

## NO “DEAD GIVEAWAYS”: FINDING A VIABLE MODEL OF ANTE-MORTEM PROBATE FOR NEW JERSEY

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### I. INTRODUCTION

Testators who make every effort to preserve their assets, consult with an attorney, and strategize their dispositions may still face the scorn of a friend or relative who feels slighted by an unfavorable bequest. While theoretically a testator may be of sound mind and free from undue influence up until his last moments, it is not until after death that potential takers will emerge to challenge the validity of his will.<sup>1</sup> The best advocate to defend these challenges—the testator—is no longer available to offer evidence to the contrary, and courts must instead rely upon the often self-interested hearsay that remains.<sup>2</sup> Executors and estate planners alike have long been cognizant of this “worst evidence” rule,<sup>3</sup> as well as the headache of litigation it often creates.

But testators are not without recourse; options exist to mitigate the potential litany of challenges arising after death. Of these options, the ability to seek a pre-death judgment validating one’s will as to formalities, testamentary capacity, and freedom from undue influence has been hotly debated.<sup>4</sup> Ante-mortem probate, as it is more commonly known, enables living testators to seek judicial validation of their wills to reduce the likelihood of a will contest.<sup>5</sup>

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<sup>1</sup> John H. Langbein, *Will Contests*, 103 *YALE L.J.* 2039, 2044 (1994).

<sup>2</sup> *See id.*

<sup>3</sup> *See id.*

<sup>4</sup> *See generally* Jacob Arthur Bradley, *Antemortem Probate Is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 *MISS. L.J.* 1431 (2017); Mary Louise Fellows, *The Case Against Living Probate*, 78 *MICH. L. REV.* 1066 (1980); John H. Langbein, *Living Probate: The Conservatorship Model*, 77 *MICH. L. REV.* 63 (1978); Taren R. Lord-Halvorson, *Why Wait Until We Die? Living Probate in a New Light*, 37 *OKLA. CITY U. L. REV.* 543 (2012).

<sup>5</sup> Glenn R. Kazlow et al., *Ante-Mortem Probate: Why Wait Until It’s Too Late?*, 214 *N.J. L.J.* 1051 (2013).

Candidly, the benefits of ante-mortem probate are undeniable; a judicial declaration of validity shields a testator's bequests from future undue influence and capacity challenges, arming the testator with a weapon to defend the legitimacy of his wishes. Furthermore, ante-mortem probate is entirely consistent with the societal value of freedom of disposition, the principle that individuals are free to control the disposition of their property during life and at death.<sup>6</sup> Ante-mortem probate enhances this principle by providing a definitive mechanism through which testators can ensure proper succession of their legacies.

Despite its advantages, the broad shortcomings of ante-mortem probate, such as potential family disharmony and strain on judicial resources, are obvious impediments to its widespread adoption.<sup>7</sup> Much like the standard probate process, a lifetime probate proceeding is generally public in nature, with the added presence of the testator to defend all challenges.<sup>8</sup> This particular aspect has the potential to create significant discord among family members; the testator is forced to suffer the displeasure of relatives angered by unfavorable bequests or omissions.<sup>9</sup> Additionally, because testators may amend or revoke a will at any time,<sup>10</sup> the potential exists for a flood of petitions on probate courts, resulting in excessive strain on the judicial system.

While volumes of academic material exist to support state codification in theory, implementation of a viable ante-mortem probate model remains largely unexplored in practice; only a handful of states offer a mechanism for pre-death will validation.<sup>11</sup> Though most jurisdictions have yet to consider the proposition, the push for ante-mortem probate in New Jersey is gaining notable traction. After the concept was revisited in an article by Glenn R. Kazlow,<sup>12</sup> the New Jersey State Law Revision Commission authorized a survey-type project to evaluate the effects of ante-mortem probate in New Jersey.<sup>13</sup> Specifically, the project sought feedback from local scholars and practitioners to gain a better understanding of the effects of pre-

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<sup>6</sup> See Gerry W. Beyer, *Will Contests—Prediction and Prevention*, 4 EST. PLAN. & COMMUNITY PROP. L.J. 1, 51 (2011); Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 280 (2010).

<sup>7</sup> See *infra* Part III.

<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> See Fellows *supra* note 4, at 1075.

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* Part II.B.

<sup>12</sup> See Kazlow et al., *supra* note 5, at 1051.

<sup>13</sup> Katherine M. Arango, *Trial and Heirs: Antemortem Probate for the Changing American Family*, 81 BROOK. L. REV. 779, 795 (2016).

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death will validation.<sup>14</sup>

Responding to this inquiry, Susan G. Thatch, staff member of Counsel for the New Jersey Law Revision Commission, published an in-depth comment analyzing the major critiques and benefits of ante-mortem probate in its current form.<sup>15</sup> Thatch found ante-mortem probate to be a “valuable estate-planning tool” and concluded that “any legislation that New Jersey may decide to promulgate should be designed . . . to supplement New Jersey’s current traditional form of probate and to provide individuals and their legal advisors with another tool . . . to ensure that final wishes are carried out after death.”<sup>16</sup>

Thatch’s comment effectively highlights the main concerns of adopting ante-mortem legislation but leaves open for suggestion the possibility of a workable model for New Jersey to consider. As such, Part II of this Comment will begin by briefly addressing the evolution of ante-mortem probate, as well as the minority of states that promulgate it. Part III will then focus on the legal and practical considerations of adopting current models, expanding on the points offered by Thatch, as well as presenting additional areas of concern.<sup>17</sup> Finally, Part IV will suggest a viable model of ante-mortem probate, specifically tailored to the State of New Jersey. Part V will briefly conclude.

## II. CURRENT MODELS AND APPLICATIONS OF ANTE-MORTEM PROBATE

Over the last several decades, three models have persisted to guide states in adopting ante-mortem schemes. Each model essentially builds off the prior one, while maintaining significant differences in application.

### A. *Primary Models of Ante-Mortem Probate*

#### 1. The Contest Model

The Contest Model can most aptly be characterized as identical to the process of post-mortem probate, except for the timing in which it occurs.<sup>18</sup> First proposed by Professor Howard Fink in 1976, the Contest Model shifts the timing of a probate proceeding to occur while the testator is “alive and

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<sup>14</sup> *Id.*

<sup>15</sup> Susan G. Thatch, Esq., *Ante-Mortem Probate in New Jersey—An Idea Resurrected?*, 39 SETON HALL LEGIS. J. 331 (2015).

<sup>16</sup> *Id.* at 353–54.

<sup>17</sup> For a brief summation of Thatch’s comment, see Gerry W. Beyer, *Add Probating Your Will to Your Bucket List*, JOTWELL (May 25, 2016), <https://trustest.jotwell.com/2016/05/> (reviewing Susan G. Thatch, *Ante-Mortem Probate in New Jersey—An Idea Resurrected?*, 39 SETON HALL LEGIS. J. 331 (2015)).

<sup>18</sup> See Fellows, *supra* note 4, at 1073.

able to testify . . . in direct view of the court or jury.”<sup>19</sup>

Under the Contest Model, an adversarial proceeding is initiated to obtain a declaratory judgment as to the testator’s capacity, compliance with execution formalities, and the presence of any undue influence.<sup>20</sup> Parties to the proceeding include beneficiaries under the will and those who would take by intestate succession, although states that have adopted this model also include beneficiaries of prior wills that are affected by the proceeding.<sup>21</sup> Findings of validity are binding upon all parties to, or represented in, the action.<sup>22</sup> Once the will is declared valid, it is subsequently placed on file with the court.<sup>23</sup> Amendments to the will can be validated through another proceeding of the same nature.<sup>24</sup> Finally, to prevent the risk of an unfavorable verdict in future actions, facts found in a proceeding are inadmissible as evidence in actions other than for determinations of a will’s validity.<sup>25</sup>

## 2. The Conservatorship Model

The Conservatorship Model was proposed by Professor John H. Langbein in 1978, and served mainly to address concerns of family disharmony created by the Contest Model’s non-confidential nature.<sup>26</sup> The Conservatorship Model attempts to strike more of a balance between the interests of the testator and presumptive takers by improving the defensive opportunities for potential challengers.<sup>27</sup> Similar to Fink’s proposal under the Contest Model, Langbein’s Conservatorship Model requires the testator to institute a proceeding by submitting a petition to the court with the proffered will attached.<sup>28</sup> As a result, the will itself is publicly disclosed.<sup>29</sup>

Throughout the petition process, Langbein stresses the testator’s obligation to be represented by counsel, not only for the purpose of ensuring accurate preparation, but also to safeguard against potentially frivolous use of the system.<sup>30</sup> Notice requirements under the Conservatorship Model are also similar to the Contest Model in that the testator must give notice of the

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<sup>19</sup> Howard D. Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 266 (1976).

<sup>20</sup> *Id.* at 275.

<sup>21</sup> Fellows, *supra* note 4, at 1073 n.27.

<sup>22</sup> *See* Fink, *supra* note 19, at 276.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 277.

<sup>26</sup> *See* Langbein, *supra* note 4.

<sup>27</sup> *Id.* at 78.

<sup>28</sup> *Id.* at 77.

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

<sup>30</sup> *Id.* at 78.

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proceedings to the beneficiaries named in the will, those that would take under intestate succession, and beneficiaries from prior wills.<sup>31</sup>

The most drastic departure from the Contest Model is undoubtedly Langbein's proposal of a guardian ad litem to represent the interests of any and all beneficiaries who may be affected by a mistaken ruling.<sup>32</sup> Specifically, the guardian ad litem is granted powers of discovery under the supervision of the court.<sup>33</sup> These powers include the ability to conduct depositions or request documents that may be relevant to the court's determination of capacity or undue influence.<sup>34</sup>

The cost of the guardian ad litem is imposed upon the testator, so as to discourage the testator's abuse of the system and to alleviate presumptive takers of the need to calculate whether bringing a challenge is worth the cost.<sup>35</sup> The argument may be made that such an imposition unfairly shifts costs normally borne by contestants to the testator, depleting the future estate as a result. Langbein contends, however, that "to permit the testator to inflict upon his heirs apparent the choice between defaulting or bearing [the accelerated costs of ante-mortem probate]" is a serious mistake of legislative policy.<sup>36</sup> Rather, Langbein insists that justice requires testators to bear the cost of litigation, as ante-mortem probate is at the "testator's option, provided for the testator's benefit."<sup>37</sup>

Langbein additionally notes that the requirement of a guardian ad litem would allow interested parties to bring challenges anonymously, thereby preventing any threat of family disharmony caused by a challenge.<sup>38</sup> A lack of anonymity might cause the testator to reduce or eliminate a challenger's inheritance as a form of punishment, inflicting great strain on the familial relationship between the testator and challenger in the process.<sup>39</sup> Thus, Langbein asserts that the ability to anonymously contest the will through a guardian ad litem allows evidence of incapacity or undue influence to be introduced without the threat of testator retaliation.<sup>40</sup>

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<sup>31</sup> *See id.*

<sup>32</sup> Langbein, *supra* note 4, at 78.

<sup>33</sup> *Id.* at 79.

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

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 75.

<sup>37</sup> *Id.*

<sup>38</sup> Langbein, *supra* note 4, at 79.

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

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

Some scholars argue that this alteration of the Contest Model is inadequate to prevent family disharmony.<sup>41</sup> Specifically, testators and other parties are likely to recognize the source of a challenge.<sup>42</sup> For example, if the guardian ad litem submits evidence of a personal nature that only a spouse would know, the testator might realize that the challenge came from a spouse. Under the same example, even if such evidence did not originate from a spouse, the testator might nevertheless assume that it did, incidentally straining the spousal relationship in the process.

As a final matter, the Conservatorship Model does away with the option of a jury for functional reasons of judicial experience and evidentiary standards.<sup>43</sup> Langbein notes that the format of an ante-mortem probate proceeding differs drastically from post-mortem probate in the nature of proofs.<sup>44</sup> In a standard probate proceeding, evidence concerning the testator is often scattered and incomplete; this makes a jury instrumental in the fact-finding process.<sup>45</sup> Alternatively, Langbein opines that the evidence in an ante-mortem proceeding is readily available and thus better left to a judge experienced in gerontology.<sup>46</sup>

### 3. The Administrative Model

The third most widely acknowledged model of ante-mortem probate was introduced in 1979 by Professors Gregory S. Alexander and Albert M. Pearson.<sup>47</sup> The Administrative Model, as it was called, primarily served to critique the confidentiality and disclosure requirements of the Conservatorship Model.<sup>48</sup> The Administrative Model adopts the guardian ad litem suggested by Langbein, but operates through a purely administrative (rather than judicial) ex parte proceeding.<sup>49</sup>

Upon petition to the court, a guardian ad litem is appointed to examine the testator's capacity, not as a representative of presumptive takers but instead as an investigator for the court.<sup>50</sup> The guardian ad litem "conducts

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<sup>41</sup> Fellows, *supra* note 4, at 1075.

<sup>42</sup> *Id.*

<sup>43</sup> Langbein, *supra* note 4, at 80.

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

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

<sup>46</sup> *Id.* at 80–81. On this point, Langbein seems to infer that older individuals are the more likely candidates for engaging in the process of ante-mortem probate. No substantial evidence exists, however, to affirm or deny this inference. Younger individuals are equally as free to seek pre-death will validation, as evidenced by the lack of any age restrictions in current ante-mortem jurisdictions. *See infra* Part II.B.

<sup>47</sup> Gregory S. Alexander & Albert M. Pearson, *Alternative Methods of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89 (1979).

<sup>48</sup> *Id.* at 90.

<sup>49</sup> *Id.* at 112.

<sup>50</sup> *Id.* at 113–14.

private interviews, evaluates the capacity of the testator, and informs the court of the information discovered.”<sup>51</sup> The will itself is reviewed by the court in camera, and remains confidential throughout the entire proceeding.<sup>52</sup>

Additionally, the Administrative Model promulgates the belief that prospective heirs have no constitutional right to notice; their potential interests in the estate are “weak” because the testator may alter a bequest at any point during his or her lifetime.<sup>53</sup> Thus, Alexander and Pearson contend that the consequences stemming from a public will and expansive notice requirements under the Contest and Conservatorship models are effectively eliminated.<sup>54</sup>

As a disadvantage, even the Administrative Model is argued to place strain on family harmony. Specifically, scholars have argued that when the court requires the guardian ad litem to investigate potential concerns, suspicions among family members can arise.<sup>55</sup>

#### B. *Jurisdictions Offering Ante-mortem Probate*

As it stands, only a handful of states currently authorize ante-mortem probate, while others have attempted to adopt legislation with limited success.<sup>56</sup> Each jurisdiction primarily draws from the adversarial approach of Fink’s Contest Model, though several unique deviations exist with respect to certain procedural applications.

##### 1. The Petition Process: Who Can File

In each of the ante-mortem jurisdictions, a petition or complaint for declaratory judgment must be submitted to the court with the proffered will attached.<sup>57</sup> To commence the proceeding, a majority of ante-mortem states, including Delaware and Ohio, require that testators be domiciled or own real property within the state.<sup>58</sup>

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

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

<sup>53</sup> See Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 169 (1990); Alexander & Pearson, *supra* note 47, at 115.

<sup>54</sup> Alexander & Pearson, *supra* note 47, at 90.

<sup>55</sup> Fellows, *supra* note 4, at 1077.

<sup>56</sup> North Dakota, Ohio, Arkansas, Alaska, New Hampshire, North Carolina, and Delaware each maintain their own ante-mortem probate statutes. See *infra* Part II(B). Nevada unsuccessfully proposed ante-mortem legislation in 2011, but currently offers a limited form of ante-mortem probate through an amendment to its declaratory judgment statute. *Id.*

<sup>57</sup> See, e.g., N.D. CENT. CODE § 30.1-08.1-01 to -04 (Westlaw through 2017 Legis. Sess.).

<sup>58</sup> ARK. CODE ANN. § 28-40-202 (West 1979); DEL. CODE ANN. tit. 12, § 1311(a) (2015); N.H. REV. STAT. ANN. § 552:18(II) (2014); OHIO REV. CODE ANN. § 2107.081 (West 1979).

Alaska expands these eligibility requirements to include will-appointed representatives or any interested party to whom the testator gives consent, regardless of whether the testator is domiciled in Alaska.<sup>59</sup> Along with the petition, Alaska requires the addition of statements signed by the petitioner affirming the contemporariness of the will, its compliance with execution formalities, and a general statement that the testator is familiar with its contents.<sup>60</sup>

## 2. Parties to the Proceeding

The petition or complaint must name and be served upon specific parties to the will. The majority of ante-mortem jurisdictions require service upon beneficiaries named in the will, as well as any party eligible to take under state intestacy laws had the testator died on the date of filing.<sup>61</sup>

New Hampshire and Delaware offer the most comprehensive notice requirements of the ante-mortem jurisdictions. A petition filed in New Hampshire must name any “interested party,” including the petitioner’s spouse, heirs, devisees under the will, appointed executors, and the director of any charitable trust that is a devisee.<sup>62</sup> An “interested party” may also be any other person who, if the petitioner had died on the date of filing, would be deemed an interested party in a judicial proceeding to prove the will.<sup>63</sup>

Delaware’s notice requirements drastically depart from the other six jurisdictions. The scope of notice is broadened to include any party affected by a power of appointment in the will, as well as “any other person the testator wishes to be bound” by a ruling of validity.<sup>64</sup> Most significantly, Delaware provides a “notice statute” whereby interested parties are given time sensitive notices to bring challenges of their own volition.<sup>65</sup> This directly contrasts with the other ante-mortem jurisdictions, which provide “filing statutes” that require the testator to petition the court and initiate the action whether or not there is an actual challenge.<sup>66</sup>

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<sup>59</sup> ALASKA STAT. ANN. § 13.12.530 (West 2010); § 13.12.540(a).

<sup>60</sup> § 13.12.545.

<sup>61</sup> ARK. CODE ANN. § 28-40-201 (West 2012); N.H. REV. STAT. ANN. § 552:18(III) (Westlaw through 2018 Reg. Sess., Ch. 4); N.D. CENT. CODE ANN. § 30.1-08.1-02 (Westlaw through 2017 Legis. Sess.); OHIO REV. CODE ANN. § 2107.081(A) (West 2012).

<sup>62</sup> § 552:18(III).

<sup>63</sup> *Id.* While the statute does not provide specific examples of what “other” parties may be deemed interested persons, it is likely that this is meant as a catch-all granting the court discretion for unanticipated circumstances.

<sup>64</sup> DEL. CODE ANN. tit. 12, § 1311(b)–(c) (2015).

<sup>65</sup> *Id.*

<sup>66</sup> See Ralph Lehman et al., *Determining the Validity of Wills and Trusts—Before Death*, 6 OHIO PROB. L.J. 7 (2011).

### 3. Rulings on Construction

In a 2009 amendment to its declaratory judgment statute, Nevada adopted a highly simplistic form of ante-mortem probate.<sup>67</sup> The statute's overall comprehensiveness pales in comparison to other jurisdictions; it narrowly enables testators to obtain a declaratory judgment as to questions of will validity.<sup>68</sup> One unique aspect of this statute, however, is that it also allows testators to resolve questions of will *construction*, an issue which none of the other ante-mortem jurisdictions explicitly address.<sup>69</sup> The testator need not be incompetent to obtain such a ruling, and may do so at any point before his death.<sup>70</sup>

### 4. Binding Effect of a Ruling: Revocation and Modification

If a court deems the will valid as to formalities, testamentary capacity, and freedom from undue influence, it will issue a binding declaration of validity and place the will on file.<sup>71</sup> The binding effect of the declaration tends to vary among states, especially where a testator subsequently modifies or revokes his will.

Jurisdictions such as Ohio and Alaska direct that the binding effect of a declaration of validity remains effective unless and until the testator modifies or revokes his will.<sup>72</sup> A testator is free to revoke or amend his will through any lawful process, but will not retain the binding declaration of validity without going through the process again.<sup>73</sup> Delaware mirrors the language of these states but further provides that the binding nature of a proceeding will not abrogate the right of a spouse to file for an elective share, or restrict the period during which an intestate heir may claim any intestate portion of the testator's estate.<sup>74</sup>

By comparison, New Hampshire's statute contains a subtle, but noteworthy difference: upon a testator's death, a declaration of validity will remain binding *to the extent* that the testator has not modified or revoked the will after the proceeding.<sup>75</sup> In this regard, New Hampshire seemingly offers the most testator-friendly provision as to the binding effect of a declaration; a court will uphold any portion of the validated will that remains after the

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<sup>67</sup> See NEV. REV. STAT. ANN. § 30.040 (Westlaw through 2017 Reg. Sess.); NEV. REV. STAT. ANN. § 137.007 (Westlaw through 2017 Reg. Sess.).

<sup>68</sup> *Id.*

<sup>69</sup> § 30.040.

<sup>70</sup> *See id.*

<sup>71</sup> *See, e.g.*, OHIO REV. CODE ANN. § 2107.084 (West 1979).

<sup>72</sup> *Id.*; ALASKA STAT. ANN. § 13.12.555 (West 2010).

<sup>73</sup> § 13.12.555.

<sup>74</sup> DEL. CODE ANN. tit. 12, § 1311 (2015).

<sup>75</sup> N.H. REV. STAT. ANN. § 552:18(VII) (Westlaw through 2018 Reg. Sess., Ch. 4).

testator's death.<sup>76</sup>

In North Dakota, a declaration of validity is permanent unless the testator *petitions* the court to modify or revoke his will.<sup>77</sup> In such cases, the declaration's binding effect will cease until the testator executes a new will and institutes another ante-mortem proceeding naming not only the parties to the new proceeding, but any parties to former proceedings as well.<sup>78</sup>

Alternatively, Arkansas permits testators to modify or supersede a validated will "by subsequently executed valid wills, codicils, and other testamentary instruments, *whether or not validated* under a subsequent proceeding."<sup>79</sup> This directly contrasts with North Dakota's requirement that a new validation proceeding occur to revoke or modify a submitted will.<sup>80</sup>

### 5. Protective Measures

At least four jurisdictions have recognized the potential for challengers to attack the validity of a will by citing a testator's failure to utilize ante-mortem probate during his lifetime.<sup>81</sup> To counter this threat, these jurisdictions expressly provide that a testator's failure to commence an ante-mortem proceeding during his lifetime cannot be used by future challengers as evidence of lack of capacity or undue influence.<sup>82</sup>

As a final point, the public nature of an ante-mortem proceeding is arguably one of its most significant disadvantages. Not only is the will prematurely exposed to the testator's heirs and devisees, but it is fully available to the prying eyes of the public.<sup>83</sup> Alaska is the only ante-mortem jurisdiction that implements a comprehensive approach with respect to the confidentiality of a proceeding. Specifically, only a notice of filing, summary of formal proceedings, and dispositional order are made available to the public.<sup>84</sup> All other information related to the petition process is kept confidential, and is only accessible by: (1) the petitioner and his or her attorney; (2) interested parties that have appeared in the proceedings or have submitted to the jurisdiction of the court; (3) the judge who took part in the proceeding; (4) court staff for essential authorized purposes; or (5) any other

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

<sup>77</sup> N.D. CENT. CODE ANN. § 30.1-08.1-03 (Westlaw through 2017 Legis. Sess.).

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

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

<sup>80</sup> *Id.* Compare *id.*, with § 30.1-08.1-03.

<sup>81</sup> DEL. CODE ANN. tit. 12, § 1311(d) (2015); N.H. REV. STAT. ANN. § 552:18 (IX) (Westlaw through 2018 Reg. Sess., Ch. 4); N.D. CENT. CODE ANN. § 30.1-08.1-04 (Westlaw through 2017 Legis. Sess.); OHIO REV. CODE ANN. § 2107.081(B) (West 2012).

<sup>82</sup> *Id.*

<sup>83</sup> See Langbein, *supra* note 4, at 77.

<sup>84</sup> ALASKA STAT. ANN. § 13.12.585 (West 2010).

person for good cause shown.<sup>85</sup>

### III. LEGAL AND PRACTICAL CONSIDERATIONS OF ANTE-MORTEM PROBATE IN NEW JERSEY

It is undeniable that ante-mortem probate has its benefits, especially when considering the flexibility it provides to honor a testator's freedom of disposition. The freedom of disposition is a fundamental principal of donative transfer in American law, and endows testators with the "nearly unrestricted right to dispose of their property as they please."<sup>86</sup> Ante-mortem probate enhances this freedom by providing testators with additional opportunities to ensure disposition is effected in accordance with their wishes. If New Jersey is to join the current minority of states, however, certain legal and practical considerations must be recognized.

#### A. *Legal Considerations*

##### 1. Standing of Interested Parties

A primary consideration of ante-mortem probate is an interested party's ability to establish standing. It has long been held in New Jersey that a testator's heirs and devisees are not identifiable until the testator's death.<sup>87</sup> Moreover, "no one may [challenge a will] unless she would be injured by the probate of the will propounded."<sup>88</sup> Because an heir or devisee's interest during the testator's lifetime is a mere expectancy or possibility,<sup>89</sup> there can be no certainty of injury until the will is admitted to probate. So long as the testator is alive and able to modify or revoke the current will, any person's interest is a mere expectancy and thus cannot be certain.<sup>90</sup> This ambiguity is only further compounded by various familial changes likely to occur in a testator's life. A marriage, divorce, birth or adoption of a child, or even the death of a close relative, all have the potential to affect the expectancy interests of heirs-apparent.

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

<sup>86</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 10.1 (AM. LAW INST. 2003).

<sup>87</sup> *In re Buzby's Estate*, 118 A. 835, 836 (N.J. 1922) ("The legal relation, or status, of heirs at law and next of kin arises immediately upon the death of the ancestor . . .").

<sup>88</sup> *In re Myers' Will*, 119 A.2d 129, 133 (N.J. 1955).

<sup>89</sup> *In re Will of Gardner*, 522 A.2d 492, 496 n.5 (N.J. Super. Ct. App. Div. 1987) (noting a devisee's interest is mere expectancy or possibility of inheritance before the testator's death).

<sup>90</sup> David L. Skidmore & Laura E. Morris, *Before the Party's over the Arguments for and Against Pre-Death Will Contests*, PROB. & PROP. 50., Mar.–Apr. 2013, at 51, 55.

## 2. Inconsistencies with the Legal Effect of a Will

The underlying principles of ante-mortem probate are fundamentally inconsistent with the legal nature of a will.<sup>91</sup> Like many jurisdictions, New Jersey has historically recognized the effect of a will to be inoperative until the testator's death.<sup>92</sup> This principle serves the practical purpose of allowing testators to freely plan their dispositions without the interference of lifetime challenges.<sup>93</sup> Alternatively, an ante-mortem probate system accelerates will contests into proceedings that occur before the testator has died.<sup>94</sup> By allowing interested parties to challenge a will during the testator's lifetime, courts would essentially be acknowledging the will as an effective instrument, despite decades of precedent to the contrary.<sup>95</sup>

### B. Practical Considerations

The legal considerations of ante-mortem probate are only further supplemented by an extensive range of practical difficulties arising from the nature of pre-death will validation. While each ante-mortem jurisdiction offers measures to counteract some of these difficulties, no state has yet availed itself of them entirely.

#### 1. Family Disharmony

For the ante-mortem states that have adopted variations of the Contest Model, a significant drawback lies in the proceeding's sacrifice of confidential testamentary disposition during the testator's lifetime.<sup>96</sup> This fact, scholars argue, has the potential to disrupt family harmony, straining the relationship between the testator and presumptive takers who come to discover that their inheritance is unfavorable.<sup>97</sup>

Professor Fink, founder of the Contest Model, agreed with this sentiment in his proposal, but ultimately questioned whether such disharmony was any more apparent than in a post-mortem contest.<sup>98</sup> While

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<sup>91</sup> *Id.* at 52.

<sup>92</sup> See *Salvemini v. Giblin*, 130 A.2d 842, 843 (N.J. 1957) (holding a will cannot operate in a testator's lifetime); *Miller v. Reich*, 34 A.2d 143, 145 (N.J. Ch. 1943) ("A will, however, becomes effective as of the time of the death of the testatrix, and its operative effect is regulated by the law existing at that time."); *In re Will of Reilly*, 493 A.2d 32, 35 (N.J. Super. Ct. App. Div. 1985) ("[A] will ordinarily is ambulatory and speaks only as of the death of the testator.").

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

<sup>94</sup> See generally *infra* Part II.A.

<sup>95</sup> *Skidmore & Morris*, *supra* note 90, at 51 (citing *In re Veazey's Will*, 85 A. 176, 177–78 (N.J. 1912)).

<sup>96</sup> Gerry W. Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, 23 ACTEC Notes 83, 88 (1997), <http://perma.cc/QP49-LETR>.

<sup>97</sup> Langbein, *supra* note 4, at 73.

<sup>98</sup> Fink, *supra* note 19, at 289.

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plausible, Fink too broadly generalizes the unique implications of family disharmony in the ante-mortem setting. While family disharmony can arise before or after the testator's death, its occurrence during the testator's lifetime is particularly detrimental. In death, the testator can avoid any anguish of familial tension caused by his or her bequests. Alternatively, ante-mortem probate forces such tribulations into the testator's lifetime. The testator must not only endure the disharmony that would have arisen among heirs in the post-mortem context, but is additionally exposed to the direct resentment of interested parties. Thus, states must be wary not to generalize conceptions of family disharmony in the ante-mortem setting, and instead should consider how best to mitigate these unique implications.

Alternatively, Susan Thatch opines that states prohibiting ante-mortem probate for reasons of family disharmony is "seemingly paternalistic" and denies testators the flexibility of a "valuable estate-planning tool."<sup>99</sup> One can see how this conclusion might be reached: such a prohibition dubiously presumes that testators are unable to bear any strain on familial relationships, and thus should be barred from ante-mortem probate entirely. As opposed to Professor Fink's broader view, Thatch's claim is arguably narrow in that it overlooks the substantial implications of family disharmony in favor of ante-mortem probate's benefits. Although prohibiting ante-mortem probate solely for reasons of family disharmony indeed seems paternalistic, states should not necessarily disregard its effects altogether. Instead, states should evaluate and mitigate the effects of family disharmony as equally as any obstacle. Overlooking family disharmony and instead focusing only on the benefits of ante-mortem probate would be a disservice to testators and interested parties alike; familial tensions that could have been avoided by creative legislation are ignored as a result. Thus, while family disharmony should not be dispositive in a state's decision to adopt ante-mortem probate, its effects should be fairly considered to provide the most efficient model for both individuals and courts.

## 2. Size of Estate at Death

It is not unlikely that a testator could die with a minimal amount of property in his estate, or even nothing at all.<sup>100</sup> If a testator dies with nothing to distribute, any proceedings initiated to validate the will during his lifetime are rendered unnecessary.<sup>101</sup> "If the testator, will contestants, and the court invest resources on a lifetime will contest, and the testator subsequently fails to leave an estate worth fighting about, then public and private funds would

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<sup>99</sup> Thatch, *supra* note 15, at 354.

<sup>100</sup> Skidmore & Morris, *supra* note 90, at 55.

<sup>101</sup> *Id.*

be wasted.”<sup>102</sup> Under the Contest Model, this dilemma is especially burdensome on presumptive takers, as they must bear the costs of any challenge.<sup>103</sup>

### 3. Judicial Resources

Perhaps the most common threat of pre-death will validation is the strain that it could place on judicial resources.<sup>104</sup> Because testators reserve the right to revoke or amend any will validated through ante-mortem probate, there is no limitation on how often such a proceeding could be initiated.<sup>105</sup> While Professor Langbein predicts that testators using ante-mortem probate would rarely wish to revoke or modify their validated wills,<sup>106</sup> it is hardly unforeseeable that even a modest number of testators could bring multiple proceedings that would not have occurred under a standard probate system. While no overwhelming authority exists to emphasize the severity of such abuse, the fact that testators *have* the ability to bring multiple proceedings is nonetheless an unnecessary and avoidable risk.

While repeated contests brought under multiple proceedings seem less likely to occur,<sup>107</sup> the testator’s abuse of judicial resources (whether or not intentional) could nonetheless severely limit a court’s efficiency. In this sense, Langbein’s suggestion that testators be obligated to initiate each proceeding with the assistance of counsel would help to limit excessive amendments or revocations with respect to a validated will.<sup>108</sup> That said, there are certainly legitimate reasons as to why a testator might need to update his validated will on multiple occasions. In such cases, Professor Fink suggests a statute allowing minor changes that would not affect a ruling of testamentary capacity or undue influence.<sup>109</sup>

### 4. Notice

Even if a testator is able to validate his will in a proceeding, the binding nature of any resulting judgment is only applicable to those parties who receive proper notice.<sup>110</sup> In cases where interested parties receive defective

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<sup>102</sup> *Id.*

<sup>103</sup> See Fellows, *supra* note 4, at 1073.

<sup>104</sup> Thatch, *supra* note 15, at 346.

<sup>105</sup> *Id.*

<sup>106</sup> Langbein, *supra* note 4, at 81.

<sup>107</sup> See Fink, *supra* note 19, at 290 (“[C]oncepts of collateral estoppel coupled with the grant of summary judgment would prevent repeated trials when no new facts were disclosed.”).

<sup>108</sup> Langbein, *supra* note 4, at 78.

<sup>109</sup> Fink, *supra* note 19, at 277.

<sup>110</sup> See *supra* Part II.B.

notice, or none at all, the risk of a post-death will contest remains significant.<sup>111</sup> Thus, under a model requiring notice, the effectiveness of a proceeding depends largely upon the testator's ability to not only keep track of those individuals whom he wishes to devise property, but also any intestate successors whom he does not consider, especially where there has been a birth or death after the proceeding.<sup>112</sup> Under New Jersey's current probate system, a variety of beneficiaries not contemplated by the testator are protected by omitted child and anti-lapse statutes.<sup>113</sup> In the case of ante-mortem probate, however, these measures would not protect the testator from the claims of such unknown beneficiaries if they did not receive notice of the original proceeding.

#### 5. Testator Migration

It is unclear whether the binding nature of a validity declaration would retain its effect if the testator relocated to a state that did not offer ante-mortem probate.<sup>114</sup> Comparable precedent exists, however, to resolve such a conflict. For instance, New Jersey courts have held that where testators migrate from community property states to separate property states, "the law of the place of the domicile of the acquiring spouse at the time of the acquisition governs the determination of whether the acquired property is separate or community."<sup>115</sup> In a similar manner, a court could defer to the law of the testator's domicile in cases of migration.

#### 6. Inference of Invalidity

A final point on the legal concerns of ante-mortem probate include litigious threats that may present themselves if not carefully addressed during legislative consideration. Where a state offers some process of will validation during the lifetime of a testator, and the testator fails to utilize such a process, potential challengers may be able to assert an inference of invalidity during the probate process. While the burden of proof is always on the challenger of a duly executed will,<sup>116</sup> a testator's failure to validate his or her will when the process was available may serve as fodder for litigation. As discussed previously, states such as Delaware have avoided this pitfall by explicitly denying as evidence of invalidity that ante-mortem probate was

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<sup>111</sup> Skidmore & Morris, *supra* note 90, at 52; Press Release, N.Y.C. B. Ass'n, *supra* note 104.

<sup>112</sup> Skidmore & Morris, *supra* note 90; Press Release, N.Y.C. B. Ass'n, *supra* note 104.

<sup>113</sup> N.J. STAT. ANN. § 3B:5-16 (2005); N.J. STAT. ANN. § 3B:3-35 (2005).

<sup>114</sup> N.J. STAT. ANN. § 3B:5-16 (2005); N.J. STAT. ANN. § 3B:3-35 (2005).

<sup>115</sup> *In re Unanue*, 710 A.2d 1036, 1039 (N.J. Super. Ct. App. Div. 1998) (citing *United States v. ITT Consumer Fin. Corp.*, 816 F.2d 487, 490-491 n.7 (9th Cir.1987)); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 259 (AM. LAW INST. 1971).

<sup>116</sup> *See, e.g., In re Estate of Stockdale*, 953 A.2d 454, 470 (2008).

not used.<sup>117</sup>

#### IV. A WORKABLE MODEL FOR NEW JERSEY

The State of New Jersey has yet to adopt a model of ante-mortem probate. Rather, the State employs post-mortem probate which considers mental capacity and undue influence only after the testator's death.<sup>118</sup> If New Jersey is to join the minority states and pursue a course of legislation adopting ante-mortem probate, it should do so by incorporating the strongest aspects of other state laws while at the same time mitigating the effects of the implications outlined above.

Susan Thatch's comment offers valuable insight pertinent to New Jersey's adoption of an ante-mortem scheme, but leaves the framework of a suitable model open to discussion.<sup>119</sup> Combining Thatch's considerations with the model frameworks presented by legal scholars, a wealth of information exists to begin proposal of a model specifically tailored to New Jersey.

##### A. *Petition*

New Jersey's first major consideration in adopting ante-mortem probate should be the petition process through which a testator may initiate a proceeding. To have standing to file a petition, current states require that the testator be domiciled in the state or, at the very least, own real property in the state.<sup>120</sup> Like Delaware, New Jersey should permit only testators that are domiciled in the state to take advantage of pre-death will validation.<sup>121</sup>

On one hand, the obvious drawback to this proposal is the fact that a testator owning real property in New Jersey, but residing in another ante-mortem jurisdiction, could never fully validate his will without the requirement of an ancillary proceeding in New Jersey. This would allow interested parties, otherwise bound by the determination of the domicile state, to challenge the disposition of the New Jersey real property. On the other hand, the primary benefit of this proposal would serve to lessen an influx of ante-mortem proceedings brought by testators who do not reside in the state. This could help to reduce any potential strain on judicial resources, allowing the court to focus on matters strictly relating to New Jersey, rather than attending to ancillary ante-mortem proceedings involving wills from other jurisdictions.

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<sup>117</sup> DEL. CODE ANN. tit. 12, § 1311(d) (West 2015).

<sup>118</sup> See Thatch, *supra* note 15, at 347; N.J. CT. R. 4:80-1.

<sup>119</sup> See generally Thatch, *supra* note 15.

<sup>120</sup> See *supra* Part II.B.

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

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While disallowed in some jurisdictions, a testator's guardian, conservator, or attorney-in-fact should be permitted to commence the proceeding on behalf of a testator who is physically incapable of doing so himself.<sup>122</sup> Where a guardian's presence is required, it is likely that a testator's mental and/or physical state may become the basis for capacity and undue influence challenges. To protect against such challenges, and to ensure certainty in the testator's dispositions, a guardian's ability to initiate a proceeding on behalf of the testator is crucial.

Finally, consistent with Alaska's requirements, the petition should include signed statements by the petitioner affirming the contemporariness of the will, its compliance with execution formalities, and a general statement that the testator is familiar with its contents.<sup>123</sup> Imposing such a thorough standard will help to reduce potential challenges of fraud, which can be brought by interested parties regardless of the binding nature of a pre-death will validation.<sup>124</sup>

#### B. Notice

The next major element in initiating an ante-mortem probate proceeding is deciding upon whom, if at all, notice should be served. In determining whether interested parties should receive notice, the Contest and Administrative models are in direct tension.<sup>125</sup> All of the ante-mortem probate states offer variations of the Contest Model.<sup>126</sup> As stated, the Contest Model requires interested parties to be named in the proceeding, during which the contents of the will are disclosed.<sup>127</sup> This lack of confidentiality has been considered the model's largest flaw, especially because of its potential to strain family relationships.<sup>128</sup> Nonetheless, notice served under the Contest Model is the most preferable option in that it ensures finality in the proceeding.<sup>129</sup>

Alternatively, some scholars have advocated the no-notice style of the Administrative Model as an ideal way to mitigate the concerns of public disclosure and confidentiality.<sup>130</sup> This proposal, however, fails to address

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<sup>122</sup> This is not to be confused with a testator who lacks the capacity to create or amend a will, in which case a guardian could not utilize ante-mortem probate to validate the testator's wishes. See generally *Casternovia v. Casternovia*, 197 A.2d 406, 409–10 (N.J. Super. Ct. App. Div. 1964).

<sup>123</sup> ALASKA STAT. ANN. § 13.12.545 (West 2010).

<sup>124</sup> Fellows, *supra* note 4, at 1082.

<sup>125</sup> See *supra* Part II.A.

<sup>126</sup> See *supra* Part II.B.

<sup>127</sup> Fink, *supra* note 19, at 290.

<sup>128</sup> Fellows, *supra* note 4, at 1073.

<sup>129</sup> Beyer, *supra* note 96, at 83, 86.

<sup>130</sup> Arango, *supra* note 13, at 808; Lord-Halvorson, *supra* note 4, at 544.

the increased risk that a lack of notice would contribute to an erroneous finding of validity.<sup>131</sup> The Administrative Model “subverts the goal of improving fact-finding during living probate because it precludes interested parties who possess relevant information” from participating in the process.<sup>132</sup> As a result, the risk of a court upholding an invalid will under this model is significantly higher. Additionally, the no-notice approach has no better chance in deterring family disharmony; parties who are questioned by a guardian ad litem are likely to become indignant when a testator refuses to reveal the contents of his will.<sup>133</sup> Thus, to promote finality and ensure that invalid wills are not upheld, New Jersey should require interested parties to be given notice of the proceeding.

If notice is to be required, the inquiry then turns on who may be entitled to receive it. Like New Hampshire, interested persons should include the petitioner’s spouse, heirs, devisees under the will, appointed executors, the director of any charitable trust that is a devisee, and any other persons whom the court would deem interested parties if the petitioner died on the date of filing.<sup>134</sup> This broad definition of interested persons must exist for two reasons. First, by requiring notice to as many interested parties as possible, the testator can ensure that the binding effect of a declaratory judgment will not be overridden by a forgotten challenger. This will not only benefit the testator, but will add to the finality of a proceeding, thus sparing the court from having to hear another challenge even though it issued a valid ruling. Second, and for the same reasons the Administrative Model fails, a broad requirement of notice will better serve to uncover all the facts and circumstances necessary to the court’s decision.

The final proposal for notice is arguably the most dramatic, and entails how parties may issue a challenge. A majority of ante-mortem jurisdictions impose a “filing statute,” which requires the testator to petition the court and initiate the action whether or not there is an actual challenge.<sup>135</sup> Delaware, on the other hand, provides for a “notice statute,” whereby interested parties are given a time sensitive notices and may bring challenges of their own volition.<sup>136</sup> In making its determination, New Jersey should decide in favor of adopting a “notice statute” similar to Delaware’s. By putting the onus on the challenger to come forward, the court is relieved of excessive or frivolous claims. On the other hand, some practitioners believe that requiring interested parties to initiate the action, rather than respond to one, imposes

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<sup>131</sup> Fellows, *supra* note 4, at 1081.

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

<sup>133</sup> Fellows, *supra* note 4, at 1077.

<sup>134</sup> N.H. REV. STAT. ANN. § 552:18(III) (West 2014).

<sup>135</sup> See *supra* Part II.B.; Lehman, *supra* note 66.

<sup>136</sup> See *supra* Part II.B.; Lehman, *supra* note 66.

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too great a burden.<sup>137</sup> Though a viable contention, placing the burden on challengers is more consistent with honoring freedom of disposition; testators can more easily control the disposition of their property without the impediment of weak or meritless claims. Because a “notice statute” does not afford challengers with the same ease of access as a “filing statute,” challengers are forced to evaluate the strength of their claims and weigh the overall costs and benefits of bringing suit. Thus, a “notice statute” would provide a filter of sorts against claims that would not otherwise be brought and for this reason should be incorporated in future ante-mortem probate statutes.

### C. Hearing

With respect to the proceeding itself, there are several elements New Jersey should consider adopting from other states, and some that should be disregarded altogether. As Professor Langbein’s Conservatorship Model suggests, an ante-mortem proceeding should be conducted without a jury.<sup>138</sup> Not only is the evidence in an ante-mortem proceeding readily available and better left to an experienced judge, but statistics also suggest that juries tend to favor the circumstances of challengers.<sup>139</sup> This implication has strong potential to upset the balance of power between the testator and interested parties.<sup>140</sup> Therefore, the fact-finding stage of the proceeding is better left to the impartiality of a judge, as Langbein suggests.<sup>141</sup>

Like Nevada, New Jersey should also limit the scope of the proceeding to matters of validity and refrain from allowing courts to issue rulings on construction.<sup>142</sup> Legal scholars have noted that while the availability of the testator may help to resolve construction related ambiguities, there is no certainty that a court may nonetheless overlook them and issue a valid judgment.<sup>143</sup> Next, and more importantly, the efficiency of the proceeding risks being undercut by a lengthy and complicated resolution of ambiguities that “may never be relevant or important.”<sup>144</sup> As such, the power to issue a binding ruling on matters of construction seems too comprehensive a measure, and should be avoided to prevent additional points of conflict.

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<sup>137</sup> See e.g., Langbein, *supra* note 4, at 75.

<sup>138</sup> *Id.* at 80–81.

<sup>139</sup> See Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607 (1987).

<sup>140</sup> See *id.*

<sup>141</sup> Langbein, *supra* note 4, at 81.

<sup>142</sup> NEV. REV. STAT. § 30.040(2) (West 2009).

<sup>143</sup> Fellows, *supra* note 4, at 1069.

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

Another important factor not explicitly recognized by all ante-mortem jurisdictions is the effect that a proceeding could have on a spousal elective share. Like Delaware, New Jersey should clearly express that a spouse's right to an elective share is not influenced by a pre-death declaration of validity.<sup>145</sup> Under certain conditions, a spouse may bring a claim in New Jersey for one-third of a deceased spouse's estate, regardless of whether the surviving spouse received an inheritance under the will.<sup>146</sup> While the function of ante-mortem probate is to assess and honor a testator's wishes, such wishes are irrelevant for purposes of determining the spousal right to an elective share. As such, the superiority of the elective share should be expressly reaffirmed in any adoption of ante-mortem probate legislation.

New Jersey must also be cognizant of challengers attempting to argue an inference of invalidity in cases where a testator failed to institute an ante-mortem proceeding. A strict prohibition like the ones imposed by Ohio, Delaware, and New Hampshire should be utilized as a preventative measure.<sup>147</sup>

#### D. *Revocation and Modification*

Once a court has determined the will's validity, it should be sealed and stored in the offices of the probate court. As explained earlier, states differ as to how a will may be revoked or modified once the proceeding has concluded.<sup>148</sup> In deciding its approach, New Jersey should take the middle ground between North Dakota's requirement that another proceeding be instituted, and other states which allow the will to be revoked or modified at the testator's discretion.<sup>149</sup> That is, a testator should be required to revoke or amend the will by submitting a notice to the court.<sup>150</sup> If the testator's ability to do so is impaired by illness, immobility, or substantial inconvenience, flexibility should be afforded to allow a representative or guardian to act on the testator's behalf.

Requiring notice to the court not only lessens the types of modification restraints imposed by North Dakota, but also eliminates the possibility of "unfounded or erroneous allegations that the . . . will has been revoked[,] without imposing another costly and time consuming procedure . . ." <sup>151</sup> That said, this requirement could not be absolute. Should the testator

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<sup>145</sup> See DEL. CODE ANN. tit. 12, § 1311(f) (West 2015). Although Delaware is the only jurisdiction to expressly state that a spousal elective share is unaffected, there is no indication whatsoever that the result would be different in any of the other ante-mortem probate states.

<sup>146</sup> N.J. STAT. ANN. § 3B:8-1 (West 2006).

<sup>147</sup> See *supra* Part II.B.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> Alexander & Pearson, *supra* note 47, at 119.

<sup>151</sup> Fellows, *supra* note 4, 1079–80.

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perform an otherwise valid revocation in his or her lifetime without submitting notice, it would be contrary to widely accepted principles to bar revocation on the basis that notice to the court was not submitted. Accordingly, a rebuttable presumption must exist to uphold the notice requirement without excluding principles of modification and revocation. Thus, absent notice to the court, a will validated through ante-mortem probate should be presumed not revoked, unless rebutted with clear and convincing evidence that the testator performed a valid revocation in accordance with established state law and/or the Uniform Probate Code.

Because any revocations or modifications are made subsequent to a proceeding, they are generally not entitled to the binding effect of an ante-mortem judgment. In his proposal of the Contest Model, Professor Fink noted the potential for excessive proceedings instituted by the testator to retain the binding effect of validity for minor changes.<sup>152</sup> Fink addressed this issue by suggesting that states create a statute allowing certain minor changes to be made, without losing the binding effect of validity.<sup>153</sup> This could be another useful way to reduce the burden on judicial resources. Such changes could include changing an executor, adding contingent beneficiaries, or updating the contact information of certain parties.

Finally, to avoid negating the binding effect of a judgment in its entirety, New Jersey should also consider adopting the language of New Hampshire's testator-friendly provision.<sup>154</sup> That is, a previously validated will should remain binding to the extent it has not been modified or revoked by the testator.<sup>155</sup> Such a provision would salvage the binding effect as to portions of the will unchanged by the testator, thus allowing the testator to more freely dispose of his property without the fear of wholly forfeiting the binding effect of a judgment.

#### E. *Legal Fees*

New Jersey is unique in its approach to legal fees with respect to challenges issued in a probate matter. Where probate is granted and a contestant has reasonable cause for contesting the validity of a will, the court may direct the contestant's attorney fees to be paid out of the estate.<sup>156</sup> This requirement is in direct contention with the Contest Model's imposition of costs on presumptive takers, though it bears strong resemblance to the cost

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<sup>152</sup> Fink, *supra* note 19, at 277.

<sup>153</sup> *Id.*

<sup>154</sup> *See supra* Part II.B.

<sup>155</sup> *Id.*

<sup>156</sup> N.J. CT. R. 4:42-9; 7A N.J. PRACTICE, WILLS AND ADMINISTRATION § 1548 (rev. 3d ed. year).

shifting directive of the Conservatorship Model.<sup>157</sup>

While New Jersey might be tempted to lean towards the same cost shifting requirement for ante-mortem proceedings, doing so would provide too great an advantage to contestants. This policy would force testators into an inherently unfair dilemma; either initiate a proceeding and pay the costs of any reasonable challenges, or refrain from utilizing ante-mortem probate altogether. Unlike a post-mortem proceeding where only a beneficiary's interest may be reduced, the testator in an ante-mortem proceeding is still very much alive and will be directly impacted by an assessment of contestant fees. This is an obvious conflict for both policy reasons and standards of general fairness. As such, New Jersey should strongly consider altering its contestant fee rule to account for these unique circumstances, should ante-mortem probate be adopted.

#### V. CONCLUSION

Even the most carefully drawn will may invariably face retaliation from parties who feel they have been disfavored. Though individuals have many tools at their disposal to mitigate post-mortem contests, a testator's ability to face these challenges in person is unparalleled. Not only does ante-mortem probate allow the best evidence (the testator's own testimony of his wishes) to come forward, but it also reinforces the value society places on the freedom of disposition. While nationwide codification is arguably still in its infancy, the current minority states offer enough of a resource for New Jersey to evaluate the positives and negatives of ante-mortem probate and make an informed decision based on the considerations that have been set forth. While there are "no dead giveaways" with respect to a perfect model, the benefits of ante-mortem probate are undeniable and therefore should be readily placed at a testator's disposal.

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<sup>157</sup> See *supra* Part II.A.2.