

Mom Liked Me Better, and She Will Prove It: Pre-Mortem Validation—Permanent Solution or Fad?

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In its March/April 2013 issue, *Probate & Property* readers were provided with an overview of pre-mortem validation. In *Before the Party's Over – The Arguments for and Against Pre-Death Will Contests*, authors David L. Skidmore and Laura E. Morris provided readers with information on what was considered a novel topic at that time.

Fast forward to 2021. The world is still in the midst of a global pandemic. Another presidential election occurred in the United States. And will and trust contests are all too common. Most often an aggrieved child, who perceives injustice because she is treated differently than her siblings, will sue to challenge her parent's will or trust.

It does not matter that the child was estranged from her parent, perhaps for many years, before her parent's death. Allegations of lack of capacity and undue influence will assure that the estate is tied up for many years in costly litigation and that whatever remains of family relationships is destroyed forever.

But the most important witness in the proceeding will not be there to testify. Death has silenced that person. The court will be forced to rely on the testimony of others: neighbors, friends, healthcare professionals, family members, experts, and, most importantly, the benefited parties.

In response, nine states (an increase from the four states referred to in the March/April 2013 article) enacted legislation to guarantee that the voice of the most important witness is heard. These laws establish a process known as pre-mortem validation.

Definitions

"Pre-mortem validation" refers to the use of a statutory procedure to validate, during the lifetime of the maker of that document, a will, trust, or other instrument taking effect at death. It may be the testator of a will, the trustee of a trust, or the power holder of a power of appointment who initiates the statutory procedure. The term "pre-mortem probate" is used exclusively when the document being validated is the maker's will.

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State Statutes

Pre-Mortem Validation of Wills

Nine states have statutes allowing pre-mortem probate of wills in some form. They are Alaska, Arkansas, Delaware, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, and South Dakota. *See* Pre-Mortem Validation State Chart, below.

Some states require nexus to use a pre-mortem probate procedure. In Arkansas, the will must dispose of all or part of the testator's estate located in Arkansas. Ark. Code Ann. § 28-40-202(a). Other states require that the testator be a resident of or domiciled in the state to use a pre-mortem probate statute. N.C. Gen. Stat. § 28A-2B-1; 12 Del. C. § 1311. And one state permits the pre-mortem probate proceeding if the individual is domiciled in the state or owns real property located in the state. N.H. Rev. Stat. § 552:18. In Alaska, the testator need not be a resident or domiciliary of the state or own property located in the state to take advantage of the Alaska pre-mortem probate statute. *See* Alaska Stat. § 13.12.530. Further, Nevada and South Dakota permit pre-mortem validation by listing wills in their generic declaratory judgment statutes, as opposed to states, such as Ohio, with a dedicated pre-mortem validation wills statute. *Compare* Nev. Rev. Stat. 30.040(2); S.D. Codified Laws § 21-24-3, *with* Ohio Rev. Code Ann. § 5817.02.

Pre-Mortem Validation of Trusts

Six states permit pre-mortem validation of trusts. They are Alaska, Delaware, Nevada, New Hampshire, Ohio, and South Dakota. *See* Pre-Mortem Validation State Chart, page 53. Although not specifically stated in the statute, it is implicit that a pre-mortem validation proceeding must be commenced in the state where the state court has primary supervision over the trust. This will typically be where the trustee resides and where the trust is administered. The proceeding is available for both revocable and irrevocable trusts. *See, e.g.*, 12 Del. C. § 3546.

Pre-Mortem Validation of Powers of Appointment

Two states permit a pre-mortem validation proceeding for the holder or exercisor of a power of appointment. They are Delaware and Nevada. *See* 12 Del. C. § 1312; Nev. Rev. Stat. 30.040(2).

In each permissible state except two, pre-mortem probate and pre-mortem validation proceedings are required to be initiated through a judicial proceeding in the first instance: a declaratory judgment action. Delaware, notably, takes a notice approach and permits pre-mortem probate and pre-mortem validation to be commenced by appropriate notice to the potential contestant. 12 Del. C. § 1311; 12 Del. C. § 3546; 12 Del. C. § 1312. South Dakota's pre-mortem validation statute is similar to Delaware's pre-mortem validation statute. Like Delaware, South Dakota permits pre-mortem validation of a trust to be commenced by appropriate notice to the potential contestant. S.D. Codified Laws § 55-4-57.

State-Specific Examples

Comparing the laws of two states where the authors are licensed to practice, Delaware and Ohio, a hypothetical fact pattern could be approached as follows:

Hypothetical Example

Jane is a surviving spouse with a complex family. Jane lives in Ohio and has four children, Mark, Michelle, Lindsay, and Susan, and ten grandchildren. Although they were once close, family disharmony has developed over the years. Jane and Mark had a falling out and have not spoken for nearly 20 years.

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Lindsay is a recovering alcoholic, and two of her children also suffer from substance abuse issues.

Jane has assets over \$200 million and is unsure of how to dispose of her estate. After discussion with her advisors, she establishes a series of irrevocable trusts (established in Delaware) with a corporate co-trustee. Upon her death, the trusts make unequal distributions and provide detailed precatory language about restrictions on distributions to beneficiaries known to have substance abuse issues. Jane's estate plan in Ohio comprises a pour-over will and revocable trust that benefits her descendants, with the Ohio revocable trust having terms similar to the irrevocable trusts described above.

Although most are employed, Jane's children and grandchildren do not currently have significant assets, and those who receive annual exclusion gifts from Jane rely on them for their annual budgeting needs. Upon her death, however, under Jane's revocable trust approximately 1/3 of her assets will be distributed among the children and 2/3 among the grandchildren.

Jane is concerned about how the distribution schema under her Ohio will and revocable trust and the series of Delaware irrevocable trusts will be interpreted upon her death and consults her advisors on the best next steps.

Delaware

The Delaware pre-mortem validation statutes were enacted in 2015. Unbiased commentators have observed that Delaware law is at the cutting edge of pre-mortem validation because, unlike other states' pre-mortem statutes, Delaware's pre-mortem statute does not require a court petition and hearing and requires only written notice to all interested parties at the outset of the process. *See* Bove & Langa, *A Shortcut to Probate—Do It While You Are Alive*, Mass. L. Wkly., Mar. 2017, available at <https://bit.ly/3fFsJqj>. Following receipt of such written notice, the recipient has 120 days to initiate a judicial proceeding. 12 Del. C. § 1311(b); 12 Del. C. § 3546(a)(1). After 120 days, recipients of the notice are forever foreclosed from making a challenge. *See id.*

In the hypothetical described above, Jane created trusts governed by Delaware law. The trustees' attorneys would follow 12 Del. C. § 3546(a)(1) and provide written notice to the trust beneficiaries: Mark, Michelle, Lindsay, and Susan, and ten grandchildren. But what about the ten grandchildren? If any of them are minors, how are they bound to the notice? Under 12 Del. C. § 3546(d), for purposes of 12 Del. C. § 3546(a)(1), a person is deemed to have been given any notice that has been given to any other person who under 12 Del. C. § 3547 may represent and bind such person. A discussion of virtual representation is outside the scope of this article. It would behoove the trust draftsman, however, to consider so-called "silent trust" provisions, that allow a third party to bind any minor beneficiaries. *See discussion in* Gordon & Gordon, *Why is Everyone Talking about Delaware Trusts?*, 2016 Tr. & Wealth Exec. Seminar, available at <https://bit.ly/2JcMcCq>.

Ohio

Ohio has offered pre-mortem validation of wills since 1978, although the statute has been revised several times since, including most recently in 2019. In Ohio, a testator can have a declaratory judgment of testamentary capacity and freedom from undue influence entered by filing the original will with the probate court together with a petition for declaratory judgment of the validity of the will. *See* Ohio Rev. Code Ann. §§ 5817.02, 5817.05. The court will hold an evidentiary hearing on the petition for declaratory relief, with notice to all legatees in the will, all potential heirs, and any other necessary party under Ohio law. *See* Ohio Rev. Code Ann. § 5817.08. Trusts may also be validated in the same manner. A testator who desires to obtain a validity determination as to the testator's will should file a complaint to determine the validity of both *the will and any related trust*. Ohio Rev. Code Ann. § 5817.02(B). *See* Ohio

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Rev. Code Ann. § 5817.03.

For Jane, one area of caution concerns the treatment of the Delaware trusts in conjunction with the Ohio estate plan due to Ohio Rev. Code Ann. § 5817.02(B). Query how an Ohio court would treat the Delaware irrevocable trusts if such process began in Delaware? What if the process began by a testator moving for a declaratory judgment on the will and revocable trust in Ohio first?

If the process addressed only the will and revocable trust, what would the process entail for Ohio resident Jane? Below is a summary of the process for determining the validity of her will and revocable trust:

The Complaint. Only the testator has the right to file the complaint—neither the testator’s guardian nor an agent under the testator’s power of attorney may file it. Ohio Rev. Code Ann. § 5817.02(A). The complaint shall be accompanied by an express written waiver of the testator’s physician-patient privilege provided in division (B) of section 2317.02 of the Revised Code. Ohio Rev. Code Ann. § 5817.02(D).

The complaint shall name as party defendants all the following, as applicable:

- testator’s spouse;
- testator’s children;
- testator’s heirs at law;
- testator’s beneficiaries under the will; and
- any beneficiary under the testator’s most recent prior will.

Ohio Rev. Code Ann. § 5817.05.

Failure to name one of the above necessary defendants allows that defendant to contest the validated will. Ohio Rev. Code Ann. § 5817.11. The complaint may name as a party defendant any other person the testator believes may have a pecuniary interest in the determination of the validity of the testator’s will. All named party defendants shall receive service of process, with a copy of the complaint, the will, and any related trust. Ohio Rev. Code Ann. § 5817.07. In determining proper representation for purposes of effectuating service (e.g., whether Jane’s grandchildren are appropriately represented to the extent any of them are minors), Ohio’s representation statutes contained in Chapter 5803 of the Ohio Revised Code should be consulted. Under Ohio law, a person represented in the action under Chapter 5803 is bound by the declaration of validity even if, by the time of the testator’s death, or the challenge to the trust, the representing person has died or would no longer be able to represent the person to be represented in the proceeding under this chapter. *See* Ohio Rev. Code Ann. § 5817.11.

The Hearing. After a complaint is filed, the court shall set a time and date for a hearing. Notice of the hearing shall be given to the testator, settlor (if applicable), and all party defendants. Ohio Rev. Code Ann. § 5817.08. The testator has the burden of proof of establishing prima facie evidence of the will’s execution. A person who opposes the complaint must establish one or more of the following:

- lack of testamentary intent;
- lack of testamentary capacity;
- undue influence, restraint, or duress on the testator;
- fraud or mistake in the execution of the will; and
- revocation of the will.

Ohio Rev. Code Ann. § 5817.09.

Declaration of Validity. The court must declare the will valid if it finds all the following:

- The will was properly executed under Ohio law;
- the testator has testamentary capacity, was free from undue influence, and was not under restraint or

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duress; and

- the will was not the result of fraud or mistake.

Ohio Rev. Code Ann. § 5817.10(A).

After the testator's death, unless the will or trust is modified or revoked after the court's declaration, the will or trust has full legal effect and shall be admitted to probate upon request. Ohio Rev. Code Ann. §§ 5817.10(A)(2), 5817.10(B)(2).

Is the process for declaring the validity of Jane's will and revocable trust too arduous? Ohio would benefit from a system like Delaware's in that the approach of Delaware may curtail court involvement. Judging from the facts of the hypothetical scenario, court intervention would be likely, although the legal fees of responding to the initial notice in Delaware and possible court fees in a foreign jurisdiction (outside of Jane's state of residence) may discourage the parties involved.

Conclusion

Pre-mortem probate and pre-mortem validation statutes are increasingly beneficial tools for defending estate plans. We now have nine states permitting pre-mortem probate of wills, six states permitting pre-mortem validation of trusts, and two states allowing pre-mortem validation of other testamentary instruments such as powers of appointment. It is hoped that more states will join in adopting pre-mortem probate and pre-mortem validation statutes.

Who better to tell the world what was intended than the person whose will or trust is being contested?