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COMMENT ON PERMITTING PRE-MORTEM PROBATE IN THE STATE OF NEW YORK

COMMITTEE ON TRUSTS, ESTATES AND SURROGATE'S COURTS

There recently has been discussion about allowing pre-mortem probate of a last will and testament in the State of New York. The Committee opposes any change in the law to permit pre-mortem probate in any type of judicial proceeding.

A. <u>Current New York Law</u>

New York law does not permit a person to probate his own last will and testament while he is alive.

The issue recently arose in the context of guardianship proceedings under the Mental Hygiene Law. There were inconsistent court decisions on whether a court in an Article 81 proceeding may revoke a will. In *Matter of Rita R. v. Richard R.*, 1 the Appellate Division, Second Department held that the Surrogate's Court of Nassau County had such authority if it found that the document was executed during a period of time when the person was incapacitated. The Surrogate's Court of New York County, however, held that a determination by the Supreme Court of the invalidity of an incapacitated person's will is not binding in a subsequent Surrogate's Court proceeding upon any party who was not provided a full opportunity to be heard on the issue.2 Presented with these conflicting decisions, in July 2008 the New York State Legislature amended Section 81.29(d) of the Mental Hygiene Law in July 2008 by adding the following provision: "The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person."3

Although the recent legislation settles the issue in the context of guardianship proceedings, there presently is no statutory authority for pre-mortem probate in non-guardianship contexts.

B. <u>Developments in Other States</u>

At least three states currently permit pre-mortem probate. North Dakota4 provides that a court can issue a declaratory judgment that a will is valid unless the testator executes a new will

^{1 26} A.D.3d 502, 811 N.Y.S.2d 89 (2d Dep't 2006).

² *Matter of Socolow*, N.Y.L.J., Sept. 1, 2004, p. 24, col. 2 (Surrog. Ct. N.Y.Co.)

³ L. 2008, c. 176.

⁴ N.D. Cent. Code § 30.1-08.1-01 to -04 (supp. 1987).

and institutes a new pre-mortem probate proceeding which names all the parties to the former proceeding. In a pre-mortem proceeding under Ohio law,5 the will and the declaration of its validity are filed in a sealed envelope to which only the testator has access during his lifetime. Unlike North Dakota law which requires a new pre-mortem proceeding to revoke a will which has been granted pre-mortem probate, Ohio law permits a testator to modify or revoke a will using any methods allowed under Ohio law. Arkansas law6 is similar to Ohio law. While these procedures are available, they rarely are used.7

C. Advantages and Disadvantages of Pre-Mortem Probate

There are advantages to permitting pre-mortem probate. Most importantly, the testator is available to testify and has the opportunity to personally defend against challenges. If the will is granted probate, the testator is assured that her property will be devised in accordance with her wishes. Courts may ascertain testamentary intent while testators are alive, thereby eliminating the need to reconstruct intent later. If a pre-mortem probate proceeding reveals errors in the execution of a will, it allows the opportunity for these errors to be corrected prior to death. In addition, a pre-mortem probate proceeding promotes testamentary freedom by assuring testators that courts will uphold their wills after death.

Nonetheless, there are significant disadvantages to permitting pre-mortem probate proceedings. First, such proceedings would waste precious judicial resources since testators reserve the right to revoke wills granted pre-mortem probate. Furthermore, a testator may die with no estate to distribute, thereby rendering the pre-mortem probate proceeding unnecessary. Additional problems could arise if the distributees of the decedent are different from the persons who were given notice of the pre-mortem probate proceeding, due to either the birth or death of individuals after the proceeding. This could require a new probate proceeding so that the proper parties have the opportunity to object. In addition, it is likely that a person with valid objections to a will might not come forward while the testator is alive for fear of offending the testator (who may then write a new will, disinheriting the objectant). The granting of pre-mortem probate may itself be subject to challenge after the death of the testator if there is a claim that the testator was acting under undue influence at the time of the pre-mortem probate proceeding. Finally, there is no guarantee that, if a testator moves to another state, the state of the testator's residence at death will recognize a decree of another state granting pre-mortem probate.

D. <u>Alternatives to Pre-Mortem Probate</u>

There are numerous alternatives to pre-mortem probate, such as videotaped wills, self-proving affidavits, testamentary substitutes and *in terrorem* clauses, to discourage disgruntled heirs. While none of these alternatives is fool-proof and each is subject to challenge, they offer a testator several means to achieve the alleged benefits of pre-mortem probate without incurring its detriments.

⁵ Ohio Rev. Code Ann. § 2107.081 – .085 (Anderson Supp. 1987).

⁶ Ark. Code Ann. § 28-40-201 to -203 (1987).

⁷ Leopold, A and Beyer, G., Ante-Mortem Probate: A Viable Alternative, 43 Ark. L. Rev., 131, 171-175 (1990).

E. Conclusion

The Committee on Trusts, Estates and Surrogate's Courts opposes any change in New York law to permit pre-mortem probate in any type of judicial proceeding, whether in the form of an actual probate proceeding, an action for a declaratory judgment that a will is valid, or any other type of proceeding.

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