Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives

Daniel A. Friedlander

Follow this and additional works at: https://scholarlycommons.law.case.edu/caselrev

Recommended Citation
Available at: https://scholarlycommons.law.case.edu/caselrev/vol32/iss3/7
CONTEMPORARY ANTE-MORTEM STATUTORY FORMULATIONS: OBSERVATIONS AND ALTERNATIVES

Ante-mortem probate is the process of legally determining the validity of a will prior to the testator's death. This Note examines that process in detail, beginning with a discussion of the historical development of the ante-mortem concept. An explanation of the various proposed ante-mortem models is presented next, followed by a critique of the three existing ante-mortem statutes. Following a description of the various non-ante-mortem alternatives, the Note concludes that the best possible formulation is an administrative model ante-mortem statute.

INTRODUCTION

ANTE-MORTEM PROBATE is a procedure that allows a will to be probated before the testator’s death. Three states—Arkansas, North Dakota, and Ohio—have enacted ante-mortem statutes. The purpose of these statutes is to ensure that the testamentary intent of the testator is not defeated by post-mortem litigation, and to reduce the economic and social costs of post-mortem proceedings. In their present declaratory judgment form, however, ante-mortem statutes have not gained widespread acceptance.

The existing ante-mortem statutes are an expensive redundancy in an area of the law already served by proven, practical, and economical methods of ensuring the fulfillment of the testator's will.
tor's intent. Proper estate planning often simplifies the estate to the point that post-mortem litigation is no longer economically practical. Assuming jurisdictional acceptability, refinements such as videotaped wills, self-proved wills, and clauses inserted into the will, can be used to reduce post-mortem litigation.

An additional problem with existing ante-mortem statutes is the use of a declaratory judgment action in a probate proceeding. Probate law is encumbered with antiquated procedures with which courts are reluctant to tamper, as well as numerous presumptions and traditions that resist statutory alteration.

In addition to evaluating present ante-mortem formulations, this Note presents an alternative to existing statutory formulations via an administrative ante-mortem procedure. This model, although dropped from active consideration by the dissolution of the National Conference of Commissioners for Uniform State Laws (NCCUSL) Committee on Ante-Mortem Probate, has several features that make it worth reconsidering. Alternatively, refinements could be incorporated into existing statutes to obviate

---

6. See infra notes 185–93 and accompanying text.
7. For a discussion of the costs associated with probate in the absence of proper estate planning, see Beating the High Cost of Probating a Will, CHANGING TIMES, May 1981, at 45.
8. See infra notes 189–95 and accompanying text.
9. See infra notes 196–202 and accompanying text.
10. See infra notes 203–12 and accompanying text.
11. See infra note 205.
12. See supra note 5.
13. Historically, the English legal system probated a will one of two ways: the solemn form or the common form. Simes, The Function of Will Contests, 44 MICH. L. REV. 503, 505 (1946). In the common form, the will was admitted to probate in an ex parte hearing in which the executor gave his oath to affirm the validity of the will. Consequently, the will could only be challenged after the probate of the estate. Id. at 506. In the solemn form, witnesses testified in support of the will and interested parties were given notice of the proceeding and an opportunity to either support or oppose admission of the will. Id.

The United States adopted the English systems of solemn and common probate on a state-by-state basis—resulting in what one commentator has termed “a totally anomalous legal device.” Id. at 515. While there is substantial precedent for contesting a will during the probate proceedings or after the actual probate of the will, there is no precedent for probating the will in the absence of the normal operative condition for probate—the death of the testator. As Justice Cardozo stated: “[w]hat has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed.” B. CARDozo, THE PARADOXES OF LEGAL SCIENCE 49–50 (1928). The novelty of contemporary ante-mortem statutes, therefore, is an important hurdle to be overcome.

16. See infra notes 245–50 and accompanying text.
the more pressing problems. Ultimately, the failure of existing statutes should not be interpreted as a failure of ante-mortem probate as a concept.

I. POLICY JUSTIFICATIONS FOR ANTE-MORTEM PROBATE

Ante-mortem probate procedures allow the testator to probate his or her will prior to death. A court may then ascertain testamentary intent while the testator is alive, thereby eliminating the need to reconstruct this intent later. To avoid intestacy, technical errors in will construction may be spotted and corrected before death. Problems with testamentary capacity, as well as questions of undue influence, may be resolved by the court while the will’s maker is alive. The result of ante-mortem probate ideally is elimination of many common grounds for potential will contests.

An additional benefit of ante-mortem probate is lawyer accountability—malpractice may be detected while the testator is still alive to bring suit. Court review of the will prior to death, moreover, will identify drafting problems that even experienced practitioners might overlook, such as questions involving the rule against perpetuities. Ante-mortem probate, therefore, has the potential to protect not only the testator but the attorney as well.

17. See infra notes 168–69 and accompanying text. The North Dakota finality of judgment requirement should be incorporated into existing Ohio and Arkansas statutes in the absence of further ante-mortem reform.

18. See infra notes 97–152 and accompanying text.

19. See Cavers, supra note 1, at 445–47.

20. Questions of testamentary capacity are best established prior to death. Since the substantive question is capacity as of the time of execution of the testament, execution would be the ideal time to determine capacity. The longer adjudication of any question is postponed, the more likely it is that the quality of the evidence available to the trier will deteriorate. In the field of testamentary capacity, that probability is a certainty: post-mortem adjudication of capacity insures by definition that the best evidence of capacity—the testator himself—will be placed beyond the reach of the court.


22. See Langbein, supra note 20, at 80.

23. Under an ante-mortem plan, “the reasonable possibility of having the entire will destroyed and the testator’s intentions upset by some simple mistake would be obviated.” Redfearn, supra note 21, at 572.

24. In many cases malpractice is avoided and the court acts as a check on the drafter’s ability. Any flaws discovered at the trial stage would probably be corrected by the practitioner without charge if he or she was at fault.

II. HISTORICAL CONTEXT

The first statute authorizing an ante-mortem probate proceeding was enacted in Michigan in 1883.26 Three years later, however, the Michigan Supreme Court declared the Act unconstitutional in *Lloyd v. Wayne Circuit Judge.*27

A. Lloyd v. Wayne Circuit Judge

1. The Arguments

The testator in *Lloyd* presented for probate, under the Michigan ante-mortem statute, a will which excluded his wife and a son from sharing in his estate.28 The probate court decided against the will.29 On appeal, the circuit court affirmed the probate court's rejection of the will on the express ground that the ante-mortem statute was unconstitutional.30 The testator appealed to the Michigan Supreme Court, where a unanimous court rejected his arguments and declared the Michigan Act of 1883 void.31 The court did not, however, reach a consensus on the basis for its decision.32

The first opinion, written by Chief Justice Cooley, offered two reasons for declaring the ante-mortem statute void.33 First, the ante-mortem statute enabled the testator to circumvent the inchoate rights of the spouse and child.34 Second, the post-mortem pro-

---

27. 56 Mich. 236, 23 N.W. 28 (1885).
28. Id. at 237, 23 N.W. at 28.
29. Id. at 238, 23 N.W. at 28.
30. Id. The circuit court based this ruling on the Act's failure to provide the testator's wife adequate notice and opportunity to be heard. Id.
31. Id. at 239, 243–44, 23 N.W. at 29, 31.
32. Of the four judges, three found the statute unconstitutional: one judge objected to the statute as being inconsistent; two judges ruled on the constitutionality issue and also on the grounds that potential heirs were excluded and that the statute was inconsistent. See 3 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 26.25, at 67 n.2 (rev. ed. 1961).
33. See infra notes 62–69 and accompanying text.
34. See infra text accompanying notes 62–64. Chief Justice Cooley however, offered a caveat:

But it may be said that these rights of the widow and mother are not property rights, and therefore not protected by the constitution, but may be taken away by the legislature at pleasure. It is to be observed, however, that the legislature does not profess to take them away; they remain nominally protected by the law, and the act of 1883 is expected to have effect while preserving them. Id. at 239, 23 N.W. at 29 (emphasis added). Chief Justice Cooley left the question of inchoate rights to the legislature for conclusive determination. In the absence of specific statutory language declaring an established inchoate right invalid, the court must reconcile any
ceeding did not ensure finality of the judgment.35

Normally—that is, upon probate after the death of the testator—inchoate rights, such as dower and the right to appoint a guardian for the minor son, were protected by statutory and common law.36 But the Michigan Act did not require notice to the spouse before probate, thus creating a tension between the established post-mortem inchoate rights and the ante-mortem proceeding which seemed to dispense with those rights.37 Without notice, the spouse's inchoate rights might go unprotected, and so the ante-mortem proceeding was declared unconstitutional.38

The second reason for declaring the ante-mortem statute void involved the dilemma of the finality of an ante-mortem judgment.39 Chief Justice Cooley articulated the problem thus:

The probate court had acted and decided against the propo-

nent, and we know of no authority for requiring the circuit
court to take cognizance of appeals in cases not properly judi-
cial, and to give its time and attention to the making of orders
which are not judgments, and which the party seeking and ob-
taining them is under no obligation to leave in force for a day
or an hour.40

Section 6 of the statute provided that a will probated under the
Act could be revoked in the same manner as a will executed under
normal circumstances.41 If the probate court allowed the will to
be probated, the judgment would be moot if the testator later re-
voked the instrument through a statutorily prescribed physical act
or by express language of revocation in a subsequent will.42 Chief
Justice Cooley reasoned that the ease with which an ante-mortem
decision could be rendered moot by the testator eliminated any
pretext of the judgment's finality.43 Without such finality, the
ante-mortem procedure was a fruitless exercise inviting litigation

conflicts between the laws. This implicitly includes the power to declare a law unconstitu-
tional if the conflict cannot be reconciled.

35. See infra text accompanying notes 65–69.

36. Although the husband can specifically disinherit his spouse and child in a will,
Chief Justice Cooley was concerned that under the Act the wife could not challenge the
will for undue influence or lack of testamentary capacity. 56 Mich. at 238, 23 N.W. at 29.

37. Chief Justice Cooley stated: "[The Act] therefore makes no sufficient provision for
its own enforcement without conflict with other statutes not meant to be repealed and is
inoperative for that reason." 56 Mich. at 239, 23 N.W. at 29.

38. Id.

39. See infra notes 65–69 and accompanying text.

40. 56 Mich. at 239, 23 N.W. at 29.


42. See supra text accompanying note 40.

43. 56 Mich. at 239, 23 N.W. at 29.
without end.\textsuperscript{44}

A second opinion was written by Justice Campbell.\textsuperscript{45} Justice Campbell, while not rejecting Chief Justice Cooley's arguments, felt that ante-mortem probate should be rejected outright.\textsuperscript{46} He observed that the maxim "the living can have no heirs" was well established as a central postulate of probate law.\textsuperscript{47} To deny this axiom by allowing probate before the testator's death would undermine the concept of an ambulatory will. During the testator's life prospective heirs\textsuperscript{48} could die, the estate could be squandered, or the testator could leave the court's jurisdiction.\textsuperscript{49} Thus, the final result of ante-mortem probate would be to place a judicial seal of approval on an uncertainty.\textsuperscript{50}

A second concern voiced by Justice Campbell was the possible harm to the family unit from the ante-mortem process.\textsuperscript{51} Premature public disclosure of the will's contents could only result in "unfortunate spectacle" and discord within the family.\textsuperscript{52} Disappointed prospective heirs would quarrel with the testator.\textsuperscript{53} Finally, Justice Campbell asserted that concerns over the security of a will were obviated by a wide variety of available devices, including "having wills executed or declared in solemn form, or acknowledged before reputable officers and a sufficient number of disinterested witnesses."\textsuperscript{54} Justice Campbell argued that the ease with which these accepted devices were employed outweighed the benefits that ante-mortem probate could provide, with significantly less stress on the courts and the family unit.\textsuperscript{55}

\begin{footnotes}
\item[44.] \textit{Id.}
\item[45.] \textit{Id.} at 244, 23 N.W. at 31.
\item[46.] Justice Campbell observed: "I am disposed to think . . . that this is not in any sense a judicial proceeding which [the circuit court judge] was bound to consider or entertain." \textit{Id.} at 240, 23 N.W. at 29.
\item[47.] \textit{Id.}, 23 N.W. at 30.
\item[48.] For purposes of this Note, the term "prospective heirs" is used broadly to include all potential heirs as well as beneficiaries named in a testamentary instrument.
\item[49.] 56 Mich. at 241, 23 N.W. at 30.
\item[50.] As Justice Campbell observed, "[t]he law gives no preference to contingent expectation." \textit{Id.}
\item[51.] In dicta Justice Campbell remarked: "It is a singular, and in my judgment, a very unfortunate spectacle to see a man compelled to enter upon a contest with the hungry expectants of his own estate . . . ." \textit{Id.}
\item[52.] \textit{Id.} See also infra notes 120--23, 127, 140 and accompanying text.
\item[53.] \textit{See supra} note 51.
\item[54.] 56 Mich. at 241, 23 N.W. at 30.
\item[55.] \textit{Id.} See Langbein, \textit{supra} note 20, at 67--68; see also infra notes 185--216 and accompanying text (general discussion of non-ante-mortem alternatives).
\end{footnotes}
2. Lloyd’s Contemporary Validity

Proponents of ante-mortem probate have sought to distinguish the arguments in Lloyd on the grounds that the modern concept of declaratory judgments was unknown when Lloyd was decided.56 The general acceptance of declaratory judgments following the United States Supreme Court decision in Aetna Life Insurance Co. v. Haworth57 prompted advocates of ante-mortem probate to sug-


57. 300 U.S. 227 (1937). In Aetna, the Supreme Court established explicit guidelines for determining a “controversy,” which is the crucial element of a valid declaratory judgment: “The controversy must be definite and concrete, touching the legal relations of parties having adverse interests.” Id. at 240–41. The Court also required that a controversy “must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” Id. at 241.

The test for whether a controversy could be resolved by declaratory judgment was further modified by the Court in Toilet Goods Ass’n v. Gardner, 387 U.S. 158 (1967). In Gardner, the Court established a bifurcated inquiry to decide whether the controversy, in this case an administrative regulation, would be ripe for judicial determination: (1) whether the issues tendered are appropriate for judicial resolution and (2) whether hardship to the parties would result if judicial relief were denied at that stage. Id. at 162.

Extension of the Supreme Court’s declaratory judgment standards to the potential problems of ante-mortem probate has been exhaustively covered by Professor Paul Edwards. Edwards, Antemortem Probate and Judicial Power to Render or Refuse Declaratory Relief, 7 Ohio N.U.L. Rev. 189 (1980). While Professor Edwards argues persuasively that the Ohio ante-mortem statute in particular is valid as a declaratory judgment, his analysis may also be applied to the Arkansas and North Dakota statutes. Professor Edwards suggests that “artful pleading is necessary to assure that a petition for an ante-mortem validity declaration is not dismissed.” Id. at 205. On the question of justiciability, Edwards adds that “no advance, blanket assessment may be made that an ante-mortem petition for a validity declaration does or does not present a justiciable controversy.” Id. at 208. Professor Edwards examines other ante-mortem statute concerns and ultimately concludes:

[Although there may be minor imperfections in the Ohio ante mortem act, the very attractiveness of allowing achievement of such certainty, which derives from the often clouded goal of our probate system to allow each of us to control the devolution of our property at death, should sway doubting courts towards validity.

Id. at 226. Ultimately the validity of ante-mortem probate as a declaratory judgment appears to rest more on policy than precedent.

Recently the Ohio Supreme Court in Pack v. Cleveland, 1 Ohio St. 3d 129, 438 N.E. 2d 434 (1982), held in a constitutional challenge to a Cleveland pornography ordinance that:

Where a complainant asserts the validity of a law in a declaratory judgment proceeding and shows that he is affected by, or materially interested in, a statute or ordinance, and that he has a justiciable cause concerning such law, the litigant’s standing may be established. A justiciable cause may be shown in these instances by the relationship of the parties concerned with the application of the law, and there need not be an actual controversy or violation of the ordinance to give one standing.
gest that ante-mortem statutes could be drafted which would eliminate some of the basic flaws of the Michigan Act of 1883.58

The three existing ante-mortem statutes59 are based upon a contest model of ante-mortem statute suggested by Professor Howard Fink.60 The contest model was developed in response to the criticisms leveled by the Lloyd court.61 These criticisms fall into four broad categories.

a. The Inchoate Rights Criticism. The inchoate rights criticism highlights the conflict between the statutory or common law inchoate rights of prospective heirs and the circumvention of those rights by the ante-mortem statute.62 Contemporary ante-mortem formulations seek to delimit interested parties, and provide them with notice, largely by legislative fiat.63 For example, modern statutes give the spouse an inchoate interest in the ante-mortem proceedings and provide notice to prospective heirs.64

b. The Finality of Judgment Criticism. Chief Justice Cooley's second objection was with the difficulty of ensuring that the court's judgment would stand when the testator could revoke the probated will any time after the ante-mortem proceeding.65 Proponents of ante-mortem statutes argue that declaratory judgments by necessity are contingent on the actions of the parties involved

Id., at 131. The majority opinion in Pack gives substantial impetus to Ohio's Declaratory Judgment Act even where the question of sufficiency of justiciability is tenuous. Whether the liberalized justiciability test promulgated by the Pack court will suffice to uphold the ante-mortem aspects of the Declaratory Judgment Act, id., at 132 n.2, has not been directly addressed by the court.

58. See supra note 56 and accompanying text.
59. See infra notes 154–85 and accompanying text.
60. See Fink, supra note 26. See also infra notes 100–23 and accompanying text.
61. See Fink, supra note 26, at 274.
62. See supra notes 33–38 and accompanying text.
63. The problem of notice in probate proceedings has been examined extensively both in regard to conventional probate proceedings, e.g., J. Ritchie, N. Alford & R. Effland, Cases and Materials on Estates and Trusts 291–92 (5th ed. 1977); Levy, Probate in Common Forms in the United States: The Problem of Notice in Probate Proceedings, 1952 Wis. L. Rev. 420, and ante-mortem probate, e.g., Alexander & Pearson, Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession, 78 Mich. L. Rev. 89, 96–111 (1979); Fellows, The Case Against Living Probate, 78 Mich. L. Rev. 1066, 1096–98 (1980); Fink, supra note 26, at 279–85. The term "interested parties" in the context of this Note refers to parties, which under common law or statute, are given specific or inchoate rights in an estate before the testator's death without a specific inter vivos transaction conferring those rights. These inchoate rights must still be viewed in the context of Chief Justice Cooley's explanation of legislative prerogative. See supra note 34 and accompanying text.
65. See supra note 42 and accompanying text.
in the suit.\textsuperscript{66} The absence of appellate decisions on the validity of ante-mortem statutes as declaratory judgments affords no conclusive answer to this problem.\textsuperscript{67} One existing statute, however, does include a mechanism that may prove efficacious.\textsuperscript{68} The North Dakota ante-mortem statute stipulates that an ante-mortem probated will cannot be revoked unless the testator commences another ante-mortem proceeding to probate a new will.\textsuperscript{69}

c. \textit{The Living Have No Heirs} Criticism. Justice Campbell’s formulation of this argument in \textit{Lloyd} suggests that a will is am- bulatory until the testator’s death,\textsuperscript{70} and that “premature” probate would invalidate established precedent.\textsuperscript{71} The specific language of the ante-mortem statutes resolves this problem. For the purposes of the ante-mortem proceeding, the statute gives the prospective heirs a justiciable interest.\textsuperscript{72} Since wills are statutory creatures, however, it would seem within the bounds of legislative discretion to confer these intangible rights.\textsuperscript{73} Opponents might argue that the legislature is limited in conferring rights that effectively extend the jurisdiction of the courts.\textsuperscript{74} Depending upon the disposition of the judges, either argument may find favor with a

\textsuperscript{66}. Professor Fink, however, suggests that “[t]o some extent, all declaratory judgments deal with hypothetical and mutable situations.” Fink, \textit{supra} note 26, at 278. This appears to conflict with the declaratory judgment requirements of a “real and substantial conflict admitting of specific relief through a decree of conclusive character.” \textit{See supra} note 57.

\textsuperscript{67}. The test case mentioned in Comment, \textit{The Ante Mortem Alternative to Probate Legislation in Ohio}, 9 \textit{Cap. U.L. Rev.} 717, 723 n.46 (1980), brought in Franklin County was subsequently dropped. Gugle v. Gugle, No. 326-892 (Franklin County C.P. filed Aug. 27, 1979). A test case filed in Cuyahoga County, Ohio, Bost v. Cable, No. 912302 (Cuyahoga County P. Ct. filed July 7, 1980), was also dropped when the testator died before the suit could be pursued.


\textsuperscript{69}. N.D. CENT. CODE § 30.1-08.1-03 (Supp. 1981). The North Dakota ante-mortem statute states that the “will shall be binding in North Dakota unless and until the plaintiff-testator executes a new will and institutes a new proceeding under this chapter naming the appropriate parties to the new proceeding as well as the parties to any former proceeding under this chapter.” \textit{Id. See infra} notes 164-71 and accompanying text.

\textsuperscript{70}. \textit{See supra} note 47 and accompanying text.

\textsuperscript{71}. \textit{See Langbein, supra} note 20, at 74.

\textsuperscript{72}. \textit{See, e.g.,} N.D. CENT. CODE § 30.1-08.1-02 (Supp. 1981).

\textsuperscript{73}. \textit{See supra} note 34 and accompanying text.

\textsuperscript{74}. This presumes, of course, that the courts can be persuaded to allow legislative expansion of their jurisdiction. \textit{See Edwards, supra} note 57, at 208; \textit{see also} \textit{Ohio Const. art. IV, § 4(B)} (establishing original jurisdiction for courts of common pleas to justiciable matters). Whether the legislature can expand the court’s authority beyond constitutional justiciability constraints regarding ante-mortem probate has not been ruled upon. Ohio courts, however, have not been overly receptive to this expansion of power. \textit{See Williams v. City of Akron, 54 Ohio St. 2d 136, 374 N.E.2d 1378, 1382 (1978). But cf.} Burger Brewing Co. v. Liquor Control Comm., 34 Ohio St. 2d 93, 296 N.E.2d 261 (1973) (judicial scrutiny available with the requisite of justiciability for declaratory relief).
court. The outcome, therefore, appears to be as much political as it is legal.  

d. *The Security of the Testator Criticism.* This fourth argument encompasses both the importance of shielding the will's contents from public disclosure and the social costs involved in allowing a testator to probate his will before death. The element of security in guarding the testator's intent must be weighed against the importance of keeping the family unit free from discord. Proponents of existing ante-mortem statutes which lack safeguards against public disclosure argue that loss of confidentiality is a necessary cost of insuring that the testator's intent is followed, and opponents argue that the cost to the family unit is too high. The ideal solution would be a procedure that offers an alternative means of probate without public disclosure. To this end, several ante-mortem models specifically address the disclosure problem.

B. *Declaratory Judgments Without Enabling Legislation*

1. Cowan v. Cowan

Application of the four arguments set forth in *Lloyd* to a declaratory judgment action demonstrates the importance of correct statutory formulation. In *Cowan v. Cowan*, the Texas Court of Civil Appeals struck down the use of a declaratory judgment to invalidate a living testator's will absent express statutory authorization of ante-mortem judgments. The prospective heirs in *Cowan* brought a declaratory judgment action against the testator

75. Among the courts, the crucial factor in ante-mortem probate acceptance seems to be one of policy. See supra note 57.

76. See generally Alexander, *The Conservatorship Model: A Modification*, 77 Mich. L. Rev. 86, 89-90 (1978). Professor Alexander argues, in a precursor to his eventual administrative model formulation, see infra notes 133-52 and accompanying text, that a major flaw in Professor Langbein's Conservatorship Model, see supra note 20, involves the will's disclosure in an ante-mortem proceeding. Disclosure presumably could lead to intrafamily hostilities. Cf. supra notes 79-83 and accompanying text (discussing the analogous problem of the security of the testator criticism).

77. See supra note 51 and accompanying text.

78. E.g., Langbein, supra note 20, at 77.

79. E.g., Alexander & Pearson, supra note 63 passim.

80. Id. See also infra notes 97-98 and accompanying text (discussion of the various ante-mortem models).

81. See supra note 30. The degree of notice given could be problematic without careful construction of the ante-mortem statute regarding what rights are conveyed or withheld from interested parties. See supra note 63.


83. Id. at 865.
(who was their mother) and the named legatees in the mother's will.\textsuperscript{84} The Texas court dismissed the suit, citing \textit{Lloyd} for the proposition that heirs have no cognizable interest under a will until the testator's death.\textsuperscript{85}

The court further noted that without specific enabling legislation, Texas' declaratory judgment statute\textsuperscript{86} could not confer the requisite jurisdiction on the prospective heirs.\textsuperscript{87} The court stated that before invoking the Declaratory Judgments Act, "there must be present a justiciable issue; that is, the cause of action must relate to matters which are within the jurisdiction of the court."\textsuperscript{88} Echoing similar language in \textit{Lloyd},\textsuperscript{89} the \textit{Cowan} court stressed the public policy problem of allowing prospective heirs to challenge the testator's will.\textsuperscript{90}

2. \textit{The Application of Cowan to Lloyd}

\textit{Cowan} was decided in a jurisdiction without a specific ante-mortem statute.\textsuperscript{91} The case does, however, indicate the scrutiny that any ante-mortem statute based on a declaratory judgment scheme must undergo if it is challenged.\textsuperscript{92} Specific legislation may authorize probate court jurisdiction over prospective heirs. Whether the courts will accept the additional jurisdiction is entirely another question.\textsuperscript{93} Although it did not reach the specific issue of the validity of an ante-mortem statute, the \textit{Cowan} court did indicate that premature probate may not be a justiciable controversy for declaratory judgment purposes.\textsuperscript{94}

The issue that troubled the \textit{Lloyd} court—how prospective heirs can be parties to an action involving the will of a living testa-
tor—remains unresolved. Similarly, the policy concerns articulated in *Lloyd* regarding the efficacy of forcing intra-family challenges over a document that may be moot by the time the testator dies also remain unanswered.

### III. THE ANTE-MORTEM MODELS

In response to the flaws in the Michigan Ante-Mortem Act of 1883, three models have evolved. Which one provides the most effective means of ensuring adherence to the testator's intent is open to question—indeed, critics argue that none comports with the expectations of its creators.

#### A. The Contest Model

The first model, proposed by Professor Fink, is a variation on the Michigan Act of 1883. Because this model is adversarial and based on actions for declaratory judgments, it has been termed the “contest model.”

Under the contest model, named beneficiaries and those who would be intestate heirs are designated as parties with standing. Protection of other potential takers is achieved under the doctrine of virtual representation. This doctrine, within the context of ante-mortem litigation, posits that unborn or unascertained future beneficiaries are protected by those presently designated to take under the will. If these interests were not protected, the court could appoint a guardian ad litem.

Procedurally, the contest model requires a declaratory judg-

---

95. See supra notes 72–75 and accompanying text.
96. See supra notes 39–44 and accompanying text.
97. See generally infra notes 100–52 and accompanying text.
98. See generally Langbein, supra note 20, passim; Alexander & Pearson, supra note 63, passim.
99. See Fellows, supra note 63, at 1081-94.
100. See Fink, supra note 26, at 274-77.
101. This model was proposed by Professor Howard Fink as a direct response to the earlier failure of ante-mortem probate in Michigan. See Fink, supra note 26, at 274.
102. The term “contest model” was coined by Professor Langbein. See Langbein, supra note 20, at 63; see also Fellows, supra note 63, at 1067 n.13.
103. Fink, supra note 26, at 275.
104. Under a scheme of virtual representation, “the interests of remote and possibly unborn takers by intestate succession would usually coincide with the interests pressed by present takers.” *Id.* at 275, citing Roberts, *Virtual Representation in Actions Affecting Future Interests*, 30 Ill. L. Rev. 580, 581 (1936).
105. Fink, supra note 26, at 275-76.
106. See id. at 276.
The testator executes the will and institutes a proceeding in the statutorily designated court, usually the probate court in the testator’s county of residence. The testator then petitions the court for a “judgment declaring the validity of the will as to the signature on the will, required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing his will.” Notice is then sent to those parties stipulated to have an interest in the will. Such parties include any beneficiaries mentioned in the will and all living intestate successors. Service of process is limited to parties who can be contacted within the state where the ante-mortem litigation occurs. For those parties who cannot be located, notice is provided by publication within the plaintiff’s county.

Assuming the court finds that the will has properly been executed and that the testator had the requisite testamentary capacity and freedom from undue influence, the will is declared valid and is filed with the court. The results of the proceeding may be nullified by the subsequent execution of a new will and the successful completion of another ante-mortem proceeding to validate the new will.

Although the contest model is the basis for the three existing ante-mortem statutes in Arkansas, North Dakota, and Ohio, it has come under heavy criticism. The notice provisions in the contest model do not require publication beyond the state where the will is being adjudicated. Consequently, the ultimate effect that a judgment may have on parties in interest outside the court’s jurisdictional boundaries is constitutionally questionable.

Professor Fink’s proposal effectively resolves the problem of finality of judgment by requiring the testator to institute a new
ante-mortem proceeding to invalidate the old will. Unfortunately, the contest model does not secure the contents of the will from public disclosure.

The parties in interest are compelled to litigate at their own expense without assurance that the litigated estate will exist when the will takes effect. Should interested parties contest the will, moreover, there is no guarantee that the testator will not execute a new will disinheriting the unlucky party for his or her impertinence in challenging the original will. This disincentive to challenge the ante-mortem proceeding makes its "adversarial nature" dubious.

In addition to these basic procedural problems, there remains unresolved the problem of the serious strain imposed on the family in an adversarial proceeding of this nature. Given these problems with the contest model, it is no surprise that additional refinements have been suggested for the ante-mortem process.

B. The Conservatorship Model

Professor Langbein proposed to ameliorate several of the burdens associated with the contest model. Although the "conservatorship model" also uses a declaratory judgment proceeding, it eliminates the problem of compelling the prospective heirs to join in the litigation. Instead, the court appoints a conservator to represent the prospective heirs' interests. This refinement relieves the prospective heirs of the dilemma of challenging family in court; it also enables the court to place the financial burden of

---


120. Arguably only an administrative proceeding with the opportunity to have in camera evaluation of the will by the court could insure total privacy. See generally infra notes 217-50 and accompanying text.

121. The same problem was identified by the Lloyd court. See supra notes 49-50 and accompanying text.

122. As Professor Langbein explains: [The heirs apparent who successfully defend a living probate suit must still wait for the testator's death before any of them can acquire a beneficial interest in his property. . . . Depending upon the relative ages and affluence of the parties, the difficulty of the proofs, and the other factors that bear on the risk preferences of the heirs apparent, the financial investment necessary to defend such a lawsuit may appear quite unwise, even though the testator be quite mad.]

Langbein, supra note 20, at 74.

123. See supra note 51.

124. Langbein, supra note 20, at 63.

125. Id. at 78-79.

126. Id. at 63.
the proceeding on the testator.\textsuperscript{127}

The conservatorship model, however, does not solve the contest model's problems with jurisdiction\textsuperscript{128} or with public disclosure of the will.\textsuperscript{129} Thus, although prospective heirs are not directly involved in the litigation, tensions may still arise when they discover the contents of the will.\textsuperscript{130} Additionally, the conservator faces the dilemma of representing multiple, and potentially conflicting, interests. To solve this problem the court may appoint multiple conservators. The expense will be passed on to the testator, making an ante-mortem proceeding potentially very costly. To compel the testator to pay the costs of litigation may preclude the use of ante-mortem probate in those very situations where it would be most effective.\textsuperscript{131}

The conservatorship model, although designed to ameliorate the weaknesses of the contest model, creates problems of its own. Excessive costs, including the social costs on the family when the will is disclosed, and the economic costs if multiple conservators must be appointed, diminishes the value of the refinement.\textsuperscript{132}

C. The Administrative Model

The administrative model, as the name suggests, is a significant departure from contest model variations.\textsuperscript{133} The administrative model proposes a viable ex parte proceeding\textsuperscript{134} in which

\textsuperscript{127} Id. at 79–80.
\textsuperscript{128} See supra text accompanying note 118.
\textsuperscript{129} Alexander, supra note 76, at 89. See also supra note 118 and accompanying text.
\textsuperscript{130} As a result, Professor Alexander suggests: "[s]acrificing the confidentiality of the conventional testamentary process may deter some testators who need ante-mortem probate from using it." Id. at 89.
\textsuperscript{131} For example, if there are many prospective heirs with diverse financial demands who do not get along with one another, they might contest a will which gives them less than a full share. Under normal circumstances, this situation would be ideal for ante-mortem probate, but the expense of additional conservators to represent all the potentially conflicting interests could be prohibitive.
\textsuperscript{132} See Fellows, supra note 63, at 1074–75.
\textsuperscript{133} See generally Alexander & Pearson, supra note 63.
\textsuperscript{134} Because the administrative proceeding is ex parte, some commentators suggest that it denies prospective heirs due process by excluding them from an ante-mortem proceeding, and deprives the court of important "inside" information obtainable only through interested parties. Fellows, supra note 63, at 1095–96. Others suggest that the inchoate interests bestowed by the State are revocable where, as in the case of ante-mortem probate, the interests of the prospective heirs are so tenuous. See Alexander & Pearson, supra note 63, at 96–111. The common law maxim that the "living have no heirs" may provide traditional support for the proposition that prospective heirs have no standing, since their interest is entirely contingent on a living testator who is free to change or revoke the will.
prospective heirs have no right to challenge the testator's will.\textsuperscript{135} Instead of appointing conservators, the court appoints a guardian ad litem who functions as a special master to help the court accumulate the necessary information on the will maker's testamentary capacity and freedom from undue influence.\textsuperscript{136}

The administrative action is initiated by petitioning the court to review the validity of the will.\textsuperscript{137} After reviewing the testimony of expert witnesses, the court rules on the validity of the will.\textsuperscript{138} The finality of the judgment would be ensured by amending the state will contest statutes to preclude attack on an ante-mortem judgment except by a specifically designated group such as the testator's "nuclear family."\textsuperscript{139} Confidentiality of the will's contents would be ensured by in camera evaluation of the will.\textsuperscript{140} Without an adversarial proceeding there would be no need to disclose the contents of the will to an "opposing" party.

Advantages of the administrative model include confidentiality of the will, conclusive effect given to the court's final determination through amendment of existing will contest statutes, and savings in court time and other litigation costs.\textsuperscript{141} The administrative model therefore has the potential of being a significant improvement on previous models.\textsuperscript{142}

The major flaw in the administrative approach, however, is the difficulty of utilizing an ex parte hearing in an ante-mortem proceeding.\textsuperscript{143} Much of the administrative model\textsuperscript{144} is devoted to establishing the efficacy of a no-notice proceeding for probate. The

\textsuperscript{135} While direct challenge may be statutorily excluded, see, e.g., \textsc{ohio rev. code ann.} § 2107.084 (E) (Page Supp. 1979), thereby excluding even collateral attack on the ante-mortem proceeding to parties involved in the ante-mortem proceeding, some statutes do not even address the question of collateral attack of the ante-mortem judgment. \textit{See} Fellows, \textit{supra} note 63, at 1077–79.

\textsuperscript{136} Alexander & Pearson, \textit{supra} note 63, at 113–14.

\textsuperscript{137} \textit{Id.} at 112–13.

\textsuperscript{138} \textit{Id.} at 116–18.

\textsuperscript{139} \textit{Id.} at 119–21. In the alternative a purely ex parte proceeding "to maintain a relatively simple ante-mortem determination of capacity" is preferable. \textit{Id.} at 121. For purposes of this Note the term "nuclear family" designates a family group consisting of a father, mother, and children.

\textsuperscript{140} \textit{Id.} at 114.

\textsuperscript{141} \textit{See supra} notes 134–40 and accompanying text.

\textsuperscript{142} \textit{Contra} Fellows, \textit{supra} note 63. Professor Fellows' own proposals to remedy the probate problems "by abolishing the mental capacity requirement and providing a statutory election to those we most fear may suffer in the event of disinheritance," \textit{Id.} at 1110, seems more extreme than necessary.

\textsuperscript{143} \textit{See supra} note 134.

\textsuperscript{144} \textit{See} Alexander & Pearson, \textit{supra} note 63, at 96–111.
question that arises echoes Chief Justice Cooley's reasoning in *Lloyd* that the rights of the spouse and children, although inchoate, may not be eliminated 145 without an opportunity for the interested parties to respond. Advocates of the administrative model counter this argument by suggesting that rights, whether inchoate or substantial, given by the state may be removed by the state. 146 Opponents argue that the absence of notice to parties in interest may constitute a denial of due process, rendering the entire determination by the court unconstitutional. 147

Another problem posed by critics of the administrative model is the practical effect of allowing a court-appointed special master to interview friends and relatives of the testator. 148 As Professor Fellows notes, "[a]fter interviews by the guardian *ad litem*, family members will likely grow curious as to the contents of the will." 149 These interviews could engender the very suspicions and hostility between family members that the model is designed to correct. 150

The only definite way of testing the validity of these criticisms is to actually use the model. That a special master's questions might induce hostility is conjectural. 151 The due process concerns, however, are more substantial. 152 Unfortunately, there has not been a definitive expression by the courts on the due process question.

IV. EXISTING ANTE-MORTEM STATUTES

The three existing ante-mortem statutes are based on a contest model. 153 Each statute, however, represents a different philosophy as to the ultimate effect given the ante-mortem judgment and the

145. See supra notes 34–37 and accompanying text.
146. See Alexander & Pearson, supra note 63, at 96–111.
147. After extensive case analysis, Professor Fellows concludes that "[t]he lack of notice and hearing under the Administrative Model may therefore violate the due process clause of the Constitution." Fellows, supra note 63, at 1109.
148. See Fellows, supra note 63, at 1076–77.
149. Id. at 1077.
150. The problem with this analysis is that prospective heirs will always be curious. In the absence of verification of their fears, whether valid or not, the prospective heirs are left in the same position as they were before the procedure.
151. See supra note 150.
152. At least to the extent that contemporary due process questions involve a balancing test to assess the deficiencies of a statute, the desirability of an ante-mortem proceeding could be weighed against the rights, if any, of the expectant heirs. See Fellows, supra note 63, at 1107 n.158. The court will have to weigh tradition against the security of the testator. See supra note 35.
153. See supra notes 100–23 and accompanying text.
methodology for revising that judgment. A brief discussion of some of these basic differences follows to serve as a conceptual basis for comparison with alternatives to the existing statutes.

A. The Arkansas Statute

The Arkansas Ante-Mortem Probate Act of 1979 is the shortest of the three existing state ante-mortem statutes. The Arkansas statute grants probate courts the requisite jurisdiction to entertain ante-mortem declaratory judgments. The stipulated parties to the action are all beneficiaries named in the will and all potential intestate successors. The parties are granted standing by legislative fiat which grants them inchoate property rights.

The testator initiates the proceeding; if the will is declared valid, the proceeding “shall constitute an adjudication of probate.” The judgment may be revoked by a subsequent will or codicil.

The Arkansas ante-mortem statute, therefore, is patterned after the contest model except in terms of revocability. The statute thus not only shares all the basic problems of the contest model, but also fails to provide a final judgment. The Arkansas statute has not been tested in appellate litigation. The lack of any authoritative court pronouncements on the validity of the contest model is unfortunate, since it impairs the development of effective legislation.

B. The North Dakota Statute

The North Dakota Ante-Mortem Probate Act also prescribes a contest model proceeding, and it includes all of the contest model’s basic procedural flaws. The North Dakota statute, however, more closely approaches the theoretical ante-

---

155. See infra notes 164-85 and accompanying text.
157. Id. § 62-2136.
158. Id. See also Langbein, supra note 20, at 74. Compare this provision with the similar function of N.D. CENT. CODE §§ 30.1-08.1 (Supp. 1981).
160. Id.
161. See supra notes 100-23 and accompanying text.
162. See supra notes 116-23 and accompanying text.
163. See supra notes 116-22 and accompanying text.
165. See supra notes 100-23 and accompanying text.
166. See supra notes 116-22 and accompanying text.
ANTE-MORTEM PROBATE

Revocation under the statute is accomplished only when the testator executes a new will and a new ante-mortem proceeding is instituted with the proper parties. The statute thus ameliorates the finality of judgment problem, by ensuring that the court’s efforts cannot be undone solely through the execution of a new will or codicil. Like the Arkansas statute, the North Dakota law has not been widely utilized or heavily litigated. Again, in the absence of appellate litigation on the statute there is no effective way of ascertaining whether ante-mortem probate is a conceptual failure or whether practitioners are simply unaware of its existence.

C. The Ohio Statute

The Ohio ante-mortem statute shares certain structural similarities with both the Arkansas and North Dakota acts. Revocation can be accomplished under the Ohio statute in several ways. The testator may revoke or modify a previously litigated ante-mortem will by petitioning the court or by executing a new will or codicil. The latter option, however, perpetuates the finality of judgment problem.

One feature unique to the Ohio ante-mortem statute is a clause specifically detailing the circumstances where the court’s ante-mortem judgment may be challenged collaterally in a post-mortem proceeding. Parties named in the original ante-mortem suit are precluded from attacking the judgment. This particular

---

168. Id.
169. See supra notes 159–60 and accompanying text.
170. Pursuant to a Lexis search on October 14, 1982.
171. An informal telephone survey of Cleveland probate practitioners indicated that many were unaware that an ante-mortem statute existed. Others did not feel such a statute was necessary, and only one felt it was usable. Of the three statutes North Dakota’s is the closest to the contest model in the sense that the statute’s revocation procedures match those originally suggested by Professor Fink, supra note 26 at 276. Litigation would be most instructive to states considering the adoption of an ante-mortem procedure.
173. See supra notes 154–71 and accompanying text.
175. Id. § (C).
176. Id. § (D).
177. See supra notes 42–44 and accompanying text.
179. Id. However, parties may contest the judgment “if the person is one who should have been named a party defendant in the action in which the will, modification or codicil was declared valid.” Id. § 2107.71(B).
refinement is similar to the administrative model approach of eliminating will contests once the ante-mortem determination has affirmed the will's validity.\textsuperscript{180}

The Ohio statute is the most complex of the three ante-mortem acts. While it regulates detailed issues such as collateral attack,\textsuperscript{181} it fails to resolve the finality of judgment problem.\textsuperscript{182} The broad revocation language makes any court determination subject to the plaintiff's whim.\textsuperscript{183} Despite its varied potential applications, the Ohio ante-mortem proceeding is rarely used.\textsuperscript{184} The probate practitioner, therefore, is discouraged from using the statute because of its untested viability, certain expense, and questionable effectiveness.

V. ALTERNATIVE SOLUTIONS TO THE ANTE-MORTEM DILEMMA

Many alternatives to ante-mortem probate have gained widespread legal viability. These alternative devices, ante-mortem probate opponents suggest, undercut the need for an extensive proceeding to validate the will. An examination of these procedures, however, reveals that the ante-mortem probate process can most effectively preserve the testator's intent.

A. Non-Ante-Mortem Alternatives

The testator seeking to dispose of property has three basic options. The first is to avoid the entire testamentary process by using inter vivos trusts or other inter vivos transfers.\textsuperscript{185} Second, the testator can use supplemental devices, such as videotaped wills or the self-proving provisions of the Uniform Probate Code (UPC), to build a wall of presumptive validity around the will. These devices can lessen the chances of success of post-mortem attacks on the will. A third option is to use language in the will that discourages post-mortem contests. Such language includes "in terrorem" clauses and designated heir clauses. Such devices can only be

\textsuperscript{180} The similarity ends, however, with the inclusion of the exclusion to mandatory statutory collateral estoppel. \textit{See id.} § 2107.71(B); \textit{see supra} note 135 and accompanying text.

\textsuperscript{181} \textit{See supra} notes 178-80 and accompanying text.

\textsuperscript{182} \textit{See supra} note 177 and accompanying text.

\textsuperscript{183} \textit{See supra} notes 175-77 and accompanying text.

\textsuperscript{184} \textit{See supra} note 170.

\textsuperscript{185} For general background on alternatives to probate, see generally Sheard, \textit{Avoiding Probate of Decedents Estates}, 36 U. CIN. L. REV. 70 (1967) (revocable conveyances); \textit{see also} J. CORCORAN, JR., ALTERNATIVES TO PROBATE §§ 16-1 to 29-1 (1971) (trusts).
used, of course, where the local statutes are receptive to them.\textsuperscript{186}

None of these options can assure that post-mortem litigation will be avoided because each device is subject to attack by dissatisfied heirs.\textsuperscript{187} The professional estate planner uses these techniques in an individual estate based on the testator's desires and the probability of post-mortem attack.\textsuperscript{188} The estate planner must determine whether, in light of these three non-ante-mortem alternatives, a need for ante-mortem probate really exists. To aid this determination, each method must be examined in detail.

I. \emph{Videotaped Wills}

With the widespread availability of videotape equipment probate practitioners have been quick to recognize the advantages of videotaping wills.\textsuperscript{189} In a videotaped will the testator reads the will into a camera and records for posterity every gesture, facial expression, and verbal intonation. The impact of actually seeing the testator reading the will is presumed to lend credibility to the physical document while giving the testator the opportunity to speak to the beneficiaries with candor.\textsuperscript{190}

The legality of videotaped evidence in general is well established,\textsuperscript{191} and the cost minimal.\textsuperscript{192} The videotaped will can be used in probate as a trial tool, ensuring some measure of security against challenges grounded on lack of testamentary capacity or undue influence.

There are, however, certain potential problems with videotaping wills. Although videotaping is useful as a supplement to the

\textsuperscript{186} See infra notes 203–12 and accompanying text.
\textsuperscript{187} See Fink, supra note 26, at 265–66; see also Langbein, supra note 20, at 64–66.
\textsuperscript{188} Beating the High Cost of Probating a Will, supra note 7, at 45–46. Additional concerns include the ramifications of local statutes. Id. at 46.
\textsuperscript{189} “Videotaped wills have existed for several years, although they have only recently started to become widely used. They have even entered pop culture. . . . [T]wo network T.V. programs—\textit{WKRP in Cincinnati} and \textit{Too Close for Comfort}—[have] worked the wills into their plots.” Lights, Cameras, Wills, TIME, Dec. 14, 1980, at 72.
\textsuperscript{190} Thanato-TV, SATURDAY REVIEW, Feb. 2, 1980, at 6 (California law firm charging $150 for a videotaped will). The credibility of videotape presentations in the courtroom was expressed by one court:

When these factors [of conventional non-video evidence] were weighed against the advantages of videotape, i.e., an opportunity for the jury to watch the witness testify and the instant replay capability, the Court found that the procedures ultimately employed were not only entirely proper but in fact the best solution possible.

\textsuperscript{191} See, e.g., First Videotape Trial: Experiment in Ohio, 21 DEFENSE L.J. 267 (1972).
\textsuperscript{192} See, e.g., SATURDAY REVIEW, supra note 190, at 6.
will, technical compliance with wills statutes requires the actual will to be written. Perhaps the videotaped will might someday be given the same effect as a holographic will—assuming the court is satisfied that the tape is unedited. Presently, however, a videotaped will is no assurance of technical compliance with the wills statutes, and may lead unknowledgeable testators to assume they have a valid will without the written document.  

Additionally, the videotaping process can be abused by creating an erroneous impression of the testator on the tape. Guidelines already exist for the use of makeup, camera angles, lighting, and other Hollywood-type refinements in videotaped depositions. These same techniques could be used in a videotaped will, including the use of professionally prepared scripts, to obtain a high degree of unwarranted credibility.

In spite of the potential abuses, the videotaped will can be an effective means of increasing the credibility of the testator’s capacity and freedom from undue influence. The videotaping process, however, is not a complete solution to post-mortem litigation problems. At best the videotaped will should be used only as a supplement to the written will.

2. The UPC Self-Proved Will

Under section 2-504 of the Uniform Probate Code a testator may create a self-proved will. A will is self-proved by executing a supplemental document attesting to the will’s technical validity. This document is then signed by the testator and the witnesses and notarized.

Self-proving a will dispenses with the need to call witnesses at an informal probate proceeding to attest to the testator’s signature. The self-proved will, like the videotaped will, merely adds one more quantum of evidence as to the will’s validity. The self-proving provision only eliminates the signature requirements...
foundation for post-mortem litigation. Once admitted into probate, the self-proved will establishes a prima facie case of due execution that may still be challenged on other grounds. A self-proved will, therefore, also is no guarantee against post-mortem litigation.

3. *In Terrorem* Clauses

Another means of discouraging post-mortem litigation is to incorporate language into the will which lessen the financial incentives to contest. This type of testamentary clause, sometimes referred to as an “in terrorem” clause, typically gives a token amount to potentially contesting beneficiaries with the condition precedent that there be no contest.

Although these clauses have been described as “primitive coercion,” many jurisdictions conditionally allow their use. The majority of those jurisdictions, however, stipulate that the will’s forfeiture provisions cannot be invoked if the will is contested in good faith and with reasonable good cause. The drafters of these provisions must therefore tread a thin line, ensuring that potentially contesting beneficiaries are given enough in the will to deter any desire to forfeit the allocated amount. Similarly, the drafter must also avoid any clause in the will that would give a potentially contesting beneficiary a good faith basis to contest.

The value of in terrorem clauses, as with almost any clause incorporated into the will, is limited by the many potential grounds for attack that courts could construe to be good faith grounds. These clauses, furthermore, have no value in establishing the will’s technical validity and could conceivably operate against the testator on questions of testamentary capacity. Still, in

---

202. *Id.*
203. For drafting suggestions, see generally Jack, *No Contest or In Terrorem Clauses—Construction and Enforcement*, 19 Sw. L.J. 722, 735–37 (1965).
204. *Id.*
209. *Id.*
210. Alternatively, prospective heirs not explicitly mentioned in the will can, in many jurisdictions, lead to difficulties, particularly where statutes such as *UPC* § 2–301 create forced shares in the estate.
211. See generally Ritchie, Alford, Jr., & Effland, *supra* note 63, at 310–12.
terrorem clauses might be practical where there is a strong suspicion that a disgruntled beneficiary will harass the estate with post-mortem litigation.212

4. Conclusions

Supplemental devices to the will cannot preclude post-mortem litigation.213 While videotaped wills, self-proving documentation, and in terrorem clauses can appreciably lessen incentives for challenging the will, only ante-mortem probate offers a direct means of establishing the will’s validity.214

A will drafter has numerous techniques available with which to avoid possible post-mortem attack.215 It is possible, however, that a particular means of invalidating the will could be overlooked. The advantage of ante-mortem probate is its wide scope—the ability to deal with a host of potential problems with a single procedure.216 The use of one or more specific alternatives to insure the validity of the will is never a completely satisfactory method of recording the testator’s intent. This is because each specific alternative is addressed only to a specific problem and not to the total procedure itself.

B. The Administrative Model as An Ante-Mortem Alternative

Existing contest model ante-mortem statutes217 are similar to conventional will contest statutes, but contain a major refinement—the proceeding occurs before the testator’s death.218 Thus, these statutes suffer from many of the same disadvantages associated with both will contest actions and ante-mortem probate in general.219 In response to these problems, the National Conference of Commissioners for Uniform State Laws (NCCUSL) Drafting Committee for a Uniform Ante-Mortem Probate of Wills Act220 considered a model draft for an administrative ante-

212. Jack, supra note 203, at 723.
213. See Langbein, supra note 20, at 68.
214. See supra note 186 and accompanying text.
215. See supra notes 203–11 and accompanying text.
216. See Fink, supra note 26, at 266.
217. See generally supra notes 154–85 and accompanying text (brief survey of existing statutory formulations).
218. See supra note 13.
219. See supra notes 115–23 and accompanying text.
220. The National Conference of Commissioners on the Uniform State Laws are comprised of members appointed by the governors of their respective states. The NCCUL drafts model codes and uniform laws when the commissioners deem it both desirable and practical. These drafts are then offered for approval to the American Bar Association.
mortem statute that is a significant departure from earlier contest model formulations. The Drafting Committee subsequently disbanded and the model draft received no further attention. In view of the flaws inherent in the existing statutes, there is a clear need for a viable alternative to the antiquated probate procedures. It seems somewhat premature to simply disregard the administrative model ante-mortem statute when this statute has the capacity to solve many of the deficiencies of both conventional probate alternatives and existing ante-mortem statutes.

1. The Draft B Model Statute

The NCCUSL Draft B statute is an ex parte administrative ante-mortem proposal. In a Draft B proceeding, the testator applies for a judicial determination that the will is valid. The word "determination" is used expressly in lieu of "judgment" to minimize any suggestion of an adversarial proceeding. The effect of this determination is to certify that the will is technically correct, that the testator had the requisite capacity to execute a will, and that the testator was not subject to any undue influence. Once such a determination is made the will can only be challenged if it is shown that another will was probated after the ante-mortem determination.

The courts under Draft B have several methods of obtaining the information necessary for a proper and accurate determination. The court may appoint a special master to interview the


222. There is no evidence in subsequent NCCUSL reports that Draft B has been re-examined or even discussed.

223. Whitman, Preparing for the Future of Probate in America, 5 Conn. L. Rev. 557 (1973). Whitman sees the need for improvement in three areas of probate: 1) expediting the probate process; 2) making probate more economical; and 3) better protecting the rights of interested parties. Id. at 560.

224. See supra notes 213–16 and accompanying text.

225. See supra notes 154–94 and accompanying text.


227. Draft B, supra note 221, § 1(a).

228. Id. § 1 comment.

229. Id.

230. Id. § 6. For a discussion of the Draft B safeguard against revocation by a later will, see infra note 236 and accompanying text.

231. See generally Draft B, supra note 221, §§ 2, 3(a), 3(b).
testator's legatees, friends, and relatives, and may use expert witnesses, such as psychiatrists, to provide additional information as it deems necessary. If the court decides to interview the testator, Draft B requires that counsel be present to insure the full protection of the testator's interests.

Once the court is satisfied that the will is proper, it will issue a determination which is binding on all parties. Although revocation may be effected by creating a new will or codicil, the statute suggests that the court be given notice of revocation. Finally, Draft B stipulates that the testator bear all costs for the ante-mortem procedure, including any expenses of the special master and witnesses.

2. Problems Associated with the Draft B Procedure

The Draft B model statute has two potential defects. The first is whether an ex parte proceeding is a constitutionally acceptable method of probate. The second is whether there is sufficient finality in a court decree which is voidable at the testator's whim through the creation of a new will or codicil.

The drafters of Draft B, addressing the constitutionality question, argue that the right to make a will is a function of the statute. Thus, being statutorily granted, the prospective beneficiaries' rights may be statutorily divested. Nevertheless, standard notice procedures, conforming with existing probate proceedings, might also be necessary to ensure the constitutionality of Draft B. This proposal could be placed in the model statute in place of language stipulating a purely ex parte proceeding.

Remedying the problem of finality is an inherently easier
question than that of constitutionality. One solution would be to modify the statute along the lines of the North Dakota ante-mortem statute to require a new court proceeding to invalidate a prior ante-mortem determination.\textsuperscript{243} Testators seeking to modify an administrative ante-mortem determination would thus be forced to seek a second hearing. The expense and difficulties of a second proceeding may discourage a potential user of an administrative ante-mortem statute.\textsuperscript{244} but the finality of the ante-mortem determination would be assured.

3. The Benefits of Draft B

If the flaws in the Draft B statute pass judicial scrutiny, the potential benefits of such a proceeding could revolutionize probate. An administrative proceeding would lessen the testator’s cost of an ante-mortem proceeding and would eliminate the cost to the prospective heirs.\textsuperscript{245}

The confidentiality of the will is assured under a Draft B proceeding.\textsuperscript{246} Except for a collateral attack on the ante-mortem proceeding itself, direct will contest could be virtually eliminated.\textsuperscript{247} The testator’s intent would be determined while he or she is alive and any technical problems with the will could be resolved.\textsuperscript{248} Drafting errors could be identified and corrected prior to a contest that could invalidate all or part of the will.\textsuperscript{249} Additionally, probate practitioners might be more accountable for errors in drafting, since any errors would be discovered in the testator’s lifetime and could have possible malpractice repercussions.

The courts would enjoy a dual benefit. First, post-mortem litigation would be reduced; second, any formal probate proceeding would be eliminated once the will was probated ante-mortem.\textsuperscript{250}

\textsuperscript{243} See supra notes 168–69 and accompanying text for a discussion of the finality requirements under the North Dakota ante-mortem statute.

\textsuperscript{244} Similarly, notice costs could prove prohibitive if the ex parte proceeding was rejected. See Alexander & Pearson, supra note 63, at 95–96.

\textsuperscript{245} See supra note 20, at 78–80.

\textsuperscript{246} See supra note 140 and accompanying text.

\textsuperscript{247} See, e.g., DRAFT B, supra note 221, § 1e comment:

An ex parte proceeding in the domiciling state determining the validity of the will under local rules would be entitled to full faith and credit in sister states, subject to provision for collateral attack to determine whether the testator was actually domiciled in the state making the determination.

\textit{Id.}

\textsuperscript{248} See supra note 20, passim.

\textsuperscript{249} See supra notes 18–25 and accompanying text.

\textsuperscript{250} See DRAFT B, supra note 221, § 5(b).
The courts would also benefit indirectly by the increased accountability of probate lawyers and the resulting improved work product coming to the courts. Ultimately, the greatest benefits should accrue to the general public under this type of ante-mortem proceeding.

VI. CONCLUSION

Contemporary ante-mortem formulations, represented by the ante-mortem statutes in Arkansas, North Dakota, and Ohio, cannot fulfill the promise of ante-mortem probate. The value of a comprehensive procedure which verifies testamentary capacity, freedom from undue influence, and the technical validity of a will is too important to be dismissed because of inadequate statutory formulations.

The primary defect in present ante-mortem statutes is the lack of confidentiality afforded the testator's will. The contest model proceeding compels the testator to publicly display a uniquely personal document that under normal circumstances would not be revealed or given legal effect until after its creator's death. It is not surprising that the existing statutes are rarely utilized.

Another serious flaw with existing ante-mortem statutes is the finality of judgment problem in the Arkansas and Ohio statutes—the court judgment may be overturned by the testator creating a new testamentary instrument. These statutes should be modified to conform with the North Dakota statute to ensure that the validity of the court's judgment will not be overturned by such a subsequent testamentary instrument. Thus, the testator should be compelled to seek another ante-mortem judgment before any subsequent testamentary instruments are given effect. This is indeed an insignificant burden to bear to obtain the potential security of an ante-mortem proceeding.

Established alternatives to existing ante-mortem statutes also have defects. Supplements to the will such as videotaping and self-proving procedures merely create presumptions of validity.

251. See supra note 2.
252. See supra note 120 and accompanying text.
253. See supra notes 100–23 and accompanying text.
254. See supra note 184.
255. See supra note 176 and accompanying text.
256. See supra notes 168–69 and accompanying text.
257. Id. See also supra notes 57 & 74 and accompanying text.
258. See supra notes 189–95 and accompanying text.
259. See supra notes 197–202 and accompanying text.
that are neither comprehensive nor conclusive in assuring a valid testamentary disposition. Devices incorporated in the will are useful in only a relatively narrow range of circumstances and can easily be overcome. Therefore, such devices cannot assure total testamentary security. These alternatives are really only supplementary measures to comprehensive probate reform.

The problems with existing ante-mortem statutes and established alternatives to ante-mortem probate have been the subject of considerable debate. What has yet to be fully addressed is the administrative model ante-mortem statute advanced by Professors Alexander and Pearson and given shape and form in the NCCUSL Uniform Ante-Mortem Probate of Wills Act, Draft B.

While Draft B has been dropped from consideration with the subsequent elimination of the Committee on Ante-Mortem Probate of Wills Act, it deserves reevaluation. There are, however, several problems with Draft B which arise in part from the novelty of the proceeding. The procedure's ex parte feature, which guarantees the security and confidentiality of the will, may be constitutionally difficult to sustain due to the lack of notice afforded the prospective heirs. This problem, however, can be conclusively resolved only by the courts.

Draft B's failure to resolve the problem of judgment finality can be solved by incorporating a provision similar to the revocation language in the North Dakota ante-mortem statute. An ante-mortem determination should not be revoked unless the testator is willing to revise that determination in another ante-mortem proceeding. This is a small burden to bear for almost absolute judicial assurance that testator's intent will be followed and post-mortem litigation eliminated.

Assuming that administrative ante-mortem probate is viable, the issue becomes whether this type of proceeding should be resurrected when existing ante-mortem statutes have failed. It is hoped that the failure of existing statutes should not be taken as a

260. See supra notes 203-12 and accompanying text.
261. See Langbein, supra note 20, at 68.
262. See Alexander & Pearson, supra note 63.
263. See supra notes 217-50 and accompanying text.
264. See supra note 221.
265. See supra note 13.
266. See supra note 134 and accompanying text.
267. See supra note 164 and accompanying text.
268. See supra note 57 and accompanying text.
failure of ante-mortem probate as a concept. A widely utilized administrative ante-mortem procedure could eliminate post-mortem litigation. Technical drafting problems that have plagued the profession for centuries could be identified and rectified prior to will invalidation. Finally, ante-mortem probate operates as a check against error on the part of the drafter, thereby ultimately benefiting the profession. Draft B deserves an opportunity to provide the probate area with a comprehensive solution to the present problems of existing ante- and post-mortem probate.

DANIEL A. FRIEDLANDER

269. See generally supra notes 19–20 and accompanying text (rationales for ante-mortem probate delineated).


271. The text of Draft B is set forth, without comments, in the Appendix to this Note.
APPENDIX*

National Conference of Commissioners for
Uniform State Laws
Uniform Ante-Mortem Probate of Wills Act
Draft B
November 7-9, 1980

SECTION 1. (Application for Ante-Mortem Verification of Will; Declarations Regarding Due Execution of Will During Testator's Lifetime.)

(a) Venue. During his lifetime a testator may apply to a court in the county of his domicile for a determination that his will has been duly executed and is his valid will subject only to subsequent revocation.

(b) Contents of Application. The application shall contain a copy of the will that the applicant wishes to have verified and shall include the following allegations: (1) that the will is in writing and was signed by the applicant or in the applicant's name by some other person in the applicant's presence and by his direction and was signed in the presence of the testator by two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will; (2) that the instrument was properly executed with testamentary intent; (3) that the applicant executed the instrument in the exercise of his own free will; and (4) that the applicant is familiar with the contents of the instrument.

The original will shall be filed with the application, but neither the original nor any copy thereof shall be available for inspection by any person other than the Court except as the Court in its discretion shall determine to be necessary and proper.

SECTION 2. (Procedure; Appointment of Special Master.)

(a) Qualifications. Upon the filing of an application, the Court shall appoint a special master to assist the Court in making determinations regarding due execution of the will. The master shall be a qualified attorney having no interest in verification of the will.

(b) Powers and Duties. The master shall interview the testator outside the presence of the attorney who prepared the will. He shall also interview members of the testator's family, other rela-
tives and friends of the testator, or any other individual as the
Court shall direct him. The Court may delegate to the master
such powers of investigation, including the right to have any rele-
vant documents produced, as it shall deem appropriate under the
circumstances. Following completion of his investigation, the
master shall submit to the Court a written report detailing his
findings. This report shall not be available for inspection to any-
one other than the Court.
SECTION 3. (Procedure; Hearing.)
(a) Hearing; Inquiry by Court. The Court may, if it deems
appropriate, schedule a hearing at which to interview the testator
the attesting witnesses if available, and any other witnesses or rel-
evant evidence. The testator shall at all times be represented by
counsel of his own choice or by court-appointed counsel.
(b) Witnesses; Medical Examination. The Court may call as
witnesses physicians, psychologists, psychiatrists, and other per-
sons of its own choosing to examine the testator or to be inter-
viewed by the Court. All interviews shall be conducted at a closed
hearing.
SECTION 4. (Determination on Application.)
If the Court is satisfied that the allegations of the application
have been sustained, it shall issue a written determination that the
testator’s will has been duly executed and is his valid will subject
only to subsequent withdrawal of the will or revocation and shall
require the will retained in the custody of the Court.
SECTION 5. (Effect of Determination; Necessity of Post-Mortem
Proceedings to Probate.)
(a) Notwithstanding any other provision of this Act, the deter-
mination of validity of a will during the testator’s lifetime under
this procedure shall be conclusive and binding on all persons. Any
will which has been the subject of a determination of validity
under this procedure shall not be subject to subsequent contest by
any person except on the ground of subsequent revocation.
(b) Unless subsequently withdrawn or revoked by the testator
any will which has been the subject of a determination of validity
under this procedure shall be deemed to have been probated and
no proceedings to probate such a will shall be necessary after the
death of the testator, except for purposes of determining whether
such a will has been subsequently revoked or modified.
SECTION 6. (Withdrawal of Will; Revocation.)
A will determined to be valid under the procedure may be
withdrawn during the testator's lifetime provided the testator files with the Court written notice of his withdrawal or revocation. Upon filing such notice with the Court, the will previously determined to be valid shall no longer be deemed his valid will. A will previously determined to be valid hereunder may also be revoked or modified by a subsequent will or codicil though the Court is not informed thereof.

SECTION 7. (Compensation and Expenses.)

The special master and any physician, psychologist, psychiatrist, or other person employed by the Court or the special master hereunder are entitled to reasonable compensation. The testator shall be responsible for expenses associated with these proceedings.