceeding. *See supra* Section II.B.

<sup>203</sup> This section is modeled after the five current state statutes. *See* ALASKA STAT. § 13.12.555; ARK. CODE ANN. § 28-40-203(a); N.H. REV. STAT. ANN. § 552:18(VI); N.D. CENT. CODE § 30.1-08.1-03 (2015); OHIO REV. CODE ANN. § 2107.084(A).



### *Section 7. Revocation*<sup>204</sup>

A testator may withdraw a will declared valid and filed with the court provided the testator signs a statement of revocation to be written across the face of the will at the time of withdrawal. A testator's request to withdraw a will previously declared valid must be made by verified application filed with the court that originally declared the will to be valid. A testator may modify a will declared to be valid with a subsequent will or codicil only if the testator presents new evidence of execution, capacity, and freedom from undue influence, in order to establish the presumption of validity of the codicil or superseding will.

### *Section 8. Confidentiality*<sup>205</sup>

- a) A notice of the filing of a petition and a modification or revocation shall be available for public inspection. Except as provided in subsections (b) and (c) of this section, all other information related to the ex parte proceeding is confidential.
- b) The ex parte proceeding records may be made available to:
  - i. The testator;
  - ii. The testator's attorney;
  - iii. The judge hearing or reviewing the matter; and
  - iv. A member of the clerical or administrative staff if access is essential for authorized, internal administrative purposes.
- c) For good cause shown, the judge may order the ex parte records that are confidential under section 8(a) to be made available to a person who is not listed in section 8(b).

### *Section 9. Effect of Failure to Petition for Declaration of Validity*<sup>206</sup>

Failure of a testator to file a petition for a declaration of the validity of the testator's executed will shall not be construed as evidence or an admission (i) that the will was not properly executed, (ii) that the testator lacked requisite testamentary capacity, or (iii) that the testator was subject to undue influence.

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<sup>204</sup> This section is based on OHIO REV. CODE ANN. § 2107.084(D) and the Administrative Model, which proposes that notice of revocation or modification be submitted to the court. Alexander & Pearson, *supra* note 124, at 119. Also influential was a draft considered by the National Conference of Commissioners on Uniform State Laws in the early 1980s, which is reproduced in Leopold & Beyer, *supra* note 72, at app. E.

<sup>205</sup> This section is based on ALASKA STAT. § 13.12.585.

<sup>206</sup> This section is based on N.H. REV. STAT. ANN. § 552:18(IX) and OHIO REV. CODE ANN. § 2107.081(B).

## CONCLUSION

The structure of the American family has evolved and will continue to transform. But what will not change is that we all must face death. The current inheritance laws do not account for and are not adapted to the dramatic change in the American family in the past few decades. Family structures that include unmarried cohabitating couples, same-sex couples, and blended stepfamilies are now commonplace. For these nontraditional families, functional relationships may be more important than relationships created through blood or marriage. Given the changing family structure, there are many benefits that a nontraditional family member could realize through the use of antemortem probate. So while wills serve as a workable way of opting out of intestacy rules, the testator who chooses to prepare for death through a will should be able to rest in peace knowing that a carefully crafted plan is faithfully upheld and executed. Antemortem probate is merely one possible solution to the glaring gap in the current inheritance law. An antemortem probate statute in the UPC would help to preserve the commitment to testamentary freedom of disposition embedded in inheritance law and protect a nontraditional family member's right to control the disposition of property at death without worry that this exercise might later be undone by a spurious will contest.

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