

To: New Jersey Law Revision Commission
From: Susan G. Thatch
Re: Ante-Mortem Probate
Date: November 10, 2014

MEMORANDUM

In January 2014, the Commission authorized Staff to engage in a project to determine whether ante-mortem probate might be appropriate for New Jersey and what form such a law would take in light of the differing opinions on the subject. The authorization for this project was based largely upon the New Jersey Law Journal article entitled “Ante-Mortem Probate: Why Wait Until It’s Too Late” which described a policy approach adopted in four States (Alaska, Ohio, Arkansas & North Dakota). In contrast to New Jersey, these States permit a testator to preemptively validate a will during his or her lifetime by petitioning the court for ante-mortem probate. While the process and effect varies in each jurisdiction, the existence of ante-mortem probate provides an opportunity for testators in those jurisdictions (especially those making unconventional bequests) to prevent a will contest after their death. Such an approach is beneficial in that it obviates the evidentiary problem inherent to traditional post-mortem probate and permits the realization of the testator’s intent. However, detractors warn that raising probate matters during the testators lifetime could lead to family disturbances and could potentially waste judicial resources.

Since the Commission’s authorization, Staff has conducted outreach with the Administrative Office of the Courts, the NJSBA Real Property Trust and Estates Section, the Elder and Disability Law Section, and legal practitioners in the area of trust and estates to ascertain whether this type of proposal would make sense for New Jersey. Several of these groups require additional time to properly discuss this idea’s viability and have offered to provide feedback in the near future. After receiving this input, Staff will be in a position to produce a Draft Tentative Report discussing not only the history and nature of ante-mortem probate, but also encompassing the viewpoints of important New Jersey stakeholders.

Additionally, this project will be the subject of a forthcoming Seton Hall Legislative Journal article discussing the unique benefits and potential pitfalls of ante-mortem probate. The submission deadline for this article is January 2015 with an anticipated publication date of May 2015.