America's Next Top Probate Model

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Katherine M. Arango, Trial and Heirs: Antemortem Probate for the Changing American Family, 81 **Brook. L. Rev.** 779 (2016).

The idea of the "traditional family unit" is changing at a rapid pace that requires the law to adapt to effectuate a testator's intent when administering a will. With 16.3 million unmarried Americans cohabiting and one in five children born into such households, the need for a valid will to avoid intestacy is at an all-time high. Specifically, more families are living with stepchildren or same-sex partners. This makes traditional intestacy statutes, which are designed to protect a more traditional family unit, potentially dangerous for a testator with a nontraditional family. Some states, however, permit ante-mortem probate which allows a testator to probate his or her own will prior to death thus ensuring that the testator's at-death property distribution plans are upheld. States with ante-mortem probate statutes allow interested parties, such as will beneficiaries and heirs, to contest the will like they would in a post-mortem probate for issues such as undue influence, mental incapacity, or fraud. Unlike post-mortem probate, where the testator is deceased and the court must determine the testator's capacity and intent without the testator's input, ante-mortem probate allows the testator to avoid an unwarranted will contest, and the risk of intestacy if the contest is successful, by testifying at the probate hearing. Major concerns with ante-mortem probate statutes, however, are that will contents become public knowledge and that the litigation may strain familial relationships.

Katherine Arango's article details the shift in American families and how an ante-mortem probate statute would protect nontraditional families. The article explains how adverse attitudes of courts and juries toward nontraditional families could lead to an intestacy distribution, which would be contrary to the testator's intent. Ms. Arango highlights how ante-mortem probate provides nontraditional families security whereas traditional post-mortem probate cannot. By recounting the history of ante-mortem probate, the article delineates the slow awareness and affirmation of the importance of the doctrine in modern society. The article analyzes the different models of ante-mortem probate statutes and how those models protect the intent of the testator while also explaining possible complications. Then, the article evaluates currently enacted ante-mortem probate statutes. Finally, the article offers a new, comprehensive statute that could be inserted into the Uniform Probate Code as well as adopted by any state looking to implement this probate method.

The article's in-depth discussion of the changing family dynamic further strengthens the suggestion that ante-mortem probate is essential to protecting a client's estate planning desires in the modern age. By describing how intestacy laws were designed to protect bloodlines and create a fair and simple distribution scheme, the article focuses the reader's attention on how intestacy disregards the testator's intent should a court determine the will to be invalid. Instead, a better option for nontraditional families is a will that is further protected by an ante-mortem probate.

The article examines the history of ante-mortem probate and how issues of notice and finality of judgment originally cast doubt on the doctrine. The Supreme Court alleviated some of those issues by describing an appropriate standard for declaratory judgment in 1937. *See* *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 277 (1937). Issues of ripeness, notice, and finality of judgment remained and, although the Supreme Court held that a declaratory judgment could be granted, some states choose to avoid ante-mortem probate because of the lack of controversy surrounding a will because the testator is still alive. The article also describes how legal scholars attempted to establish a method for ante-mortem probate. Starting in 1977, five states enacted ante-mortem probate statutes.

The article describes the three traditional models of ante-mortem probate—the contest model, the conservatorship

model, and the administrative model—and presents the arguments for and against each model. By analyzing how the five states with ante-mortem probate—North Dakota, Ohio, Arkansas, Alaska, and New Hampshire—use the doctrine, Ms. Arango demonstrates that the implementation of the doctrine has met with varying degrees of success. A successful ante-mortem probate makes the will incontestable after the testator's death. However, the procedure, as currently implemented, publishes the will contents that could lead to family strife and expensive litigation. This author takes the history, models, and the current state statutes into account when she drafted a new framework for an ante-mortem probate statute.

The proposed statute would be a no-reveal statute, meaning the contents of the will would not be public knowledge. Ms. Arango suggests the testator petition the court to determine the validity of the will with the court reviewing the will *in camera*. The public would have notice as to of the petition's filing, modification, or revocation but not the contents of the will. This allows the will to remain confidential and lessens potential family tensions. The testator would have the burden to prove elements such as proper execution, requisite capacity, and rebut claims of undue influence under normal evidentiary rules. The testator would lose the benefits of the ante-mortem probate if the testator modifies or revokes the will unless the ante-mortem procedure was again used.

I highly recommend the statute proposed in this article as a model for state legislatures and the drafters of the Uniform Probate Code when considering ante-mortem probate because it fixes the issues with current ante-mortem probate statutes. As an advocate for ante-mortem probate for many decades, I can confidently say this article offers a cohesive alternative for current ante-mortem probate statutes in an age where intestacy laws are ill-equipped to handle the nontraditional family.

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