SECURING YOUR ESTATE BEFORE IT IS TOO LATE: THE CASE FOR ANTE-MORTEM PROBATE LEGISLATION IN TEXAS

Comment

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I. INTRODUCTION

Texas is known to have strong views regarding property rights.[1] Texans are born with a sense of ownership and feeling that "I can do what I want with my property because it is mine and I worked hard for it!"[2] Texans may be able to do what they want with their property while they are alive and as long as it is within the limits of the law, but this freedom diminishes when an individual plans to leave his property to loved ones.[3] Texans' strong ownership ideas become squashed by deceptive will contests that aim at destroying the individual's intent of who the individual wishes to leave his property to.[4] Texas should follow what a minority of states have done and enact ante-mortem probate legislation to help protect the testator's intent.[5] Ante-mortem probate legislation is an alternative to post-mortem probate, which was enacted to allow a testator to prove the validity of his will during his lifetime in order to ensure that the testator's intent is protected.[6] Ante-mortem probate enables an individual "to open his will to all charges of invalidation while he is still alive."[7] If the court finds the testator has proved the requirements of a valid will, then the will becomes valid and protected from further attacks after death.[8] Thus, ante-mortem probate ensures testators that their estate will be distributed according to their will.[9]

To illustrate the benefits of ante-mortem probate, imagine a man around the age of seventy-five named David that resides in Texas.[10] David's wife has passed away and he has one living daughter, named Kathryn. After his wife's death, David decided to meet with an attorney to draft a will. David wanted to avoid intestate succession because his wife passed away without a will and he experienced firsthand the difficulties of dying intestate.[11] In David's first drafted will he left half of his estate to Kathryn and the other half to his brother, Brad. David recently had a falling out with Kathryn and

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1. *See* Bruce Wright, *A Victory for Property Rights: Texas Court Decision Affirms Right to Water*, FISCAL NOTES (May 7, 2012), http://comptroller.texas.gov/comptrol/fnotes/fn1204/water-rights.Php [https://perma.cc/BH6Z-P6LM].

2. *Id.*

3. TEX. EST. CODE ANN. § 256.002 (West 2015); *see* Ralph Lehman, *Determining the Validity of Wills and Trusts – Before Death*, 21 No. 6 OHIO PROB. L.J. 7 (July/Aug. 2011).

4. *See* Aloysius Leopold & Gerry Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 133 (1990).

5. *See* N.H. REV. STAT. ANN. § 552:18 (2016); OHIO REV. CODE ANN. § 2107.081 (West 2016); ALASKA STAT. ANN. § 13.12.530 (West 2016); ARK. CODE ANN. § 28-40-202 (West 2015); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015).

6. *See* Dara Greene, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 663–64 (1999).

7. *Id.*

8. *Id.*

9. *Id.*

10. The author created this hypothetical.

11. *See* Leopold & Beyer, *supra* note 4, at 136.

decided to disinherit her from his will. David meets with his attorney and amends his will to leave everything to his brother, Brad, instead of his daughter, Kathryn.[12]

A couple of months after amending his will, David is diagnosed with Alzheimer's. David's health deteriorates rapidly and within a year the Alzheimer's takes his life. Before David passes away, he leaves a note to Brad explaining where to find his will and that his will should cover any questions Brad may have. Brad locates his brother's will and files an application admitting the will to probate.[13] Shortly after, his daughter commences a suit to contest the validity of her father's will, claiming that her father lacked the testamentary capacity needed to draft a valid will.[14] Since the court already admitted David's will to probate, the burden is on Kathryn to prove testamentary incapacity by a preponderance of the evidence and "the proper inquiry in a will contest on the ground of testamentary incapacity is the condition of the testator's mind on the day the will was executed."[15] Kathryn will likely be able to prove that her father's Alzheimer's symptoms occurred before his actual diagnosis, and may be able to show that their falling out was because of the symptoms associated with Alzheimer's.[16] Thus, Kathryn will likely be successful in a will contest to declare that her father's will is invalid.[17]

The result of this scenario would have been different had David lived in a state with an ante-mortem probate statute.[18] When David visited his attorney to amend his will and disinherit Kathryn, a skilled estate planner would have detected that disinheriting his daughter would likely cause a will contest.[19] Thus, the attorney would have offered different solutions in order to prevent a will contest, and one solution would have been an ante-mortem probate proceeding.[20] If David and his attorney would have chosen ante-mortem probate, then he could have had his will validated before his death.[21] In addition, David would have been available to provide direct evidence of

12. TEX. EST. CODE § 251.002 (West 2015) (permitting individuals to leave property to whomever).

13. *Id.* § 256.003.

14. *Id.* § 258.001(b).

15. *See* Croucher v. Croucher, 654 S.W.2d 475, 477 (Tex. App—El Paso 1982, writ granted).

16. *See About Alzheimer's Disease*, ALZHEIMER'S FOUNDATION OF AMERICA, http://www.alzfdn.org/AboutAlzheimers/defintion.html [https://perma.cc//WXH9-DSKW] (listing Alzheimer's symptoms as loss of memory, thinking and language skills, and behavioral changes).

17. *See* Croucher v. Croucher, 660 S.W.2d 55, 57 (Tex. 1983).

18. *See* N.H. REV. STAT. ANN. § 552:18 (2016); OHIO REV. CODE ANN. § 2107.081 (West 2016); ALASKA STAT. ANN. § 13.12.530 (West 2016); ARK. CODE ANN. § 28-40-202 (West 2015); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015) (permitting states to allow testators to declare the validity of their will before their death).

19. *See* David L. Skidmore & Laura E. Morris, *Before the Party's Over the Arguments for and Against Pre-Death Will Contests*, 27-APR PROB. & PROP. 50.

20. *Id.*

21. *Id.*

his testamentary capacity, and prove that he had the requisite capacity before his mental health deteriorated.[22] David's own direct evidence would have defeated Kathryn's claim and thus, David's intent would have been preserved and his estate distributed to Brad.[23] Instead, David's intent has been destroyed and his estate has been distributed against his wishes.[24]

This comment will discuss the need for ante-mortem probate legislation in Texas by first explaining the current probate system used in Texas and the various problems estate planners experience with post-mortem probate.[25] Next, this comment will discuss the history of ante-mortem probate statutes and their emergence in the United States.[26] Furthermore, this comment will examine the different ante-mortem probate models and the current states that have enacted ante-mortem statutes.[27] Next, this comment will discuss the ideal client that should take advantage of ante-mortem probate.[28] Last, this article will discuss Texas's attempt at ante-mortem probate and recommend that Texas should enact an ante-mortem probate statute, by discussing Texas's attempt at ante-mortem probate and recommending legislation that Texas should enact.[29]

II. GENERAL OVERVIEW OF THE PROBATE SYSTEM IN TEXAS

A. The Texas Probate System

In Texas, when a person dies leaving a will, either attested or holographic, the will is admitted to probate to determine whether the will is valid and to distribute the estate according to the testator's wishes.[30] This process has often been referred to as post-mortem probate because the validity of the testator's will occurs after the testator has died, as opposed to ante-mortem probate, where the validity of the testator's will occurs before the testator dies.[31] Texas has two methods of probate: independent administration and dependent administration.[32] Independent administration has little to no court supervision and "avoids the costs and delays associated with" dependent administration, which the executor must seek court approval

22. *See* Leopold & Beyer, *supra* note 4, at 133.
23. *Id.*
24. *Id.*
25. *See infra* Part II.
26. *See infra* Part III.A–B.
27. *See infra* Part III.C–D.
28. *See infra* Part IV.
29. *See infra* Part V.A–B.
30. TEX. EST. CODE ANN. § 256.151(1) (West 2015). *See* Natalie Cobb Koehler et. al., *Texas Probate Passport: A Guide to Probate and Estate Planning in Texas*, TYLA.ORG, http://www.tyla.org/tyla/assets/File/38668TexasProbatePassportWebReady.pdf [https://perma.cc//JK4L-7GYF].
31. *See* Leopold & Beyer, *supra* note 4, at 133.
32. *See* Natalie Koehler et. al., *supra* note 30.

before performing certain acts.[33] Statutory requirements must be met in order for an estate to take advantage of independent administration.[34] In contrast, dependent administration is burdened with costs and delays because the executor must seek court approval for certain acts.[35] Even though independent administration is the preferred method, dependent administration is chosen when "there are conflicts between heirs of the estate . . . to ensure that the Court resolves disputes . . . rather than through subsequent litigation involving the executor."[36]

Texas dependent administration is similar to the traditional system of probate used.[37] The traditional system of probate is often referred to as post-mortem probate because the validity of the testator's will occurs after the testator has died, as opposed to ante-mortem probate where the validity of the testator's will occurs before the testator dies.[38] Professors Aloyius Leopold and Gerry Beyer describe the post-mortem probate process as follows:

> [A]n individual of legal age and of sufficient mental health plans for the distribution of his bounty at death, apportioning shares to individuals or organizations that he feels are most deserving. These generous intentions are then formalized by being scribed into his last will and testament, which is stored in a safe and often secret place. The will awaits the death of its writer so that at the time of probate, it can be read once again to proclaim donative intent and assure that the estate is distributed in accordance with the testator's desires.[39]

As described above, the probate of a decedent's will does not occur automatically; instead, the will must be admitted to probate for a will to be deemed valid.[40] Individuals who are able to file an application with the court admitting a will to probate include "an executor named in a will . . . or an interested person."[41] The Texas Estates Code (TEC) defines an interested person as an "(1) heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered; and (2) anyone interested in the welfare of an incapacitated person, including a minor."[42] The executor or interested person has four years after the

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *See* Leopold & Beyer, *supra* note 4, at 133.
39. *Id.*
40. *See* TEX. EST. CODE ANN. § 256.001 (West 2015).
41. *Id.* § 256.051.
42. *Id.* § 22.018.

anniversary of the testator's death to admit the will to probate.[43] TEC § 256.052 lists the contents that must be in the application for probate of a will.[44] Once the executor or interested person applies for the will to be admitted to probate the executor or interested person:

> [M]ust prove to the court's satisfaction that: (1) the testator is dead; (2) four years have not elapsed since the date of the testator's death and before the application; (3) the court has jurisdiction and venue over the estate; (4) citation has been served and returned in the manner and for the period required by this title; and (5) the person for whom letters testamentary or of administration are sought is entitled by law to the letters and is not disqualified.[45]

In addition to the requirements set out in TEC § 256.151, an applicant must also prove to the court's satisfaction that the testator did not revoke the will; that the testator, when executing his will, had the legal capacity, testamentary capacity, and testamentary intent; and fulfilled the requisite formalities listed in TEC § 251.051.[46] If the executor or interested person proves the requirements set out in TEC § 256.151 to the court's satisfaction, then the court shall enter an order admitting the will to probate.[47] However, if the requirements are not proved, the court will deny the order, and the decedent's property passes as if the decedent died without a will; thus, passing by intestate succession.[48]

Furthermore, the TEC allows an interested person to commence a suit to contest the validity of the will before or "after a will [has been] admitted to probate."[49] The suit must be commenced no later than two years after the date the will is admitted to probate, "except that an interested person may commence a suit to cancel a will for forgery or other fraud not later than the second anniversary of the date the forgery or fraud was discovered."[50] Will contestants often challenge the validity of a will by arguing that the testator lacked legal or testamentary capacity, the testator lacked testamentary capacity, the testator did not execute the document with testamentary intent, or the document and its execution did not comply with the requisite formalities.[51] Approximately three percent of all wills in the United States

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43. *Id.* § 256.003.
44. *Id.* § 256.052.
45. *Id.* § 256.151.
46. *Id.* § 256.152(a).
47. *Id.* § 256.201.
48. *See* Koehler et. al., *supra* note 30.
49. EST. §§ 256.204, 55.001 (stating that an interested person may, at any time before the court decides an issue in a proceeding, file a written opposition regarding the issue.).
50. EST. §§ 256.204, 55.001.
51. GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES 201 (5th ed. 2012).

are contested.[52] This might seem like a low number, but given the number of wills executed per year this number is actually quite high.[53] Although Texas's probate system may seem to run smoothly and efficiently due to the use of independent administration, there are still meritless will contests that frustrate the testator's intent.[54]

B. The Problems with Post-Mortem Probate

There are several problems with post-mortem probate, and these problems make ante-mortem probate appealing to a testator.[55] The problems with post-mortem probate include the following: mere technical errors, meritless will contests, and evidentiary deficiencies that frustrate the testator's intent.[56] Commentators have acknowledged that "[p]ost-mortem probate provides a feeding ground for spurious will contests which eat away the corpus of an estate no longer protected by the evidentiary power that lies buried with the testator."[57]

First, under Texas law, mere technical errors have invalidated otherwise valid wills.[58] Despite being competent and having the testamentary intent to dispose of his property, a testator's will can be invalidated by simple errors resulting in the testator's property being distributed contrary to his intent.[59] Instances demonstrating this criticism include situations in which "the testator may not be in the presence of the witnesses when [he] attest[s] to the will[;] . . . the will having only one witness[;] an unwitnessed will containing too much material not in the testator's own handwriting to qualify as a holographic will[;] and the incompetency of one of the witnesses."[60] Thus, a testator's will may be deemed invalid when a simple error destroys the validity of a will.[61]

Another problem with post-mortem probate is that meritless will contests are encouraged.[62] The purpose behind a will contest is to "ensure that deserving heirs are not deprived of a share of the decedent's estate as a result of the testator's lack of capacity when the will was executed or because a devious person defrauded or exerted undue influence on a susceptible

52. Margaret Ryznar & Angelique Devaux, *Au Revoir, Will Contests: Comparative Lessons for Preventing Will Contests*, 14 NEV. L.J. 1, 2 (2013).

53. *Id.*

54. *See* Leopold & Beyer, *supra* note 4, at 141–48; Koehler et. al., *supra* note 30.

55. *See* Leopold & Beyer, *supra* note 4, at 133.

56. Gerry W. Beyer, *Will Contests-Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L. J. 1, 45–46 (2011).

57. *See* Leopold & Beyer, *supra* note 4, at 133.

58. Beyer, *Will Contests*, *supra* note 56, at 45.

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

testator."[63] However, too often greedy heirs use a will contest to gain a larger share of the estate when no evidence of lack of capacity, fraud, or undue influence exists.[64] A will contester has no hesitation when deciding whether to contest a will because "there are no real penalties for spurious claims."[65] The contester takes his shot at possibly getting more than his fair share, and if he loses, the contester "does not have to reimburse the testator's estate for the cost it incurs in defending the contest."[66] Thus, spurious will contests are disastrous for an estate because of the expense the estate must bear in defending the contest.[67]

Another problem with ante-mortem probate is that it has evidentiary deficiencies that frustrate the testator's intent.[68] Namely, the fact that the probate proceeding occurs after the testator dies, and the testator is the best witness as to the validity of his will.[69] This proves to be a huge advantage for a will contester because the best person to defend the testator's intent or capacity is the testator, and unfortunately, that person is dead.[70] In *Redman v. Watch Tower Bible and Tract Society of Pennsylvania*, the Ohio Supreme Court explained this issue best by stating that "[i]n any will-contest action, the person who can give the best evidence of influence is dead. Therefore, most evidence will be circumstantial, leaving the factfinder to draw permissible inferences."[71] Furthermore, witnesses used to testify to the capacity of a testator "often hold a position contrary to the testator."[72] For instance, in the hypothetical previously discussed where David disinherited his daughter, Kathryn, and left his estate to his brother Brad: should "we trust the daughter's testimony on the subject of her father's competency?"[73] Had David been alive during his will contest he would have been able to disprove Kathryn's credibility with direct evidence as to his capacity.[74] Thus, if the testator were able to participate, then the quality of the evidence would be enhanced.[75]

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63. *Id.*
64. *Id.* at 46.
65. Greene, *supra* note 6, at 666.
66. *Id.*
67. *See id*.
68. *Id.*
69. *Id.* at 664.
70. *See id*.
71. Redman v. Watch Tower Bible & Tract Soc'y of Pa., 630 N.E.2d 676, 679 (Ohio 1994).
72. Greene, *supra* note 6, at 665.
73. *See supra* Part I; Greene, *supra* note 6, at 665.
74. Greene, *supra* note 6, at 666.
75. Skidmore & Morris, *supra* note 19.

III. ANTE-MORTEM PROBATE

A. General Overview of Ante-Mortem Probate

Ante-mortem probate is a system used in a minority of states where the testator is able to prove the validity of his will prior to his death.[76] Ante-mortem probate is a misnomer because "the actual probating of a will occurs after a testator's death," but the declaring of validity occurs before the testator's death.[77] Thus, if a testator initiates an ante-mortem probate proceeding and the court declares his will valid, then the estate will still need to admit the will to probate once the testator dies.[78] Ante-mortem probate is an alternative and a supplement to post-mortem probate, which provides estate planners with another tool to be used for their clients.[79] The main advantage of ante-mortem probate is that it provides certainty to a testator that his will is valid and the testator has a peace of mind that his estate will be dispensed according to his wishes.[80]

B. The History of Ante-Mortem Probate

Ante-mortem probate has an extensive history dating back to the Bible "where a type of living validity of a will was used to facilitate inheritance."[81] There is also evidence that a form of ante-mortem probate was used at English common law, in which a testator could request that his testament (the term used for a will at common law) be proved during his lifetime.[82] The rise of ante-mortem probate legislation in the United States began in 1883, when the Michigan Legislature passed a statute allowing a testator to petition the probate court for his "will to be admitted and established as his last will and testament."[83] However, the Michigan attempt at ante-mortem probate was short-lived because two years later in 1885, the Michigan Supreme Court held that the statute was unconstitutional.[84] In *Lloyd v. Wayne Circuit Judge*, a testator petitioned his will for probate under the Michigan statute and the court held that the act was unconstitutional because it "fail[ed] to provide proper notice to the parties, fail[ed] to provide for finality of judgment, and

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76. *See* Leopold & Beyer, *supra* note 4, at 133.

77. Forrest J. Heyman, *A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in Light of Alaska's Recent Ante-Mortem Legislation*, 19 ELDER L. J. 385, 388 (2012).

78. *See* TEX. EST. CODE ANN. § 258.001 (West 2015); Leopold & Beyer, *supra* note 4, at 133.

79. *See* Leopold & Beyer, *supra* note 4, at 133; Heyman, *supra* note 77, at 388.

80. *See* Skidmore & Morris, *supra* note 19.

81. *See* Leopold & Beyer, *supra* note 4, at 148.

82. *Id.* at 149.

83. *Id.* at 152.

84. Beyer, *Will Contests*, *supra* note 56, at 47; Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 28 (Mich. 1885).

because the court believed ante-mortem procedures exceeded the judicial power traditionally exercised by courts at common law."[85]

The holding in *Lloyd*, declaring the Michigan ante-mortem statute unconstitutional, resulted in courts believing "they were powerless to resolve or prevent a conflict without a full blown controversy over the validity of a testator's will."[86] This belief lasted until 1937 when the United States Supreme Court "resolved the issue of judicial involvement in ante-mortem probate by clarifying what constitutes a controversy."[87] In *Aetna Life Insurance Co. v. Haworth*, the Supreme Court interpreted the Federal Declaratory Judgment Act and held that a controversy must exist for a court to have authority to hear a claim.[88] The Court defined judicial controversy as "distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests."[89] Although, this development seemed to "open the door for courts to use declaratory judgments to determine the validity of a will and the legal rights stemming from it even though the testator was still alive," states were hesitant to enact legislation expressly granting courts jurisdiction to hear ante-mortem proceedings.[90] It was not until almost forty years later that states became interested in ante-mortem probate and enacted ante-mortem probate legislation.[91] In short, state legislatures are still hesitant over the use of ante-mortem probate and their reasoning is based on outdated policies, such as the maxim that the living has no heirs.[92]

C. The Various Models of Ante-Mortem Probate

In response to the growing interest in ante-mortem probate, three ante-mortem probate models emerged in the late 1970's and 1980's, and a fourth alternative was introduced in the late 1990's.[93] The four models include:

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85. Beyer, *Will Contests*, *supra* note 56, at 47.

86. Gerry W. Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, 23 ACTEC Notes 83, 84 (1997).

87. *Id.*

88. Aetna Life Ins. Co. v. Haworth, 300 U.S. 229, 240–41 (1937).

89. *Id.* at 240-41.

90. Beyer, *Ante-Mortem*, *supra* note 86, at 84.

91. *Id.* at 85.

92. *See* N.H. REV. STAT. ANN. § 552:18 (2016); OHIO REV. CODE ANN. § 2107.084 (West 2016); ALASKA STAT. ANN. § 13.12.575 (West 2016); ARK. CODE ANN. § 28-40-203 (West 2015); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015).

93. *See* Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L. J. 264 (1976); John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978); Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89 (1979); Greene, *supra* note 6, at 663.

(1) the Contest Model; (2) the Conservatorship Model; (3) the Administrative Model; and (4) the Mediation Model.[94] This comment explores each of the four models in order to determine which model should be recommended for Texas.

1. Contest Model

The Contest Model, proposed in 1976 by Professor Howard Fink, was the first ante-mortem probate model created.[95] Currently, the Contest Model is the only model used in states with existing ante-mortem probate statutes.[96] The procedure for this model begins when a person executes a valid will in compliance with the person's state statutory requirements and then institutes a "proceeding for a judgment declaring the validity of the will as to the signature on the will, required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing his will."[97] The testator must list "any beneficiaries named in the will and all of testator's present intestate successors . . . as parties to the proceeding."[98] Notice must be given by service of process to any named party to the proceeding that is an "inhabitant of or is found within the state."[99] Also service must be made "[u]pon a party who is not an inhabitant of or found within the state . . . by mailing a copy of the summons and complaint to the party at his last known address by registered mail" and parties whose addresses are unknown or whose interest under the will is presently unascertainable, service "may be made by publication in a newspaper of general circulation published in plaintiff's county."[100] If the court finds that the testator's will meets all of the requirements of a valid will, then the court "shall declare the will valid and order it placed on file with the court."[101]

Furthermore, the model states that the will shall have a binding effect in the state in which it is deemed valid, unless the "plaintiff executes a new will

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94. *See* Fink, *supra* note 93; Langbein, *supra* note 93; Alexander & Pearson, *supra* note 93; Greene, *supra* note 6, at 663.

95. *See* Fink, *supra* note 93.

96. *See* N.H. REV. STAT. ANN. § 552:18 (2016); OHIO REV. CODE ANN. § 2107.081 (West 2016); ALASKA STAT. ANN. § 13.12.530 (West 2016); ARK. CODE ANN. § 28-40-202 (West 2015); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015). All of the current ante-mortem statutes closely resemble the proposed statute Professor Fink created. *See* N.H. REV. STAT. ANN. § 552:18; OHIO REV. CODE ANN. § 2107.081; ALASKA STAT. ANN. § 13.12.530; ARK. CODE ANN. § 28-40-202; N.D. CENT. CODE ANN. § 30.1-08.1-01.

97. *See* Fink, *supra* note 93, at 274.

98. *Id.*

99. *Id.*

100. *Id.* at 274–75.

101. *Id.* at 275.

and institutes a new proceeding under this section."[102] Finally, the model provides that the facts found in the ante-mortem proceeding are not to be "admissible in evidence in any proceeding other than one brought in this state to determine the validity of a will" and the determination made by a proceeding under this section shall not "be binding upon the parties to such a proceeding in any action not brought to determine the validity of a will."[103]

Professor Fink proposed the Contest Model in order to provide an ante-mortem probate statute that meets the constitutional due process requirements, unlike the Michigan Act of 1883.[104] Moreover, Professor Fink discussed the possible disadvantages of the proposed Contest Model.[105] First, he considered the "risk that disgruntled losers of the former judgment would threaten to drag the testator through repeated court battles every time he wanted to change his will."[106] Professor Fink's solution to this risk would be to advise the client to refrain from changing the will or to draft a will that is "flexibl[e] enough to anticipate changed circumstances without the need for a new will."[107] Also, he discussed the applicability of the doctrine of res judicata and collateral estoppel by stating that, "to the extent that issues which had been determined in a prior declaratory proceeding would arise in a subsequent one, the former findings would be controlling upon the same parties who had previously litigated the issues, by the doctrine of res judicata or collateral estoppel."[108]

Another possible disadvantage of the Contest Model is the possibility of a new array of intestate successors arising because of the time period between the proceeding and the testator's actual death.[109] This new array of intestate successors would not be bound by the ante-mortem proceeding because they were not made parties to the proceeding and were unascertainable at the time of the proceeding.[110] Professor Fink's answer to this problem is the new array of intestate successors would be bound because of the doctrine of virtual representation and the use of a guardian *ad litem*.[111] The doctrine of virtual representation would bind these intestate successors because, if the absent parties interests at the time of the testator's death coincide with those who were present and litigating in the declaratory action, the later intestate successors should be bound.[112] Also, the use of a guardian *ad litem* would

102. *Id.*
103. *Id.*
104. *See id.*; Leopold & Beyer, *supra* note 4, at 133.
105. *See* Fink, *supra* note 93, at 276.
106. *Id.*
107. *Id.*
108. *Id.* at 276–77.
109. *Id.* at 286.
110. *See id.*
111. *Id.*
112. *Id.* at 275.

bind future intestate successors that have conflicting interests with the present intestate successors.[113] This model provides that if during the ante-mortem proceeding the court noticed a possibility that the present intestate successors interests would not coincide with future intestate successor's interests, then the court should appoint a guardian *ad litem* to protect these future interests.[114] Professor Fink gave an example of this scenario by describing the possible situation where:

> the only intestate successor present might be the testator's pregnant wife who is also his sole taker under the will. The expected child might have an adverse interest to that of his mother. The unborn child should be represented by a guardian *ad litem*. [And] [i]f the guardian protects the interest fully and fairly, this should bind future holders of that interest.[115]

The Contest Model's use of declaratory judgments and guardian *ad litems* provides states with a model that minimizes the difference between the declaratory proceeding and the present post-mortem will contest.[116] This is evident because out of the five states with ante-mortem probate statutes all were drafted to resemble the Contest Model.[117] Furthermore, the Contest Model is the best model for David's circumstances from the hypothetical previously discussed.[118] The Contest Model enables David to provide direct evidence of his testamentary capacity and enables him to cross-examine Kathryn for weaknesses in her case.[119] Moreover, the disadvantages presented in this model will not affect David because his family already experiences family unrest, and the use of a guardian *ad litem* will protect any claims by future intestate successors.[120] Thus, the Contest Model is the most favorable model created because it furthers the advantages and purposes of ante-mortem probate, while staying within constitutional limits.[121]

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113. *Id.* at 286.

114. *Id.*

115. *Id.*

116. *See* N.H. REV. STAT. ANN. § 552:18 (2016); OHIO REV. CODE ANN. § 2107.081 (West 2016); ALASKA STAT. ANN. § 13.12.530 (West 2016); ARK. CODE ANN. § 28-40-202 (West 2015); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015).

117. Greene, *supra* note 6, at 676─77 (explaining that the Contest Model served as the basis for the Arkansas, Ohio, and North Dakota statutes).

118. *See supra* Part I; Fink, *supra* note 93, at 286.

119. *See* Fink, *supra* note 93, at 286.

120. *Id.*

121. *See id.*

2. Conservatorship Model

Professor John Langbein created the Conservatorship Model in 1978 in order to cure some issues created by the Contest Model.[122] Some of the deficiencies the Conservatorship Model attempts to resolve is the possibility that the testator mistakenly foresees a will contest that would not have otherwise been brought.[123] This forces the beneficiaries and present intestate successors to "make the decision to litigate earlier than it is in their interest to do so."[124] The Conservatorship Model proposes a system in which the testator can "have his capacity adjudicated before it is squarely in the interest of his" beneficiaries and present intestate successors to challenge it.[125]

The Conservatorship Model is fashioned after conservatorship and guardianship hearings, which is the "long-established procedure for determining the competence of the living."[126] The testator would petition the court for a declaration that the testator has the testamentary capacity to draft a will.[127] The testator would attach the will to the petition filed with the court.[128] Furthermore, the proceeding requires counsel to represent the testator to "protect against any frivolous use of the procedure."[129] The procedure requires notice to be given to present intestate successors; beneficiaries named in the will attached to the petition; and "beneficiaries named in any former will or wills that might have been revoked or amended."[130] This model further requires the appointment of a guardian *ad litem*.[131] The guardian *ad litem* "would represent all persons whose ultimate property interests might be adversely affected by a mistaken determination that the testator possessed capacity to execute the will."[132] Thus, the guardian *ad litem* "would represent the heirs apparent, all potential heirs unborn or unascertained at the time, and persons whose potential interests under any previous will or wills still in force might be impaired under the new will."[133] The appointment of a guardian *ad litem* allows the heirs apparent to decline contesting the will in their own names, "while still being represented by the guardian ad litem [sic]."[134] The use of the guardian *ad litem* would prevent hostility towards the testator because communications between the heirs

122. *See* Langbein, *supra* note 93, at 72.
123. *Id.* at 73.
124. *Id.* at 74.
125. *Id.*
126. *Id.* at 77.
127. *Id.*
128. *Id.*
129. *Id.* at 78.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*

apparent and the guardian *ad litem* would be confidential.[135] This model provides that a medical examination of the testator would be conducted automatically, and if the trier of fact is persuaded "that the testator possessed the requisite capacity and freedom from undue influence, [then] the court would issue an ante-mortem judgment that would be conclusive on the point in post-mortem proceedings to probate the will."[136] Moreover, the determination of testamentary capacity would follow present conservatorship procedures, which are conducted without the use of a jury.[137] Also, the testator bears the expense of the guardian *ad litem*, which Professor Langbein believes justice requires.[138]

Professor Langbein addressed two advantages the Conservatorship Model has over the Contest Model.[139] First, the Conservatorship Model allows the guardian *ad litem* to gather evidence of the testator's incapacity without having the testator's family and friends face the testator to claim the testator lacked capacity.[140] Thus, the use of the guardian *ad litem* would prevent family unrest because the guardian *ad litem* would be advancing these arguments, instead of the testator's family.[141] Second, the guardian *ad litem* would represent the heirs unborn or unascertained, just as the heirs apparent are represented, unlike the Contest Model procedure.[142]

Furthermore, there are disadvantages with this model.[143] To begin with, multiple heirs to a will all have different interests, and if there is only one conservator representing all of these interests the court might have to appoint multiple conservators to resolve these issues.[144] Even though the court will resolve the issue of conflicting interests, the appointment of multiple conservators is very costly and the testator bears this expense.[145] Also, commentators have argued that this model does not protect family harmony because the will's contents are revealed.[146]

To illustrate the use of this model, consider David from the hypothetical previously discussed.[147] Shortly after David amends his will, he would initiate an ante-mortem proceeding, and the court would appoint a guardian

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135. *Id.*
136. *Id.* at 80.
137. *Id.*
138. *Id.* at 79.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *See* Tracy Costello-Norris, *Is Ante-Mortem Probate a Viable Solution to the Problems Associated With Post-Mortem Procedures?*, 9 CONN. PROB. L.J. 327, 336 (1995).
144. *Id.*
145. *Id.* at 336–37.
146. *See* Leopold & Beyer, *supra* note 4, at 133.
147. *See supra* Part I.

ad litem for Kathryn and Brad.[148] Because of the conflicting interests between Brad and Kathryn, the court will have to appoint a guardian *ad litem* for Kathryn and a separate guardian *ad litem* for Brad.[149] A medical examination of David would take place, and then the court would issue an ante-mortem judgment based on the evidence presented.[150] This scenario reveals many defects in the conservatorship model.[151] First, David will be required to pay for both guardians *ad litem*, which may be a significant expense.[152] Secondly, the model fails to explain how the hearing takes place; are the guardian *ad litems* cross-examined or is David the only witness?[153] The only possible benefit to using this model is that family unrest already exists in David's family; however, this benefit is present in the Contest Model as well.[154] Thus, a testator may elect to forego an ante-mortem proceeding based on this model because of the significant expense and the exposure of the will's contents.[155]

3. Administrative Model

Professors Gregory Alexander and Albert Pearson advanced the Administrative Model in 1979.[156] Unlike both the Contest and Conservatorship Models, the Administrative Model is based on an ex parte proceeding rather than an adversarial action.[157] Alexander and Pearson proposed the Administrative Model in order to "protect[] the testamentary plan against strike suits and preserves the confidentiality of the plan during the testator's lifetime."[158] The ante-mortem probate proceeding would be initiated when the testator petitions the court "for a declaration that the testator duly executed the will, possessed the requisite capacity, and was free from undue influence."[159] The petition would contain the will that the testator wants to declare valid; however, the will, unlike in both the Contest and Conservatorship Models, is inspected by the trier of fact in camera.[160]

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148. Langbein, *supra* note 93, at 79.
149. Costello-Norris, *supra* note 143.
150. Langbein, *supra* note 93, at 80.
151. *See id.*
152. *See* Costello-Norris, *supra* note 143, at 336–37.
153. *See generally* Langbein, *supra* note 93, at 80 (stating only this model follows a guardianship hearing and does not explain how the proceeding takes place).
154. *See id.*; Fink, *supra* note 93, at 286.
155. *See* Costello-Norris, *supra* note 143, at 337.
156. Alexander & Pearson, *supra* note 93, at 89.
157. Beyer, *Will Contests*, *supra* note 56, at 49.
158. Alexander & Pearson, *supra* note 93, at 90.
159. *Id.* at 112.
160. *Id.* at 112–13.

The court would then appoint a guardian *ad litem*.[161] Unlike proceedings under the Conservatorship Model, the guardian in the Contest Model would act for the court to determine facts, rather than represent the individual interests of the heirs apparent or beneficiaries.[162] The guardian would interview the testator and others to ascertain the testator's capacity and freedom from undue influence.[163] In contrast to the Conservatorship Model, the guardian *ad litem* is not informed of the will's contents in order to "guard the confidentiality of the testator's wishes."[164] In this model the court and guardian *ad litem* play an investigative role and once the investigation is complete, the will, the guardian's interviews, and personal evaluations will help "the trier to determine testamentary capacity."[165]

Because of this arrangement, notice to the heirs apparent or to other interested parties under the will would not be required; the court would examine the evidence brought forth by the guardian *ad litem* in deciding whether the will is entitled to ante-mortem probate.[166] The common saying, "you cannot have the best of both worlds" applies to the administrative model because "[i]f the model is seen as binding upon the parties, then the specter of the notice requirement raises its ugly head. If the model is employed in its nonbinding state, then the testator and his family suffer unnecessary hardship and expense with little confidence in the document's finality."[167] Thus, even though the Administrative Model provides a solution to the possible family unrest created during an ante-mortem proceeding, this model is flawed due to its limited notice requirement and its binding effect of the judgment.[168]

4. Mediation Model

Dara Greene suggested the Mediation Model in 1999 to address the concerns created by the Contest, Conservatorship, and Administrative Models.[169] In this model, the testator petitions the court for a declaratory judgment and the court could order all interested parties and potential heirs to mediation.[170] Notice required under this model is relaxed "[b]ecause the process would not be the litigation of a case or controversy."[171] Furthermore, the mediation process does not become "part of the public record and all

161. *See* Greene, *supra* note 6, at 675.
162. Alexander & Pearson, *supra* note 93, at 113.
163. *Id.* at 114.
164. *Id.*
165. *Id.*
166. *See* Greene, *supra* note 6, at 675.
167. *See id.*
168. *See id.*
169. *Id.*
170. *See id.* at 683.
171. *Id.* at 683–84.

matters discussed would be kept confidential."[172] However, the main disadvantage with the Mediation Model is that the decision would not be binding.[173] Instead, Greene advises "those unhappy with the final resolution . . . to take the matter to court following the process."[174] However, Greene fails to explain the process an unhappy heir would use in the event the heir takes the matter to court.[175] Additionally, the Mediation Model begs the question of whether the model actually protects the testator's true wishes.[176] The most logical answer would be no, because the model advocates for the testator to negotiate with the testator's beneficiaries and present intestate successors, which undermines the testator's intent.[177] The testator should not have to try and make all parties happy, instead the testator should be able to leave his property to whomever they want.[178]

To illustrate the use of this model consider David from the hypothetical previously discussed.[179] How could David and Kathryn ever come to a resolution when David's wishes are to leave his estate to Brad?[180] The answer is that there is no possibility of a resolution.[181] Therefore, the Mediation Model undermines the purpose of ante-mortem probate, which is to protect the testator's intent.[182]

D. States That Have Enacted Ante-Mortem Probate Statutes

As previously discussed, Michigan was the first state to pass an ante-mortem probate statute.[183] Almost a century later, North Dakota, Ohio, and Arkansas passed their own ante-mortem probate statutes in the late seventies.[184] There was a brief gap of disinterest in ante-mortem probate legislation, but this gap closed when Alaska passed a statute in 2010, followed by New Hampshire in 2014.[185] All of the states with ante-mortem

172. *Id.* at 684.
173. *Id.*
174. *Id.* at 685.
175. *See generally id.* (stating that those unhappy with the final resolution are free to take the matter to court following the process, but nothing in the comment states what remedy an unhappy heir would receive if the heir were to take the matter to court).
176. *See generally id.* (requiring parties to go to mediation forces the testator to change his wishes).
177. *Id.*
178. *See* Leopold & Beyer, *supra* note 4, at 152.
179. *See supra* Part I.
180. *See supra* Part I.
181. *See supra* Part I.
182. Heyman, *supra* note 77, at 388.
183. *See* Leopold & Beyer, *supra* note 4, at 152.
184. OHIO REV. CODE ANN. § 2107.084 (West 2016); ARK. CODE ANN. § 28-40-203 (West 2015); N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015).
185. N.H. REV. STAT. ANN. § 552:18 (2016); ALASKA STAT. ANN. § 13.12.575 (West 2016).

probate statutes follow the Contest Model and each state has experienced different reactions to their statutes.[186]

1. North Dakota

The North Dakota ante-mortem probate statute is the oldest ante-mortem statute still in effect.[187] Even though North Dakota's ante-mortem statute is the oldest, it is rarely used.[188] When the statute is used it allows any person to institute a proceeding "for a judgment declaring the validity of the will as to the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will."[189] Also, the statute requires certain parties to be named in the proceeding, which include the beneficiaries named in the will and any person that would be the testator's intestate successors in the event that the testator were to die.[190] The statute grants possession of inchoate property rights to any beneficiary and the testator's present intestate successors, and requires service of process to the parties to be fulfilled under the North Dakota Rules of Civil Procedure.[191]

If the court finds that the "plaintiff testator [had] the requisite testamentary capacity and freedom from undue influence" when he executed his will, then the court will declare the will valid and order that it be placed with the court.[192] A finding of validity shall be binding on all the parties in North Dakota, unless the testator executes a new will.[193] The statute further states that the facts found in the will validation proceeding shall not be admissible in evidence in any other proceeding; thus the testator cannot use the facts determined in his will validation proceeding to help a subsequent proceeding that is not a will validation proceeding.[194] Unlike some of the other states with ante-mortem statutes, North Dakota's statute does not discuss whether a will is still valid if the testator amends his will.[195]

186. *See* Leopold & Beyer, *supra* note 4, at 152.
187. N.D. CENT. CODE ANN. § 30.1-08.1-01.
188. *See* Leopold & Beyer, *supra* note 4, at 171.
189. N.D. CENT. CODE ANN. § 30.1-08.1-01.
190. *See id.* § 30.1-08.1-02.
191. *Id.*
192. *Id.* § 30.1-08.1-03.
193. *Id.*
194. *Id.*
195. *See id.* § 30.1-08.1-02; OHIO REV. CODE ANN. § 2107.084 (West 2016); N.H. REV. STAT. ANN. § 552:18 (2016); ARK. CODE ANN. § 28-40-203 (West 2015).

2. Ohio

Ohio's ante-mortem statute authorizes a testator to file a complaint for a judgment declaring that the testator's will is valid.[196] The testator must file the complaint "in the probate court of the county in which the person is domiciled if the person is domiciled in this state or in the probate court of the county in which any of the person's real property is located if the person is not domiciled in this state."[197] And the testator's domicile shall be determined at the date of the "time of filing of the complaint with the probate court."[198] Like North Dakota's ante-mortem probate statute, Ohio's statute requires the testator, on the day the complaint is filed, to name as parties all of the beneficiaries in the will and all of the testator's present intestate successors if the testator were to die intestate.[199] Moreover, if the testator fails to:

> file a complaint for a judgment declaring the validity of a will the testator has executed shall not be construed as evidence or an admission that the will was not properly executed . . . . [or] that the testator did not have the requisite testamentary capacity or was under any restraint.[200]

The statute requires the complaint to make service of process on every party named in the complaint and provides that the complaint can achieve service of process through various methods.[201]

The probate court where the complainant files the complaint conducts a hearing on the validity of the will and the hearing is adversary in nature.[202] If the court determines that the testator properly executed the will and "that the testator had the requisite testamentary capacity and was not under any restraint," then the probate court must declare the validity of the will.[203] Like North Dakota's statute, the judgment will be binding on all the parties in Ohio.[204] Unlike North Dakota's statute, Ohio's statute provides that the will is binding in Ohio unless someone modified or revoked the will.[205] Also the statute requires the testator to seal the judgment and the will in an envelope and have them "filed by the probate judge or the probate judge's designee in

196. *See* OHIO REV. CODE ANN. § 2107.081.
197. *Id.* § 2107.081(A).
198. *Id.*
199. *See id.* § 2107.081; N.D. CENT. CODE ANN. § 30.1-08.1-02.
200. OHIO REV. CODE ANN. § 2107.081(B).
201. *See id.* § 2107.082.
202. *See id.* § 2107.083.
203. *Id.* § 2107.084.
204. *See id.*; N.D. CENT. CODE ANN. § 30.1-08.1-02.
205. *See* N.D. CENT. CODE ANN. § 30.1-08.1-02; OHIO REV. CODE ANN. § 2107.084.

the offices of that probate court."[206] In the event that the testator wants to modify or revoke his will, the testator must "fil[e] a complaint in the probate court in possession of the will and ask[] that the will be revoked or modified."[207]

Thus, the Ohio statute requires the testator to go through the will validation proceeding each time the testator modifies or revokes his will.[208] The Ohio ante-mortem statute has seen the greatest use compared to other states, which might be attributable to Ohio's population.[209] Also, the most frequent use of the procedure has been where an attorney has prepared a will for an elderly person or a person under guardianship.[210]

3. Arkansas

Arkansas' ante-mortem statute is most similar to North Dakota's ante-mortem statute in that a testator may seek validation of a will by petitioning the court for a declaratory judgment.[211] Additionally, the testator must name all beneficiaries named in the will and all of the testator's intestate successors as parties.[212] Lastly, the beneficiaries and intestate successors are deemed to possess inchoate property rights.[213] The court declares the will valid and places it on file with the court if the court determines that the testator executed the will in accordance with Arkansas' laws, and that at the time of the execution of the will the testator had the requisite testamentary capacity and was free from undue influence.[214]

Like other ante-mortem statutes, the Arkansas statute allows a validated will to "be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter."[215] However, once a testator modifies or supersedes the subsequently executed valid will, then the newly executed or modified will is no longer binding on the parties named as defendants in the will validation proceeding.[216] Unlike the other ante-mortem statutes, the Arkansas statute allows the introduction of factual findings made in ante-mortem proceedings as evidence in other proceedings.[217] There were no

206. OHIO REV. CODE ANN. § 2107.084.
207. *See id.*; N.D. CENT. CODE ANN. § 30.1-08.1-03.
208. *See* OHIO REV. CODE ANN. § 2107.084.
209. *See* Leopold & Beyer, *supra* note 4, at 173.
210. *Id.*
211. *See* ARK. CODE ANN. § 28-40-203 (West 2015); N.D. CENT. CODE ANN. § 30.1-08.1-03.
212. *See* ARK. CODE ANN. § 28-40-203; N.D. CENT. CODE ANN. § 30.1-08.1-03.
213. *See* ARK. CODE ANN. § 28-40-203; N.D. CENT. CODE ANN. § 30.1-08.1-03.
214. *See* ARK. CODE ANN. § 28-40-203.
215. *Id.* § 28-40-203(b).
216. *See id.* § 28-40-203.
217. *See* Leopold & Beyer, *supra* note 4, at 175.

reported cases where a testator initiated a proceeding under Arkansas' ante-mortem statute.[218]

4. Alaska

Alaska's statute differs from other states' ante-mortem probate statutes in that it is more extensive and more detailed.[219] First, the statute allows "[a] testator, a person who is nominated in a will to serve as a personal representative, or, with the testator's consent, an interested party may petition the court to determine before the testator's death that the will is a valid will subject only to subsequent revocation or modification."[220] Unlike other states with ante-mortem probate statutes, Alaska allows individuals other than the testator to petition the court to determine the validity of the testator's will.[221] Also, Alaska's statute differs because it allows an individual to petition the court to declare a trust valid as well.[222] Additionally, venue is proper in "[]the judicial district of [Alaska] where the testator is domiciled; or []if the person who executed the will is not domiciled in [Alaska], [then] any judicial district of [Alaska]."[223]

The petition filed with the court must contain an extensive list of requirements in order to provide the court with sufficient proof that the will, on its face, is valid.[224] Moreover, the Alaska statute grants authority to the court to declare a will or trust valid, and after the testator's death, "the will has the full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request."[225] Similar to other ante-mortem statutes, the Alaska statute provides a binding effect on "[a] person, whether the person is known, unknown, born, or not born at the time of" the proceeding, and "even if, by the time of the testator's death, the representing person has died or would no longer be able to represent the person represented in th[is] proceeding."[226] Additionally, the court must provide notice to the testator's spouse, children, and heirs in the manner established under Alaska's notice statute.[227] Although, the statute allows a testator to modify or revoke his will after the declaration of validity, the

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218. The author conducted a thorough search on Westlaw and found no reported cases.

219. *See* N.H. REV. STAT. ANN. § 552:18 (2016); OHIO REV. CODE ANN. § 2107.081 (West 2016); ALASKA STAT. ANN. § 13.12.530 (West 2016); ARK. CODE ANN. § 28-40-202; N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015).

220. ALASKA STAT. ANN. § 13.12.530.

221. *See id.*

222. *See id.* § 13.12.535.

223. *See id.* § 13.12.540.

224. *Id.*

225. *Id.* § 13.12.555.

226. *Id.* § 13.12.560.

227. *Id.* §§ 13.06.110, 13.12.565.

statute is unclear as to the validity of the modified or revoked will.[228] There were no reported cases where a testator initiated an ante-mortem proceeding under Alaska's ante-mortem probate statute.[229]

5. New Hampshire

New Hampshire enacted its ante-mortem probate statute in 2014, making it the most recent state to enact an ante-mortem statute.[230] New Hampshire's ante-mortem statute allows an individual to commence a judicial proceeding to determine the validity of the individual's will during his lifetime.[231] Like other ante-mortem statutes, the validity of the will is subject to the will's subsequent modification or revocation.[232] Venue is proper in the petitioner's county of domicile, or if the petitioner is not domiciled in New Hampshire, but owns real property in New Hampshire, then venue is proper in that county.[233] The New Hampshire statute lists various parties that qualify as interested persons and deems each of the interested parties to be in possession of inchoate property rights and states that notice must be provided to each of the interested parties.[234] Furthermore, the statute states that after the individual's death, the declaration of validity of the individual's will "shall have full legal effect as the individual's will and, upon request, shall be admitted to probate and conclusively deemed proved, except to the extent that the will is modified or revoked after the court's declaration."[235] There were no reported cases where a testator has petitioned a court for the validation of his will under New Hampshire's ante-mortem statute.[236]

E. Criticisms of Ante-Mortem Probate

There are many criticisms of ante-mortem probate; however, these criticisms fail to render ante-mortem probate inadequate because the advantages far outweigh these criticisms.[237] Moreover, these criticisms fail to acknowledge that ante-mortem probate is just another estate-planning tool that can be utilized by estate planners to prevent will contests, and estate

228. *See id.* § 13.12.575.
229. The author conducted a thorough search on Westlaw and found no reported cases.
230. N.H. REV. STAT. ANN. § 552:18 (2016).
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. The author conducted thorough search on Westlaw and could not find any reported cases.
237. *See* Skidmore & Morris, *supra* note 19.

planners can still elect to not take advantage of ante-mortem probate.[238] The main criticisms of ante-mortem probate include the maxim that the living can have no heirs, disruption to the testator's family, the cost of ante-mortem probate, having to go through multiple ante-mortem proceedings in the event of a codicil or revocation of a will, and the possibility of a testator moving to a different state after going through an ante-mortem proceeding.[239]

The first criticism of ante-mortem probate is the maxim that the living can have no heirs.[240] The reasoning behind this maxim is that "[u]ntil a man dies it can never be known who will succeed him, even if intestate, and whatever may be the probability there is no certainty that a single one of the persons who have come in here to oppose the will may survive the testator."[241] Even though it might be well settled that the living can have no heirs, and the fear is that there is no certainty that a single one of the persons who attend the ante-mortem proceeding will survive the testator, this fear is misplaced.[242] As long as the will is declared valid, then it is immaterial who contests.[243] It is immaterial because the validity of the will withstands any claim of invalidity.[244] Moreover, it is arguably impossible that there will be an individual who is not yet born at the time of the ante-mortem probate proceeding who will be able to come forward, once the testator has died, with stronger evidence than anyone at the ante-mortem proceeding, and will be able to prove that the testator's will is invalid.[245] As previously discussed, the strongest evidence to rebut an argument that the testator's will is invalid is evidence from the testator himself and the ability for the testator to be cross-examined at the ante-mortem probate proceeding.[246] Thus, the probability of the scenario above occurring is likely impossible.[247]

Another criticism of ante-mortem probate is the potential for family unrest.[248] Commentators believe that family unrest occurs when a testator is

> compelled to enter upon a contest with the hungry expectants of his own estate, and litigate while living with those who have no legal claims whatever upon him, but who may subject him to ruinous costs and delays in meeting such testimony as is apt to be paraded in such cases.[249]

238. *Id.*
239. *Id.*
240. *Id.*
241. Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 30 (Mich. 1885) (concurrence).
242. *See id*.
243. *See id*.
244. *See* Skidmore & Morris, *supra* note 19.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. Lloyd v. Wayne Circuit Judge, 23 NW. 28, 30 (Mich. 1885) (concurrence).

This concern is genuine because there is an actual possibility that family members and friends will become upset with the share of the estate they receive.[250] However, these friends and family members should respect the testator's wishes and like the saying goes, "you can't make everyone happy."[251] Moreover, "disruption caused by ante-mortem probate is hardly distinguishable from disruption caused by post-mortem proceedings."[252] Both cause family unrest, the only difference is that ante-mortem probate unrest occurs when the testator is dead.[253] Also, an ante-mortem proceeding may reduce the number of will contests because possible contesters may hesitate to challenge the "capacity of a man or woman who may later change the challenger's inheritance."[254] Thus, clients should consider the potential for family unrest when deciding whether to initiate an ante-mortem probate proceeding.[255]

Another concern about ante-mortem probate is the expense associated with going through with the proceeding.[256] Similar to litigation, an ante-mortem proceeding may be expensive; the cost of the proceeding depends on the complexity of the testator's estate and whether the testator's beneficiaries or present intestate successors contest the validity of the will.[257] Thus, estate planners should advise their clients of the expected costs associated with an ante-mortem proceeding before deciding whether to go through with it.[258]

Also, commentators have criticized ante-mortem statutes due to the concern that a testator will have to commence an ante-mortem proceeding multiple times in the event of a codicil or revocation of a will.[259] Most ante-mortem probate statutes allow a testator to revoke or amend the will after an ante-mortem proceeding; however, the will is no longer deemed valid.[260] Thus, estate planners should advise their clients to refrain from changing their wills and, in the event that they must, then estate planners should advise their clients that another proceeding must be initiated in order to declare their new or modified will valid.[261]

A final criticism concerns the possibility of a client moving to another state after a testator's will has been declared valid and the state subsequently

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250. *See* Skidmore & Morris, *supra* note 19.
251. *See Id.*
252. Heyman, *supra* note 77, at 405.
253. *Id.*
254. *Id.* at 406.
255. *See* Skidmore & Morris, *supra* note 19.
256. *See* Stephen C. Simpson, *Avoiding a Will Contest: Estate Planning and a Legislative Solution*, 37 HOUS. L. 36, 36–37 (July/Aug. 1999).
257. *See id*.
258. *See id*.
259. *Id.*
260. *See* Fink, *supra* note 93, at 274.
261. *Id.*

refusing to recognize the decree of validity of the forum state.[262] One response to this criticism is that it is overstated because "in over thirty years of published state opinions in North Dakota, Ohio, and Arkansas, not one such challenge to interstate portability of ante-mortem judgments has been noted."[263] Also, an ante-mortem judgment, even though not binding, may carry substantial weight in favor of a finding of validity.[264] Thus, estate planners should advise their clients of this possibility in the event a client plans on moving to a different state.[265]

IV. THE IDEAL CLIENT THAT SHOULD TAKE ADVANTAGE OF ANTE-MORTEM PROBATE

As previously discussed, ante-mortem probate is another alternative for estate planners to use when determining which available options are best for their clients.[266] Even though this comment will explain the ideal client to take advantage of ante-mortem probate, ante-mortem probate can be used by anyone who wants their will to be declared valid before they die.[267]

Ante-mortem probate is arguably the best estate planning tool to combat will contests and should be discussed when an estate planner suspects that a will contest will be raised.[268] There are many reasons for people to contest a will, but the most common will contests allege undue influence or lack of testamentary capacity; lack of testamentary formalities; forgery or altered documents; revocation; mistake; fraud or duress; and insane delusion.[269] Estate planners should be aware of "red flags" or common scenarios that make will contests more likely to occur.[270] Possible red flags that should put an estate planner on alert include the following: when a client omits a family member from a will; "distinctions among family members in disposing of property"; leaving property to non-family members, which may include mistresses or charities; restrictions on disposed property, which may include properties in a trust or a life estate; extreme deviations from a prior will; multiple families which may include remarriages, children from prior marriages, or community property issues; and also unusual conditions of the testator, which might include eccentric behavior, physical, or mental illness.[271] If one or more of these scenarios are present in a client's will, then

262. *Id.*
263. Heyman, *supra* note 77, at 404.
264. *Id.*
265. *Id.* at 391.
266. *See supra* Part I.
267. Heyman, *supra* note 77, at 386.
268. Simpson, *supra* note 256, at 36–37.
269. *Id.*
270. *Id.*
271. *Id.* at 36–37.

ante-mortem probate may be the best possible option to use to combat the will contest and declare the validity of the testator's will.[272]

One illustration of a situation in which clients may be susceptible to a will contest is when wealthy individuals leave the majority of their estate to charities, instead of their family members.[273] For instance, Bill Gates stated in an interview, "I knew I didn't think it was a good idea to give the money to my kids. That wouldn't be good either for my kids or society."[274] In reality Bill Gates might intend to leave the majority of his estate to charity; however, there is no safeguard to protect his estate from his children contesting his will once he dies.[275]

One famous example that illustrates what may happen to Bill Gates's estate if he leaves the majority of his estate to charity is the probate litigation over James Brown's estate.[276] Brown left his music empire valued at $100 million to the James Brown "I Feel Good" Trust, which is used solely for education in order to help underprivileged students in Georgia and South Carolina.[277] Because James Brown left the majority of his estate to charity, a six-year probate battle ensued.[278] Some of James Brown's children and his companion contested the will seeking a larger amount than Brown left to them.[279] The will contesters were unsuccessful, and the South Carolina Supreme Court ended the probate battle.[280] Brown's estate plan established one of the largest private charity contributions to underprivileged children; however, if the will contest could have been prevented there is no telling how many children could have been helped had the charity not been delayed.[281] Thus, if an ante-mortem probate statute was available in South Carolina, the battle over Brown's estate could have been prevented.[282]

In addition to detecting red flags, estate planners should consider whether it is financially smart for their clients to use ante-mortem probate.[283] An ante-mortem probate proceeding, like litigation, may cost thousands of

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272. *Id.* at 37–38.

273. *See id.* at 38. *See generally* Megan Willett, *15 Tycoons Who Won't Leave Their Fortunes to Their Kids*, BUS. INSIDER (Aug. 20, 2013), http://www.businessinsider.com/tycoons-not-leaving-money-to-their-kids-2013-8?op=1 [https://perma.cc/KX92-HQ4L].

274. Willet, *supra* note 273.

275. *See generally* Leopold & Beyer, *supra* note 4, at 133 (discussing how ante-mortem probate protects the testator's intent).

276. *See* Sue Summer, *SC Supreme Court Ends Historic Battle Over James Brown Estate*, WATCHDOGWIRE (May 12, 2013), http://watchdogwire.com/blog/2013/05/13/sc-supreme-court-ends-historic-battle-over-james-brown-estate/ [https://perma.cc/LS54-B8JA].

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *See generally* Skidmore & Morris, *supra* note 19 (discussing how to prevent will contests).

283. *Id.*

dollars depending on how many interested parties a testator might have.[284] Moreover, it might be unwise for clients to use ante-mortem probate if they plan on passing a small estate on to their beneficiaries.[285] Thus, it is important to discuss the financial impact of ante-mortem probate before determining whether ante-mortem probate is the best option.[286]

In addition to the financial implications of ante-mortem probate, clients should realistically consider whether they plan on making multiple codicils to their current will or possibly revoking their will.[287] For instance, it is common for thirty-year-old clients to amend their will multiple times during their lifetime; or even revoke their current will and write a new one.[288] Therefore, it may be more beneficial to the client to postpone instituting an ante-mortem proceeding; or if the client is financially capable it might be best to go through with an ante-mortem proceeding, and then later on, if the client decides to amend or revoke his will, to go through the ante-mortem proceeding again.[289] This process might seem daunting, but the end result far outweighs the hassle of having to institute multiple proceedings because the client's true intent is preserved.[290]

Another factor to consider in determining whether ante-mortem probate is the best option for a client is whether the client is willing to share the contents of the will with their family members.[291] An estate planner should advise their clients of the consequences that result if the testator shares the contents of their will.[292] Some consequences that could result if a client shares the contents of his will are the possibility that his family members may get upset at their potential share of the inheritance, some may get upset at what other family members are getting, and some may be upset because they are getting nothing.[293] This has the potential to cause rifts in a family and an estate planner must advise clients of these possibilities.[294] Thus, if a client is advised of the consequences and is still seeking to go through with an ante-mortem proceeding, then ante-mortem probate is the best option.[295] However, if a client is hesitant about the potential unrest, then ante-mortem probate may not be the best option, and the estate planner should provide other possible alternatives that might prevent family unrest.[296]

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284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.*

Therefore, the ideal client to take advantage of ante-mortem probate is a client with a red flag in his will, which would be prone to a will contest; has a larger estate so it is worth the cost of going through with the proceeding and in case the client has to institute the proceeding more than once; or a client that is willing to share the contents of his will with family members.[297]

V. A RECOMMENDATION FOR TEXAS

A. The Attempt at Ante-Mortem Probate in Texas

Texas was first confronted with the possibility of ante-mortem probate in 1943 when the legislature enacted the Uniform Declaratory Judgments Act, "which provid[ed] that any person interested under a deed, will, or written contract may have . . . any question of validity arising under the instrument [determined through the use of a declaratory judgment]."[298] Less than ten years later a Texas court, in *Cowan v. Cowan*, interpreted the Uniform Declaratory Judgments Act.[299] In *Cowan*, a testator's will was asked to be declared invalid by two of the testator's three children.[300] The two children, W.C. Cowan and Ora Lee Scott, plead that at the time their mother, Mrs. Cowan, executed her will she lacked the testamentary capacity required and that "she was suffering with insane delusions concerning the objects of her bounty."[301] The testator's children further plead that their mother executed the will while acting under the undue influence of her third child, James C. Cowan and his wife.[302] The appellants alleged that "since their mother is still living, she could appear in court and thus assist the court and jury in determining her mental status, both now and at the time she executed the purported will."[303]

The trial court dismissed the suit for lack of jurisdiction, and the appellants appealed insisting that under the Uniform Declaratory Judgments Act the court has jurisdiction to determine whether a will is valid.[304] The appellate court confirmed the trial courts judgment and held that the Declaratory Judgments Act does not create jurisdiction in the courts to declare the validity of the will of a living person.[305] The appellate court reasoned that "the Act does not contemplate declarations upon matters where the interest of the plaintiff is contingent upon the occurrence of some future

297. *See generally id.* (discussing how to detect and avoid will contests).
298. Cowan v. Cowan, 254 S.W.2d 862, 862 (Tex. Civ. App.—Amarillo 1952, no writ).
299. *Id.*
300. *Id.*
301. *Id.* at 863.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 864.

event" and that "[the Act] does not create jurisdiction in the courts over subjects in which they had no jurisdiction before the passage of the Act[, the Act] only changed the method of exercising existing jurisdiction."[306] The appellate court condemned the policy of declaring the validity of a living persons will by stating:

> It seems clear that in the absence of statute expressly conferring such jurisdiction, a court does not have the power to entertain a suit for the establishment or annulment of the will of a living testator. The ambulatory nature of a will, and the absence of parties in interest, which results from the rule that a living person has neither heirs nor legatees, render impossible the assumption that a court has inherent power to determine the validity of a will prior to the death of the maker. While there is much to commend in the practice in civil-law countries which permits a testator to prevent a contest of his will by disappointed heirs after his death, particularly a contest on the ground of testamentary incapacity, by acknowledging his will before reputable officers, public policy condemns an attempt to compel a testator to enter upon a contest of his will with persons who can have no interest in his estate until after his death.[307]

Thus, the holding in *Cowan* eliminated the possibility of ante-mortem probate in Texas.[308] Although it seemed as if the Uniform Declaratory Judgments Act granted courts jurisdiction, the Texas court held that there must be express statutory language granting a court jurisdiction and the present Uniform Declaratory Judgments Act did not include express language granting courts authority to hear the validation of a living will.[309]

The Texas legislature has subsequently enacted legislation declaring that the probate of a testator's will before death is void; therefore, in order for courts to have jurisdiction over these types of proceedings, the Texas legislature must repeal TEC § 256.002 and enact express language allowing courts to probate the wills of living persons[310]

Furthermore, it is unclear why Texas has not proposed ante-mortem probate legislation.[311] A survey was conducted in 1994 for the Texas Real Estate, Probate & Trust Law Council (REPTL) that provided research on various attorney's and judge's views on ante-mortem probate in Arkansas, North Dakota, and Ohio.[312] REPTL "studied the possibility of drafting a Texas ante-mortem statute" and although the study provided evidence that

306. *Id.* at 865.
307. *Id.* at 864 (quoting from 57 Am. Jur., 523).
308. *See id*.
309. *See id*.
310. TEX. EST. CODE ANN. § 256.002 (West 2015).
311. Beyer, *Will Contests*, *supra* note 56, at 51.
312. *Id.*

ante-mortem probate is beneficial, "the Council decided not to move forward with legislation because of the existence of more pressing concerns."[313]

B. The Proposed Statute

Even though Texas's law prohibits the validation of a will before death, Texas should reconsider ante-mortem probate because of the many advantages it provides testators.[314] Moreover, the public policy that condemns the validation of a living will is outdated.[315] Many states have overcome this outdated public policy and enacted statutes to fall within their Declaratory Judgment Acts.[316] Furthermore, even though states with ante-mortem probate statutes have seen little use, there is no telling how Texas will greet an ante-mortem probate statute.[317] Out of the states that currently have ante-mortem probate statutes, Ohio's statute experiences the most use.[318] Commentators believe it is because Ohio's population is larger than the other states with ante-mortem statutes.[319] Thus, due to Texas's large population it only seems logical that more estate planners would use ante-mortem probate in their estate planning practice.[320]

Furthermore, the Supreme Court of Texas has not ruled on whether a declaratory judgment that declares a will valid while the testator is alive is unconstitutional.[321] However, the Texas Legislature has enacted legislation expressly prohibiting the probate of a living person's will, but no reported cases were found that interpreted this statute or addressed the constitutionality of an ante-mortem proceeding.[322] Thus, the Texas Supreme Court could overrule the holding in *Cowan* and find TEC § 256.002 unconstitutional; however, this series of events seems highly unlikely.[323] Therefore, the Texas legislature must repeal TEC § 256.002 and enact an ante-mortem probate statute that falls in line with the holding of *Cowan*.[324]

After examining the various ante-mortem probate models and ante-mortem probate state statutes, the best proposed statute for Texas would be one similar to the Contest Model that combines pieces of Alaska and Ohio's

313. *Id.*

314. EST. § 256.002. *See also* Leopold & Beyer, *supra* note 4, at 133 (discussing the many advantages ante-mortem probate provides to individuals).

315. Leopold & Beyer, *supra* note 4, at 133

316. *Id.*

317. *See generally id*.

318. Heyman, *supra* note 77, at 388.

319. *Id.*

320. *Id.*

321. Author conducted thorough search on Westlaw and found no reported case.

322. TEX. EST. CODE ANN. § 256.002 (West 2015).

323. EST. § 256.002; Cowan v. Cowan, 254 S.W.2d 862, 862 (Tex. Civ. App.—Amarillo 1952, no writ).

324. EST. § 256.002; *Cowan*, 254 S.W.2d 862.

statutes and the TEC.[325] The Contest Model is the most logical model to draft a statute after because it is the only model that closely resembles pre-existing laws through the use of declaratory judgments.[326] Additionally, the Contest Model is superior to the other models because the Conservatorship Model results in unnecessarily expensive proceedings; the Administrative Model lacks clarity of "whether the combination of a lack of notice to presumptive takers and the imposition of a binding judgment is constitutionally binding"; and the Mediation Model's lack of a binding judgment allows "those unhappy with the final resolution . . . to take the matter to court."[327] Furthermore, Alaska and Ohio's ante-mortem probate statutes are the most detailed statutes out of the states with ante-mortem statutes and cover possible issues that the proposed statute may face if challenged in court.[328] The author's proposed statute for Texas reads as follows:

Declaration of Validity of Will Prior to Death

Section 1. Declaration of validity of will prior to death
A testator who executes a will in conformity with the laws of Texas may petition the court for a judgment that declares the will's validity prior to the testator's death, "subject only to [a] subsequent revocation or modification."[329]

Section 2. Contents of Petition for Will Validity
(a) A petition under Section 1 of this statute must contain:
(1) a statement that a copy of the will has been filed with the court;
(2) a statement that the will is in writing;[330]
(3) a statement that the will is "signed by:
(A) the testator in person; or
(B) another person on behalf of the testator:
(i) in the testator's presence; and
(ii) under the testator's direction;"[331]
(4) in the case of an attested will, a statement that the will was attested by two or more credible witnesses who are at

325. OHIO REV. CODE ANN. § 2107.081 (West 2016); ALASKA STAT. ANN. § 13.12.530 (West 2016).
326. *See* Fink, *supra* note 93, at 274.
327. Heyman, *supra* note 77, at 408–09.
328. *See* OHIO REV. CODE ANN. § 2107.081; ALASKA STAT. ANN. § 13.12.530.
329. OHIO REV. CODE ANN. § 2107.081; ALASKA STAT. ANN. § 13.12.530.
330. TEX. EST. CODE ANN. § 251.051 (West 2015).
331. *Id.*

least 14 years of age, and who subscribe their names to the will in their own handwriting in the testator's presence;[332]

(5) in the case of a holographic will, a statement that the will is written wholly in the testator's handwriting and notwithstanding Subsection (4), a holographic will "is not required to be attested by subscribing witnesses."[333]

(6) in the case of a self-proved will, a statement that:

(A) the testator and witnesses executed a self-proving affidavit; or

(i) Texas Estates Code § 251.104 governs the requirements for a self-proving affidavit.[334]

(B) the will was "simultaneously executed, attested, and made self-proved" as provided by Texas Estates Code § 251.1045.[335]

(C) Texas Estates Code § 251.101–107 governs the requirements for a self-proved will.[336]

(7) in the case of a self-proved holographic "will written wholly in the testator's handwriting," an affidavit must be attached to the testator's will and follow the requirements listed in Texas Estates Code § 251.107.[337]

(8) a statement that the testator executed the will in compliance with Texas Estates Code 256.152(a).[338]

(9) a statement that the testator properly executed the will with testamentary intent;

(10) a statement that the testator had testamentary capacity at the time the testator executed the will;

(11) a statement that the testator was free from undue influence and duress and executed the will freely;

(12) a statement that the execution of the will was not the result of fraud or mistake;

(13) the names and addresses of the testator, the testator's spouse, the testator's children, the testator's present intestate successors, the personal representatives nominated in the will, and devisees under the will;

(14) if minors, the ages of the testator's children, the testator's present intestate successors, and the devisees under the will,

332. ALASKA STAT. ANN. §§ 13.12.545, 13.12.502.
333. EST. § 251.052.
334. *Id.* § 251.104.
335. *Id.* § 251.1045.
336. *Id.* § 256.152(a).
337. *Id.* § 251.107.
338. *Id.* § 256.152(a).

as far as known or ascertainable with reasonable diligence by the petitioner;

(15) a statement that the testator is familiar with the contents of the will.[339]

Section 3. Venue

(a) The venue for a petition under Section 1 is

(1) the judicial district of this state where the testator is domiciled; or

(2) if the person who executed the will is not domiciled in this state, any judicial district of this state.[340]

Section 4. Parties

(a) The petition shall name as parties all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator under Chapter 201 of the Texas Estates Code had the testator died intestate on the date the petition was filed.[341]

(b) If the court determines that "in the future there might be intestate successors whose interests would not coincide with present parties, [then the court] should appoint a guardian *ad litem* to protect [their] future interests."[342]

Section 5. Service of Process

Service of process in an action authorized by Section 1 shall be made on every party named in the petition by the following methods:[343]

(a) By certified mail, or any other valid personal service permitted by the Texas Rules of Civil Procedure or the Texas Estates Code, if the party is an inhabitant of this state or is found within this state;[344]

(b) By certified mail, with a copy of the summons and complaint, to the party at the party's last known address or any other valid personal service permitted by the Texas Rules of Civil Procedure, if the party is not an inhabitant of this state or is not found within this state;[345]

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339. *See* ALASKA STAT. ANN. § 13.12.530 (West 2016).
340. *See* OHIO REV. CODE ANN. § 2107.081 (West 2016).
341. EST. § 201.001; OHIO REV. CODE ANN. § 2107.081.
342. *See* Fink, *supra* note 93, at 286.
343. *See* OHIO REV. CODE ANN § 2107.081.
344. *See id.*
345. *See id.*

(c) "If the address of [a] party is unknown [and] if all methods of personal service under [subdivisions (a) and (b)] of this section were attempted without success," then the clerk shall issue citation for such defendant for service by publication provided under Texas Rule of Civil Procedure 109.[346]

Section 6. Hearing

When a petition is filed pursuant to Section 1, the court shall conduct a hearing on the validity of the will. The hearing shall be [adversarial] in nature and shall be conducted pursuant to [this statute].[347]

Section 7. Burden of Proof

A petitioner under Section 1 of this statute "has the burden of establishing prima facie proof of the execution of the will . . . [a] person who opposes the petition has the burden of establishing the lack of testamentary intent, lack of capacity, undue influence, fraud, duress, mistake, or revocation."[348]

Section 8. Declaration of Validity

The "court shall declare the will valid if, after conducting a proper hearing, . . . it finds that the will was properly executed" in compliance with the requirements of a valid will pursuant to the Texas Estates Code.[349] "After the testator's death, unless the will is modified or revoked after 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 upon [application]."[350]

Section 9. Binding Effect of Declaration of Validity

(a) "Any judgment under this [statute] declaring a will valid is binding in this state as to the validity of the will on all facts found," and if the will remains valid the judgment "shall give the will full legal effect as the instrument of disposition of the testator's estate."[351]

(b) Any judgment declaring a will valid "shall be sealed in an envelope along with the will to which it pertains, and filed by the

346. *See id*.
347. *Id.* § 2107.083.
348. ALASKA STAT. ANN. § 13.12.570 (West 2016).
349. OHIO REV. CODE ANN § 2107.084.
350. ALASKA STAT. ANN. § 13.12.555.
351. OHIO REV. CODE ANN § 2107.084.

> . . . [court]."[352] The filed will shall only be available to the testator during the testator's lifetime.[353]
>
> Section 10. Change to Will After Declaration of Validity
> After a declaration of the validity of a will under Section 8, a testator may modify or revoke the will "in the same manner as a will for which there is no declaration of validity."[354]
>
> Section 11. Effect of Findings
> (a) The findings of facts by a court in a proceeding brought under this statute are "not admissible as evidence in any proceeding other than one brought to determine the validity of a will."[355]
> (b) "The failure of a testator to file a [petition] for a judgment declaring the validity of a will the testator has executed is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator."[356]

This proposed statute enables Texans to petition a court for the declaration of the validity of their will.[357] Also, this statute falls in line with *Cowan* by expressly granting courts jurisdiction to declare a testator's will valid before death.[358] Moreover, this statute meshes parts of the TEC with Alaska and Ohio's statutes and the Contest Model proposed by Professor Fink to require testator's to file an all-encompassing petition with the court.[359] The petition allows a testator to provide proof that his will is in conformity with the laws of Texas, whether there will be an attested will, a holographic will, a self-proved attested will, or a self-proved holographic will.[360] Furthermore, the statute requires the petition to name the beneficiaries and present an intestate successors as parties to the suit.[361]

Unlike other state statutes, the proposed statute permits a court to appoint a guardian *ad litem* to protect the interests of future intestate successors if it appears to the court that the present parties' interests coincide

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352. *Id.*
353. *Id.*
354. N.H. REV. STAT. ANN. § 552:18 (2016).
355. OHIO REV. CODE ANN § 2107.085.
356. *Id.*
357. *See supra* Part V.B.1.
358. Cowan v. Cowan, 254 S.W.2d 862, 862 (Tex. Civ. App.—Amarillo 1952, no writ). *See supra* Part V.B.8.
359. *See supra* Part V.B.2.
360. *See supra* Part V.B.2.
361. *See supra* Part V.B.4.

with the future intestate successor's interests.[362] The appointment of a guardian *ad litem* enhances the binding effect of the declaration because the future intestate successors are represented, and it decreases the possibility of future successors contesting the finding of validity on grounds that they are not bound by the declaration.[363] Next, the proposed statute requires service of process to be provided to all of the named parties, both within and outside of Texas.[364] This form of service ensures that the named parties are given "actual notice and an opportunity to appear and defend, which are requisites of due process of law."[365]

Once notice is given, the proposed statute requires the court to conduct a hearing to determine the validity of the testator's will.[366] If named parties fail to show or contest the validity of the will, then the testator has the burden to prove the validity of the will, which should be a short and simple proceeding with no contest.[367] However, if a named party does contest the validity of the testator's will, the testator still has the burden to prove the will's validity, but the contester has the burden of establishing lack of validity.[368] If the court finds the will valid under Texas law, then the court will enter a judgment declaring the will valid and binding in Texas.[369] Additionally, the proposed statute requires the judgment declaring the will valid and the court to seal the actual will, in order to assure safe-keeping.[370] In the event the testator wants to modify or revoke the valid will, then the proposed statute allows him to, but the declaration of validity will be void, and the testator will need to initiate a new proceeding to declare the new will or modification valid.[371] Finally, the findings of fact by a court in a proceeding under the proposed statute are not admissible in any other proceeding other than a will validation.[372] In addition, failure to take advantage of the proposed statute is not admissible as evidence to determine the validity of the testator's will.[373] Thus, the proposed statute has similarities and differences to the current ante-mortem probate statutes currently enacted, and the proposed statute provides Texas with detailed legislation that seeks to minimize constitutional concerns.[374]

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362. *See supra* Part V.B.4.
363. *See* Fink, *supra* note 93, at 276.
364. *See supra* Part V.B.5.
365. *See* Fink, *supra* note 93, at 276.
366. *See supra* Part V.B.6.
367. *See supra* Part V.B.7.
368. *See supra* Part V.B.8.
369. *See supra* Part V.B.8.
370. *See supra* Part V.B.9.
371. *See supra* Part V.B.10.
372. *See supra* Part V.B.11.
373. *See supra* Part V.B.11.
374. *See supra* Part V.B.; N.H. REV. STAT. ANN. § 552:18 (2016); OHIO REV. CODE ANN. § 2107.081 (West 2062); ALASKA STAT. ANN. § 13.12.530 (West 2016); ARK. CODE ANN. § 28-40-202 (West 2015);

VI. CONCLUSION

The future of ante-mortem probate is unpredictable, as well as the possibility that Texas will consider enacting ante-mortem probate legislation.[375] However, with the second largest state population, Texas has the potential to make ante-mortem probate more beneficial than ever.[376] With the millions of potential clients that have strong property rights, like many Texans do, there is a strong likelihood that Texas would welcome ante-mortem probate.[377] Moreover, with the recent ante-mortem probate statutes enacted in Alaska and New Hampshire, there is hope that states are catching on to the trend that ante-mortem probate provides estate planners with a viable alternative to post-mortem probate.[378] Although, ante-mortem has some disadvantages, the peace of mind and certainty it provides testators far outweighs the criticism it faces.[379]

Before proposing the recommended statute for Texas, this comment began by discussing Texas's current probate system and the flaws associated with it.[380] Next, this comment discussed the history of ante-mortem probate and examined the four ante-mortem probate models and five state statutes currently in effect.[381] This comment examined the advantages and disadvantages of ante-mortem probate and presented the ideal client that should take advantage of ante-mortem probate.[382] Also, this comment explored Texas's attempt at ante-mortem probate and the reasons for its demise.[383] Finally, this comment proposed a statute for Texas that combined language found in Alaska and Ohio's ante-mortem statute with sections of the TEC.[384] This recommended statute provides Texans with the peace of mind that their property will be left according to their wishes.[385] Lastly, with more and more individual's estate plans containing red flags, making them more susceptible to will contests, the solution to these red flags is clear: ante-mortem probate protects client's estates before it is too late.[386]

N.D. CENT. CODE ANN. § 30.1-08.1-01 (West 2015).

375. *See* Leopold & Beyer, *supra* note 4, at 181–84.
376. *See* Heyman, *supra* note 77, at 405.
377. *See* Wright, s*upra* note 1.
378. *See* N.H. REV. STAT. ANN. § 552:18; ALASKA STAT. ANN. § 13.12.530.
379. *See* Leopold & Beyer, *supra* note 4, at 133.
380. *See supra* Part II.
381. *See supra* Part III.B.
382. *See supra* Parts III, IV.
383. *See supra* Part V.A.
384. *See supra* Part V.B.
385. *See* Leopold & Beyer, *supra* note 4, at 133.
386. *See* Simpson, *supra* note 256, at 36–37.