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Ante-Mortem Probate: Why Wait Until It's Too Late?

A proposal for proceedings that can take place before the death of the testator

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In 2011, copper heiress Huguette Clark died at the age of 104, leaving behind an estate valued at over $300 million. Clark, who had been divorced since 1929 and never had any children, waited until she was 98 years old to execute her first will. That will left most of her vast fortune to distant family members, many of whom she had never met. The complications began just six week later, however, when Clark executed a second will, expressly cutting out her family, and calling for most of her estate to be used to establish a foundation for the arts. Within months of the admission of Clark's second will to probate, her distant and estranged family members contested the will, challenging, among other things, Clark's mental capacity at the time of the second will's execution. This challenge, of course, came only after Clark had passed away, making any determination of her competency far from infallible.

Although the Clark saga played out in a New York court, New Jersey, like New York, employs post-mortem probate procedures by which the mental capacity of a testator, like Clark, can only be considered *after* her death. In New Jersey, pursuant to Title 3B, any individual that is "18 or more years of age who is of sound mind may make a will" that sets forth the intended distribution of his or her estate at death. N.J.S.A. 3B:3-1. The will is submitted for probate after the testator's death, at which time disappointed heirs may challenge its validity. The flaw in this system is that it allows for will contests, like that involving Huguette Clark, which all suffer from the same recurring evidentiary problem, i.e., the testator is no longer alive to testify as to his or her mental capacity and testamentary wishes. Moreover, will contests often occur many years after a will's execution, when memories have faded or individuals with relevant knowledge have moved or passed away. As a result, these contests are generally rife with speculation and conjecture that not only increase the expense of the proceedings, but also leave the accuracy of their ultimate outcome in doubt.

To alleviate these problems, four states—North Dakota, Ohio, Arkansas and Alaska—have authorized lifetime will validation by enacting "ante-mortem" probate statutes. See N.D. Cent. Code Ann. § 30.1-08.1-01, et seq.; Ohio Rev. Code Ann. § 2107.081, et seq.; Ark. Code Ann. § 28-40-201, et seq.; Alaska Stat. Ann. § 13.12.530, et seq. These statutes permit testators, if they choose during their lifetime, to have a court declare the validity of their wills, so as to reduce the probability of a will contest after their death.

Under North Dakota's ante-mortem probate statute, for example, a testator can seek a declaratory judgment during his or her lifetime concerning specific aspects of the will: (1) the will's statutory execution requirements; (2) testamentary capacity; and (3) the absence of undue influence. All beneficiaries named in the will and the present intestate successors must be named as parties to the action and can appear and challenge the validation should they so choose. Ultimately, a court's validation of the different aspects of the will is binding on all parties, unless and until a new will is created *and* a new ante-mortem proceeding is brought. Notably, facts found during an ante-mortem proceeding are inadmissible in any other proceeding not pertaining to the testator's will.

Ohio's statute is similar to North

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Dakota's in that it also permits a testator to petition the court for a declaratory judgment in which all beneficiaries and intestate successors are joined as parties. Ohio's statute also explicitly provides that the failure to use ante-mortem probate is inadmissible as evidence that the testator lacked testamentary capacity or was unduly influenced. In addition, Ohio's law allows the testator to modify or revoke the will using any lawful method; a new ante-mortem proceeding is *not* required. Moreover, rather than allowing judgments only on specific matters concerning the will, Ohio's statute allows the entire will to be validated during life.

The Arkansas statute also closely tracks the North Dakota law, but is similar to Ohio's statute in that it permits judgments based on the entire will rather than just specific matters, such as testamentary capacity. In addition, Arkansas allows the will to be "modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments," whether or not validated with ante-mortem proceedings. Ark. Code Ann. § 28-40-203. Finally, findings of fact made in connection with ante-mortem probate are admissible in subsequent legal proceedings.

Alaska became the fourth state to adopt ante-mortem probate in 2010. Unlike the other three states, Alaska's model allows ante-mortem validation of wills *and* trusts. Additionally, Alaska allows will validation proceedings to be initiated by either a testator or any interested party who has obtained the testator's consent. Furthermore, Alaska authorizes ante-mortem validation of any will, regardless of whether the testator is domiciled in Alaska. Alaska's statute also requires that many aspects of the ante-mortem proceedings be kept confidential.

New Jersey law does not currently allow ante-mortem probate. Although there are several options for reducing the likelihood of a will contest currently available in New Jersey (either by eliminating the need for a will or making it more difficult to challenge a will), each fails to offer the protection that an ante-mortem probate statute would provide. See Tracy Costello-Norris, Note, "Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?" 9 Conn. Prob. L.J. 327, 353-55 (1995) (providing a list of alternatives to ante-mortem probate). These options are discussed below:

• *Revocable Inter Vivos Trusts.* These trusts allow an individual to transfer an interest in property to a trust during life, while at the same time maintaining the ability to revoke the trust if desired. Inter vivos trusts are often used as a convenient method for disposing of assets at death, without the necessity of probate. Despite the convenience of the option, revocable inter vivos trusts, just like wills, can be challenged on the basis of fraud, undue influence or lack of capacity. In contrast, an ante-mortem declaration of a will's validity would not be subject to such attacks.

• *Joint Ownership with Survivorship Rights.* Joint ownership gives multiple individuals the right to control an asset during life. When a joint owner dies, the decedent's interest passes to the surviving joint owner or owners. However, many individuals do not wish to share control of their assets prior to death. Moreover, joint tenancy arrangements can also be contested on various grounds, such as fraud, lack of capacity or undue influence. An ante-mortem statute allows an individual to retain control of his or her assets until death and provides protection against attacks concerning their subsequent disposition.

• *Outright Gifts.* While making outright gifts can be a useful way of disposing of assets while an individual is alive, they can be contested after death on many of the same grounds as bequests in a will. Moreover, individuals may not wish to dispose of the majority of their estate in this fashion due to control issues, financial constraints and tax implications.

• *Self-Proved Wills.* Although the self-proved will provides a presumption that the formal requirements for the creation of a will have been satisfied, a challenger may still allege that the will was the product of fraud, forgery, undue influence or lack of capacity. Ante-mortem declarations allow an individual to offer direct testimonial evidence establishing that his or her will is valid.

• *In Terrorem Clauses.* In terrorem clauses reduce an individual's financial incentive to challenge a will by giving the prospective challenger a bequest so long as he or she refrains from contesting the will. An ante-mortem statute would allow an individual to protect his or her will from attack without the need to provide such defensive bequests. Moreover, if a reasonable basis for contesting the will exists, courts will not enforce these clauses even if the challenge ultimately fails.

• *Videotaped Will Execution Ceremonies.* While videotaped evidence may assist in establishing the validity of a will if performed properly, it is not as effective as an ante-mortem proceeding because it does not allow for interaction between the judge and the testator. At such a proceeding, a petitioner can provide direct testimony and a judge can make careful inquiries regarding the individual's capacity and freedom from undue influence, while at the same time affording interested parties an opportunity to present contrary evidence.

In 2013, after nearly two years of fighting, all of which could have been avoided by an ante-mortem proceeding, the battle over Huguette Clark's will ended with an 81-page settlement agreement. While the settlement was a win for many, the clear loser was Clark, whose wishes were unquestionably not carried out as intended under either version of her will.

Ante-mortem probate statutes afford a greater opportunity to achieve justice in probate actions. They provide individuals with a method to significantly reduce the probability that litigation will interfere with their carefully crafted estate plans. They also provide courts with an ability to consider direct testimony and evidence concerning an individual's testamentary intent, which increases the probability that courts will reach accurate conclusions concerning the validity of wills. Finally, ante-mortem probate statutes may foster judicial economy by discouraging frivolous will contests that would otherwise be instituted following the death of the testator. With the benefit of having four states' ante-mortem probate laws to draw from, the time has come for New Jersey to adopt its own ante-mortem probate statute. Doing so will provide individuals concerned about the ultimate disposition of their estate with a useful option to consider as an alternative to traditional post-mortem probate. ■