

The Commissioners’ Model of Ante-Mortem Probate

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I. INTRODUCTION

*“[T]here is no form of civil litigation more acrimonious and more conducive to the public display of soiled linen and the uncloseting of family skeletons than is the will contest.”*¹

Post-mortem probate involves utilizing a will to determine the distribution of property upon the testator’s death. At death, the will is offered for probate and the property is disposed of according to the testator’s desires, as reflected in the will. However, “experience has revealed that in many cases [post-mortem probate] serves only to destroy the very intentions which it is designed to protect.”² Post-mortem probate exposes the vulnerability of an estate’s resources, which are “no longer protected by the evidentiary power that lies buried with the testator.”³

This article discusses the problems with post-mortem probate, including the inadequacies of conventional techniques used to avoid it. Few states offer an alternative to post-mortem probate. Ante-mortem probate is one such alternative and serves to validate a testator’s will during his or her lifetime. This article describes the four current models of ante-mortem probate and their attempt to resolve the problems of post-mortem probate. Ante-mortem probate “confronts a problem that seriously impairs our probate system, the deprecatious will contest, and promises to help revitalize the probate process.”⁴ This article summarizes the advances and the revitalization of America’s interest in ante-mortem probate.

The focus of this article is to advocate a new method of ante-mortem probate, along with its proposed statute.⁵ This new method, the Commissioners’ Model, addresses the unresolved issues and eliminates the problems of current ante-mortem probate models. Additionally, this model could be easily modified to establish the validity of trusts during a settlor’s lifetime. In no way does this article purport to be the ultimate ante-mortem solution; however, this model demonstrates that ante-mortem probate deserves serious consideration and can eliminate the

traditional problems of post-mortem probate.

II. THE POST-MORTEM PROBATE PREDICAMENT

A. Deficiencies of Post-Mortem Probate

The three main deficiencies of post-mortem probate are: determining and effectuating the testator's intent, the encouragement of spurious will contests, and the creation of evidentiary dilemmas.⁶ These glaring deficiencies expose the ineffectiveness of post-mortem probate.⁷

1. Determining and Effectuating the Testator's Intent

“The ability to convey one's property is a right which every property owner normally enjoys during his life and, by use of a will, expects to have upon his death.”⁸ “The function of our testamentary law is to provide an efficient procedure for the transmission of property upon death in accordance with the will of its owner.”⁹ “The most difficult obstacle in determining the testator's intent in conventional post-mortem probate is the fact that the best witness to the meaning of the will, the testator, is dead.”¹⁰ Additionally, “in post-mortem probate, courts often substitute their own view of a *fair* dispositive scheme for that of the testator by finding that the testator's scheme is abnormal.”¹¹ Post-mortem probate simply cannot guarantee that a testator's property will be distributed according to his or her intentions.¹²

2. Spurious Will Contests

Post-mortem will contests “ensure that deserving heirs do not lose their portion of a decedent's estate as a result of fraud, improper influence, or insufficient capacity which may have affected the decedent at the time he executed his will.”¹³ However, “for the sole purpose of taking a greater share of the bounty . . . disgruntled devisees and disinherited heirs” enter into will contests to prove lack of capacity, fraud, or undue influence where none exists.¹⁴ The audacity of these false accusers is bolstered by the lack of consequences for unsuccessfully

contesting a will.¹⁵ Furthermore, this encourages the estate to settle spurious will contests to ensure that litigation costs do not deplete the estate's assets.¹⁶

3. Evidentiary Dilemma

“The evidentiary problems [with post-mortem probate] are both complex and numerous because the testator is dead and cannot testify as to his true intent.”¹⁷ Moreover, “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.”¹⁸ “Consequently, only indirect evidence is available to establish the testator's competence.”¹⁹ Additionally, will contests often occur years after the execution of the will, detrimentally affecting the availability of witnesses and quality of evidence during post-mortem procedures.²⁰

B. Ineffectiveness of Conventional Techniques

Attorneys have utilized four techniques in attempts to resolve the inherent problems with post-mortem probate.²¹ “However, none of these techniques are a substitute for ante-mortem probate.”²²

1. Non-Probate Transfers

The fear that post-mortem probate will not dispose of a testator's property in accordance with his or her intentions has prompted many testators to utilize non-probate transfers to avoid probate altogether.²³ However, these non-probate transfers “offer only slightly more security than the probate they claim to avoid.”²⁴

a. Revocable Inter Vivos Trusts

A revocable inter vivos trust contains the property of a settlor and names the persons who would have taken under his or her will as beneficiaries.²⁵ Once the settlor dies, “the power to revoke is extinguished [and] . . . [t]he trust continues to operate in favor of the beneficiaries

without the intervention of probate.”²⁶ This method, although generally effective, is subject to contests based on lack of capacity, undue influence, and fraud.²⁷ Therefore, this method is not a substitute for ante-mortem probate.

b. Joint Ownership with Survivorship Rights

“This estate planning tool, commonly used between spouses, permits the property subject to the survivorship agreement to pass immediately to the surviving joint owner without the interference of a probate court.”²⁸ “With joint ownership, each owner has the ability to control his or her proportionate share of the asset.”²⁹ However, many individuals wish to retain total control of their property before death.³⁰ Furthermore, this method is subject to claims of lack of capacity, undue influence, and fraud.³¹ Accordingly, this method is not an alternative to ante-mortem probate.

c. Outright Gifts

“The simplest and most pedestrian non-probate transfer is the outright gift.”³² Outright gifts are irrevocable and lack the flexibility that other methods provide.³³ Moreover, contrary to the desire of most individuals, outright gifts require that the donor relinquish his or her property prior to death.³⁴ Outright gifts are also subject to contests based on lack of capacity, undue influence, and fraud.³⁵ Thus, this method is not a plausible substitute for ante-mortem probate.

2. Self-Proved Wills

A testator may execute a self-proved will³⁶ by filing an affidavit along with his or her will.³⁷ “The accompanying instrument, which is signed by the testator as well as the requisite number of witnesses, is then notarized.”³⁸ A self-proved will has the effect of a “conclusive presumption of mechanical compliance with the signature requirements for the testator and the attesting witnesses.”³⁹ However, self-proved wills do not “make a conclusive determination that

a will is valid and binding as does ante-mortem probate.”⁴⁰ Moreover, self-proved wills may be contested on various grounds, including lack of capacity, undue influence, and fraud.⁴¹ Therefore, self-proved wills are not an alternative to ante-mortem probate.⁴²

3. In Terrorem Clauses

An in terrorem clause in a will gives beneficiaries a sizeable bequest and “threatens [them] with loss of their bequests should they unsuccessfully challenge the validity of the will.”⁴³ “Although typically this bequest is substantially less than his intestate share, it is considerably more than what the contestant would receive if the challenge fails.”⁴⁴ However, in terrorem clauses do nothing to establish the validity of a testator’s will.⁴⁵ Furthermore, in terrorem clauses are subject to contests on various grounds, including capacity, undue influence, and fraud.⁴⁶ Accordingly, in terrorem clauses cannot be a substitute for ante-mortem probate.

4. Videotaped Will Executions

“In a videotaped will the testator reads the will into a camera and records for posterity every gesture, facial expression, and verbal intonation.”⁴⁷ The use of a videotaped will, however, does not dispense of the requirement that the actual will be in writing.⁴⁸ For example, a testator could conceivably have a valid videotaped will and an invalid written will, which would render the videotaping process useless. Videotaping also lends itself to exploitation by “creating an erroneous impression of the testator on tape” through the use of “professionally prepared scripts, to obtain a high degree of unwarranted credibility.”⁴⁹ At best, videotaped wills are a supplement to written wills and “pale[] in comparison to ante-mortem probate.”⁵⁰ Therefore, videotaped wills cannot be an alternative to ante-mortem probate.

III. CURRENT ANTE-MORTEM PROBATE MODELS

A. The Contest Model

Proposed by Professor Howard Fink in 1976, the Contest Model “places the testator and the prospective heirs in an adversarial position which allows for a declaratory judgment.”⁵¹ All persons would be notified of the proceeding and granted standing.⁵² “[A]ny unborn or unascertained heirs are protected by the appointment of a guardian ad litem or by the active protection of others under virtual representation.”⁵³

Once a testator executes his or her will under this model, he or she initiates a “proceeding for a [declaratory] judgment declaring the validity of the will.”⁵⁴ “To determine the will’s validity, the court would consider the signatures, the number of witnesses to the will, the absence of undue influence, and . . . testamentary capacity.”⁵⁵ If the court determines that the will is valid, the will is placed on file with the court and is binding unless the testator executes a new will in accordance with Contest Model.⁵⁶

Although this model resolves the problem finality by binding all parties, its adversarial nature along with disclosing the will’s contents, results in severe disharmony between the testator and his or her family and friends.⁵⁷

B. The Conservatorship Model

Developed in 1980, Professor Langbein’s Conservatorship Model attempted to resolve the problems of the Contest Model.⁵⁸ Here, a testator petitions the court to enter a declaratory judgment validating his or her will.⁵⁹ However, instead of requiring heirs and beneficiaries to personally contest the will, this model appoints a guardian ad litem to represent the interests of all presumptive takers.⁶⁰

Although this model seems to promote family harmony by resolving the confrontation

problem of the Contest Model, it still discloses the will's contents.⁶¹ "The repercussions on family life tend to make [proposals that disclose the will's contents] poor public policy."⁶²

C. The Administrative Model

"Reflecting a significant departure from the contest and conservatorship models . . . Professors Gregory Alexander and Albert Pearson proposed the implementation of an Administrative Model of ante-mortem probate."⁶³ Unlike the previous models, which resemble an accelerated will contest, the Administrative Model is an ex parte proceeding to determine a will's validity.⁶⁴

As with the other models, the testator initiates the proceeding by petitioning the court to determine the validity of his or her will.⁶⁵ "The hearing regarding the will would take place in camera, so that the will does not need to become a matter of public record."⁶⁶ The guardian ad litem in this model "would be an investigating agent of the court, rather than a fiduciary of those holding prospective interests in the testator's estate."⁶⁷ The guardian is responsible for "privately interviewing the testator to determine the existence of undue influence or lack of capacity."⁶⁸ Unlike Langbein's model, the guardian is not informed of the will's contents; however, the judge has the discretion to disclose any unusual provisions, without disclosing its terms.⁶⁹

Because "expectant heirs and legatees have no constitutional right to notice . . . notice should not be required for any other individual" except the guardian ad litem.⁷⁰ "The product of the process would be an order declaring the will free from testamentary defects and duly executed."⁷¹ Alexander and Pearson "assert that because the right to contest the suggested proceeding is statutory and can be changed, the alterations of these statutes should make the administrative proposal functional and legal."⁷²

States have not adopted the Administrative Model, primarily because of their concerns of

finality.⁷³ If the proceeding is binding, then problems of notice arise.⁷⁴ If the proceeding is not binding, the unnecessary hardship and costs to the estate make the procedure futile.⁷⁵

D. The Mediation Model

In 1999, Dana Greene attempted to resolve the issues of the previous models with the Mediation Model of ante-mortem probate.⁷⁶ This model applies the principles of mediation to probate matters to “preserve the relationships between family members and the society around them.”⁷⁷

Like the other models, the testator petitions the court to declare the validity of his or her will.⁷⁸ Once the court receives the petition, it orders all “interested parties and potential heirs” into mediation through “relaxed” rules of service.⁷⁹ Under this model, the mediation does not become part of the public record and it is not binding.⁸⁰ Additionally, “the cost of the mediator should be shared by all parties involved.”⁸¹

Although the expense of the actual mediation is diminished through cost-sharing, the outcome of the mediation is not binding on any party. This forces the estate to either litigate or settle spurious will contests. Either way, the estate’s assets are at risk of unnecessary waste. Furthermore, the court notifies potential heirs and beneficiaries of the will’s contents; thus creating substantial family disharmony.

IV. DEVELOPMENT OF ANTE-MORTEM PROBATE IN THE UNITED STATES

A. Overview

Michigan enacted the first ante-mortem probate legislation in 1883.⁸² However, just two years later, the Michigan Supreme Court declared these innovative statutes unconstitutional.⁸³ “In 1910, Congress enacted a kind of ante-mortem probate applicable to certain Indian tribes under the guardianship of the federal government.”⁸⁴ Under this Act, the Secretary of the

Interior's duty was to establish the authenticity of the testator's signature, assess mental capacity, and determine why natural heirs, if any, were disinherited.⁸⁵ However, "[t]he potential for extensive development of this ante-mortem technique . . . was never realized" because subsequent "regulations indicated that the preferred practice was not to approve a will before the testator's death."⁸⁶

Interest in ante-mortem probate declined until the 1930s, when the "National Conference of Commissioners on Uniform State Laws (NCCUSL) created a special committee to draft a uniform act to establish wills before the death of the testator."⁸⁷ Although, ante-mortem probate garnered support from legal commentators, most notably, Professor David F. Cavers, the committee's "tentative draft was not met with a positive response."⁸⁸

Prior to 1937, when the United States Supreme Court "broke the shackles restraining judicial involvement by clarifying what constitutes a 'controversy,'" declaratory judgments were "outside the realm of judicial competence."⁸⁹ "This development opened the door to the use of declaratory judgments . . . regarding the validity of a will and legal rights stemming from it."⁹⁰

However, in *Cowan v. Cowan*, a Texas court refused to determine the validity of a mother's will through a declaratory judgment proceeding requested by her two children.⁹¹ In reaching its decision, the *Cowan* court relied on the same opinion that invalidated the Michigan ante-mortem legislation.⁹² "Absent a statute expressly conferring such jurisdiction, the court held that there was no judicial authority to hear a suit to establish or annul the will of a living person."⁹³ In light of *Cowan*, "[i]t seemed that a statute . . . expressly giving jurisdiction to the courts to hear ante-mortem cases would be required."⁹⁴

"During the early 1940s, the drafters of the Model Probate Code gave brief consideration to the possibility of including provisions for ante-mortem probate," but ultimately decided

against it because of the “publicity involved in such a proceeding.”⁹⁵ In 1967, during the “early stages of the development of the Uniform Probate Code, the drafters again gave serious consideration to the inclusion of an ante-mortem procedure”⁹⁶ and even drafted provisions “permitting the testator to petition the court ‘for an order declaring that his [w]ill has been duly executed and is his valid [w]ill subject only to subsequent revocation.’”⁹⁷ However, “[d]espite the initial sanctioning of this progressive estate planning technique, the drafters omitted any reference to ante-mortem probate in subsequent drafts of the UPC.”⁹⁸

“Between 1976 and 1982, many articles were written expressing both the advantages and disadvantages of the ante-mortem probate alternative.”⁹⁹ Based on this renewed interest, “three states enacted ante-mortem statutes based on the contest model: North Dakota in 1977, Ohio in 1978, and Arkansas in 1979.”¹⁰⁰ “Simultaneously, the NCCUSL drafted several versions of a Uniform Ante-Mortem Probate of Wills Act.”¹⁰¹ Despite its initial success, however, the commissioners never approved a final draft and “enthusiasm began to wane once again.”¹⁰² This enthusiasm for ante-mortem probate would remain dormant for over thirty years.

In 2010, Alaska reignited the interest in ante-mortem probate when it enacted the first ante-mortem probate legislation since the Arkansas statutes.¹⁰³ With the interest in ante-mortem probate gaining momentum, Nevada soon followed in enacting its own ante-mortem probate legislation.¹⁰⁴ As with the previous states to enact ante-mortem probate statutes, both Alaska and Nevada enacted a form of the Contest Model.¹⁰⁵ Unlike the previous statutes, Alaska and Nevada also provided for the validation of a trust during a settlor’s lifetime.¹⁰⁶ The problem, however, with all current ante-mortem legislation is the adversarial and public nature of the proceeding.

V. THE PROPOSED COMMISSIONERS' MODEL OF ANTE-MORTEM PROBATE

It is common sense to take a method and try it: If it fails, admit it frankly and try another. But above all, try something.

— Franklin D. Roosevelt,
Oglethorpe University Commencement Address, May 22, 1932

A. Introduction

Modeled loosely after the Special Commissioners' Hearing of the eminent domain and condemnation process,¹⁰⁷ the Commissioners' Model of ante-mortem probate is a viable alternative to the four current models of ante-mortem probate. Not only does this model address the inherent inadequacies with post-mortem probate,¹⁰⁸ it seeks to reduce, if not eliminate, the flaws in the current ante-mortem models.¹⁰⁹ By embracing the benefits of the current ante-mortem probate models and utilizing new procedures to redress their inadequacies, the Commissioners' Model finally provides a testator with the opportunity, during his or her lifetime, to have a court declare his or her will valid and free from undue influence.

1. Overview

The testator initiates the process by petitioning the probate court.¹¹⁰ Once the testator initiates the proceeding, the court appoints three commissioners and one disinterested probate attorney. The guardian's purpose is to determine capacity and freedom from undue influence.¹¹¹ The commissioners are responsible conducting the hearing and will hear evidence from the testator and the guardian ad litem to make their determination. The entire record of the hearing shall be sealed and filed with the court. At the conclusion of the hearing, the commissioners enter a report and recommendation to the probate judge. The probate judge should enter a judgment accordingly and upon the testator's death, it shall be enforceable against all presumptive takers.

B. The Process

1. Initiation

As an initial procedural safeguard, this model requires that the testator obtain legal representation by a licensed practitioner of the testator's domiciliary jurisdiction.¹¹² Although the right to represent oneself is a fundamental constitutional right, it is not absolute.¹¹³ "The requirement of representation should assure adequate preliminary counseling of the testator and proper drafting . . . of the will; it would also protect against any frivolous use of the [ante-mortem] procedure by perverse or entertainment-seeking testator."¹¹⁴

The testator initiates the proceeding in the probate court in the county in which he or she is domiciled. The petition should also include the testator's proposed, unexecuted will. Additionally, the petition must include an affidavit from the testator stating that he or she possesses the requisite capacity and is free from undue influence. The testator's petition must also include an affidavit from a physician, along with the physician's report, stating that the testator is in satisfactory mental and physical health. A testator may select any physician who is licensed to practice medicine within the testator's state of domicile. This minimal restriction is balanced with the physician-commissioner's ability to review the physician's report for any discrepancies.¹¹⁵ Once a testator has initiated the ante-mortem process, the court would appoint a guardian ad litem and three commissioners.

2. Guardian Ad Litem

The guardian ad litem's role is purely administrative.¹¹⁶ The guardian sole purpose is to determine capacity and freedom from undue influence. He or she does not represent a class or classes of claimants.¹¹⁷ Unlike the Administrative Model, the commissioners should not inform the guardian of the contents of the testator's will nor should they alert the guardian to inquire

about specific matters within the will.¹¹⁸

Before the hearing, the guardian should interview the testator with no one else present. This will enable the guardian to ascertain possible capacity and undue influence issues without any outside influence. Privacy also encourages the testator to disclose information in confidence, that he or she may not have disclosed if the interview was recorded or others were present. Additionally, the guardian may not interview any of the testator's family, friends, or beneficiaries to previous wills. This maintains familial harmony and prevents confusion of the ultimate issue—whether the testator has capacity and is free from undue influence.

Based on this interview and before the hearing, the guardian submits a report to the commissioners regarding capacity and undue influence. The written report and hearing provide the guardian with ample opportunity to express any concerns he or she has.

3. The Commissioners

The court appoints three commissioners: a medical physician, a notary public, and a disinterested probate attorney. The notary may also be an attorney or physician. For example, the commissioners may consist of one or more doctors or attorneys, so long as there is at least one notary public. Each commissioner should live in the county where the testator initiated the ante-mortem proceeding. The commissioners must take an oath to determine, fairly, impartially, and in accordance with the applicable law, whether the testator possesses the required capacity and is free from undue influence. They may not disclose the contents of the testator's will to anyone nor disclose any information to anyone not present at the hearing.

Within twenty-one (21) days from their appointments, the commissioners should conduct the hearing. The commissioners must schedule the hearing at the most practical place within the county and provide at least eleven (11) days notice to the testator and guardian ad litem. These

relatively short deadlines ensure the reasonable expediency and efficiency of ante-mortem probate.¹¹⁹

During the hearing, the commissioners will consider evidence from the testator and guardian ad litem regarding capacity and undue influence. Because one of the commissioners is a medical physician, he or she can knowledgably review the testator's health report. This enables the commissioners to rule out any possible error on the part of the testator's physician. Moreover, if the physician-commissioner deems proper, he or she may conduct his or her own medical examination of the testator. The hearing will also provide the commissioners with an opportunity to question the testator about and resolve any issues regarding capacity and freedom from undue influence. Furthermore, the commissioners will be able to review the will to determine compliance with the formalities requirement. Once the commissioners determine that the testator possesses the requisite capacity, is free from undue influence, and the will satisfies the formalities requirement, the testator should then execute the will.

Will execution at the commissioners' hearing is similar to the process of executing a self-proving affidavit. To execute his or her will, the testator must sign in the presence of the commissioners, have two commissioners attest to his or her signature, and have the signatures notarized. The composition of the commissioners facilitates this process. If the commissioners find that the testator lacks capacity or has acted under undue influence, they should not attest to the testator's will. They should make a report and recommendation noting the reasons for their findings. The court will then enter a declaratory judgment according to the commissioners' report and recommendation. Regardless of the commissioners' determination, the entire record, including the will, would be sealed and filed with the court. During the testator's lifetime, only the testator and his or her attorney may have access to the court's file.

4. Notice and Service of Process

. . . [T]he most striking difficulty that inheres in conceiving of living probate . . . is expressed in a fundamental maxim of property law: *nemo est haeres viventis*, commonly rendered as “the living have no heirs.”¹²⁰

Under the Commissioners’ Model, only the appointed commissioners and guardian ad litem receive notice. It is not necessary to serve or notify any presumptive taker that the testator has initiated ante-mortem probate proceedings, because presumptive takers have no constitutional right to due process.¹²¹ Moreover, any potential beneficiary’s interest in the will is a “mere expectancy” and is not a sufficient property interests to trigger the due process guarantee of the Constitution.¹²² Although there are no United States Supreme Court decisions that expressly hold that the property interest of a potential beneficiary under a will is insufficient to trigger the due process guarantee of the Constitution, analysis of the following cases support that proposition.¹²³

In 1950, the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*,¹²⁴ established a state’s right to close a trust and determine the interests of all claimants, resident or non-resident, provided they had an opportunity to appear and be heard.¹²⁵ In *Mullane*, New York law authorized trustees to pool smaller trusts into a larger, common trust, pursuant to a binding, judicial decree.¹²⁶ The property right at issue was a beneficiary’s right to contest the trustee’s actions at the judicial hearing.¹²⁷ The Court determined that the judicial proceeding did or might deprive the beneficiaries of property in two ways: (1) “[i]t may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests;”¹²⁸ and (2) “their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest.”¹²⁹ The *Mullane* Court struck down the New York statute

because notice by publication alone was insufficient with regard to “known *present* beneficiaries with known place of residence.”¹³⁰ However, the Court held that notice by publication is sufficient with regard to beneficiaries “whose interests or addresses are unknown.”¹³¹

As Alexander and Pearson stated, “Reliance on *Mullane* to establish the same procedural due process requirements for [ante-mortem] probate proceedings fails because the interests of the trust beneficiaries in *Mullane* are fundamentally different from those that the testator’s legal heirs and legatees . . . may assert in [ante-mortem] probate proceedings.”¹³² Perhaps the most notable distinction is that, unlike the beneficiaries in *Mullane*, an heir or legatee has no *present interest* in a will.¹³³ At most, a potential taker has a mere expectancy to take under a will after the death of the testator.¹³⁴ Moreover, a legatee’s expectant interest cannot be diminished because potential beneficiaries are not present to contest the ante-mortem proceeding. Additionally, unlike the trustee in *Mullane*, a testator has no fiduciary duty to maintain property in his or her will for the benefit of a potential taker.¹³⁵ Heirs and legatees may not claim a breach of fiduciary duty against the testator because no such duty exists.¹³⁶ Since no fiduciary duty exists, a testator cannot negligently or illegally impair a legatee’s conjectural interest. No fiduciary duty exists and potential heirs and legatees do not have a *present* property interest. Therefore, ante-mortem probate cannot deprive them of property and does not require notice under *Mullane*.

In *Goldberg v. Kelly*, the United States Supreme Court determined that an individual had sufficient property interest in statutorily mandated welfare payments to require procedural due process before the state may discontinue payments.¹³⁷ The Court explained that “[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss.’”¹³⁸ The “crucial factor” in *Goldberg*, was that

the “termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.”¹³⁹ The Court reasoned that “welfare provides the means to obtain essential food, clothing, housing, and medical care”¹⁴⁰ and that under these circumstances, an individual must “concentrate on finding the means for daily subsistence, in turn, adversely affect[ing] his ability to seek redress from the welfare bureaucracy.”¹⁴¹

Unlike a welfare recipient, a legatee is not “condemned to suffer grievous loss” at the hands of ante-mortem probate. Potential beneficiaries have an expectant interest and not a *present* interest in taking under a testator’s will. Because a presumptive taker has an expectant interest, an ante-mortem determination cannot deprive him of means by which he *presently* relies. Furthermore, the determination of requisite capacity and freedom from undue influence cannot deprive a potential legatee while he waits, because the legatee is not *presently* relying on that interest. Additionally, the expectation of taking under a will does not provide a potential beneficiary with the means to obtain essential food, clothing, housing, or medical care. The ante-mortem probate process does not affect an individual’s ability to acquire daily sustenance nor does it condemn potential beneficiaries to “suffer grievous loss.” Because, ante-mortem probate does not affect this “crucial factor,” it does not require notice under *Goldberg*.

The United States Supreme Court in *Board of Regents of State Colleges v. Roth*, established a framework to determine the requirements for notice with respect to property rights. In *Roth*, the property interest was the continued employment of a state employee who was fired without a pre-termination hearing. “[T]o determine whether due process requirements apply in the first place, we must look not to the ‘weight’ but to the nature of the interest at stake.”¹⁴² The Court further explained that the “procedural protection of property is a safeguard of the security

interests that a person has *already* acquired in specific benefits.”¹⁴³ Elaborating, the Court stated that, “[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must have a legitimate claim of entitlement to it.”¹⁴⁴ The Court acknowledged that property interests are not created by the Constitution, but are statutorily created and secure benefits or claims of entitlements to those benefits.¹⁴⁵ The applicable statutes in *Roth* created no property interest or legitimate claim to the interest of reemployment whatsoever.¹⁴⁶ The Court held that the only property at interest was an abstract concern, which did not trigger due process requirements.¹⁴⁷

Similarly, a presumptive taker only has an expectancy to receive property under the will. Prior to the death of the testator, a beneficiary under a will has not *acquired* any rights to the testator’s property. Because he or she has not *acquired* any rights to the testator’s property a legatee or devisee cannot have a “legitimate claim of entitlement.” At best, a potential beneficiary’s interest is a “unilateral expectation” or an “abstract desire” to take under the will. The potential legatee cannot be said to have *already acquired* a “legitimate claim of entitlement” to something which he or she may not receive at all. For example, a testator may revoke his will, a potential taker may predecease the testator, a court may declare a will void for failure to comply with formalities, etc. The potential beneficiary’s abstract desire to obtain property under the will is not a sufficient property interest to elicit the due process guarantees of the Constitution. Because a legatee does not have a “legitimate claim of entitlement” to property in a testator’s will, ante-mortem proceedings do not require notice under *Roth*.

5. Confidentiality

One of the problems facing ante-mortem probate is the disruption of family harmony by disclosing the contents of the testator’s will.¹⁴⁸ This is why the Commissioners’ Model does not

disclose the contents of the will. This prevents anyone, except the commissioners, from knowing the contents of the will unless the testator discloses that information. Critics of ante-mortem probate also argue that the disruption of family harmony occurs because the testator will recognize the source of information used to challenge the will¹⁴⁹ and family members will grow curious as to the contents of the will.¹⁵⁰ However, both of these arguments fail under the Commissioners' Model.

The Commissioners' Model does not provide notice to anyone. This includes, but is not limited to, family members, presumptive takers, and beneficiaries under previous wills. Because family members do not receive notice of the ante-mortem probate proceeding, there is no threat that a testator will discover the source of information challenging the will. For this same reason, there is no threat that family members will grow curious as to the contents of the will. Additionally, the sources challenging the will are the commissioners and the guardian ad litem, both of which are readily apparent to the testator. It is extremely improbable and almost absurd to think the testator will disrupt his or her *own* family harmony. The bottom line is that family members who have no notice can do no harm.

By placing the sealed record with the court, family members and beneficiaries will only become aware of the will's contents *after* the testator's death. This is the normal procedure for current post-mortem probate as well. Therefore, opponents of ante-mortem probate cannot claim that this method of ante-mortem probate causes any more family discord than the current model of post-mortem probate. Thus, the Commissioners' Model resolves the problems by maintaining the testator's confidences and preserving familial harmony.

6. Certainty and Finality

The declaratory judgment should state whether the testator possesses the required capacity, is free from undue influence, and whether the will satisfies the formalities requirement. The declaratory judgment is final and binding upon all parties in any post-mortem proceeding with regard to capacity, undue influence, and satisfaction of the formalities. As Alexander and Pearson stated, “[h]eirs at law and disappointed legatees need not be given an opportunity to contest because . . . their interests, being only derivative of the testator’s, are bound by the testator’s actions.”¹⁵¹ This ensures that a disgruntled heir or beneficiary cannot attack the will’s validity based on any ante-mortem determination.

The court’s decree, however, is not binding on those persons “injured by fraud in the [ante-mortem] probate proceedings.”¹⁵² Because a “testator would not be bound by a proceeding that was fraudulently induced, the heirs [injured by fraud] may raise the matter during post-mortem proceedings.”¹⁵³ The retention of the “traditional remedies for fraudulent concealment of evidence of invalidity” does not affect the court’s ante-mortem declaratory judgment and does not allow will contests to challenge the ante-mortem determinations of capacity, freedom from undue influence, or satisfaction of formalities.¹⁵⁴ These contests are designed to prevent fraud that induced the testator to enter into ante-mortem proceeding and/or fraud that prevented the testator from modifying or revoking a will validated by ante-mortem probate. This protects the estate’s assets and the testator’s desires by reducing the scope of post-mortem probate and preventing dissatisfied legatees from initiating spurious will contests.

7. Revocation

Another criticism of the various methods of ante-mortem probate is the method of revocation.¹⁵⁵ Under the current models of ante-mortem probate¹⁵⁶ there are three alternative

methods of revocation.¹⁵⁷ First, Fink requires the testator who wishes to modify or revoke a previously validated will to initiate another ante-mortem probate proceeding.¹⁵⁸ Second, Langbein permits a testator to modify or revoke a will validated by living probate by any legally acceptable means.¹⁵⁹ Third, Alexander and Pearson's method of revocation lies in the middle of these two extremes by allowing the testator to simply submit notice of revocation or modification to the court.¹⁶⁰

The Commissioners Model seeks to provide the testator with the best possible method of revocation. Fink's method, while extremely thorough, is too burdensome on the testator. The burden includes the additional costs and time that another ante-mortem probate proceeding requires. This burden would prevent a testator from revoking or modifying his or her will, which is detrimental to effectuating the testator's true intent.¹⁶¹ Langbein's method, on the other hand, is too lax. Allowing a testator to revoke or modify a previously validated will outside the purview of the court would subject him or her to post-mortem contests regarding capacity and undue influence—the precise issues that ante-mortem is designed to eliminate. This would effectively render ante-mortem probate useless. Alexander and Pearson's method, although adequate, lacks additional safeguards. Simply notifying the court that the testator has modified or revoked his or her will provides no assurance to the court that the testator has capacity or is free from undue influence.

The Commissioners' Model requires a testator to provide notice of revocation or modification to the court that conducted the ante-mortem probate proceeding. This model also requires an affidavit from the testator stating that he or she has the requisite capacity and is free from undue influence. The testator and two witnesses should sign the affidavit and notice of revocation or modification. Once the affidavit and notice have the required signatures, they

should be notarized. After the testator files his affidavit and notice with the court, the court should place them both in the testator's sealed file. Under this method, a testator may not revoke or modify a previously validated will by any other means.

These additional safeguards provide a testator with the ability to modify or revoke his or her will and furnishes the court with reasonable assurances of its validity, without undergoing another ante-mortem probate proceeding. Since the will is sealed and filed with the court, a testator may not revoke his or her will by physical act. This protects the testator's estate from possible claims of fraudulent destruction or modification of the will.

Revocation or modification of a will validated by ante-mortem probate, although permissible, invalidates the court's declaratory judgment. This negates the presumption of capacity and freedom from undue influence. However, the sealed record of the ante-mortem probate proceeding is admissible in any post-mortem will contest. This allows the estate to use the evidence of capacity and freedom from undue influence to establish a correlation between the previously validated will and the modified or revoked will. While this relationship may not always exist, a testator who utilizes ante-mortem probate should be cognizant of the effect a modification or revocation has on the determination of capacity and freedom from undue influence. Moreover, if the testator desires, he or she may choose to initiate another ante-mortem probate proceeding to modify or revoke a previously validated will. This new proceeding would have the same effect as the original, assuming the commissioners found requisite capacity and freedom from undue influence.

8. Costs

As Langbein put it, "Living probate is a testator's option, provided for the testator's benefit, and it should proceed at the testator's expense."¹⁶² Accordingly, the testator is

responsible for the cost of ante-mortem probate. The Commissioners' Model seeks to minimize the cost by granting reasonable and customary compensation to the commissioners and guardian ad litem, establishing a flat rate court cost, and providing testators with incentive to submit an accurate physician's report.

The testator should pay the commissioners and guardian ad litem a reasonable and customary compensation for the same or similar services within the county in which the ante-mortem probate proceeding was initiated. Since they are similarly situated parties with similar duties, the commissioners and guardian ad litem should receive equal compensation. Because reasonableness is dependent upon location, the court should determine reasonable compensation. However, the testator's attorney is free to establish his or her own fees. For example, an attorney may have gained a reputation for being an exceptional will drafter or particularly knowledgeable in estate planning and probate matters. There is no reason to prevent an attorney from charging a testator at his or her normal rate when he or she has earned that right.

Conducting a hearing should become routine as commissioners, guardians ad litem, and attorneys become more familiar with the process. This familiarity will decrease the total time involved, thus decreasing the total amount charged to the testator. Furthermore, since minimal court involvement is required, the court costs should be relatively low. Thus, the court should adopt the same or similar fee for the Commissioners' Model as for uncontested probate, since both proceedings entail minimal court involvement.

The testator is also responsible for the cost of his or her initial medical examination. If the commissioners are unsatisfied with the testator's medical report, the testator must also pay for the additional medical examination. This provides a testator with incentive to ensure the initial medical report is thorough and unbiased. Furthermore, it is highly unlikely that the

additional medical examination would cost more than the reasonable hourly rate of the physician-commissioner. Thus, the cost would be less than paying for one hour of a commissioner's reasonable and customary fee.

By awarding reasonable and customary compensation, establishing a relatively low court cost, and providing an incentive to produce an accurate physician's report, the Commissioners' Model effectively minimizes the cost of ante-mortem probate. The minimization of costs will increase the attractiveness of ante-mortem probate and provide an incentive for testators to utilize the process. This attractiveness and increased use of the Commissioners' Model will increase the overall efficacy of ante-mortem probate and provide testators with the ability to prevent spurious post-mortem will contests. The Commissioners' Model acknowledges that a relatively high cost is associated with the ante-mortem process. However, the costs associated with defending post-mortem will contests, substantially outweighs the cost associated with ante-mortem probate.

9. Right to Appeal the Commissioners' Decision

A testator and guardian should have the right to appeal the commissioners' decision. To appeal the decision, the testator should file the appeal with the court that initiated the ante-mortem proceeding. If the guardian does not appeal the commissioners' decision within seven (7) days, he or she has lost that right. The court should review the sealed record of the ante-mortem proceeding for abuse of discretion. The abuse of discretion standard gives a stronger weight to the facts as established at the commissioners' hearing. This provides a testator with incentive to disclose all material and relevant facts at the hearing so that both the commissioners' and the appellate review can make an accurate determination.

If the court determines that the commissioners did not abuse their discretion, it should

affirm the commissioners' decision and enter a judgment accordingly. If, however, the court determines that the commissioners did abuse their discretion, it should specifically note its findings for reversal and enter a judgment accordingly. Regardless of whether the court reverses or affirms the commissioners' decision, it should place its decision in the sealed record and file it accordingly. The entire record is only available to the testator and his or her attorney during the lifetime of the testator.

An unsuccessful testator may wish to initiate another ante-mortem proceeding. The entire sealed record is available as evidence in this new proceeding. The ability to review the record *and* conduct its own factual inquiry, increases the accuracy of the determination of validity or invalidity.

10. Legal Malpractice

Another criticism of ante-mortem probate is the fear that attorneys will be subject to malpractice claims for failing to inform a testator of ante-mortem probate.¹⁶³ However, under the Commissioners' Model, the failure to use or inform a testator of ante-mortem probate is inadmissible against that attorney in any legal malpractice action.¹⁶⁴ With regard to ante-mortem probate, an attorney should not be obligated to inform a client of a procedure that would be futile or subject the client to unnecessary embarrassment.

VI. ADDRESSING THE CRITICISM¹⁶⁵ OF ANTE-MORTEM PROBATE

In Mary Louise Fellows', *The Case Against Living Probate*, she argues that current ante-mortem probate models contain unresolved issues and are flawed.¹⁶⁶ The Commissioners' Model addresses and resolves Fellows' concerns.

A. Unresolved Issues with Current Ante-Mortem Probate Models¹⁶⁷

1. Parties of a living probate could appeal a finding of validity or invalidity

Fellows claims that difficulties will arise “in defining the duty of a guardian ad litem to pursue an appeal.”¹⁶⁸ Under the Commissioners’ Model, the guardian must appeal the commissioners’ decision within seven (7) days. This provides efficient and reasonable resolution to the guardian’s doubts, while expediting the process for the testator.

Fellows also argues that if a testator dies before the conclusion of the appellate process, “the distribution of the estate will have to await a final order.”¹⁶⁹ The statute for the Commissioners’ Model expressly deals with this situation. If a testator dies during the appellate process, the distribution of his or her property depends on whether the court previously entered a declaratory judgment validating the will. If previously validated, the will executed at the commissioners’ hearing governs the property distribution. If not, the property is governed by a prior will or the laws of intestacy. By providing the family with a distribution scheme, this model seeks to maintain familial harmony and allow them to grieve for their loved one instead of feuding over property distribution.

2. Uncertainty as to collateral effect of a final ante-mortem order of invalidity

Fellows contends that problems arise when a testator executes another will after an ante-mortem determination of invalidity.¹⁷⁰ Although the sealed record is admissible, the court must conduct its own factual inquiry into capacity, undue influence, and fraud with regard the new will. The court’s ability to utilize the sealed record *in addition* to its own inquiry bolsters its ability to attain a more accurate determination of validity or invalidity. For example, the court can develop a positive or negative correlation between the facts at the commissioners’ hearing and the post-mortem proceeding. It may also draw upon similarities or differences from the will

at the commissioners' hearing and the proffered will. This is quite different from the process Fellows envisions, where the court supplants its own factual inquiry with the evidence from a finding of invalidity.¹⁷¹

Fellows also maintains that “a prior finding of fraud or undue influence with respect to a prior will is likely to be given less weight.”¹⁷² Again, because the sealed record of invalidity is admissible as evidence, the court is able to compare the invalid will to the proffered will. Contrary to Fellows' belief, the fact that the proffered will contains the same or substantially same dispositions as the invalid will, is evidence that the same undue influence or fraud is still at work. This ensures a more accurate determination of validity or invalidity of the proffered will.

3. Method of Revocation

Fellows argues that Alexander and Pearson's method of “court approval of a subsequent revocation or modification of a will” is the most appropriate method.¹⁷³ However, Alexander and Pearson's method is far from the judicial supervision that Fellows described.¹⁷⁴ Alexander and Pearson's method of revocation requires “only that notice of the revocation or the modification be submitted to the court.”¹⁷⁵ The mere notice requirement does nothing to prevent post-mortem contests of capacity, undue influence, fraud, or modification or revocation. The Commissioners' Model, however, ensures that the testator is modifying or revoking the will free from undue influence and that he or she possesses the capacity to do so. These safeguards provide the optimum balance between accuracy, efficiency, and security.

B. So-called “Failings” of Ante-Mortem Probate¹⁷⁶

1. Quality of evidence at living probate

Fellows maintains that the quality of evidence at living probate is inferior to the quality of evidence at post-mortem probate.¹⁷⁷ This nonsensical argument supposes that the testator's

direct evidence is less beneficial than indirect evidence, which is often diminished over time. In fact, the testator's death compounds these evidentiary problems.¹⁷⁸ The Commissioners' Model, however, enables the testator to testify in person, greatly enhancing the accuracy of the ante-mortem proceeding. The preclusion of interested persons from testifying at the ante-mortem proceeding also improves its accuracy. This allows the testator to express his or her opinions free from family judgment and outside the presence of the person(s) committing fraud or undue influence. The Commissioner's Model will not replace the testator's direct evidence with less accurate, indirect evidence of diminished quality.

2. Effectuating testator's intent

Fellows asserts that even after living probate declared a will valid, "[t]estators will remain uncertain as to the validity of their wills because of the possibilities of a post-mortem contest based upon fraud on the court and fraud or undue influence occurring after the living probate decree is issued. . . ."¹⁷⁹ However, anyone contesting a will validated by living probate must introduce *new* evidence that wasn't available at the ante-mortem hearing. This limited scope of post-mortem contests is one of the benefits of ante-mortem probate. By limiting the scope and prohibiting post-mortem contests that challenge any ante-mortem determination, the Commissioners' Model protects both the testator's intent and the estate's assets.

3. Excessive costs to testator

Fellows contends that the cost of ante-mortem probate, including the physical and mental toll, will entice would-be testators to utilize a revocable trust.¹⁸⁰ She further states that potential challengers are less likely to know of a trust's existence than a will's existence.¹⁸¹ The Commissioners' Model resolves this problem. First, presumptive takers are unaware of the ante-mortem proceeding and will only become aware *after* the testator's death. Second, a revocable

trust is subject to challenges of capacity, undue influence, and fraud. A will validated under the Commissioners' Model, however, is not subject challenges based on any ante-mortem determination. Last, the expenses regarding ante-mortem probate are substantially outweighed by the cost of litigating post-mortem will contests. Accordingly, the benefits of ante-mortem probate do not outweigh its cost and ante-mortem probate continues to be a viable option for many testators.

4. Unfairness to presumptive takers

Fellows argues that the current models of ante-mortem probate are unfair to presumptive takers.¹⁸² She contends that, since the guardian ad litem is not an “economically interested party . . . the likelihood of erroneous determinations substantially increases.”¹⁸³ Under the Commissioners' Model, the guardian ad litem does not represent anyone. He or she is an officer of the court, sworn to determine whether the testator possesses capacity and is free from undue influence.

Fellows further contends that the unfairness is a result of state-induced reliance “through the intestate succession statute and the will execution statute.”¹⁸⁴ According to Fellows, the state has caused individuals to rely on inheritance absent a validly executed will.¹⁸⁵ She claims that the expectancy to take through intestacy “meets the requirements of an entitlement,” which requires due process to decide whether or not a valid will exists.¹⁸⁶ Fellows' reasoning is flawed and unpersuasive. First, as previously discussed, a presumptive taker's mere expectancy does not create an entitlement. Second, the determination of whether or not a valid will exists has no bearing on a person's right to take through intestacy. For example, the decedent could have already disposed of his or her property before death. Also, the presumptive taker could have predeceased the testator. In either situation, the presumptive taker gets nothing, despite the

determination that the decedent died with or without a valid will. Quite frankly, if a presumptive taker does not agree with the decedent's property distribution scheme—too bad.

VII. CONCLUSION

“The strong movement of modern succession law toward probate alternatives has resulted, in general terms, from the delay and cost of probate.”¹⁸⁷ However, the inadequacies of conventional techniques suggest that we must do more to protect a decedent's estate from unwarranted challenges. “Ante-mortem probate has the potential of greatly improving the ability of our legal system to effectively transmit an individual's wealth by providing the testator with greater certainty that his distribution desires will be fulfilled.”¹⁸⁸

The Commissioners' Model protects the decedent's estate and desires by limiting the scope of post-mortem contests and preventing spurious will contests. Moreover, this model preserves judicial resources by utilizing the commissioners' panel and guardian ad litem. Although the Commissioners' Model has some difficulties, “[t]he benefits of ante-mortem probate should not be withheld from the public merely because the technique is flawed or because it is difficult to ascertain which model will function best.”¹⁸⁹

¹ David F. Cavers, *Ante Mortem Probate: An Essay In Preventative Law*, 1 U. CHI. L. REV. 440, 441 (1934).

² Gerry W. Beyer & Aloysius A. Leopold, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 133 (1990).

³ *Id.*

⁴ Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 89 (1979).

⁵ This statute is produced in full in Appendix A.

⁶ See Beyer & Leopold, *supra* note 2, at 134-148.

⁷ See *id.* (stating that these problems cannot be compartmentalized).

⁸ *Id.* at 136 (any procedure that thwarts this basic right is defective).

⁹ Cavers, *supra* note 1, at 440.

¹⁰ Dara Greene, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 664 (1998).

¹¹ Mary L. Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 170 (1980)

(emphasis added).

¹² See Timothy R. Donovan, *The Ante Mortem Alternative to Probate Legislation in Ohio*, 9 CAP. U. L. REV. 717, 717-18 (1980) (a testator's fear that his or her intentions may not be fulfilled after death calls into question the efficacy of post-mortem probate); see also Daniel H. Redfearn, *Ante-Mortem Probate*, 38 COM. L.J. 571, 571 (1933) (the unreasonable possibility exists that a testator's intentions will be destroyed by a simple mistake); John H. Langbein *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 489 (1975) ("probate courts do not speak of harmless error in the execution of wills"); but see UNIF. PROBATE CODE § 2-503 (2006) (establishing the "harmless error" rule; however, few states have adopted this provision); see RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 3.3 (1999) (stating that only Colorado, Hawaii, Michigan, Montana, South Dakota, and Utah have enacted the revised harmless error rule).

¹³ Beyer & Leopold, *supra* note 2, at 134 (citing *Wilson v. Kemp*, 7 Ark. App. 44, 51, 644 S.W.2d 306, 310 (1982) (other citations omitted)).

¹⁴ *Id.* at 134-35.

¹⁵ See *id.* at 135 (losing plaintiff not required reimburse the decedent's estate).

¹⁶ See *id.* (spurious will contests are often settled out of court to prevent asset depletion).

¹⁷ *Id.* at 138.

¹⁸ Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 67 (1978).

¹⁹ See Donovan, *supra* note 10, at 718.

²⁰ See *id.* at 718-19.

²¹ See Beyer & Leopold, *supra* note 2, at 141.

²² *Id.*

²³ See *id.*

²⁴ *Id.*

²⁵ See *id.*

²⁶ *Id.* (citing *Citizens Nat'l Bank v. Allen*, 575 S.W.2d 654, 658 (Tex. Civ. App. 1978) (writ ref'd n.r.e.) (other citations omitted)).

²⁷ See *id.* at 142-43.

²⁸ *Id.* at 143 (citing TEX. PROB. CODE ANN. § 451 (Vernon Supp. 1990) (other citations omitted)).

²⁹ *Id.* (citing TEX. PROB. CODE ANN. § 438 (Vernon 1980)).

³⁰ See *id.* at 144.

³¹ See *id.*

³² *Id.* (citing *Cogdill v. First Nat'l Bank*, 193 S.W.2d 701, 702 (Tex. Civ. App. 1946) (no writ) (other citations omitted)).

³³ See *id.* at 145 (outright gifts lack the ambulatory property of wills).

³⁴ See *id.*

³⁵ *Id.*

³⁶ See generally UNIF. PROB. CODE § 2-504 (2006).

³⁷ See Beyer & Leopold, *supra* note 2, at 145.

³⁸ *Id.*

³⁹ Langbein, *supra* note 17, at 70; see also UNIF. PROB. CODE § 3-406 (2006).

⁴⁰ Beyer & Leopold, *supra* note 2, at 146.

⁴¹ Langbein, *supra* note 17 at 70; see also UNIF. PROB. CODE § 3-406 (2006); UNIF. PROB. CODE § 3-406 comment (2006) (does not "preclude proof of undue influence, lack of testamentary

capacity, revocation, or any relevant proof that the testator was unaware of the contents of the document”).

⁴² See *id.* (self-proved wills cannot be a substitute for ante-mortem probate).

⁴³ Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 266 (1976).

⁴⁴ Beyer & Leopold, *supra* note 2, at 146.

⁴⁵ See Daniel A. Friedlander, *Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives*, 32 CASE W. L. REV. 823, 845 (1982) (in terrorem clauses do not establish a will’s technical validity and can operate against the testator with respect to capacity); see also Beyer & Leopold, *supra* note 2, at 147.

⁴⁶ See *id.*; see also Beyer & Leopold, *supra* note 2, at 147 (in terrorem clauses cannot provide the security established by ante-mortem probate).

⁴⁷ *Id.* at 843.

⁴⁸ See *id.* at 844-45 (“compliance with will statutes requires the actual will to be written”).

⁴⁹ *Id.* at 844.

⁵⁰ Beyer & Leopold, *supra* note 2, at 148 (“during an ante-mortem probate proceeding, the actual testator is available for direct observation”); see also Friedlander, *supra* note 45, at 844 (“videotaped wills should be used only as a supplement to the written will”).

⁵¹ Beyer & Leopold, *supra* note 2, at 166 (citing Fink, *supra* note 43, at 274-74).

⁵² Greene, *supra* note 9, at 671; see also Beyer & Leopold, *supra* note 2, at 166.

⁵³ Beyer & Leopold, *supra* note 2, at 166.

⁵⁴ Fink, *supra* note 42, at 274.

⁵⁵ Beyer & Leopold, *supra* note 2, at 166.

⁵⁶ See Fink, *supra* note 42, at 276.

⁵⁷ See Beyer & Leopold, *supra* note 2, at 166.

⁵⁸ See *id.* at 167; see also Greene, *supra* note 9, at 673 (Langbein’s model addresses some of the problems of the Contest Model).

⁵⁹ See Langbein, *supra* note 17, at 77.

⁶⁰ See *id.*; see also Greene, *supra* note 9, at 673 (“testator would confront a guardian ad litem” instead of presumptive heirs); Beyer & Leopold, *supra* note 2, at 168 (“conservator litigates the interest of all prospective heirs and beneficiaries”).

⁶¹ See Beyer & Leopold, *supra* note 2, at 168 (the will contest becomes part of the public record).

⁶² See *id.*

⁶³ *Id.*

⁶⁴ See *id.* at 167 (considers the testator and his circumstances to determine a will’s validity).

⁶⁵ See Alexander & Pearson, *supra* note 4, at 112-13.

⁶⁶ Greene, *supra* note 9, at 674.

⁶⁷ Beyer & Leopold, *supra* note 2, at 168.

⁶⁸ *Id.*

⁶⁹ See Alexander & Pearson, *supra* note 4, at 114; see also Beyer & Leopold, *supra* note 2, at 168-69.

⁷⁰ *Id.* at 115.

⁷¹ Beyer & Leopold, *supra* note 2, at 169.

⁷² *Id.*

⁷³ Greene, *supra* note 9, 674 (questioning whether or not the proceeding is finally binding).

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- ⁷⁴ *Id.* at 675 (if binding, the notice requirement “raises its ugly head”).
- ⁷⁵ *Id.* (“unnecessary hardship and expense with little confidence” in finality).
- ⁷⁶ *See generally*, Greene, *supra* note 9.
- ⁷⁷ *Id.* at 679.
- ⁷⁸ *Id.* at 683.
- ⁷⁹ *Id.* at 683-85.
- ⁸⁰ *Id.* at 684 (although the court should give it “great weight”).
- ⁸¹ *Id.*
- ⁸² *See* Beyer & Leopold, *supra* note 2, at 152 (citing 1883 Mich. Pub. Acts 17, § 1).
- ⁸³ *Id.* at 153 (citing *Lloyd*, 56 Mich. at 239 (1885)).
- ⁸⁴ *Id.* at 159 (citing Act of June 25, 1910, ch. 431 § 1, 36 Stat. 886 (codified at 25 U.S.C. § 373 (Supp. 1988))).
- ⁸⁵ *See id.* at 160 (citing Henry C. Lewis, *Ante Mortem Probate of Wills and Testaments*, 50 AM. L. REV. 742, 744 (1916)).
- ⁸⁶ *Id.*
- ⁸⁷ *Id.* at 161.
- ⁸⁸ *Id.* at 162-63 (citing *Cavers*, *supra* note 1, at 440).
- ⁸⁹ *Id.* at 155-56 (citing *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 229, 240-41 (1937)).
- ⁹⁰ *Id.* at 156.
- ⁹¹ 245 S.W.2d 862 (Tex. Civ. App. 1952) (no writ); *see* Beyer & Leopold, *supra* note 2, at 157-58.
- ⁹² *Id.* at 863-64 (judicial power extends only to cases and controversies, which can never exist between a living person and his or her possible heirs); *see also* Beyer & Leopold, *supra* note 2, at 158 (ripeness can never exist “between a living man and his possible heirs”).
- ⁹³ Beyer & Leopold, *supra* note 2, at 158 (citing *Cowan*, 254 S.W.2d at 863 (Tex. Civ. App. 1952) (no writ)).
- ⁹⁴ *Id.* (other citations omitted).
- ⁹⁵ *Id.* at 164-65 (citing LEWIS M. SIMES & PAUL E. BASYE, *PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE 20* (1946) (other citations omitted)).
- ⁹⁶ *Id.* at 165 (citing WILLIAM D. ROLLISON, *COMMENTARY ON THE UNIFORM PROBATE CODE 25* (1970)).
- ⁹⁷ *Id.* (citing Summer, 1967, Draft of the Uniform Probate Code § 2-903, *quoted in*, WILLIAM D. ROLLISON, *COMMENTARY ON THE UNIFORM PROBATE CODE 25* (1970)).
- ⁹⁸ *Id.* (citing WILLIAM D. ROLLISON, *COMMENTARY ON THE UNIFORM PROBATE CODE 26* (1970)).
- ⁹⁹ *Id.*
- ¹⁰⁰ *Id.* at 169 (citing 1977 N.D. Laws ch. 296, *codified at* N.D. CENT. CODE §§ 30.1-08.1-01 to .04 (Supp. 1987); 1978 Ohio Laws H. 505, *codified at* OHIO REV. CODE ANN. §§ 2107.081-.085 (Anderson Supp. 1987); 1979 Ar. Acts 194, *codified at* ARK. CODE ANN. §§ 28-40-201 to -203 (1987)).
- ¹⁰¹ *Id.* at 169-70 (citing UNIF. ANTE-MORTEM PROB. OF WILLS ACT (N.C.C.U.S.L., Proposed Drafts A & B, 1980)).
- ¹⁰² *Id.* at 165.
- ¹⁰³ *See* 2010 Alaska Sess. Laws ch. 64, *codified at* ALASKA STAT. § 13.12.530-.590 (2010).
- ¹⁰⁴ *See* Nev. Stat. ch. 263 (2011).
- ¹⁰⁵ *See* ALASKA STAT. § 13.12.530-.590 (2010); Nev. Stat. ch. 263 (2011); *see also* N.D. CENT.

CODE §§ 30.1-08.1-01 to .04 (Supp. 1987); OHIO REV. CODE ANN. §§ 2107.081-.085 (Anderson Supp. 1987); ARK. CODE ANN. §§ 28-40-201 to -203 (1987).

¹⁰⁶ See ALASKA STAT. § 13.12.530-.590 (2010); Nev. Stat. ch. 263 (2011).

¹⁰⁷ See generally TEX. PROP. CODE §§ 21.014-103 (2007).

¹⁰⁸ See Beyer & Leopold, *supra* note 2, at 134-148 (describing the inherent inadequacies).

¹⁰⁹ See Fellows, *supra* note 10 (disapproving of ante-mortem probate because of her perceived problems with it).

¹¹⁰ The term “probate court” refers to any court with probate jurisdiction. This term is used throughout to represent said court.

¹¹¹ Similar to the Administrative Model. See Alexander & Pearson, *supra* note 4, at 113 (the guardian is “more closely analogous to a court-appointed special master than to the representative of a class of claimants”).

¹¹² Before initiating the ante-mortem process, legal counsel has the ability to determine for his or herself whether the testator has capacity and is free from undue influence. This ensures that the ante-mortem process will not be abused; See also Langbein, *supra* note 17, at 77 (discussing the requirement of counsel and its benefits); UNIFORM PROBATE CODE § 5-406.

¹¹³ See *Faretta v. California*, 422 U.S. 806 (1975).

¹¹⁴ Langbein, *supra* note 17, at 78.

¹¹⁵ See discussion *infra* Part V(B)(3).

¹¹⁶ As opposed to Langbein’s Conservatorship Model. See Langbein, *supra* note 17, at 78-79 (guardian ad litem represents all heirs apparent, including those unborn or unascertained at the time).

¹¹⁷ See Alexander & Pearson, *supra* note 4, at 113 (guardian is more similar to a court-appointed special master).

¹¹⁸ See *id.* at 114 (we do not contemplate informing the guardian of the will’s contents, but the court might be given the discretion to or to alert the guardian to specific dispositions).

¹¹⁹ This is especially helpful for testator’s with terminal illnesses and ensures that the testator possesses capacity.

¹²⁰ Langbein, *supra* note 17, at 74 (describing the most challenging problem to living probate); See also *Eckford v. Knox*, 67 Tex. 200, 202 (1886) (no writ) (stating that there is no such thing as an heir of a living person).

¹²¹ See Alexander & Pearson, *supra* note 4, at 101-06 (distinguishing *Mullane*, *Goldberg*, and *Roth* to establish that potential heirs and legatees have a mere expectancy that does not trigger due process guarantees).

¹²² See *id.* at 102 (describing why potential heirs have an expectancy interest); U.S. CONST. amend. XIV, § 1; Because wills are statutory in nature, the state may create and define a person’s property interest in an ante-mortem proceeding.

¹²³ See *id.* at 101-06 (distinguishing *Mullane*, *Goldberg*, and *Roth* to establish that potential heirs and legatees have a mere expectancy that does not trigger due process guarantees).

¹²⁴ *Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950).

¹²⁵ *Id.* at 313 (this right is established beyond a doubt).

¹²⁶ *Id.* at 308-312 (describing the process under the New York statute).

¹²⁷ *Id.* at 313 (state must give beneficiaries an opportunity to contest a trustee’s actions).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 318 (emphasis added).

¹³¹ *Id.*

¹³² Alexander & Pearson, *supra* note 4, at 101.

¹³³ *See id.* (difference is a present legal right and one that is no more than a hope or expectancy).

¹³⁴ *See id.* at 102 (discussion on why potential heirs have an expectancy) (emphasis added).

¹³⁵ *See id.* at 101 (heirs at law and legatees in any unprobated will have no fiduciary relationship with the property's custodian).

¹³⁶ *See id.* (no fiduciary duty exists between testators and heirs at law or legatees).

¹³⁷ *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

¹³⁸ *Id.* at 262-63 (citing Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 126, 168 (1951)).

¹³⁹ *Id.* at 264 (describing the reason for providing a pre-termination hearing for welfare recipients).

¹⁴⁰ *Id.*

¹⁴¹ *Id.* (referencing Comment, *Due Process and the Right to a Prior Hearing in Welfare Cases*, 37 FORD. L. REV. 604, 610-611 (1969)).

¹⁴² Board of Regents of State Colleges v. Roth, 408 U.S. 564, 571 (1972) (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

¹⁴³ *Id.* at 576 (stating that due process protects property interests acquired in benefits).

¹⁴⁴ *Id.* at 577 (describing certain attributes of property interests that are protected by due process).

¹⁴⁵ *Id.* (describing the origination of property rights),

¹⁴⁶ *Id.* at 578 (the terms of respondent's appointment secured absolutely no interest in re-employment for the next year).

¹⁴⁷ *Id.*

¹⁴⁸ Fellows, *supra* note 10, at 1073-77 (beneficiaries will either learn contents of will, the testator will recognize the source of information used to challenge the will, or family members will grow curious as to the will's contents).

¹⁴⁹ *Id.* at 1075 (testator and others will likely recognize the source of information used to challenge the will).

¹⁵⁰ *Id.* at 1077 (family members will likely grow curious as to the contents of the will).

¹⁵¹ Alexander & Pearson, *supra* note 4, at 117.

¹⁵² *Id.* ("We leave unaltered the exception for persons injured by fraud in the probate proceedings.").

¹⁵³ *Id.* (heirs' rights are derivative of testator's).

¹⁵⁴ *See id.* at 118 (heirs injured by fraud maintain their traditional remedies but may not challenge ante-mortem determinations); *see also* UNIF. PROBATE CODE § 1-106 (2006) (the retention of traditional fraud remedies is intended as supplementary protection).

¹⁵⁵ *See* Fellows, *supra* note 10, at 1079 (discussing the three current methods of revocation).

¹⁵⁶ *See* Fink, *supra* note 42, at 276-77; Langbein, *supra* note 17, at 81; Alexander & Pearson, *supra* note 4, at 118-19; *See also* Fellows, *supra* note 10, at 1079-80 (discussing the three current methods of revocation).

¹⁵⁷ *See* Greene, *supra* note 9, at 663 (this model is not binding and does not address a method of revocation).

¹⁵⁸ *See* Fink, *supra* note 42, at 276-77.

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- ¹⁵⁹ See Langbein, *supra* note 17, at 81.
- ¹⁶⁰ See Alexander & Pearson, *supra* note 4, at 118-19.
- ¹⁶¹ See *id.* (court supervised revocation or alteration imposes a disincentive).
- ¹⁶² Langbein, *supra* note 17, at 75.
- ¹⁶³ See Beyer, *Ante-Mortem Probate—The Definitive Will Contest Prevention Technique*, 23 ACTEC Notes 83, 90 (1997) (explaining that, while evidence of the failure to utilize ante-mortem probate is inadmissible in a malpractice action, the failure to inform a testator of the option is).
- ¹⁶⁴ See Proposed Statute *infra* Appendix A, § 1(e).
- ¹⁶⁵ See Fellows, *supra* note 10, at 1066 (describing the unresolved issues and problems with ante-mortem probate).
- ¹⁶⁶ See *id.* at 1077.
- ¹⁶⁷ See *id.* (describing the unresolved issues of ante-mortem probate).
- ¹⁶⁸ *Id.* (“difficulties arise in defining the duty of a guardian ad litem to pursue an appeal”).
- ¹⁶⁹ *Id.*
- ¹⁷⁰ See *id.* at 1077-78 (“literature contains little discussion of the collateral effect of a final ante-mortem order holding the proffered will invalid”).
- ¹⁷¹ See *id.* at 1078 (“a prior finding of invalidity will bear on whether the testator possessed capacity at a later time”).
- ¹⁷² *Id.*
- ¹⁷³ *Id.* at 1080.
- ¹⁷⁴ See *id.*
- ¹⁷⁵ Alexander & Pearson, *supra* note 4, at 119.
- ¹⁷⁶ See Fellows, *supra* note 10, at 1080 (Fellows expresses her opinion of the “failings of living probate”).
- ¹⁷⁷ See *id.* (“living probate sacrifices considerable evidence in order to obtain the testator’s testimony”).
- ¹⁷⁸ See Beyer & Leopold, *supra* note 2, at 138 (“evidentiary problems are both complex and numerous because the testator is dead”).
- ¹⁷⁹ Fellows, *supra* note 10, at 1082.
- ¹⁸⁰ See *id.* at 1094 (the costs of living probate outweigh its benefits).
- ¹⁸¹ See *id.*
- ¹⁸² See *id.* at 1095 (“living probate schemes sacrifice fair adjudicatory procedures for the presumptive takers”).
- ¹⁸³ *Id.* at 1096.
- ¹⁸⁴ *Id.* at 1105.
- ¹⁸⁵ See *id.* (“individual qualifying as an heir under the intestate statute is induced by the state to rely upon the inheritance absent the execution by the testator of a valid will”).
- ¹⁸⁶ *Id.*
- ¹⁸⁷ Alexander & Pearson, *supra* note 4, at 121.
- ¹⁸⁸ Beyer & Leopold, *supra* note 2, at 181.
- ¹⁸⁹ *Id.* at 182.

APPENDIX A**THE PROPOSED STATUTE¹⁸⁹ OF THE COMMISSIONERS' MODEL**

The following statute codifies the process of the Commissioners' Model of ante-mortem probate as discussed above.

VALIDATING A WILL DURING THE TESTATOR'S LIFETIME**Section 1. Petition for Judgment Declaring Validity of Will During Testator's Lifetime.**

(a) **Persons Who May Petition the Court.** (1) Persons domiciled in [enacting state]. Any person domiciled in this State and represented by counsel licensed to practice in this State may, petition the court in the county in which he or she is domiciled for a judgment declaring that the person possesses the requisite capacity, is free from undue influence, and has duly executed his or her will, subject only to revocation or modification as prescribed in Section 6. (2) Persons not domiciled in [enacting state]. Any person not domiciled in this State and represented by counsel licensed to practice in this State may, petition the court in the county in which he or she has real property, for a judgment declaring that the person possesses the requisite capacity, is free from undue influence, and has duly executed his or her will, subject only to revocation or modification as prescribed in Section 6.

(b) **Contents of Petition.** The petition shall contain: (1) an affidavit that the testator possesses the requisite capacity and is free from undue influence; (2) an affidavit from a physician licensed to practice medicine in the testator's domiciliary stating that the testator is in satisfactory mental and physical health; (3) the physician's report noting his findings and his or her reasons for those findings; and (4) the testator's proposed, unexecuted will.

(c) **Court's Action.** (1) Upon receiving the testator's petition, the Court must appoint a guardian ad litem in compliance with Section 2 and select three commissioners in compliance

with Section 3; and (2) Notice to presumptive beneficiaries is not required because presumptive beneficiaries do not have an actual, present interest that requires due process.

(d) **Determination of Domicile.** The testator's domicile at the time of filing the petition shall be the testator's domicile.

(e) **Effect of Not Petitioning Court for Judgment Declaring Validity of Will.** (1) An attorney is not required to inform or recommend that a client utilize ante-mortem probate. (2) Evidence that an attorney did not inform or recommend that a client utilize ante-mortem probate is inadmissible against that attorney in any legal malpractice action. (3) Failing to utilize ante-mortem probate is inadmissible in any post-mortem will contest. This includes any contest to challenge capacity, undue influence, or the validity of a will.

Section 2. The Guardian Ad Litem. The Court must select one guardian ad litem domiciled in the county in which the petition was filed.

(a) **The Guardian's Duties.** The guardian serves a purely administrative role and does not represent a class or classes of claimants.

(1) The Guardian's Oath. The guardian ad litem must swear to: (A) ascertain fairly, impartially, and in accordance with the applicable law, whether the testator possesses the required capacity and is free from undue influence or fraud; and (B) not disclose any information to anyone not present at the hearing. (2) Primary Function. The guardian's primary function is to ascertain whether the testator has the requisite capacity and is free from undue influence or fraud. (3) Interview. (A) Prior to the actual hearing, the guardian shall interview the testator with no one else present. (B) The guardian shall not interview anyone other than the testator. This includes, but is not limited to: the testator's family, friends, or beneficiaries to prior wills. (4) Report. Before the hearing and based on the one-on-one interview with the testator, the

guardian shall submit a written report to the commissioners regarding his or her opinion of whether the testator possesses the requisite capacity and is free from undue influence. (5) Legal Malpractice. A guardian ad litem is not subject to any legal malpractice claim regarding any ante-mortem determination. The record of the ante-mortem proceeding is inadmissible as evidence against the guardian in any legal malpractice action.

Section 3. The Commissioners. The Court must select three commissioners domiciled in the county in which the petition was filed.

(a) Composition of the Commissioners. (1) The commissioners panel must consist of: (A) one disinterested probate attorney licensed to practice law in the state in which the petition was filed; (B) one medical physician licensed to practice medicine in the state in which the petition was filed; and (C) one notary of the state in which the petition was filed. (2) If the notary is also a probate attorney or medical physician, the court must select another probate attorney, medical physician, or notary as the third commissioner.

(b) Commissioners' Duties. (1) The commissioners must swear to: (A) determine fairly, impartially, and in accordance with the applicable law, whether the testator possesses the required capacity and is free from undue influence or fraud; (B) not disclose the contents of the testator's will to anyone; and (C) not disclose any other information to anyone not present at the hearing. (2) Timeline. (A) The commissioners shall conduct the hearing no later than 21 days after accepting the Court's appointment. (B) The commissioners shall provide the guardian ad litem and the testator with at least 11 days notice prior to the hearing. (C) The commissioners may, if the testator shows good cause, modify this timeline. (D) The hearing shall be conducted at the most practical place for all parties. (3) Prior to the Hearing. (A) The commissioners shall review all of the relevant documents, including: (i) the testator's affidavit; (ii) the testator's

physician report and affidavit; and (iii) the testator's proposed, unexecuted will. (B) Based on the physician-commissioner's examination of the physician's report and affidavit, he or she may conduct his or her own physical and/or mental examination of the testator and submit a report and affidavit noting his or her findings and opinions. (C) Based on the commissioners' examination of the testator's proposed, unexecuted will, they can determine whether the testator's will satisfies the formalities requirement. (4) During the Hearing. (A) The commissioners may administer oaths in the same manner as a judge. (B) The commissioners shall hear evidence from the testator and the guardian ad litem with regard to capacity and freedom from undue influence. (C) A court reporter or stenographer shall be present at the hearing to maintain a record of the proceeding. (5) Will Execution at the Hearing. (A) If the commissioners determine the testator has the requisite capacity, is free from undue influence, and the will satisfies the formalities requirement: (i) the testator must execute his or her will at the hearing; (ii) the non-notary commissioners must attest to the testator's will; and (iii) the notary-commissioner must notarize the will. Then, the commissioners shall submit to the Court, the duly executed will along with a report and recommendation that the Court enter a declaratory judgment validating the testator's will. (B) If the commissioners determine that the testator lacks the requisite capacity and/or is acting under undue influence, the commissioners shall not commence will execution as described above. The commissioners shall submit to the Court, the unexecuted will and a report and recommendation that the judge enter a declaratory judgment accordingly. (C) Regardless of the commissioners' determination, their report shall remain in the sealed record of the Court. During the testator's lifetime, only the testator and his or her attorney shall have access to the sealed record.

Section 4. Declaratory Judgment

(a) **Duty of the Court.** (1) The Court shall review the sealed record and the commissioners' report and recommendation and make its determination accordingly. (2) The Court shall give deference to the commissioners' report and recommendation. (3) The Court shall enter a declaratory judgment stating whether the testator possess the requisite capacity and is free from undue influence. (4) The entire record shall be sealed and filed with the court. During the testator's lifetime, only the testator and his or her attorney shall have access to the sealed record.

Section 5. Certainty and Finality

(a) **Finality of Declaratory Judgment.** (1) The Court's declaratory judgment is final and binding upon all parties in any post-mortem proceeding with regard to capacity, undue influence, and satisfaction of the formalities. (2) The Court's declaratory judgment is not final and binding upon any party injured by fraud. (A) The retention of the traditional remedies for fraudulent concealment of evidence of invalidity does not affect the court's ante-mortem declaratory judgment and does not allow post-mortem will contests to challenge the ante-mortem determinations of capacity, freedom from undue influence, or satisfaction of formalities.¹⁸⁹

Section 6. Revocability. A testator may revoke or modify a will validated through ante-mortem probate. Such modification or revocation invalidates the Court's declaratory judgment. A will validated by an ante-mortem proceeding may not be revoked or modified except as proscribed in Section 6(a).

(a) **Revocation Procedure.** To revoke or modify a previously validated will, a testator must provide the Court that validating his or her will with a notice of revocation or modification and an affidavit stating that he or she possesses the requisite capacity and is free from undue influence. (1) The notice of revocation or modification and affidavit must be: (A)

signed by the testator; (B) signed by two witnesses; and (C) notarized. (2) A will validated by this procedure may not be revoked by physical act.

(b) **Admissibility in Post-Mortem Proceedings.** The Court's entire sealed record is admissible in any post-mortem will contest as evidence of capacity and freedom from undue influence.

Section 7. Right to the Appellate Process

(a) **Who May Appeal the Commissioners' Decision.** A testator and guardian ad litem may appeal the commissioners' decision.

(b) **Standard of Review and Process for Appeal.** The Court shall review the commissioners' decision for abuse of discretion. (1) The testator must file his or her appeal in the same Court that conducted the ante-mortem probate proceeding. (2) The guardian ad litem must file his or her appeal within 7 days of commissioners' decision. Failure to file within 7 days prohibits the guardian from appealing the decision. (3) If the Court determines that the commissioners did not abuse their discretion, the court shall enter a judgment affirming the decision. (4) If the Court determines that the commissioners abused their discretion, the Court shall note the reason for its findings and reverse the decision. (5) Regardless of whether the Court affirms or reverses, the entire record shall be sealed and filed with the court.

(d) **Finality of Appeal.** Neither the testator nor the guardian ad litem may appeal the Court's decision. This does not affect the testator's right to initiate a new ante-mortem probate proceeding.

Section 8. Costs. Ante-mortem probate is conducted for the benefit of the testator and he or she shall bear the cost.

(a) **The Testator Shall Pay:** (1) Filing Costs. The testator must pay and all filing fees.

(2) Commissioners and Guardian Ad Litem. The testator shall pay the commissioners and guardian ad litem a reasonable and customary compensation for the same or similar services within the county in which the ante-mortem probate proceeding was initiated. They shall be paid equally. Payment shall be made at the conclusion of the hearing. (3) Testator's Attorney. The testator shall pay for the cost of his or her attorney at that attorney's regular billing rate for the same or similar services. (4) Court Costs. The Court should adopt the same or similar fee for ante-mortem probate as an uncontested probate..

Section 9. Effect of a Testator's Death During the Ante-Mortem Probate Process.

(a) Before the Commissioners' Decision and Before the Court's Declaratory Judgment. The decedent's property is governed by a prior will or the laws of intestacy. The sealed record is not available to any party during any post-mortem contest.

(b) After the Commissioners' Decision but Before the Court's Declaratory Judgment. (1) If the Commissioners Declared the Will Invalid. The decedent's property is governed by a prior will or the laws of intestacy. The sealed record is not available to any party during any post-mortem contest. (2) If the Commissioners Declared the Will Valid. The decedent's property is governed by the will duly executed at the commissioners' hearing. The sealed record is available to any party during any post-mortem contest.

(c) After the Commissioners' Decision and the Court's Declaratory Judgment, but Before Appeal. (1) If the Court did not Validate the Will. The decedent's property is governed by a prior will or the laws of intestacy. The sealed record is not available to any party during any post-mortem contest. (2) If the Court Entered a Declaratory Judgment Validating the Will. The decedent's property is governed by the will duly executed at the commissioners' hearing. The sealed record is available to any party during any post-mortem contest.

(d) During the Appellate Process. (1) If the Court did not Validate the Will. The decedent's property is governed by a prior will or the laws of intestacy. The sealed record is not available to any party during any post-mortem contest. (2) If the Court Previously Entered a Declaratory Judgment Validating the Will. The decedent's property is governed by the will duly executed at the commissioners' hearing. The sealed record is available to any party during any post-mortem contest.