I. The Minnesota Legislature Should Embrace Antemortem Probate Proceedings.

"It is not the critic who counts…[;] credit belongs to the man who is actually in the arena."[1] Since the first antemortem probate legislation passed in 1883,[2] state legislatures and law revision commissions have struggled to convert antemortem probate theories and their criticisms into viable practices. As of 2024, only eight states permit some form of antemortem probate: Alaska,[3] Arkansas,[4] Delaware,[5] New Hampshire,[6] Nevada,[7] North Carolina,[8] North Dakota,[9] and Ohio.[10] Minnesota should become the ninth state to authorize antemortem probate because the proceeding can provide a practical approach to ensuring testamentary freedom while eliminating some of the problematic aspects of postmortem probate.

A. Overview of Antemortem Probate Proceedings and Existing Models

The guiding principle of American law is that people are free to give property at death however they want without court interference.[11] This freedom of disposition principle is articulated as a foundational public policy goal in most states' probate statutes.[12] When a person shuffles off this mortal coil, a postmortem probate proceeding is typically started to facilitate the transfer of property from the decedent to living individuals. [13] Postmortem probate is intended to be "speedy and efficient."[14] Nevertheless, practitioners and academics widely criticize postmortem probate for being inefficient and, in some cases, grossly undermining a testator's true intent.[15] In response, states have codified antemortem probate as a method for living testators to seek advanced validation of their wills. With a pre-validated will, testators gain more assurance that the transfer of their property at death will happen more efficiently and in the manner they intend.[16]

Legal academia has developed seven models for antemortem probate;[17] however, the eight states with antemortem probate rely mainly on the Contest Model. Under the Contest Model, antemortem probate is an adversarial court proceeding between the testator and presumptive takers to decide the legitimacy of the testator's will.[18] If the testator is successful, the court validates the

will through an order of declaratory judgment, approving the testator's legal capacity, will formalities compliance, and nonexistence of any undue influence.[19] Generally, if the will is declared valid in antemortem probate, postmortem will contests are prohibited.[20]

Though they are only theoretical models, the Conservatorship and Administrative Models have generated momentum as potential alternatives to and improvements upon the Contest Model. Under the Conservatorship Model, a living testator submits a petition to the court to get a declaratory judgment on their will's validity like in the Contest Model; however, a court-appointed guardian ad litem litigates on behalf of potential beneficiaries to a will.[21] Finally, under the Administrative Model, a guardian ad litem facilitates an administrative ex parte proceeding, and their findings determine whether a living testator's will is valid.[22] For this analysis, the Contest Model of antemortem probate is the primary point of discussion because it is the only tested model with real-life application.

The main advantages of antemortem probate over postmortem probate include (1) the reduction of frivolous will contests, (2) the superior execution of the testator's intent, and (3) the elimination of postmortem probate's main evidentiary problems.[23] On the other hand, the few disadvantages of antemortem probate are (1) the limitations on amendment and revocation of previously validated wills, (2) the inability to guarantee notice to all interested parties, and (3) the potential burden of extra litigation on the judicial system.

B. Disadvantages of Antemortem Probate Proceedings

First, testators who complete antemortem probate are disincentivized from amending or revoking their will because those actions undo all the effort and resources spent in antemortem probate. In states like Ohio and Alaska, a testator's amendment or revocation of a will nullifies the prior binding declaration of validity, thus requiring them to complete antemortem probate again should they wish to validate the new changes.[24] By contrast, a testator in North Dakota may *only*

modify or revoke a previously validated will by completing a new antemortem probate proceeding.[25] While antemortem probate excels at securing a will's permanent validity (assuming it never changes), the system is vulnerable to the truth that life circumstances may prompt a need to change the will. If that happens, testators who completed antemortem probate are caught in a Catch-22 decision: (1) modify the will, consequently undoing the time, money, and familial capital spent in the prior proceeding, or (2) keep the imperfect will, settling for something incongruent with their true end-of-life intentions. Therefore, antemortem probate may favor testators who anticipate minimal changes or have uncomplicated testamentary wishes.

Second, our American legal system's defining of property rights creates significant challenges for accurately notifying all potential beneficiaries for an antemortem probate proceeding. An unshakeable maxim in American estates law is that living persons have no heirs.[26] Consequently, relatives *expecting* property interests upon someone's death may ultimately not receive anything based on the final scoreboard; alternatively, nonexistent relatives (like a class of unborn children) may bump the line and have a property interest upon someone's death.

In response, states with antemortem probate require testators to provide notice and opportunity to appear for any living presumptive takers.[27] However, notice with perfect efficacy is unachievable. Out-of-state parties may never receive notice if the state's notice requirements are minimal, such as mere publication in a testator's local newspaper.[28] In addition, relevant beneficiaries at the time of the decedent's death may not be present in antemortem probate for lack of an expected property interest at *that* time.[29] Regardless of these concerns, declaratory judgment in antemortem probate is typically binding on all heirs, even if they were not entitled to notice at the time of the proceeding.[30] Thus, antemortem probate may favor presumptive takers, including

well-intending ones, who are vigilant and aware of a family member's antemortem probate for fear of permanently losing their right to contest the will.

Finally, antemortem probate could burden the judicial system with additional administrative loads, which would increase existing delays and undermine any gained efficiencies. Studies suggest that will contests in the United States are rare, affecting between 1% and 3% of postmortem probate proceedings annually.[31] By contrast, *every* antemortem probate petition creates a will contest. As a result, antemortem probate may require greater engagement and use of the judicial system, regardless of whether someone would have challenged the will in postmortem probate.[32] Given that postmortem probate is already known for significant delays and high caseloads, adding lengthier antemortem proceedings may clog the system and waste its existing resources.[33] As a result, states wishing to implement antemortem probate should evaluate the current capacity of their judicial systems before diving right in.

C. Advantages of Antemortem Probate Proceedings

First and foremost, antemortem probate provides an enforceable method to prevent and block frivolous will contests, safeguarding the corpus of the testator's estate and ensuring that deserving heirs get their expected portion. Currently, the postmortem system grossly incentivizes frivolous will contests for several reasons. Plaintiffs with unjustified claims are usually not obligated to reimburse the decedent's estate for fees spent defending their claims.[34] As a result, disgruntled heirs have little reason *not* to shoot for the moon because, at worst, they will land right where they started without penalty.[35] Additionally, postmortem probate incentivizes those with frivolous claims to challenge a will because the decedent's estate has the burden of proving a will's validity.[36] This evidentiary hurdle and familial and economic considerations of a decedent's estate compel a considerable amount of pretrial settlements in postmortem proceedings.[37]

For a proactive decedent, antemortem probate and its binding declaratory judgment on a will's validity (and in some states, including the lack of undue influence) provides an effective tool for eliminating the plight of frivolous postmortem contests. A state with both antemortem and postmortem probates gives a testator choice and agency for carrying out their wishes while shielding their estate from frivolous litigation.[38]

Second, antemortem probate better preserves the testator's freedom of disposition, preventing circumstances where a postmortem court improperly frustrates the testator's intent. In postmortem probate, judges or jurors are more likely to override the testator's intentions due to their subjective beliefs about what are fair and normal distributions.[39] This risk is especially prevalent where the testator's scheme is inconsistent with mainstream norms and expectations.[40] Antemortem probate mitigates the issue of unjustified subjectivity by providing direct access to the best evidence of intent: the testator's live testimony.

In addition, antemortem probate prevents invalidating a decedent's will for harmless errors while adhering to will formalities. The postmortem system allows for the simplest mistakes, like defective signatures, to invalidate a will, which is "the most illogical and impractical time for such scrutiny."[41] Antemortem probate provides a win-win scenario for eliminating unnecessary will invalidations: either the testator will achieve peace of mind that they complied with will formalities, or the testator will have the opportunity to correct their drafting mistakes *while alive and able*. Antemortem probate provides a tangible way to resolve issues of subjectivity and harmless errors that mire the postmortem venue, thus accomplishing the testator's true intent.

Finally, antemortem probate offers unparalleled evidentiary advantages over postmortem proceedings because the best factual source, the testator, is readily available in antemortem probate. Characterized by many commentators as the "Worst Evidence" rule, the trier of fact in

postmortem probate must decide the testator's intent and capacity by making inferences from circumstantial evidence rather than *any* direct evidence from the testator.[42] The quality of evidence supporting a testator's intent and capacity deteriorates as time passes between the will execution and postmortem probate petition.[43] However, a court may even disregard timely and consistent circumstantial evidence.[44] With direct testimony from the testator in antemortem probate, a trier of fact has (1) the best quality evidence of intent and capacity, (2) evidence that is likely more fresh and timely, and (3) a more robust context for evaluating the credibility of evidence from will contestants.[45] For example, testator testimony offers the trier of fact a priceless window into understanding the circumstances of disinheritance or unusual gift. Antemortem probate equalizes the evidentiary playing field between the testator and potential will contestants, streamlining proceedings and allowing for authentic inquiry into a testator's intent.

II. Minnesota's Antemortem Probate System Should Adopt a Contest Model Comprising of the Best Parts of Other States' Statutes.

Should Minnesota lawmakers decide to enact antemortem probate statutes, the State ought to utilize a Contest Model which innovates and improves upon the flaws of existing antemortem probate practices. Given the untested nature and legal uncertainty of the Conservatorship and Administrative Models, the Contest Model provides the most practical model to get something good done rather than let perfect be the enemy of the good. My statutory recommendations offer a working framework for addressing four legal topics discussed previously: (1) petition procedures, (2) notice requirements, (3) hearing procedures, and (4) the ability to revoke or modify a validated will.

A. Minnesota's antemortem probate should include a broad petition class and require comprehensive submission of testator affirmations.

The first statutory consideration revolves around the start of the antemortem probate proceeding: who has standing to file a petition, and what must they include? Minnesota should

require an antemortem probate petitioner to either be domiciled or own real property in Minnesota, which follows the trend in most states.[46] Currently, in all states except Alaska[47] and Nevada,[48] only the testator themself can commence antemortem probate;[49] however, Minnesota should depart from this narrow, paternalistic approach and permit the testator's conservator or guardian to petition. As the Minnesota Supreme Court held in *Matter of Congdon's Estate*, a person under conservatorship or guardian can still have testamentary capacity to execute a will.[50] Thus, barring guardians or conservators from petitioning antemortem probate undermines the policy goal of upholding testamentary intent, which includes a testator's wish to gain peace of mind from a pre-death will validation. Finally, regarding what a petition should consist of, Minnesota should mirror Alaska's provisions which require signed statements from the testator affirming proper will execution.[51] While these filed statements are not immune to devious practices, they offer additional evidence at the outset of antemortem probate, which may reduce frivolous challenges and expedite proceedings.[52]

B. Minnesota's antemortem probate should require notice to the broadest class possible and make will contestants responsible for initiating a contest.

The second statutory consideration concerns those bound by an antemortem probate judgment: who should receive notice, and who is responsible for contesting the will? As discussed previously, heirs are difficult (or impossible by doctrinal estates law) to identify while a testator is alive. Moreover, Minnesota courts are unlikely to abandon this principle anytime soon.[53] Therefore, Minnesota's antemortem probate should define the notified beneficiary class as broadly as possible to achieve the fairest possible outcome. Minnesota's provisions should mirror New Hampshire's notice class, which includes the petitioner's spouse, heirs at the time of the petition, devisees under the will, appointed executors, and any other persons whom the court would deem interested parties if the petitioner died on the date of filing.[54]

Finally, Minnesota should implement a "notice statute" provision similar to Delaware's, which appropriately favors the testator and the judicial system. All other states except Delaware utilize a "filing statute," mandating the testator to petition the court, commence an action, and undergo a hearing, regardless of whether someone challenges the will.[55] Alternatively, Delaware's "notice statute" permits non-judicial pre-death validations of wills when interested parties receive time-sensitive notice of opportunity to challenge the will and choose not to come forward.[56] Critics of Delaware's "notice statute" argue that placing the responsibility on interested parties to initiate the legal action places an excessive burden on them.[57] However, the practical benefits of "notice statute" outweigh these potential hardships imposed on interested parties. For Minnesota testators with uncomplicated family dynamics, this approach makes antemortem probate a more attractive tool for them to streamline the liquidation of their estate upon death while also reducing the burden on the postmortem system. For those testators who already expect a dicey contest, antemortem probate will advance the timeline of litigation that would naturally happen in postmortem probate; however, the testator will gain evidentiary advantages. Overall, shifting the burden on will contestants via "notice statute" is more in line with upholding the freedom of disposition.[58]

C. Minnesota's antemortem probate should not utilize a jury and strive to limit unintended legal consequences.

The third statutory consideration entails the heart of antemortem probate's judicial process: who should be the trier of fact, and how do proceedings affect other common probate issues? Minnesota should conduct antemortem probate and any subsequent will contests without a jury. Experience and empirical studies of postmortem probate suggest that juries favor the challengers, especially when the testamentary scheme involves gifts to nonrelatives and friends.[59] Minnesota testators may be more willing to utilize the process with a more impartial judge deciding antemortem probate cases.

Additionally, Minnesota should proactively codify the effects of antemortem probate on the spousal elective share and inferences of invalidity. Delaware is the only state with explicit provisions providing that a spouse's right to an elective share is not affected by antemortem will validation.[60] It would be improper for antemortem probate to interfere with a spouse's elective share because that election can only occur once they become widowed. In addition, Minnesota should adopt a provision similar to Ohio's, which provides that a decedent's choice to forgo antemortem probate is inadmissible evidence by postmortem will contestants.[61] Proactively blocking the invalidity-by-inference argument ensures that antemortem probate remains *an* option for testators. If a testator chooses to skip antemortem probate, the testator is unharmed, and postmortem probate avoids baseless inference arguments.

D. Minnesota's antemortem probate should freely permit testators to amend or revoke their validated will, but with consequences.

The final statutory consideration presents the potential difficulties of amending or revoking an antemortem validated will: what flexibility, if any, should the testator have to amend their will without undoing the previously binding determination? Unfortunately, no state has developed a sound method for addressing will modifications after antemortem probate. On one end of the spectrum, North Dakota requires testators to initiate a new antemortem probate proceeding if they wish to amend or revoke their previously validated will.[62] On the other end, most states permit testators to amend or revoke their validated wills through any lawful process; once done, the earlier will loses its binding declaration of validity.[63] In the middle, New Hampshire allows testators to modify their will, and only modified provisions will lose the binding effect of validity.[64]

Each practice poses significant challenges. North Dakota's approach is highly inflexible and penalizes the testator for changed circumstances outside their control. The majority "free-to-change" approach opens the door for serious postmortem confusion regarding the testator's intent,

capacity, and sources of influence behind the act. Finally, New Hampshire's approach fails to appreciate the interconnected framework of testamentary drafting – one change can cause a butterfly effect of will construction issues.

Given these considerations, Minnesota should draft modification and revocation rules using the "free-to-change" approach because it allows testator flexibility without subjecting interested parties to undue prejudice. Any antemortem probate proceeding disfavors interested parties due to the inability to predict would-be heirs and guarantee actual notice to every potential taker. If a modification or revocation had no consequence on an earlier declaration of validity, testators (and undue influencers) would have free reign to circumvent will requirements. Therefore, the "free-for-all" approach provides flexibility to the testator while adequately protecting the rights and concerns of interested parties.

III. Conclusion

Antemortem probate offers a promising tool for ensuring the Minnesota judicial system respects and honors the testamentary wishes of Minnesota residents to the fullest extent. At the same time, Minnesota lawmakers should recognize that antemortem probate is not a one-size-fits-all solution for existing probate problems. The benefits and costs of antemortem probate do not suit every testator's unique financial, social, and familial circumstances. Nonetheless, the benefits of antemortem probate proceeding greatly outweigh its flaws. Now is the time for Minnesota lawmakers to step into the messy arena and consider enacting antemortem probate.

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[1] Theodore Roosevelt, Address at the Sorbonne in Paris, France: "Citizenship in a Republic" (April 23, 1910).
[2] 1883 Mich. Pub. Acts 17, *invalidated by Lloyd v. Wayne Circuit Judge*, 23 N.W. 28, 29 (Mich. 1885).
[3] ALASKA STAT. ANN. §§ 13.12.530 to .545 (West 2023).
[4] ARK. CODE ANN. §§ 28-40-201 to -203 (West 2023).
[5] DEL. CODE ANN. tit. 12, § 1311 (West 2023).
[6] N.H. REV. STAT. ANN. § 552:18 (West 2023).
[7] NEV. REV. STAT. ANN. § 30.040 (West 2023); NEV. REV. STAT. ANN. § 137.007 (West 2023).
[8] N.C. GEN. STAT. §§ 28A-2B-l to -6 (2015).

[9] N.D. CENT. CODE ANN. §§ 30.1-08.1-01 to -04 (West 2023).
[10] OHIO REV. CODE ANN. §§ 5817.01 to .14 (West 2023).
[11] RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a. (2000).
[12] MINN. STAT. 524.1-102(b)(2) (2023) (stating that a primary purpose of probate is "to discover and make effective the intent of a decedent of property.").
[13] MINN. STAT. 542.1-102(b)(3) (2023).
[14] *Id.*
[15] Aloysius A. Leopold and Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 Ark. L. Rev. 131, 137 (1990).
[16] Joseph A. Romano, *No "Dead Giveaways": Finding A Viable Model of Ante-Mortem Probate for New Jersey*, 48 Seton Hall L. Rev. 1683 (2018)
[17] Jacob Arthur Bradley, *Antemortem Probate is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 Miss. L.J. 1431, 1442 (2017) (outlining (1) the Conservatorship Model, (2) The Administrative Model, (3) the French Notaire Model, (4) the Mediation Model, (5) the Ministerial Model, (6) the Arbitration Model, and (7) the Contest Model).
[18] Mary Louise Fellows, *The Case Against Living Probate*, 78 Mich. L. Rev. 1066, 1073 (1980).
[19] *See* Romano, *supra* note 15, at 1686.
[20] Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 276-277 (1976).
[21] John H. Langbein, *Living Probate: The Conservatorship Model*, 77 Mich. L. Rev. 63, 78 (1978)
[22] Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 Mich. L. Rev. 89, 112 (1979).
[23] Taren R. Lord-Halvorson, *Why Wait Until We Die? Living Probate In A New Light*, O.C.U. L. Rev. 543, 551 (2012).
[24] *See* Romano, *supra* note 15, at 1691.
[25] *Id.* at 1692.
[26] *Cowan v. Cowan*, 254 S.W.2d 862, 864-865 (Tex. Civ. App. 1952).
[27] *See* Bradley, *supra* note 16, at 1458.
[28] *See* Fellows, *supra* note 17, at 1096.
[29] *Id.*
[30] *See* Bradley, *supra* note 16, at 1444.
[31] David Horton, *Testation and Speech*, 101 Geo. L.J. 61, 86 n.189 (2012).
[32] *See* Bradley, *supra* note 16, at 1459.
[33] *Id*.
[34] *See* Leopold and Beyer, *supra* note 14, at 135.
[35] *Id*.
[36] *See* MINN. STAT. 524.3-407 (2023) ("Proponents of a will have the burden of establishing prima facie proof of due execution in all cases.").
[37] Susan G. Thatch, Esq., *Ante-Mortem Probate in New Jersey-an Idea Resurrected?*, 39 Seton Hall Legis. J. 331 (2015) (The perceived prevalence of [will contests] may be underestimated by the fact that many suits are designed to compel a pretrial settlement and therefore, are never reported.").
[38] *See* Leopold and Beyer, *supra* note 14, at 135.
[39] *Id.* at 137.
[40] E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 Case W. Res. L. Rev. 275, 282 (1999) ("the 'abhorrent' testator who disinherits her legal spouse or close blood relations in favor of, for example, a non-mainstream religion, a radical political organization, or a same-sex romantic partner is especially at risk of having her estate plan discarded."); *See In re Strittmater's Estate*, 53 A.2d 205 (N.J. 1947) (finding that female testator's will was a product of insanity where she had strong beliefs about women's suffrage and left her estate to the National Women's Party).
[41] *See* Leopold and Beyer, *supra* note 14, at 136.
[42] *See* Langbein, *supra* note 20, at 2044.
[43] *See* Leopold and Beyer, *supra* note 14, at 139.
[44] *See Hickman v. Hickman*, 244 S.W.2d 681 (Tex. Civ. App. 1951) (affirming a jury's determination that the testator lacked testamentary capacity despite numerous witnesses' testimony that the testator was of sound mind at the time the will was executed.)
[45] Timothy R. Donovan, *The Ante Mortem Alternative to Probate Legislation in Ohio*, 9 Cap. U.L. Rev. 717, 720 (1980).

[46] *See* N.H. REV. STAT. ANN. § 552:18(I) (West 2023) ("For purposes of commencing the proceeding under this section, the individual must be domiciled in this state or own real property located in this state.")
[47] *See* ALASKA STAT. ANN. § 13.12.530 (West 2023) ("A testator, a person who is nominated in a will to serve as a personal representative, or, with the testator's consent, an interested party may petition the court to determine before the testator's death that the will is a valid will subject only to subsequent revocation or modification.").
[48] *See* NEV. REV. STAT. ANN. § 30.040(2) (West 2023) ("A maker or legal representative of a maker of, a will, trust or other writings constituting a testamentary instrument may have determined any question of…validity.").
[49] *See* N.H. REV. STAT. ANN. § 552:18(I) (West 2023) ("A person acting as an individual's guardian, conservator, or attorney-in-fact shall not commence the proceeding on behalf of the individual.")
[50] 309 N.W.2d 261, 267 (Minn. 1981) ("Appellant argues that Ms. Congdon could not possess testamentary capacity because she was the subject of a conservatorship. However, because testamentary capacity is a less stringent standard than the capacity to contract, it is not inconsistent for the subject of a conservatorship to have sufficient capacity to execute a will.").
[51] *See* ALASKA STAT. ANN. § 13.12.545 (requiring 13 statements regarding the legitimacy of the will).
[52] *See* Romano, *supra* note 15, at 1699.
[53] *See Matter of Estate of Tomczik*, 992 N.W.2d 691, 697 (Minn. 2023) ("Because [testator] had no wife at the time of his death, the class of his 'wife's heirs-at-law' no longer existed, and any gift to them must therefore fail.").
[54] *See* N.H. REV. STAT. ANN.§ 552:18(III) (West 2023).
[55] Ralph Lehman, *Determining the Validity of Wills and Trusts-Before Death*, 21 NO. 6 O.H. Pro. L.J. 7 (2011)
[56] *See* DEL. CODE ANN. tit. 12, § 1311(a) (West 2023).
[57] *See* Romano, *supra* note 15, at 1700-1701.
[58] *Id*.
[59] Jeffrey A. Schoenblum, *Will Contests - An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 659 (1987).
[60] *See* DEL. CODE ANN. tit. 12, § 1311(f) (West 2023).
[61] *See* OHIO REV. CODE ANN. § 5817.14(C) (West 2023) ("The failure of a testator to file a complaint for a judgment declaring the validity of a will…is not admissible as evidence in any proceeding to determine the validity of that will or any other will executed by the testator.").
[62] *See* N.D. CENT. CODE ANN. § 30.1-08.1-03 (West 2023) ("The will shall be binding in North Dakota unless and until the plaintiff-testator executes a new will and institutes a new proceeding under this chapter.").
[63] *See* ALASKA STAT. ANN. § 13.12.555 (West 2023).
[64] *See* N.H. REV. STAT. ANN. § 552:18(VII) (West 2023) ("The will…shall be admitted to probate and conclusively deemed proved, except to the extent that the will is modified or revoked after the court's declaration.").