

**To: New Jersey Law Revision Commission**  
**From: Jordan Goldberg**  
**Re: Project Related to Ante-Mortem Probate**  
**Date: January 16, 2014**

## MEMORANDUM

Commissioner Burstein recently brought to the attention of Staff that the New Jersey Law Journal had recently published an article raising a new issue in the area of estate planning that might be worth exploring as a Commission project. Specifically, the NJ Law Journal ran a story entitled “Ante-Mortem Probate: Why Wait Until It’s Too Late?” that describes a policy approach taken by a few states to allow testators to probate the validity of their wills prior to death. Glen R. Kazlow et al., *Ante-Mortem Probate: Why Wait Until It’s Too Late?*, 214 N.J.L.J. 1051 (2013).<sup>1</sup>

This article describes the problems that arise from the fact that “the mental capacity of a testator . . . can only be considered *after* her death.” *Id.* In particular, “the flaw in this system is that it allows for will contests . . . which all suffer from the same recurring evidentiary problem, i.e. the testator is no longer alive to testify as to his or her mental capacity and testamentary wishes.” *Id.* Moreover, these will contests typically take place long after the will is drafted, “when memories have faded or individuals with relevant knowledge have moved or passed away.” *Id.* The authors of this piece have identified a potential policy solution to this problem, which is to enact a statute that would allow “lifetime will validation,” meaning that individual testators can go to court to validate their own wills during their lifetimes. *Id.* As documented in the article, four states have already adopted such statutes: Alaska, Arkansas, North Dakota and Ohio.

Each of the statutes allows the testator to petition a court to validate their will during their life. However, each state’s statute differs slightly in how the process works, who may initiate it and the relevance of the proceedings if a will is later changed. *Id.*; see Alaska Stat. Ann. § 13.12.530, et seq.; Ark. Code Ann. § 28-40-201, et seq.; N.D. Cent. Code § 30.1-08.1-01, et seq.; Ohio Rev. Code Ann. § 2107.081, et seq. The statutes vary in who can bring petition the court – for example, in Alaska, interested parties can also bring a petition with the permission of the testator – and what happens if the will is changed after the validation proceeding. *Compare* Ark. Code Ann. § 28-40-203 (“A finding of validity pursuant to this subchapter shall constitute an adjudication of probate. However, such validated wills may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter.”) *with* Ohio Rev. Code Ann. § 2107.084 (“A will that has been declared valid under division (A) of this section and is in the possession of the probate judge may be modified by codicil if the codicil is declared valid by the same procedure as the

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<sup>1</sup> The authors of the piece are three attorneys from the Hackensack law firm Cole Schotz who practice in several areas including Estates and Trusts.

will.”). Each statute also has different processes by which the wills may be validated and permit different types of testimony or challenges during the process. *Compare* Ohio Rev. Code Ann. § 2107.084 (“The complaint shall name as parties defendant all persons named in the will as beneficiaries, and all of the persons who would be entitled to inherit from the testator . . . .”) *with* Alaska Stat. Ann. § 13.12.565 (“After the petition under AS 13.12.530 or 13.12.535 is filed, the court shall fix a time and place for a hearing. The petitioner shall notify the spouse, the children, and the heirs of the testator or settlor in the manner established by AS 13.06.110.”).

The concept of ante-mortem probate dates back to 1883, but has never been widely adopted. Taren R. Lord-halvorson, *Why Wait Until We Die? Living Probate in a New Light*, 37 Okla. City U. L. Rev. 543, 547 (2012). Ante-mortem probate provisions were considered by both the Model Probate Code drafters in the 1946 and the Uniform Probate Code drafters in the 1960s, but neither body incorporated such provisions into the model codes. The drafters of the Model Probate Code in 1946 stated that “the practical advantages of such a device are not great in view of the fact that few testators would wish to encounter the publicity involved in such a proceeding.” *Id.* at 548. Subsequently, only four states have enacted these types of laws – the first three were enacted between 1977 and 1979, while Alaska’s ante-mortem probate law was enacted recently in 2010. *Id.* Other scholars and state bar associations have considered and rejected the idea of an ante-mortem probate law. *See* Forrest J. Heyman, *A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in Light of Alaska’s Recent Ante-Mortem Legislation*, 19 Elder L.J. 385 (2012).

Scholars have identified both drawbacks and benefits to implementation of ante-mortem probate law, including the pitfall that the proceedings involved could create significant family disturbances when probate matters are raised during the life of the testator. *See e.g.*, Forrest J. Heyman, *A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in Light of Alaska’s Recent Ante-Mortem Legislation*, 19 Elder L.J. 385 (2012); Lord-halvorson, *supra*, at 548-50. Scholars that have recommended the adoption of such laws have supported different types of such laws: One writer urges the creation of a mediation-focused ante-mortem process, which incorporates elements of alternative dispute resolution and could possibly lead to less acrimonious litigation. Lord-halvorson, *supra*, 557-60. Another author makes a strong case for adopting an ante-mortem statute, but recommends a version that incorporates elements from all of the available versions. *See* Heyman, *supra*, at 402-13 (recommending a “collage” model).

Staff research did not reveal any relevant proposed legislation in the last few sessions in New Jersey, nor did the New Jersey Law Journal article indicate that any related legislation has been proposed. In light of the absence of proposed legislation on this issue and the NJ LJ’s article recommending it, the Commission may wish to authorize Staff to engage in a project to determine whether such a law would be appropriate for New Jersey and what form that law could take given the differing opinions on the subject. Further, the Commission could consider authorizing staff to research options beyond an ante-mortem probate process, such as increased statutory authorization of videotaped wills or other pre-mortem validation devices.