

**A PATCHWORK QUILT: THE CASE FOR
COLLAGE CONTEST MODEL ANTE-
MORTEM PROBATE IN LIGHT OF
ALASKA'S RECENT ANTE-MORTEM
LEGISLATION**

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The polestar of estate planning is a testator's intent. Will validation proceedings in ninety-two percent of states, however, necessarily exclude evidence from the mouth of the testator, for the testator must be deceased. In this Note Mr. Heyman rekindles the debate about whether a testator should be allowed to validate a will before death. Mr. Heyman debunks many of the concerns surrounding ante-mortem probate and delves into a century of various models offered by advisory committees, academics, and state legislatures. Ultimately, Mr. Heyman offers the collage contest model as a solution for state adoption. The collage contest model fuses together the most clear, effective, and least burdensome portions of current ante-mortem legislation, and in doing so, capitalizes on lucid hindsight of past criticisms and opportunities for improvement.

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I. Introduction

Mere months before real estate magnate and Indiana Pacers co-owner Mel Simon died in September 2009, Simon endorsed momentous changes to his will—a will controlling an estate valued between \$1 billion and \$2 billion.¹ Bren Simon, the Simon Property Group founder's wife, had her inheritance augmented from one-third to one-half of the estate, while the children from Mel Simon's prior marriage—Deborah Simon, David Simon, and Cynthia Simon-Skjodt—were removed from the will.² The changes brought a previously simmering inheritance dispute to a boil, as Deborah Simon sued her stepmother, alleging that Bren Simon unduly influenced Mel Simon's changes.³

In an attempt to dilute post-mortem challenges to a will's validity, a testator's intent, or a testator's mental capacity,⁴ a state may consider passing ante-mortem probate legislation.⁵ While such legislation may take many forms, it generally "enables a testator, prior to his death, to adjudicate several legal and factual issues that might [otherwise] be raised in a post-mortem will contest."⁶

In light of Alaska's June 2010 adoption of ante-mortem legislation,⁷ this Note rekindles the living probate debate and encourages states to adopt a "collage version" of contest model ante-mortem probate legislation.⁸ Part II begins with an explanation of post-mortem probate and ante-mortem probate before chronologically surveying significant attempts to pass living probate legislation. Part III analyzes each attempt to pass ante-mortem probate legislation by inspecting the form and language of each proposed legislation. Unlike any past

1. Robert Frank, *Billionaire's Will Sparks Family Feud*, WALL ST. J. BLOG: WEALTH REP. (Jan. 25, 2010), <http://blogs.wsj.com/wealth/2010/01/25/billionaires-will-sparks-family-feud/>.

2. *Id.*

3. *Id.* (noting that Mel Simon allegedly suffered from dementia).

4. Cf. David F. Cavers, *Ante Mortem Probate: An Essay in Preventative Law*, 1 U. CHI. L. REV. 440, 441 (1934) (citing an oral address given by Henry W. Taft of the New York Bar, in which Taft stated, "Modern testators may say that death becomes for them 'armed with a new terror.'").

5. Ante-mortem probate is also called living probate or pre-mortem probate.

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

7. 2010 Alaska Sess. Laws 64.

8. Alaska is the fourth state with active ante-mortem probate legislation. See *id.* The three other states are Arkansas (1979), North Dakota (1977), and Ohio (1979). ARK. CODE ANN. § 28-40-202 (2004); N.D. CENT. CODE § 30.1-08.1-01 (2010); OHIO REV. CODE ANN. § 2107.081 (2007).

published article or note, this Note considers a 2009 New York Bar committee debate of ante-mortem probate, as well as recent Alaskan legislation. Ultimately, Part IV recommends weaving specific portions of North Dakota's, Arkansas's, Ohio's, and Alaska's ante-mortem probate provisions together to reach a collage version of contest model ante-mortem probate.

II. Background

A. The Post-Mortem Probate System

The post-mortem probate system is the primary system of probate in the United States.⁹ Professors Aloysius Leopold and Gerry Beyer summarized the post-mortem system 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.¹⁰

Because ante-mortem probate legislation fundamentally alters post-mortem probate systems, a keen awareness of criticisms of post-mortem probate is vital to designing effective improvements. Three primary criticisms prevail: (1) post-mortem probate incentivizes "[s]purious [w]ill [c]ontests," as "disinherited heirs might try to prove lack of mental capacity, fraud, or improper influence where none existed";¹¹ (2) expenses and caution may not be enough to ensure that a decedent's intent is upheld;¹² (3) "evidentiary problems" abound,¹³ as "post-mortem adjudication of capacity insures by definition that the

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

10. *Id.*

11. Tracy Costello-Norris, *Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?*, 9 CONN. PROB. L.J. 327, 333 (1995).

12. *Id.* at 334 (noting that technical errors, such as flawed attestation, may lead previously devised property to intestate succession or subject it to a judge's determination of fairness and intent).

13. *Id.*

best evidence of capacity—the testator himself—will be placed beyond the reach of the court.”¹⁴

B. The Ante-Mortem Probate System

Ante-mortem probate may be a misnomer; like post-mortem probate, the actual probating of a will occurs after a testator’s death.¹⁵ The timing of will validation is the key difference, as post-mortem probate allows for post-death validation, while ante-mortem probate allows for pre-death validation.¹⁶ Thus, a more accurate title to ante-mortem probate is ante-mortem will validation.

Nevertheless, when ante-mortem probate is adopted, it coexists with post-mortem probate. In this sense, it supplements post-mortem probate systems. Put differently:

[Ante-mortem] probate is addressed to the predicament of a testator who fears that after his death his estate may be subjected to a will contest in which it will be alleged that he lacked the mental capacity to execute his will. [Ante-mortem probate] legislation would permit the testator to bring suit against potential contestants in order to obtain an adjudication regarding his capacity while he is alive and best able to inform the determination.¹⁷

Ante-mortem probate is derived from the civil law system in Europe, where a “quasi-judicial officer” who could not adjudicate a testator’s capacity was “obliged to satisfy himself of the testator’s capacity as a precondition for receiving or transcribing the testament.”¹⁸ The officer’s authentication gave the will “great credibility,”¹⁹ thus making invalidation much more difficult.²⁰

The first American state to adopt ante-mortem probate legislation was Michigan in 1883.²¹ The Michigan Supreme Court overturned the statute in 1885 on constitutionality grounds,²² as it “enabled the testator to avoid the rights of a spouse and child,”²³ and “it

14. John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 67 (1978).

15. Charles F. Gibbs & Bryan Corrigan, *Pre-Mortem Probate*, TRUSTS & ESTATES, Aug. 1, 2007, at 28.

16. *Id.*

17. Langbein, *supra* note 14, at 63.

18. *Id.* at 65.

19. Leopold & Beyer, *supra* note 9, at 151.

20. Langbein, *supra* note 14, at 65–66.

21. 1883 Mich. Pub. Acts 17 *invalidated by* Lloyd v. Wayne Circuit Judge, 56 Mich. 236 (1885).

22. *See generally* Lloyd v. Wayne Circuit Judge, 56 Mich. 236 (1885).

23. Leopold & Beyer, *supra* note 9, at 153. Under intestacy laws, a spouse or child may be entitled to a certain share of a decedent’s property, and thus, they

failed to provide for finality of judgment."²⁴ Commentator Howard Fink later noted a third flaw: the statute assumed the testator had honestly and comprehensively included interested parties.²⁵

In 1910, a quasi-living probate statute was enacted for some Native American tribes, allowing "an Indian whose will disposed of certain allotments held under trust by the government to have the Secretary of the Interior approve his will prior to death."²⁶ The Secretary of the Interior had a duty to investigate the Indian's mental competency and require a reason for which any natural heirs were cut out of the will.²⁷

The ante-mortem probate debate rekindled in the 1930s when a special committee tasked by the National Conference of Commissioners on Uniform State Laws devised an ante-mortem probate act.²⁸ The act required testators to submit to the clerk of the court a will under seal with a list of witnesses and a petition with the testator's wife and prospective heirs named as defendants.²⁹ If issuance of service of process to defendants failed, notification by publication ensued.³⁰ After a will was admitted to living probate in an ensuing hearing, the testator was "conclusive[ly] presumed to have executed the writing as and for his will as of the said filing, without fear, fraud, importunity or undue influence, and with a full knowledge of its contents, and that he was of sound mind and memory and full testamentary capacity"³¹

would have an interest in the outcome of an ante-mortem probate proceeding. See UNIF. PROBATE CODE § 2-102 (1993).

24. Leopold & Beyer, *supra* note 9, at 153.

25. Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 269 (1976) (noting that "some parties named by the testator might have no legally discernable interest in the proceedings . . . ; others who would have such interest might not be named and therefore not bound by the proceedings.").

26. Leopold & Beyer, *supra* note 9, at 159–60.

27. *Id.* at 160.

28. *Id.* at 161. See generally Clarence E. Martin et al., *Report of Special Committee on Uniform Act to Establish Wills Before Death of Testator*, in 42d CONFERENCE HANDBOOK OF THE NAT'L CONFERENCE ON UNIF. STATE LAWS AND PROCEEDINGS OF THE ANNUAL MEETING 463 (1932).

29. *First Tentative Draft of Uniform Act to Establish Wills Before Death of Testator*, in 42d CONFERENCE HANDBOOK OF THE NAT'L CONFERENCE ON UNIF. STATE LAWS AND PROCEEDINGS OF THE ANNUAL MEETING 465–66 (1932).

30. *Id.* at 467.

31. *Id.* at 466.

While the attempt to rekindle the debate on living probate has led to multiple analytical commentaries,³² the special committee's recommendation failed to gain traction.³³ Indeed, the committee's work was undermined before devising recommendations; "since there was then no law on the subject on the books of any state, the Commissioners [were] in the position of advocating new legislation rather than reforming existing legislation."³⁴

The pre-mortem probate battle arose in the Texas judiciary in 1952, in *Cowan v. Cowan*.³⁵ In *Cowan*, a mother's son requested that a court declare the mother's will invalid because she allegedly lacked testamentary capacity to execute her will.³⁶ The Court noted that a justiciable issue did not exist because the testator was not dead and, technically, there was no will.³⁷

Subsequently, in the 1970s, three states—North Dakota, Arkansas, and Ohio—adopted ante-mortem probate statutes, analyzed *infra* Section III.B. Over the next three decades, no state adopted ante-mortem legislation even though a number of ante-mortem probate articles ensued.³⁸ Notions of ante-mortem probate were again resisted on January 15, 2009, when the New York City Bar Committee on Trusts, Estates and Surrogate's Courts (Committee) recommended that the New York State Legislature not adopt any form of ante-mortem probate statute.³⁹ The Committee first highlighted the ad-

32. Cavers, *supra* note 4, at 440; Harry Kutscher, *Living Probate*, 21 A.B.A. J. 427, 427 (1935); Daniel H. Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571, 571 (1933).

33. Leopold & Beyer, *supra* note 9, at 162.

34. Fink, *supra* note 25, at 289.

35. For an extended discussion on pre-mortem probate case law, see Gerard G. Brew et al., *Heirs in Waiting? Pre-Mortem Probate Disputes in the Context of Guardianships, Conservatorships, Powers of Attorney, and Family Business Entities*, 2008 A.B.A. SEC. TRUST & ESTATE L. PLANNING SYMPOSIUM 1, available at <http://meetings.abanet.org/webupload/commupload/RP570000/newsletters/PreMortemProbateDisputes.pdf>.

36. *Cowan v. Cowan*, 254 S.W.2d 862, 862–63 (Tex. Civ. App. 1952).

37. *Id.* at 865.

38. See generally 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); Costello-Norris, *supra* note 11; Fellows, *supra* note 6; Dara Greene, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. DISP. RESOL. 663 (1999); Langbein, *supra* note 14; Leopold & Beyer, *supra* note 9.

39. N.Y.C. BAR, COMM. ON TRUSTS, ESTATES & SURROG. CT., COMMENT ON PERMITTING PRE-MORTEM PROBATE IN THE STATE OF NEW YORK 3 (2009), available at http://www.nycbar.org/pdf/report/Pre_Mortem_Probate.pdf ("The Committee . . . opposes any change in New York law to permit pre-mortem probate in any type of judicial proceeding, whether in the form of an actual probate proceeding,

vantages of ante-mortem probate: (1) the testator is alive to defend challenges, (2) intent need not be reconstructed, (3) a decedent's errors can be fixed before death, and (4) testators are given peace of mind.⁴⁰ Nevertheless, the Committee found that the following disadvantages outweighed the advantages: (1) probate proceedings squander resources, (2) a testator's estate can be squandered after an ante-mortem probate proceeding, (3) issues of proper notice may arise, (4) valid objections will be muted for fear of affronting the testator, (5) post-mortem will challenges may still occur, and (6) an ante-mortem probate order may not be portable between states.⁴¹ In addition to the disadvantages of ante-mortem probate, the Committee indicated that alternatives—"videotaped wills, self-proving affidavits, testamentary substitutes, and *in terrorem* clauses"—would suffice.⁴²

III. Analysis

To better understand why New York and other states' efforts to pass ante-mortem probate have largely failed, it is necessary to understand the various academic models of proposed ante-mortem probate statutes. After the models are analyzed, this Note delves into four states' active ante-mortem probate statutes—North Dakota,⁴³ Arkansas,⁴⁴ Ohio,⁴⁵ and most recently, Alaska⁴⁶—and pays particular attention to the statutory language and actual effectiveness in an attempt to understand which wording creates effective legislation.

A. Models of Ante-Mortem Probate Legislation

Academics have offered four models of living probate: the contest model, the conservatorship model, the administrative model, and the mediation model.⁴⁷ The following analysis introduces each model and considers the benefits and burdens of each approach.

an action for a declaratory judgment that a will is valid, or any other type of proceeding.”)

40. *Id.* at 2.

41. *Id.*

42. *Id.*

43. N.D. CENT. CODE § 30.1-08.1-01 (2010).

44. ARK. CODE ANN. § 28-40-202 (2004).

45. OHIO REV. CODE ANN. § 2107.081 (2007).

46. 2010 Alaska Sess. Laws 64.

47. See generally Alexander & Pearson, *supra* note 38 (discussing the administrative model); Fink, *supra* note 25 (discussing the contest model); Greene, *supra* note 38 (discussing the mediation model); Langbein, *supra* note 14 (discussing the

1. CONTEST MODEL

The contest model, offered by Professor Richard Fink in 1976, “envisions an adversarial proceeding that results in a declaratory judgment on issues of testamentary capacity, compliance with execution formalities, and undue influence.”⁴⁸ Legatees and expecting heirs are included in the ante-mortem proceeding.⁴⁹ The key difference between post-mortem proceedings and contest model ante-mortem proceedings is timing.⁵⁰

The contest model provides a strong evidentiary benefit.⁵¹ Professor John Langbein noted:

[The contest model] does indeed respond to the need of the proponents of the will. The ante-mortem will contest permits a fundamental enrichment of the proofs. The testator whose condition is in issue can appear in court for the trier to observe and to examine. He becomes available for medical examination, and he will have the opportunity to guide cross-examination and rebuttal of opposing witnesses. The attraction of this solution is manifest. It appears at once simple and apt. Since the problem is one of timing—undue postponement of the contest—the remedy is to accelerate the contest into the testator’s lifetime.⁵²

Such an adversarial proceeding has not evaded criticism. First, critics have stated that the confidentiality of the proceeding is problematic, as the contest model proceedings would make a testator’s devises public.⁵³ Because family members may learn about less-than-favorable dispositions, family harmony may be jeopardized.⁵⁴ Second, despite an inheritance subject to dissipation, a testator’s beneficiaries bear the costs of the ante-mortem proceeding.⁵⁵ While they must survive the testator, they also risk a situation in which the testator will consume or otherwise dispose of the property before his death.⁵⁶ Third, the effect of a proceeding may be constitutionally

conservatorship model); Leopold & Beyer, *supra* note 9 (discussing the history of ante-mortem legislation and assessing the various models enacted).

48. Fellows, *supra* note 6, at 1073.

49. *Id.*

50. *Id.*

51. Langbein, *supra* note 14, at 72–73.

52. *Id.*

53. Fellows, *supra* note 6, at 1073.

54. *Id.* For information addressing family harmony in a post-mortem probate setting, see Judith McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER’S ADVISOR 61 (2006).

55. Fellows, *supra* note 6, at 1073.

56. *Id.*

questionable if notice is only published in the state of adjudication.⁵⁷ Fourth, beneficiaries may withhold will challenges because such challenges may lead to disinheritance.⁵⁸ Fifth, the dilemma of challenging a will may arise multiple times when testators write codicils.⁵⁹

2. CONSERVATORSHIP MODEL

In response to the problems associated with the contest model, Professor John Langbein created the conservatorship model in 1978.⁶⁰ The conservatorship model uses a court-appointed conservator in a declaratory judgment proceeding.⁶¹ The conservator represents any person whose interests may suffer from a validation of the will, while the testator shoulders the conservator's expenses.⁶²

Professor Langbein highlighted a few benefits of the conservatorship model: (1) it keeps the advantages of the contest model,⁶³ (2) unborn legatees are represented,⁶⁴ and (3) family harmony is preserved.⁶⁵ Further, the conservatorship model contains a cost deterrent that disincentivizes "inconsiderate use" of the living probate system.⁶⁶ Langbein believes that by requiring the testator to pay the reasonable costs of the guardian ad litem, he has dispelled reservations that judicial resources would be misspent.⁶⁷

Multiple disadvantages have been proffered against the conservatorship model. First, the procedure may be disincentivized⁶⁸ by the high cost of appointing multiple conservators.⁶⁹ Second, family harmony will not be preserved, because the conservator must rely on information provided by the legatees.⁷⁰ Professor Fellows noted:

57. Costello-Norris, *supra* note 11, at 336.

58. Fellows, *supra* note 6, at 1073–74.

59. *Id.* at 1074.

60. Langbein, *supra* note 14, at 63 ("I shall characterize the procedure called for in the North Dakota act and in similar proposals as the Contest Model of living probate, in distinction to a Conservatorship Model that I shall advocate to be the better way.").

61. Costello-Norris, *supra* note 11, at 336.

62. Fellows, *supra* note 6, at 1074.

63. Langbein, *supra* note 14, at 85.

64. *Id.* at 79.

65. *Id.* at 85.

66. *Id.* at 79.

67. *Id.*

68. Costello-Norris, *supra* note 11, at 336–37.

69. Costello-Norris's position is a precarious one, as Langbein himself *intended* to limit the scope of ante-mortem probate, and Costello-Norris, who writes in opposition to Langbein's model, is simultaneously arguing *against* its limited application.

70. Fellows, *supra* note 6, at 1075.

[The conservator] will obtain documents from [the presumptive takers], take their depositions, and investigate their suspicions. The testator and others who want the will upheld are very likely to recognize the sources of information used to challenge the will. Although Langbein envisions an informal proceeding in which the evidence would be presented in a non-adversarial context without the use of a jury, the proceeding remains adjudicative, and opposing testimony will still be presented. In essence, the proceeding is both adversarial and potentially acrimonious.

Finally, the cost of providing notice may dilute the efficacy of the scheme.⁷² Professors Gregory Alexander and Albert Pearson noted that the court will incur greater costs in avoiding underinclusive notice.⁷³ Further, notice will also distract the court from the ante-mortem validation procedure.⁷⁴

3. ADMINISTRATIVE MODEL

Professors Gregory Alexander and Albert Pearson offered the administrative model in 1979 in response to Professor Langbein's conservatorship model.⁷⁵ Tracy Costello-Norris summarized the administrative model as follows: "The procedure begins by petitioning the court for a determination on the validity of the testator's will. This ex parte proceeding is done in camera which provides privacy because the will does not become a matter of public record."⁷⁶ Like Langbein's conservatorship model, a guardian ad litem is appointed.⁷⁷ Distinctively, no notice is provided to prospective heirs because the authors contend that no constitutional right to notice exists.⁷⁸

Professors Leopold and Beyer highlighted two primary benefits of the administrative model: (1) greater confidentiality and (2) a lesser notice requirement.⁷⁹ They note that the will does not become public record, and all court functions are in camera—granting the privacy

71. *Id.*

72. Alexander & Pearson, *supra* note 38, at 95.

73. *Id.*

74. *Id.*

75. *Id.* at 93 ("In an earlier critique, one of us criticized the Langbein [conservatorship model] of ante-mortem probate for incorporating specific features that many testators are likely to find unattractive. We shall review and develop those points so that we may develop an ante-mortem probate scheme that most improves upon existing methods of wealth transmission.").

76. Costello-Norris, *supra* note 11, at 337.

77. *Id.*

78. *Id.* See generally Alexander & Pearson, *supra* note 38 (addressing due process considerations of ante-mortem probate).

79. Leopold & Beyer, *supra* note 9, at 168–69.

lacking in the prior models.⁸⁰ As a result, harm to family harmony is allegedly lessened.⁸¹

Professor Fellows questioned the efficacy of the administrative model, claiming that the administrative model still disrupts family harmony because of the curiosity arising from in camera proceedings.⁸² Although Professors Alexander and Pearson have not suggested this, the testator may waive the no-notice and restrictive procedures.⁸³ If so, the secret procedure becomes elective and the testator's failure to waive confidentiality may fuel unpleasant suspicions among family members.⁸⁴

Additionally, it is uncertain whether an administrative model judgment is binding. First, the reduced notice requirements may make critics uneasy.⁸⁵ Commentator Dara Greene noted, "If the model is seen as binding upon the parties, then the specter of the notice requirement raises its ugly head."⁸⁶ Further, there are valid questions about a judgment's state-to-state portability.⁸⁷ The issue was noted by Greene who believes that issues of finality may arise when the model is used in a nonbinding state.⁸⁸

4. GENERAL CRITICISMS OF CONTEST, CONSERVATORSHIP, AND ADMINISTRATIVE PROBATE MODELS

Some commentators are dissatisfied with all three proposed models of living probate.⁸⁹ Professor Fellows noted that all the models fail to enhance available evidence and ensure dispositions.⁹⁰ Additionally, "all three proposals make the testator pay a high price for these ephemeral advantages. Finally, and perhaps most important, all three proposals are unfair to presumptive takers, and under the Administrative Model that unfairness may rise to the level of a constitutional due process violation."⁹¹

80. *Id.*

81. Alexander & Pearson, *supra* note 38, at 120–21.

82. Fellows, *supra* note 6, at 1077.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1080.

90. *Id.*

91. *Id.*

5. THE MEDIATION MODEL

In 1999, Dara Greene offered a fourth alternative: the mediation model.⁹² In this model, the testator petitions the court for a declaratory judgment.⁹³ Following the petition, the court could order all interested parties and potential heirs to mediation.⁹⁴ All parties involved in the mediation—not just the testator—share the cost of mediation.⁹⁵ If the parties cannot agree upon a mediator, the parties defer to the probate court's determination of a mediator.⁹⁶ Through mediation, the parties discuss the testamentary intent and validity of the will.⁹⁷

Greene emphasized a few benefits of the mediation model. First, mediation proceedings are not public.⁹⁸ Second, mediation proceedings are incentivized by reduced costs to the testator.⁹⁹ Third, notice of process is not an issue.¹⁰⁰ Fourth, relationships are enhanced because mediation places emphasis on communication and amicable resolution of issues.¹⁰¹ Finally, the non-binding mediation process has finality because the issues will be resolved.¹⁰²

Greene also identified some of the shortcomings of her model. First, mediation decisions are not binding.¹⁰³ Second, in some scenarios, a mediator may not be extensively versed in probate law.¹⁰⁴ Third, Greene may be putting too much trust in the arbitrator's ability to keep heated emotions in check. In addition, the mediation model does not maintain as strict confidentiality as the administrative model because the only group of people barred from accessing the information is the non-related, non-expecting-heir public.¹⁰⁵ Essentially, Greene only disallows the uninterested people from seeing the will. Finally, Greene noted that "the focus should be on maintaining the

92. See generally Greene, *supra* note 38.

93. *Id.* at 683.

94. *Id.* at 683–84.

95. *Id.* at 684.

96. *Id.*

97. *Id.* at 683–86.

98. *Id.* at 684.

99. *Id.*

100. *Id.* at 685.

101. Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 198 (1999). For further discussion of the benefits of mediation on will contests, see generally Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397 (1997).

102. Greene, *supra* note 38, at 685.

103. *Id.*

104. See *id.* at 684.

105. Cf. Alexander & Pearson, *supra* note 38, at 115–16.

needs of the family,"¹⁰⁶ when following the testator's intent is the North Star guiding estate planning.

B. State Models of Ante-Mortem Probate

The four states with valid ante-mortem legislation uniformly utilize contest model ante-mortem probate.¹⁰⁷ Nevertheless, each version of the employed contest model differs, as a state may differ on petition, notice, or revocation, among other requirements. The following analysis delineates the differences between each state's contest model ante-mortem probate system.

1. NORTH DAKOTA

i. Statutory Analysis The North Dakota ante-mortem statute was the earliest promulgated statute among the states with active ante-mortem probate schemes. The state allows courts to make declaratory judgments on a variety of issues: "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."¹⁰⁸ The statute requires the testators to list all named beneficiaries and current intestate successors as parties to the proceeding, and each party is "deemed possessed of inchoate property rights."¹⁰⁹ Service of process adheres to the North Dakota Rules of Civil Procedure.¹¹⁰ Facts found during the proceeding are inadmissible as evidence in any proceeding not pertaining to will validation.¹¹¹ If deemed valid, the will is declared adjudicated and the court keeps it on file.¹¹² The court's judgment binds the parties in North Dakota, and the will cannot be revoked by merely creating a codicil; a new proceeding must be instituted, and the appropriate parties to the old and new proceedings must be included.¹¹³

106. Greene, *supra* note 38, at 684.

107. 2010 Alaska Sess. Laws 64; ARK. CODE ANN. § 28-40-202 (2004); N.D. CENT. CODE § 30.1-08.1-01 (2008); OHIO REV. CODE ANN. § 2107.081 (2007).

108. N.D. CENT. CODE § 30.1-08.1-01 (2008).

109. *Id.* § 30.1-08.1-02.

110. *Id.*

111. *Id.* § 30.1-08.1-04.

112. *Id.* § 30.1-08.1-03.

113. *Id.*

ii. *Probate Scheme in Practice* In 1990, Professors Leopold and Beyer reviewed the uses of the statute and reached the following conclusions: (1) the statute is rarely used and (2) when used, the proceedings progress smoothly.¹¹⁴ They noted, "There is some evidence that post-mortem contests have been avoided because the testator chose to use the Act. There have been few, if any, contests of ante-mortem probate and no reported cases were located which dealt with ante-mortem probate issues."¹¹⁵ In the thirty years since Professors Leopold and Beyer's article, the only published North Dakota state case referencing its ante-mortem probate statute is *Bartusch v. Hager*, and even *Bartusch* does not challenge the validity of the statute.¹¹⁶

2. OHIO

i. *Statutory Analysis* While Ohio also follows a contest model scheme, its statutory scheme is much more intricately delineated than North Dakota's.¹¹⁷ Like North Dakota's statute, testators petition the court for a declaratory judgment.¹¹⁸ Testators must file in their county of domicile or the county in which any of their property is located if domiciled out of state.¹¹⁹ Petitions, due to the county probate court, include all will beneficiaries and potential intestate successors.¹²⁰ Adverse parties cannot construe a testator's failure to initiate ante-mortem probate proceedings as evidence of improper execution, lack of testamentary capacity, or freedom from undue influence.¹²¹ Ohio's legislation also provides much more elaborate service of process rules than North Dakota, as Ohio allows certified mail or publication under specific scenarios.¹²²

A will may be declared valid if it was properly executed and the testator was free from undue influence and had testamentary capacity.¹²³ A declaration of validity is sealed with the will and filed with the court; although a testator may remove the will and thereby nullify

114. Leopold & Beyer, *supra* note 9, at 171.

115. *Id.*

116. See generally *Bartusch v. Hager*, 623 N.W.2d 720 (N.D. 2001).

117. Compare OHIO REV. CODE ANN. §§ 2107.081–2107.085 (2007), with N.D. CENT. CODE §§ 30.1-08.1-01–30.1-08.1-04 (2010).

118. OHIO REV. CODE ANN. § 2107.081(A) (2007).

119. *Id.*

120. *Id.*

121. *Id.* § 2107.081(B).

122. *Id.* § 2107.082.

123. *Id.* § 2107.084(B).

the declaration.¹²⁴ The testator may revoke or modify the valid will by submitting a petition to the court to repeat the aforementioned process or, inter alia, may submit a later will or codicil.¹²⁵ A court's declaration of a valid will "is not subject to collateral attack," unless it is by a person who should have been included, but was not, as a party in the validation hearing.¹²⁶ Like North Dakota's statute, the fact findings may only be used in the proceeding to determine validity of a will.¹²⁷ Failure to use the ante-mortem statute cannot be construed against the testator.¹²⁸

ii. *Probate Scheme in Practice* Although the Ohio ante-mortem probate scheme seems more legally tested than North Dakota's, its use may still be relatively low.¹²⁹ Professors Leopold and Beyer noted that "[i]n the first eight years of its availability, approximately eight ante-mortem probate cases were filed in Franklin County, one of Ohio's largest counties."¹³⁰ They further noted, "[t]he statute appears to be used most frequently when an attorney has prepared a will for a person who is under guardianship or who is elderly."¹³¹ When the statute is used, applications are rarely denied, for clients are pre-screened for competence.¹³²

Nevertheless, the statute has been applied in Ohio's state court system. In *Cooper v. Woodard*, the appellant sought to dismiss an ante-mortem judgment on the grounds that Ohio's ante-mortem legislation was unconstitutional.¹³³ The court noted that there was nothing in the record to rebut the presumption that the ante-mortem probate statute is constitutional.¹³⁴ Additionally, the court emphasized that the sole purpose of the proceeding was to adjudicate a will's validity.¹³⁵ Since

124. *Id.*

125. *Id.* § 2107.084(A)–(D) (inviting readers to revoke a will under any method allowed in § 2107.33).

126. *Id.* §§ 2107.084(E), 2107.71(B).

127. *Id.* § 2107.085.

128. *Id.*

129. See Leopold & Beyer, *supra* note 9, at 173–74.

130. *Id.*

131. *Id.* at 174.

132. *Id.*

133. *Cooper v. Woodard*, No. CA-1724, 1983 Ohio App. LEXIS 13477, at *2 (Ohio Ct. App. July 28, 1983).

134. *Id.* at *3–4.

135. *Id.* at *3.

Cooper, Ohio's ante-mortem probate legislation has been repeatedly applied by state courts.¹³⁶

3. ARKANSAS

i. Statutory Analysis The Arkansas Ante-Mortem Probate Act of 1979¹³⁷ allows testators to seek declaratory judgments in the circuit court of the county in which part of a devised estate is located.¹³⁸ The parties, who are deemed to hold inchoate property rights,¹³⁹ include named beneficiaries and intestate¹⁴⁰ successors.¹⁴¹ The statute delineates that the service of process is identical to any action for a declaratory judgment.¹⁴² To obtain a declaratory judgment, the court must find "that the will was properly executed, that the testator had the requisite testamentary capacity and [had] freedom from undue influence at the time of execution, and that the will is otherwise valid" and then place the will on file.¹⁴³ Validated wills can be superseded by codicils.¹⁴⁴ Although Arkansas promulgated nearly the same statute as North Dakota, the two schemes are not mirror images.¹⁴⁵ Commentators Aloysius Leopold and Gerry Beyer noted three primary differences: "[f]irst, the Arkansas Act is more broadly phrased to permit declaratory judgments concerning the validity of the will rather than limiting the action to specific aspects of the will's validity"; second, Arkansas is more liberal in revocation of validated wills, as codicils need not be validated to supersede validated wills; third, fact findings from ante-mortem proceedings may be used in later proceedings.¹⁴⁶

ii. Probate Scheme in Practice Professors Leopold and Beyer stated that Arkansas's ante-mortem probate statutes are "virtually ig-

136. See *Sull v. Kaim*, 172 Ohio App. 3d 297, 301 (Ohio Ct. App. 2007); see also *Hartman v. Hurley*, No. 04CA9, 2005 Ohio App. LEXIS 1510, at *2-3 (Ohio Ct. App. Apr. 5, 2005); *Aunspaw v. Gunnoe*, No. 18361, 2001 Ohio App. LEXIS 3934, at *6 (Ohio Ct. App. July 28, 1983).

137. ARK. CODE ANN. § 28-40-202 (2004).

138. *Id.* § 28-40-202(a).

139. *Id.* § 28-40-202(c).

140. Intestate successors are persons receiving dispositions from a decedent who dies without a will. BLACK'S LAW DICTIONARY 1569 (9th ed. 2009).

141. ARK. CODE ANN. § 28-40-202(b) (2004).

142. *Id.* § 28-40-202(d).

143. *Id.* § 28-40-203(a).

144. *Id.*

145. Compare *id.* § 28-40-202(d), with N.D. CENT. CODE § 30.1-08.1-03 (2010).

146. Leopold & Beyer, *supra* note 9, at 174-75.

nored.¹⁴⁷ By 1990, no reported cases addressed ante-mortem probate issues.¹⁴⁸ Since publication of their article, no cases have been published on this issue.

4. ALASKA

i. Statutory Analysis On June 9, 2010, Alaska became the fourth state with valid ante-mortem legislation.¹⁴⁹ Unlike prior state statutes, Alaska allows ante-mortem validation of wills and trusts.¹⁵⁰ Unlike other states, Alaskan ante-mortem will validation proceedings may be initiated by a testator, representative, or an interested party who has obtained the testator's consent.¹⁵¹ The statute delineates that will validation proceedings occur in the judicial district of the testator's domicile, or if not domiciled in the state, then any judicial district.¹⁵² Petitions for declarations of validity must include statements that (1) a copy of the will is filed with the court;¹⁵³ (2) the will is in writing;¹⁵⁴ signed by testator;¹⁵⁵ executed with free will,¹⁵⁶ testamentary capacity,¹⁵⁷ and testamentary intent;¹⁵⁸ and lacking undue influence and duress;¹⁵⁹ (3) the will is not the result of fraud or mistake;¹⁶⁰ (4) the will has not been modified or revoked;¹⁶¹ and (5) the testator is familiar with the will's contents.¹⁶² The petition must also contain "names and addresses of the testator, the testator's spouse, the testator's children, the testator's heirs, the personal representatives nominated in the will, and the devisees under the will."¹⁶³ Once the court fixes the time and

147. *Id.* at 175.

148. *Id.*

149. See 2010 Alaska Sess. Laws 64; see also ARK. CODE ANN. § 28-40-202 (2004); N.D. CENT. CODE § 30.1-08.1-01 (2010); OHIO REV. CODE ANN. § 2107.081 (2007).

150. Compare N.D. CENT. CODE § 30.1-08.1-01 (2010), and OHIO REV. CODE ANN. § 2107.081 (2007), and ARK. CODE ANN. § 28-40-202 (2004), with 2010 Alaska Sess. Laws 64.

151. ALASKA STAT. § 13.12.530 (2010).

152. *Id.* § 13.12.540(a).

153. *Id.* § 13.12.545(1).

154. *Id.* § 13.12.545(2).

155. *Id.* § 13.12.545(3) (noting the will may also be "in the testator's name by another person in the testator's conscious presence and at the testator's direction").

156. *Id.* § 13.12.545(8).

157. *Id.* § 13.12.545(7).

158. *Id.* § 13.12.545(6).

159. *Id.* § 13.12.545(8).

160. *Id.* § 13.12.545(9).

161. *Id.* § 13.12.545(12).

162. *Id.* § 13.12.545(13).

163. *Id.* § 13.12.545(10).

place for the hearing,¹⁶⁴ the statute requires the petition to notify the testator and the testator's spouse, children, intestate successors, personal representatives, and devisees.¹⁶⁵ The petitioner "has the burden of establishing prima facie proof of the execution of the will," whereas 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."¹⁶⁶ If a court declares the will valid, it "has full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request."¹⁶⁷ The declaration binds all people—born or unborn, known or unknown.¹⁶⁸ After the court's declaration, a testator is not barred from executing a new will or codicil.¹⁶⁹ The statute also differentiates between confidential and non-confidential information—a "notice of the filing of a petition," a "summary of all formal proceedings," and the "dispositional order or a modification or termination of a dispositional order" are publicly available, whereas all other information is confidential to all persons other than those specifically excepted by the statute.¹⁷⁰ It remains to be seen whether this version of ante-mortem probate legislation will be effective in practice.

IV. Resolution

The forty-six states that use a strictly post-mortem probate system should adopt a collage version—a patchwork of language taken from various state ante-mortem probate statutes—of contest model ante-mortem probate. In reaching such a resolution, this Note answers a few pivotal questions: why use ante-mortem probate at all; more specifically, why use contest model instead of the conservator, administrative, or mediation model; and most specifically, why use a quilt of state ante-mortem probate statutes?

A. The Case for Ante-Mortem Probate

First, justifications of the use of ante-mortem probate trump the reasons for strictly post-mortem probate systems. As the Third Cir-

164. *Id.* § 13.12.565(a) (noting notice must adhere to *id.* § 13.06.110).

165. *Id.* § 13.12.565(a)-(b).

166. *Id.* § 13.12.570.

167. *Id.* § 13.12.555.

168. *Id.* § 13.12.560.

169. *Id.* § 13.12.575.

170. *Id.* § 13.12.560.

cuit stated in *Estate of Zentmayer v. Commissioner*, “[i]t is now hornbook law . . . that the testator’s intent is the polestar and must prevail”¹⁷¹ Further, Professors Leopold and Beyer noted that “[t]he primary function of testamentary law is to maintain efficient procedures for the transfer of the testator’s property at the time of his death in accordance with his intentions.”¹⁷² Indeed, ante-mortem probate allows the testator to “obtain an adjudication regarding his capacity while he [or she] is alive and best able to inform the determination”—precisely in line with the polestar of testamentary law.¹⁷³ The ability to obtain the living intent of the testator allows states to retain the best possible evidence of a testator’s intent.

Despite this evidentiary advantage, ante-mortem probate has received criticism, albeit overstated criticism. In particular, Professor Fellows challenged the finality of ante-mortem probate and overemphasized doubts regarding the wills of the testator.¹⁷⁴ In particular, Fellows is concerned because “presumptive takers can challenge the court-approved will by alleging either fraud on the court *during* the living probate proceeding or fraud or undue influence *after* the proceeding that prevented the testator from revoking his will.”¹⁷⁵ Then, she noted that uncertainty will remain “because other states may refuse to recognize the living probate decree of the forum state.”¹⁷⁶

Fellows’ concern about the finality of judgment, while valid, is likely insignificant in legal practice. Not one example of such fraud on the court or undue influence preventing revocation has come forth in a published judicial opinion in the three states in over thirty years.¹⁷⁷ Additionally, an ante-mortem probate judgment is likely final. As Professor John Langbein noted:

The testator who uses living probate procedure will almost always be making his true “last will.” Further, if the need for modification does become inevitable, he and his lawyer are likely to understand that the circumstances that made the use of living probate advisable in the first place are persisting, and that the

171. *Estate of Zentmayer v. Commissioner*, 336 F.2d 488, 492 (Pa. 1964) (quoting *In re Estate of Burleigh*, 175 A.2d 838, 839 (Pa. 1961)); see also *Offner v. United States*, No. 2:07-CV-3439, 2008 U.S. Dist. LEXIS 10063, *4 (W.D. Pa. 2008).

172. Leopold & Beyer, *supra* note 9, at 136 (citing Cavers, *supra* note 4, at 440).

173. Langbein, *supra* note 14, at 63.

174. Fellows, *supra* note 6, at 1067.

175. *Id.* at 1082.

176. *Id.* at 1081–82.

177. See Leopold & Beyer, *supra* note 9, at 170–75.

procedure¹⁷⁸ ought to be used again despite the nuisance and expense.

Fellows' interstate portability concern, while also a valid critique, is overstated. A few reasons dilute Fellows' portability argument. First, 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.¹⁷⁹ Second, even if a state judgment were not binding, it may carry substantial weight for a probate judge. Such an outcome would be analogous to historical roots of ante-mortem probate, where the European civil law system utilized quasi-judicial notaries to approve the mental capacity of testators.¹⁸⁰ Professors Leopold and Beyer noted, "Once the notary authenticate[d] [a] will, it [was] given great credibility rendering it difficult to set aside in post-mortem proceedings."¹⁸¹ Likewise, prior ante-mortem rulings in the United States would be difficult to entirely set aside.

Further, ante-mortem probate imposes an infinitesimal burden on state court systems. As Professors Leopold and Beyer noted, ante-mortem probate proceedings are uncommon: North Dakota's legislation was "rarely used" after a dozen years, but when used "the proceedings appear to progress smoothly."¹⁸² Ohio's legislation was deemed "infrequently used," and challenges are not common, likely because lawyers pre-screen for competent clients.¹⁸³ Arkansas's legislation "seems to be virtually ignored."¹⁸⁴ Thus, the academic speculation has significant bark, yet only a negligible bite.

The relatively infrequent current use of ante-mortem probate statutes seems partially a factor of the legal markets in which the statutes are enacted. The legal markets, based on state population, in Alaska (686,293), Arkansas (2,855,390), Ohio (11,485,910), and North Dakota (641,481), account for only five percent of the 2008 U.S. Census Bureau population estimates (304,059,724).¹⁸⁵ Predictably, Ohio,

178. Langbein, *supra* note 14, at 81.

179. See Leopold & Beyer, *supra* note 9, at 170–75.

180. *Id.* at 150–51.

181. *Id.*

182. *Id.* at 171.

183. *Id.* at 173–74.

184. *Id.* at 175.

185. 2008 Population Estimates—United States—Places and County Subdivisions with 100,000 or More Population by State, U.S. CENSUS BUREAU, http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=D&-ds_name=D&-lang=en&-mt_name=PEP_2008_EST_GCTT1_US24 (last visited Oct. 7, 2011).

whose population dwarfs the other states, has seen more use of its ante-mortem probate statutes than the other states.¹⁸⁶ It only seems likely that the application of ante-mortem probate statutes would increase in much larger markets—California (36,756,666), Texas (24,326,974), or New York (19,490,297).¹⁸⁷

Critics of ante-mortem probate may point to *in terrorem* clauses and joint ownership with right of survivorship as substitutes for ante-mortem probate,¹⁸⁸ but such an argument is not valid. *In terrorem* clauses are used to disincentivize will contests by reducing the inheritance share of a challenger.¹⁸⁹ “The technical validity of a will is not established by *in terrorem* clauses. In fact, their use in a will may produce further claims of lack of capacity.”¹⁹⁰ Thus, *in terrorem* clauses provide different testamentary security than ante-mortem proceedings.¹⁹¹ Similarly, joint ownership does not substitute for ante-mortem probate. Professors Leopold and Beyer claimed:

With joint ownership, each owner has the ability to control his or her proportionate share of the asset. Many individuals prefer to retain total control of the property until death and are unwilling to divest themselves of those rights prematurely. Even if the original owner agreed to relinquish his or her rights, the entire transaction, including both its gift and survivorship aspects, could be questioned by dissatisfied heirs or will beneficiaries on various grounds such as lack of capacity and undue influence.¹⁹²

Finally, concerns about family disruption weigh in favor of implementing ante-mortem probate legislation. Fellows noted, “Family harmony is seriously threatened [in ante-mortem probate] since family members learn of unfavorable dispositions before the testator’s death.”¹⁹³ In actuality, disruption caused by ante-mortem probate is hardly distinguishable from disruption caused by post-mortem proceedings. Professor Fink dealt with the issue directly:

Would [ante-mortem probate] disrupt families? Certainly. But any more so than would a will contest after the testator has died and can no longer defend his sanity or correct any mistakes in executing the will? Society’s allowance of disposition by will presumes that a person has a right to choose his beneficiaries.¹⁹⁴

186. Leopold & Beyer, *supra* note 9, at 169–75.

187. 2008 Population Estimates, *supra* note 185.

188. N.Y.C. BAR, *supra* note 39.

189. Leopold & Beyer, *supra* note 9, at 146–47.

190. *Id.*

191. *Id.*

192. *Id.* at 143–44.

193. Fellows, *supra* note 6, at 1073.

194. Fink, *supra* note 25, at 289.

The only difference, regarding family disruption, between post-mortem challenges and ante-mortem challenges is whether the testator is alive. And, indeed, this difference weighs in favor of ante-mortem probate, because the testator—the holder of the key evidence: intent—presumptively accepted the prospect of an ante-mortem will challenge. By choosing an ante-mortem probate proceeding, the testator impliedly proclaims, “If anyone is going to challenge my will, challenge it while I am alive so that I may defend it, notwithstanding any family disruption.” Ante-mortem probate is an opportunity for the testator to disincentivize frivolous will challenges, as potential inheritors will hesitate to challenge the capacity of a man or woman who may later change the challenger’s inheritance. Notably, this feature also mitigates concerns about increased burdens on state court systems.

B. The Case for Contest Model Ante-Mortem Probate

Many of the benefits and drawbacks of general ante-mortem probate may also apply to specific forms of ante-mortem probate. To avoid overlap, this section focuses on two tasks: (1) rebutting unique criticisms of the contest model and (2) explaining why the contest model is superior to the conservatorship, administrative, and mediation models.

1. UNIQUE CRITICISMS OF CONTEST MODEL ANTE-MORTEM PROBATE REBUTTED

The first immaterial criticism of the contest model is that it is incorrectly assumed that people who would challenge the will post-mortem would bring ante-mortem challenges as well.¹⁹⁵ Professor John Langbein hypothesized that more heirs apparent may bring ante-mortem challenges than post-mortem challenges:

[T]here are situations in which the heirs apparent would contest as defendants a will that they would not have contested as objectors to probate: the testator’s suit may be an irreparable blow to family harmony, and persons who would¹⁹⁶ have been loath to start trouble may then decide to finish it . . .

195. Langbein, *supra* note 14, at 73 (“To speak of accelerating the contest is to assume that the testator’s fear would necessarily materialize, that the contest will be brought against his estate post-mortem if he is not allowed to bring it ante-mortem. But, of course, that will not always be true. Any anticipatory remedy scheme involves some overprediction among the user class.”).

196. *Id.*

As a result, Professor Langbein contends the increased caseload on the court system will be a social cost that must be subsidized by the taxpayers.¹⁹⁷

While it is not feasible to ask ante-mortem will challengers to see whether the early proceedings prompted a will contest, it is reasonable to note that Professor Langbein's hypothesis does not mesh with later findings of Professors Leopold and Beyer, who had the benefit of over ten years' hindsight.¹⁹⁸ Such increased caseload was simply not found in 1990,¹⁹⁹ and has not been found through recent legal database searches.

A second immaterial criticism is that the contest model does not account for unborn heirs.²⁰⁰ The criticism, while inarguably valid, is highly unlikely to be relevant in practice. For such a scenario to be relevant, the following events would need to occur: (1) the parent of an unborn heir apparent challenges a will, (2) the parent dies during or before the challenge concludes, (3) the testator decides not to adjust the will—under the assumption the will *actually allows* inheritance to transfer to the child—after the parent passes away.²⁰¹ Thus, such a concern is academically fascinating, but like the “fertile octogenarian” scenario in the rule against perpetuities,²⁰² exceedingly improbable.

2. THE CONTEST MODEL'S SUPERIORITY

In response to the perceived weaknesses of the contest model, academics offered a few solutions: the conservatorship model and the administrative model.²⁰³ Nevertheless, the contest model is a superior

197. *Id.* (“In these cases the overprediction incident to the ante-mortem contest format will increase the total stock of will contests, and that must be reckoned as a social cost. The courts must process the extra caseload, and under the American system of minimal recovery of court costs from the litigants, the taxpayers will subsidize it.”).

198. Leopold & Beyer, *supra* note 9, at 171–75.

199. *Id.*

200. Langbein, *supra* note 14, at 74.

201. Notably, such a scenario is addressed in Alaska's contest model ante-mortem probate. See ALASKA STAT. § 13.12.560 (2010) (“A person, whether . . . known, unknown, born, or not born at the time of a proceeding . . . is bound by the declaration . . .”). Such a scenario is also addressed by the proposed collage version in the Resolution section.

202. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 892 (7th ed. 2005) (calling the “fertile octogenarian” problem a “fantastical character”).

203. Alexander & Pearson, *supra* note 38, at 90 (“In this Article, [the authors] . . . propose a workable scheme of ante-mortem probate that both protects the testamentary plan against strike suits and preserves the confidentiality of the plan during the testator's lifetime.”); see also Langbein, *supra* note 14, at 75 (“The thesis of the present Article is that a reconceptualization of the underlying cause of

solution. The contest model trumps the conservatorship model because the conservatorship will result in unnecessarily expensive proceedings.²⁰⁴ Further, such costs may be all for naught. Professor Fellows claimed:

I doubt that employing a guardian ad litem [in the conservatorship model] will preserve the family harmony threatened by a living probate proceeding. Placing the guardian ad litem as a buffer between the presumptive takers and the testator achieves little . . . Although Langbein envisions an informal proceeding in which the evidence would be presented in a nonadversarial context without the use of a jury, the proceeding remains adjudicative, and opposing testimony will still be presented. In essence, the proceeding is both adversarial and potentially acrimonious.²⁰⁵

Likewise, the administrative model is inferior to the contest model. There is one substantial reason warranting refusal of the administrative model: it is unclear whether the combination of a lack of notice to presumptive takers and the imposition of a binding judgment is constitutionally binding. Commentator Dara Greene noted, "If the model is seen as binding upon the parties, then the specter of the notice requirement raises its ugly head."²⁰⁶ Professor Fellows noted that *Mullane v. Central Hanover Trust Co.*, likely guides the notice requirement:²⁰⁷

[T]he Court held that the state could not eliminate notice by mail for present income beneficiaries even though the statute provided for the appointment of a guardian ad litem to represent absent persons who might have any interest in the income of the trust fund at issue. For holders of more remote interests, the Court varied the form of notice, allowing notice by publication rather than by mail, after balancing the nature of the property interest at stake against the cost and delay in the administration of the common trust fund. From this case, due process seems to require notice and an opportunity to appear. Unlike the proceeding in *Mullane*, presumptive takers cannot appear at the living probate proceeding under the [a]dministrative [m]odel. Also unlike *Mullane*, the guardian ad litem in the [a]dministrative [m]odel acts only as an objective investigator rather than an advocate representing the presumptive takers' interests. The lack of notice and hearing un-

action along the lines of the existing procedure that is used to determine the capacity of the living with respect to their property in protective proceedings would eliminate the defects that have characterized the Contest Model of living probate.").

204. Costello-Norris, *supra* note 11, at 336–37 (noting that the court may need to appoint multiple conservators and "[t]he expense of this procedure is passed on to the testator").

205. Fellows, *supra* note 6, at 1075.

206. Greene, *supra* note 38, at 675.

207. Fellows, *supra* note 6, at 1108–09.

der the [a]dministrative [m]odel²⁰⁸ may therefore violate the due process clause of the Constitution.

Given the relatively small portion of testators who use ante-mortem probate, the mere specter of a due process violation—indeed, a real threat—and the monetary and non-monetary costs associated with a constitutionality challenge are enough to warrant rejection of the administrative model.²⁰⁹ Beyond the due process concerns, Professor Fellows noted that the administrative model would not further family harmony,²¹⁰ despite its claims otherwise.²¹¹

Finally, the contest model is superior to the mediation model. Dara Greene, who proposed the mediation model admits, “The mediator’s decision is not binding, and those unhappy with the final resolution are free to take the matter to court following the process.”²¹² Such a model neglects a key purpose of ante-mortem probate: testator certainty that property dispositions are valid and have full legal effect.²¹³ While Greene’s point about mediation settling most disputes is clear,²¹⁴ the fundamental absence of a binding decision is its Achilles’ heel. Finally, Alaska, which had the benefit of hindsight and availability of many options—including the mediation model—opted for the contest model.

3. PROVISION-BY-PROVISION RECOMMENDATIONS

A recommendation of ante-mortem probate, specifically the contest model, would be incomplete without a recommendation of specific provisions of potential legislation. Each form of contest model legislation differs, as states may differ in the actual processes used to

208. *Id.*

209. For an in-depth analysis of both sides of the due process debate in the administrative model, compare *id.*, with Alexander & Pearson, *supra* note 38, at 93.

210. Fellows, *supra* note 6, at 1077 (noting that “[a]fter interviews by the guardian ad litem, family members will likely grow curious as to the contents of the will”).

211. Alexander & Pearson, *supra* note 38, at 90.

If the testator’s immediate family were removed from the operation of the ante-mortem proceeding, such a procedure would not threaten family harmony and consequently would be more attractive to testators. But when the procedure makes an administrative, nonadversarial determination, the threat of an unseemly spectacle between family members is removed, and the gap in protection against postmortem attack is no longer justified.

Id.

212. Greene, *supra* note 38, at 685.

213. Fink, *supra* note 25, at 265 (noting that clients often ask whether there is “some way absolutely to assure that a testator’s will can be admitted to probate”).

214. Greene, *supra* note 38, at 684.

obtain and revoke an ante-mortem judgment.²¹⁵ Having previously analyzed the various bells and whistles of each state's statutory schemes, this Note recommends weaving specific portions of North Dakota's, Arkansas's, Ohio's, and Alaska's ante-mortem probate provisions together to reach the recommended collage version of contest model ante-mortem probate. The collage version weighs a few primary interests: (1) directness of language, (2) clarity of application, and (3) avoidance of unnecessary formalities (particularly in will revocation). Readers are encouraged to take particular note of the citations in the full text statute, and compare the relevant portions with the various states' statutory schemes listed in full text in the Appendix.

4. COLLAGE VERSION OF CONTEST MODEL ANTE-MORTEM PROBATE

§ 1 – Petition

"A person who executes a will allegedly in conformity with the laws of this state may petition"²¹⁶ the appropriate probate court, under § 2, for a declaratory judgment validating a testator's will. The petition shall contain the following statements:

- (a) a copy of the will has been filed with the court;²¹⁷
- (b) the will is in writing and the testator is familiar with the will's contents;²¹⁸
- (c) the will is signed by the testator, or signed in the testator's name by a person in the testator's conscious presence at the testator's discretion;²¹⁹
- (d) in the case of a witnessed will, the will was signed by at least two individuals, each of whom signed within a reasonable time after witnessing the signing of the will or the testator's acknowledgment of the signature on the will;²²⁰

215. Compare N.D. CENT. CODE §§ 30.1-08.1-01–30.1-08.1-04 (2010), and OHIO REV. CODE ANN. §§ 2107.081–2107.085 (2007), and ARK. CODE ANN. §§ 28-40-201–28-40-204 (2004), with ALASKA STAT. §§ 13.12.530–13.12.590 (2010).

216. OHIO REV. CODE ANN. § 2107.081(A).

217. ALASKA STAT. § 13.12.545(1).

218. *Id.* § 13.12.545(2).

219. *Id.* § 13.12.545(3).

220. *Id.* § 13.12.545(4).

- (e) in case of a holographic will, a statement that the signature and material portions of the will are in the testator's handwriting;²²¹
- (f) the will has not been revoked or modified;²²²
- (g) testator did not execute the will under undue influence or duress;²²³
- (h) testator executed the will with free will, testamentary intent, and not as a result of fraud or mistake;²²⁴
- (i) a list of the names and addresses of testator's spouse or civil partner, children, personal representatives, and all devisees under the will;²²⁵ and
- (j) a list of the names and addresses of all takers under the state intestacy statutes (as far as known or ascertainable with reasonable diligence by the petitioner) as of the date of the § 1 petition's filing.²²⁶

§ 2 – Venue

- (a) If the testator is domiciled in the state at the time of filing a § 1 petition, the testator may only file in the judicial district of domicile.²²⁷
- (b) If the testator is not domiciled in the state at the time of filing a § 1 petition, the testator may only file in a judicial district in which testator owns property.
- (c) If the testator is not domiciled in the state and owns no property in the state, the testator may not file for an ante-mortem proceeding.

§ 3 – Hearing, Service of Process, and Burden of Proof

- (a) After a § 1 petition is filed, the court shall fix a time and place for a hearing.²²⁸

221. *Id.* § 13.12.545(5).

222. *Id.* § 13.12.545(12).

223. *Id.* § 13.12.545(8).

224. *Id.* § 13.12.545(7)–(9).

225. *Id.* § 13.12.545(8).

226. *Id.*

227. *Id.* § 13.12.540(a)(1).

228. *Id.* § 13.12.565(a).

- (b) For the purpose of ante-mortem probate, the beneficiaries and intestate successors shall be deemed possessed of inchoate property rights.²²⁹
- (c) Service of process shall be made in accordance with Rule ___ of the state's Rules of Civil Procedure,²³⁰ and service of process shall be provided to all persons listed under § 1(i) and § 1(j), whether in state or out of state.
- (d) The § 1 petitioner "has the burden of establishing prima facie proof of execution of the will."²³¹ The party opposing the § 1 petition "has the burden of establishing lack of testamentary intent, lack of capacity, existence of undue influence, fraud, duress, mistake, or revocation."²³²

§ 4 – Declaration of Validity

- (a) The court may declare a will valid and "make other findings of fact and conclusions of law that are appropriate under the circumstances."²³³
- (b) After the testator's death, the will has "full legal effect as the instrument of the disposition of the testator's estate and shall be admitted to probate upon request."²³⁴
- (c) The court's declaration of validity shall be placed on file "with the will to which it pertains."²³⁵ The public may access the notice of the filing of a petition and the summary of the formal proceedings.²³⁶ All other information is confidential, and only accessible by:
 - (i) the testator or testator's attorney;²³⁷
 - (ii) the judge hearing or reviewing the matter;²³⁸
 - (iii) interested persons—and their attorneys, guardians, and conservators—who appeared in the validation proceedings;²³⁹

229. ARK. CODE ANN. § 28-40-202 (2004).

230. N.D. CENT. CODE § 30.1-08.1-02 (2010).

231. ALASKA STAT. § 13.12.570 (2010).

232. *Id.*

233. *Id.* § 13.12.555.

234. *Id.*

235. OHIO REV. CODE ANN. § 2107.084(B) (2007).

236. ALASKA STAT. § 13.12.585(a).

237. *Id.* § 13.12.585(b).

238. *Id.*

239. *Id.*

(iv) a member of the court's administrative staff if access is essential for internal administrative purposes;²⁴⁰ or
(v) parties who show good cause.²⁴¹

(d) If a testator removes the file from the court's possession, or modifies or revokes the will—in a manner recognized by this state or any other state—after the court's validation, the declaration of validity no longer has any legal effect.²⁴²

§ 5 – Facts in Subsequent Actions

- (a) The facts found in an ante-mortem proceeding shall not be admissible in any other proceeding, whether ante-mortem or not.²⁴³
- (b) Failure to obtain a declaratory judgment validating one's will prior to death does not constitute evidence of invalid will execution.²⁴⁴

V. Conclusion

Before creating the collage-version of contest model ante-mortem probate, this Note explored the arguments underpinning resistance and support of ante-mortem probate and post-mortem probate, analyzed the benefits and burdens of the four different models of ante-mortem probate, and scrutinized the four currently enacted forms of contest model legislation. The result is clear: ante-mortem probate is an opportunity for states to ensure testamentary intent is followed, the contest model offers the most efficient form of legislation, and the collage version takes the best bells and whistles of each state's enacted legislation and ensures that the resulting legislation carefully balances establishing clear processes for the citizenry and avoiding formalities that distract probate courts from the polestar of estate planning—testamentary intent.

240. *Id.* § 13.12.585(a).

241. *Id.*

242. OHIO REV. CODE ANN. § 2107.084(C) (2007).

243. N.D. CENT. CODE § 30.1-08.1-04 (2010).

244. *Id.*

