"Many of the problems arising under post-mortem probate are caused by the testator's absence. Pre-mortem probate eradicates this inherent difficulty and provides at least three significant benefits: it discourages spurious will contests, alleviates evidentiary problems and helps effectuate the testator's intent."
"[T]he post mortem squabbings and contests on mental condition... have made a will the least secure of all human dealings."—Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 30 (Mich. 1885).

The post-mortem probate model prevalent in the United States contains a glaring deficiency. The key witness—the testator—is deceased and for this reason the courts are limited to indirect evidence concerning the testator's capacity, intent and freedom from undue influence. Post-mortem probate provides a feeding ground for spurious will contests that eat away at the corpus of an estate no longer protected by the evidentiary power that lies buried with the testator. This unacceptable result can be avoided if procedures exist for validating the will while the testator is still alive, i.e., a pre-mortem or "living" probate.

An Example

Assume that your client asks you to draw a new will. The client is divorced and has two children. The original will, drafted 10 years earlier, divided the client's estate equally between the two children. The client was diagnosed as HIV positive about four years ago and now has AIDS. The client's son lives nearby and has been a constant companion, even reducing a busy work schedule to provide care and support. The client's daughter, a very successful and wealthy business owner, makes only brief and infrequent visits. For these reasons, your client wants the new will to leave the son 75% of the estate with the remainder passing to a local hospital that conducts extensive AIDS research.

This situation is ripe for a will contest. The daughter is likely to challenge the will, claiming that illness stripped away her parent's testamentary capacity and that her brother exerted undue influence over their parent. What should the client do? Outright gifts to the son and the hospital are not feasible because the client has extensive and unpredictable medical expenses that require financial liquidity. A trust would provide some solace but is open to attacks based on lack of capacity or undue influence. A videotape of the will execution ceremony may help but could backfire if the illness has caused physical deterioration that would give the daughter ammunition to challenge the will, even though the client's mental capabilities are not impaired. How will the estate planner solve this seemingly intractable problem?

If the client is fortunate enough to live in a state authorizing pre-mortem probate, the answer is easy: follow the statutory procedure to obtain a judgment declaring the will to be valid. This judgment would then prevent the will from being successfully contested after the client's death.

Development and Models

Although pre-mortem probate may seem to be a modern and progressive concept, its roots can be traced to ancient laws and customs recorded in the Old Testament. Underpinnings of pre-mortem probate can also be found in both English common law and European civil law.

The modern lineage of ante-mortem probate in the United States stems from a statute passed by the Michigan legislature in 1883. Although this statute was declared unconstitutional by the Michigan Supreme Court in 1885, recognition of judicial authority to render declaratory judgments led to a rebirth of the concept. Arkansas, North Dakota and Ohio enacted ante-mortem statutes in the waning years of the 1970s. See Ark. Code Ann. §§ 28-40-201 to -203 (Michie 1987); N.D. Cent. Code §§ 30.1-08.1-01 to -04 (Supp. 1991); Ohio Rev. Code Ann. §§ 2107.081-085 (Baldwin 1987).

All states that authorize ante-mortem probate have statutes based on the adversarial contest model. Under this method of ante-mortem probate, the testator executes a will in the normal manner and then asks the court for a declaratory judgment ruling the will valid, e.g., that all technical formalities were satisfied, and the testator had the required testamentary capacity to execute a will and was not under undue influence. The beneficiaries of the will and the heirs apparent are given notice so they may contest the probate of the will. If the court finds that the will is valid, it is effective to dispose of the testator's property at death unless the testator makes a new will or otherwise revokes the one proven via the pre-mortem procedure.

Two additional ante-mortem probate models have received extensive discussion but neither has been adopted. The conservatorship model, like the contest model, is adversarial and based on a declaratory judgment action, but a court-appointed guardian ad litem represents the heirs apparent rather than the heirs apparent representing themselves. The administrative model provides for the court to make an ex parte determination of the will's validity, based on the report of a guardian ad litem.

The National Conference of Commissioners on Uniform State Laws gave serious consideration to a Uniform Ante-mortem Probate of Wills Act. Because of disagreement on whether a contest or administrative format should be followed, the project was abandoned in the early 1980s.

Benefits

Many of the problems arising under post-mortem probate are caused by the testator's absence. Ante-mortem probate eradicates this inherent difficulty and provides at least three significant benefits: it discourages spurious will contests, alleviates evidentiary problems and helps effectuate the testator's intent. Subsumed within these benefits are welcome side effects such as the preservation of court time and estate resources that otherwise would be wasted by disputes based on artificial grounds.

- **Spurious will contests discouraged.** One of the major policies underlying a post-mortem will contest is to...
“By validating the will during the testator's lifetime, pre-mortem probate can protect a person's basic property right to dispose of property at death.”

ensure that deserving heirs do not lose a portion of the decedent’s estate as a result of fraud, undue influence or insufficient capacity that may have affected the decedent at the time of will execution. In many cases, however, the will contest is wielded by greedy and unscrupulous disinherited heirs attempting to bludgeon an estate into a settlement to avoid depletion of assets during a lengthy court battle. Pre-mortem probate serves as a barrier to unfounded challenges to the testator’s will. The presence of the testator will dissuade many unhappy heirs from bringing a spurious contest. It is certainly easier to testify about a person’s lack of capacity when the person is not looking you straight in the eye. In addition, formal validation of the will before the testator’s death will speed the process of distributing the estate to the designated beneficiaries once the testator dies. Hence, the additional costs a testator incurs while alive to secure an ante-mortem probate may prevent the even greater expense of defending a baseless suit.

- Evidentiary problems alleviated. A recurring problem with post-mortem probate is that the trier of fact must determine the capacity and intent of a person who is unable to testify or be observed. Even when everyone involved acts with the utmost propriety, this procedure often slips into an exercise of pure speculation. The quality of evidence presented may be very poor, having inevitably deteriorated with the passage of time. Even worse, disinherited heirs may deliberately misrepresent the testator’s actions based on pre-conceived notions of a “normal” estate distribution. Ante-mortem probate helps ameliorate this paradox between inter vivos and testamentary property transfers by allowing the testator to rewrite a valid will because of personal objections.

Ante-mortem probate permits a court to evaluate testamentary capacity at the most logical time: when the testator is alive to present evidence. Instead of inferences drawn from testimony about the testator’s past conduct, direct observation and cross-examination of the testator are possible. Because the burden of proving testamentary capacity is on the proponent of a will, living probate appeals to a basic consideration of fairness to the testator. Undoubtedly, most people would prefer to defend personally against assaults on their integrity or mental states.

- Frustration of testator’s intent prevented. The ability to transfer one’s property by will is taken for granted by property owners. Testators expect their wishes to be carried out after their deaths. But no matter how sane or lucid a testator is at the time of will execution, the will contest and evidentiary problems discussed above prevent the post-mortem probate system from reasonably guaranteeing that this property right is protected. Even simple “technical” errors can lead to the invalidity of a will.

By validating the will during the testator’s lifetime, ante-mortem probate can protect a person’s basic property right to dispose of property at death. Problems with the will may be detected while the testator is still alive and capable of remedying the situation. In addition, many property transfers that are accepted and even applauded when made inter vivos, such as large donations to reputable charities, serve as the basis for contest when included in a will. These attacks may succeed when a fact finder evaluates the testator’s actions based on pre-conceived notions of a “normal” estate distribution. Ante-mortem probate explains personally the reasons behind the gift. Accordingly, the likelihood that the testator’s intent will be carried out is dramatically increased.

**Deficiencies**

Ante-mortem probate is not a panacea. There are problems associated with the technique that will make it impractical or unsuitable for many testators. There is no doubt that post-mortem probate will retain its status as the procedure of choice for many, if not most, testators. However, in appropriate situations, the viability of ante-mortem probate provides a welcome alternative to anxious testators despite the up-front cost.

Many of the problems with ante-mortem probate stem from its potential psychological effects on the testator and the testator’s family. The testator may not wish to disclose the contents of the will or face the embarrassment that may occur if the testator’s testamentary capacity is litigated. Presumptive heirs who genuinely believe that the testator lacks capacity or is being unduly influenced may be reluctant to bring a contest while the testator lives.

From a legal standpoint, questions may be raised concerning the binding effect of the court’s declaration that the testator’s will is valid. The traditional maxim that “the living have no heirs” still retains validity, despite the seeming applicability of declaratory judgment principles to living probate. Another potential problem involves a posthumous challenge on the ground that undue influence was exerted over the testator after the ante-mortem probate judgment was rendered, and that this influence prevented the testator from revoking the will. In addition, ante-mortem probate may raise due process issues if notice requirements are not carefully drafted and followed. Although this discussion of potential problems with pre-mortem
probate is not exhaustive, it is apparent that this procedure is not a substitute for post-mortem probate. Instead, ante-mortem probate provides a valuable alternative.

**Conclusion**

Pre-mortem probate has the potential of greatly improving the legal system's ability effectively to transmit an individual's wealth by fortifying the testator's distribution desires. This process places the most important source of evidence, the testator, directly before the court and thus ameliorates many of the inherit difficulties of post-mortem probate that encourage the filing of spurious will contests. Besides the psychological and financial benefits that would accrue to the testator and the intended beneficiaries, ante-mortem probate may lead to a more efficient use of judicial resources.

When a will contest seems all but inevitable, such as in the example at the beginning of this article, the estate planner might consider advising the testator to establish a domicile in one of the three states (Arkansas, North Dakota and Ohio) that currently has an ante-mortem procedure. Naturally, not all clients will be willing and able to make such a change. Instead, these clients are relegated to other estate planning techniques that may not achieve the desired level of protection. The ability to dispose of property is a prized property right that may be thwarted by the traditional post-mortem procedure. The bench, bar and legislators of states without ante-mortem procedures should consider offering the benefits of this technique to their citizens.

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