NO GOOD DEED GOES UNPUNISHED: THE IMPACT OF NEW JERSEY COURT RULE 4:42-9(A)(3) ON ATTORNEY FEES IN ESTATE LITIGATION

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> [A]nd they all laid their heads together like as many lawyers when they are gettin' ready to prove that a man's heirs ain't got any right to his property.
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> Mark Twain[1]

INTRODUCTION

Estate planning almost certainly deserves classification among the most confounding and bothersome areas of the law. For clients, the drafting and execution of wills conjures up the ghastly images necessarily associated with planning for death—whether it be the testator's own demise or that of a close family member. For attorneys, probate law's labyrinthine qualities are legion, especially for practitioners lacking the requisite level of expertise. And yet, planning for the postmortem devise of one's property is an unavoidable fact of life for anyone who would rather avoid the inflexibility of her state's intestacy regime.

Adding to—and perhaps because of—these difficulties is the fact that the validity of a testator's plan, as memorialized in her will, can still be subject to attack even after her death. On one hand, such litigation, which often involves issues of undue influence, fraud, and mistake, may have the positive effect of uncovering the testator's true intent if it has been obscured by the negligent or malicious actions of others. But such litigation is often costly to the estate, in a very literal, pecuniary sense. In New Jersey, via the application of Court Rule 4:42-9(a)(3), the parties to such a controversy may have their attorney fees drawn from the corpus of the estate that is the

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1. Letter from Thomas Jefferson Snodgrass, pseudonym of Samuel Langhorne Clemens, to the KEOKUK (Iowa) POST (Oct. 18, 1856), *available at* http://www.twainquotes.com/Keokuk/18561101.html.

subject of litigation. This includes the fees accrued by the executor in defense of the estate and the fees accumulated by the party contesting the will's admission to probate. Most notably, the contestant may invade the corpus to pay his attorney fees even in cases where his claim is ultimately unsuccessful.

Such a system seemingly invites frivolous litigation, especially given the involvement of familial issues inherent in the probate arena. For example, under Rule 4:42-9(a)(3), preexisting feuds between siblings can erupt into full-blown court battles, with one side protecting a decedent-parent's testamentary plan as executor and the other side contesting that plan for whatever reason—or for no reason at all. There is no motivation for either side to back down due to the expense of the suit and little incentive for the attorneys to encourage any such settlement because the estate is itself funding the entirety of the litigation.

This Note argues that the menial safeguards in place to prevent contestants and their attorneys from taking advantage of the estate via Rule 4:42-9(a)(3) are ineffective in the face of the realities of will contests. Instead, it advocates for a viable alternative that allows testators to ensure their testamentary plan receives postmortem protection.

Part I details the relationship between Rule 4:42-9(a)(3) and the more traditional rationale of the American rule, which requires each party to pay its own costs in litigation. The American rule, which increases access to the judiciary for plaintiffs in many areas of the law, has the unfortunate effect of providing contestants with a disincentive to engage in litigation in the probate context. New Jersey alleviates this disincentive through the regime set up by Rule 4:42-9(a)(3), and Part I contains a brief history of the caselaw that has developed the Rule's doctrine from common law to statutory scheme. Finally, this Part provides an overview of the nuts and bolts necessarily involved in the application for and award of attorney fees under New Jersey's current system.

Part II employs references to cases that evidence the bizarre lengths to which plaintiffs may go to contest a will's admission to probate. Because these issues often arise at the trial level and may not be memorialized by published opinion, details of such circumstances are unfortunately few and far between. Accordingly, Part II relies on anecdotal rather than statistical evidence.

To correct these problems, Part III considers less intrusive modifications to existing law before suggesting an alternative plan that allows testators the option of admitting a will to probate before they die. This antemortem scheme need not replace the current postmortem system; rather, it allows those testators who may foresee problems arising, or who simply want to be certain their plan is

executed, the option of truly resting in peace, secure in the knowledge that their testamentary wishes will be carried out. This is mainly because antemortem probate allows the star witness in a will contest proceeding—the testator—to provide the court with testimonial evidence regarding questions of undue influence or fraud and to clear up confusion surrounding ambiguous provisions in the will.

The purpose of this Note is not to criticize the current attorney fee allocation system under Rule 4:42-9(a)(3). Rather, this Note seeks to promote an alternative regime that has found success in other jurisdictions for decades. Antemortem probate will help alleviate the incidence and impact of frivolous suits attacking the validity of a will, which may disastrously exhaust the funds of an estate, by removing the incentive and opportunity to bring these suits in the first place.

I. THE "UN-AMERICAN" ALTERNATIVE: FEE SHIFTING IN THE PROBATE ARENA FOR EQUITY'S SAKE

In 2005, the Supreme Court of New Jersey reaffirmed the state's adherence to the American rule in almost all cases,[2] except for a few narrow exceptions carved out by the courts or the legislature.[3] One such exception occurs in the probate context, permitting the award of counsel fees and costs in certain circumstances.[4] Before embarking on a discussion of the particular problems such a system engenders, it may be useful to discuss briefly how Rule 4:42-9(a)(3) relates to the American rule, how its supporting doctrine has developed over time, and how it functions to award attorney fees in probate cases.

A. The American Rule

In general, each party to an action is responsible for covering the cost of its respective attorney fees, a provision commonly known as the American rule.[5] Though this standard may seem

2. *See In re* Vayda, 875 A.2d 925, 928 (N.J. 2005); *see also* NJDPM v. N.J. Dep't of Corr., 883 A.2d 329, 338 (N.J. 2005).

3. *See Vayda*, 875 A.2d at 928-29.

4. *See In re* Niles, 823 A.2d 1, 8 (N.J. 2003); N.J.R. 4:42-9(a)(3) (2007).

5. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975); STEPHEN N. SUBRIN ET AL., CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 118 (2d ed. 2004); Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 435; David A. Root, Note, *Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining the "American Rule" and "English Rule,"* 15 IND. INT'L & COMP. L. REV. 583, 583-85 (2004); Lorraine Wright Feuerstein, Comment, *Two-Way Fee Shifting on Summary Judgment or Dismissal: An Equitable Deterrent to Unmeritorious Lawsuits*, 23 PEPP. L. REV. 125, 126 n.8 (1995).

uncompromising on its face, the American Rule is subject to a number of qualifications[6] and exceptions.[7]

Supporters of the American rule laud its penchant for allowing plaintiffs of limited means, a limited chance of success, or who assert a novel theory of recovery to institute litigation.[8] Unlike alternatives such as the English rule[9] or similar continental systems,[10] plaintiffs in the United States may bring action without having to worry that, should they lose the ensuing case, they will be forced to pay the defendant's attorney fees in addition to their own.[11]

Although the American rule is an effective way to improve access to the judiciary, "[i]n testamentary capacity litigation the American rule has the effect of requiring decedents' estates to subsidize the depredations of contestants. Put differently, the American rule diminishes the magnitude of a contestant's potential loss, which diminishes his disincentive to litigate an improbable claim."[12] Probate cases are unique[13]: the critical witness—the testator—is unavailable, evidence to support or refute either party's claims has long since disappeared, and the adverse parties are often family members with preexisting feuds.[14] Because of this, the American

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6. *See* FED. R. CIV. P. 54(d)(2) (delineating the process by which a party may petition the court for a fee award).

7. *See, e.g., Alyeska Pipeline*, 421 U.S. at 245-46 (offering three notable exceptions to the American rule: statutory authorization (as in the case of Rule 4:42-9 and others like it), bad faith (as in FED. R. CIV. P. 11 and analogous state sanction statutes), and common benefit ("which spreads the cost of litigation to those persons benefiting from it")).

8. *See* SUBRIN ET AL., *supra* note 5, at 118-21.

9. The English rule is essentially "loser pays." Scholars "have clamored for the adoption of the English . . . rule in many areas of the law, hoping to decrease frivolous litigation." Root, *supra* note 5, at 583..

10. For a comparison between the common law systems found in England and the United States and the civil law systems at work on the European continent, see generally Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation With Those Systems*, 45 U. KAN. L. REV. 9 (1996).

11. In other words, plaintiffs know that in instituting litigation, the maximum amount of money they can be required to pay is limited to the fees they themselves accrue. The incidence of their own fees may be reduced through pro bono representation or a contingency payment plan, or other means.

12. John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 65 (1978); *see also* David F. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 441 (1933) ("The tax which [will contests] levy upon estates subjected to them is frequently far more onerous than that exacted by the federal and state governments.").

13. *See* discussion *infra* Part II.

14. Fee shifting in probate cases is sometimes referred to as the common fund doctrine and is labeled "a partial exception to the [American] rule" because it provides "for recovery not from the losing defendant but from those who share in the benefit of the litigation." Dobbs, *supra* note 5, at 435, 440-41; *see also* John P. Dawson, *Lawyers*

rule, and fee shifting provisions that controvert its doctrine that each party pay its own way, has a critical impact on the incidence, genesis, and outcome of probate cases.[15]

B. New Jersey Case Law: Fee Shifting in the Probate Arena

Rule 4:42-9(a)(3), as it concerns this Note, more or less originated in 1975 when the rule was amended to require that counsel fees be drawn from the estate—although a rule providing for the award of counsel fees has existed for longer.[16] However, the New Jersey caselaw that has given effect to the provision that proponents and contestants in a will contest may have their attorney fees drawn from the estate predates even the promulgation of the source rule.[17]

The earliest cases support the idea that those parties with an interest—or potential interest—in the provisions of a will, whether seeking to promote or prevent that will's admission to probate, have the right to institute or join a proceeding to that end.[18] However, New Jersey's highest court tempered this doctrine by reducing the requested attorney fees in cases where courts felt the litigation was needlessly protracted[19] and that contestants lacked sufficient evidence to challenge the will.[20]

More recently, the doctrine evolved further in two seminal, oft-cited cases. First, in *In re Caruso*, the Supreme Court of New Jersey held that a court's power to make allowances to be paid out of the estate in a will contest proceeding is discretionary, and the court's decision should be informed by the equities surrounding the

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and Involuntary Clients: Attorney Fees from Funds, 87 HARV. L. REV. 1597 (1974) (outlining the history of the common fund doctrine).

15. Just to clarify: the American rule requires each party to pay its own attorney fees regardless of the outcome; the English rule requires one party to pay both parties' attorney fees depending on the outcome; the common fund doctrine requires neither party to pay its own fees, regardless of the outcome, because those fees are covered by the beneficiaries of the litigation. In a probate case, this "coverage" comes from the beneficiaries' interests in the estate at issue.

16. *See* SYLVIA B. PRESSLER, RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY 1518 (2007) ("Thus the [1975] amendment eliminates the authorization to make an allowance against the proponent if probate is refused and against the contestant if probate is granted.").

17. *See id.* ("There is recurrent and considerable judicial attention given to the history of the source rule, which was intended to eliminate the abuses of the pre-1948 chancery practice by limiting an award of counsel fees to a few specified situations.").

18. Bioren v. Nessler, 74 A. 791, 792 (N.J. Prerog. Ct. 1909).

19. *See, e.g., In re* Squier's Estate, 150 A. 430, 433 (N.J. 1930) (reducing attorney fees from $24,000 to $5000 in a case surrounding an estate in excess of $5,000,000).

20. *See id.* For other examples of cases decided on similar grounds during this period, see *In re* Nixon, 32 A.2d 359 (N.J. Orph. Ct. 1943); *In re* Phillips, 51 A.2d 431 (N.J. 1947); *In re* Stromming, 79 A.2d 492 (N.J. Super. Ct. App. Div. 1951); *In re* Weeks, 103 A.2d 43 (N.J. Super Ct. App. Div. 1954).

particular circumstances of the case.[21] The court dealt with attorney misconduct in the probate fee context in *In re Reisdorf*, ruling that an attorney skill in advocating for his client and the difficulty of the instant case were factors to be considered in judging the propriety of fees, but that a failure to fully disclose to the client relevant facts could be grounds for suspension.[22]

Although largely dormant for the fifty years following *Caruso*, in the last ten years this doctrine has been revisited in a number of important cases that further develop and entrench its principles. For example, in *In re Reisen* the court made a number of rulings regarding what costs a firm could and could not charge to its client and made a substantial reduction in the fees sought by the contestant's attorneys.[23] In the frequently referenced *In re Niles*, the Supreme Court of New Jersey held that attorney fees incurred by the estate on behalf of plaintiffs were recoverable under an exception to the American rule.[24] Finally, that court in *In re Vayda* reaffirmed New Jersey's commitment to the American rule, a decision motivated by the state's strong public policy against fee shifting, but outlined a small number of narrow exceptions to the American rule's proviso.[25] Importantly, however, the lower court's innovative redistribution of funds—from the losing party, who had acted in bad faith, to the victor—was disallowed. Instead, the funds were drawn from the innocent estate in keeping with Rule 4:42-9(a)(3).[26] This case demonstrates precisely the reason a reform of this doctrine is necessary and sets the stage for a discussion of the rule itself.

C. Rule 4:42-9(a)(3)

In New Jersey, attorney fees are not to be taken for granted.[27] Rather, the law seems to work from the opposite supposition: "A

21. 112 A.2d 532, 539 (N.J. 1955); *see also In re* Silverman, 227 A.2d 519 (N.J. Super. Ct. App. Div. 1967).

22. 403 A.2d 873, 879 (N.J. 1979).

23. *See* 713 A.2d 576, 580-83 (N.J. Super Ct. Ch. Div. 1998) (noting that counsel for contestant spent four-hundred hours on the case compared to counsel for the estate, who spent only one hundred).

24. *See generally* 823 A.2d 1 (N.J. 2003).

25. 875 A.2d 925, 930-31 (N.J. 2005). The case was sent back on remand to the chancery division of the superior court for a determination as to fees and was then appealed again to the appellate division, which recently handed down a decision reducing the counsel fees of one party by half. *See In re* Vayda, No. A-0580-05T2, 2006 WL 3511351, at *2-7 (N.J. Super. Ct. App. Div. Dec. 7, 2006).

26. *Vayda*, 875 A.2d at 930-31.

27. "The allowance of a counsel fee does not fix the amount of the fee which an attorney is entitled to receive; it only fixed the amount the adverse party must pay toward the counsel fees of the attorney for the other party, in most cases the successful party." James H. Walzer, *Counsel Fees—Actions in Which Fee is Allowable*, *in* 4 N.J.

court may award a fee to an attorney *only* when authorized by law or where a contract so stipulates."[28] Fortunately for attorneys involved in will contests, the law authorizes fee awards in probate actions by way of Rule 4:42-9.[29] It states, in relevant part:

> (a) Actions in Which Fee is Allowable.
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> > (3) In a probate action, if probate is refused, the court may make an allowance to be paid out of the estate of the decedent. If probate is granted, and it shall appear that the contestant had reasonable cause for contesting the validity of the will or codicil, the court may make an allowance to the proponent and the contestant, to be paid out of the estate.[30]

Thus, the law not only provides for attorney fees in probate actions, it also furnishes a ready bankroll from which such fees may be drawn by both parties regardless of each party's respective success[31]—the estate itself.[32]

This section concerns itself with the way in which the fees are drawn from the estate, the factors courts consider in determining the amount of the fees, and the legitimacy of the suit in general. Central

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PRACTICE § 57.8 (2006). "Most cases" do not appear to include probate cases, based on the language and application of Rule 4:42-9(a)(3).

28. William S. Greenberg & John E. Flaherty, *Attorney's Fees and Compensation*, *in* 47 N.J. PRACTICE § 2.2 (2007) (emphasis added). "Authoriz[ation] by law" occurs "in actions designated in Rules 4:42-9(a)(1) to (6), where another court rule so provides, or where expressly permitted by statute." *Id.* (citing N.J. Div. of Youth & Family Servs. v. D.C., 530 A.2d 1309 (N.J. Super. Ct. App. Div. 1987)).

29. N.J.R. 4:42-9(a)(3) (2007); *see also* Walzer, *supra* note 27.

30. N.J.R. 4:42-9(a)(3). The rule continues: "In a guardianship action, the court may allow a fee in accordance with R. 4:86-4(e) to the attorney for the party seeking guardianship, counsel appointed to represent the alleged incapacitated person, and the guardian ad litem." *Id.* This amendment was added in September 2006, following the decision in *In re Landry*, 886 A.2d 216, 220 (N.J. Super. Ct. Ch. Div. 2005). PRESSLER, *supra* note 16, at 1518.

An analogous provision governs the award of attorney fees on appeal. *See* N.J.R. 2:11-4. On appeal, fee awards are available for actions in which fees would have been allowed under Rule 4:42-9(a), with the exception of certain foreclosure actions. *See* Edward A. Zunz, Jr. & Edwin F. Chociey, Jr., *Cases in Which Recovery of Attorneys' Fees is Permissible*, *in* 40 N.J. PRACTICE § 12.17 (2d ed. 2007).

31. This is made clear by examining the two possible outcomes: "[I]f probate is refused"—i.e., executor unsuccessful, contestant successful—"the court may make an allowance to be paid out of the estate." *See* N.J.R. 4:42-9(a)(3). "If probate is granted"—i.e., executor successful, contestant unsuccessful—"the court may make an allowance . . . to be paid out of the estate" if it "appear[s] that the contestant had reasonable cause for contesting the validity of the will." *See id.*

32. On the other hand, will contests are historically regarded as an equitable action, and, as such, courts are not required to give the attorneys anything. *See* Greenberg & Flaherty, *supra* note 28 ("[A] counsel fee award is discretionary and will not be granted in a weak or meretricious case.").

to this discussion is perhaps the most basic touchstone for the issues surrounding attorney fee controversies: the fact that fees are based in large part upon the discretion of the trial judge.[33]

1. The Fund in Court Doctrine

In New Jersey, attorney fees that arise out of probate litigation are allowable only out of a fund in court.[34] A fund is not a tangible sum; rather, it refers to property that is in the control of a fiduciary who is a party before the court—i.e., property over which the court has jurisdiction.[35] The fund is generally available for the allowance of fees,[36] although "the mere fact that through some proceeding, a fund is subject to the court's disposition, does not subject the fund to the allowance of fees."[37]

Other jurisdictions sometimes follow alternative plans, such as a per se rule or a discretionary rule, which rely on a determination of whether good faith[38] has been exercised by either the attorney or her client.[39]

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33. Alfred C. Clapp, *Counsel Fees—In General*, *in* 7A N.J. PRACTICE § 1543 (3d ed. 2006).

34. Alfred C. Clapp, *Counsel Fees Out of a Fund in Court*, *in* 7A N.J. PRACTICE § 1545 (3d ed. 2006). "The phrase 'fund in court' as now used in this state has only appeared comparatively recently in the practice of New Jersey," apparently first appearing in Nobile v. Bartletta, 164 A. 278 (N.J. 1933). *Id.*

35. *See id.* Obviously in the vast majority of will contest proceedings the fund is the estate itself.

36. *Id.*

37. *Id.* For example, "an allowance will not be made where the action is in the interest, not of the estate, but of some beneficiary, nor where there is no good cause for the action." *Id.* nn.24-25 (quoting myriad New Jersey cases that support these propositions). This is similarly true in cases where a party seeks to diminish the estate for its own benefit. *Id.* n.26. Allowances are also not made from the entirety of the estate is the litigation only addresses a particular portion. *Id.* n.28.

38. "Good faith" is defined in the UNIFORM PROBATE CODE § 3-720 (2006).

39. The per se rule and discretionary rule may be summarized as follows:

> Some jurisdictions adopt a per se rule which does not allow attorneys to receive fees from the estate when their client has been charged with unduly influencing the testator. Other jurisdictions follow a discretionary rule whereby a personal representative may, even with a finding of undue influence, be awarded attorney fees based on the totality of the circumstances.

Jaime LaMere, Note, *The Effects of Undue Influence on the Awarding of Attorneys' Fees*, 15 QUINNIPIAC PROB. L.J. 173, 174 (2000).

2. Reasonableness of Fees

The Supreme Court of New Jersey has laid out a number of factors used to determine what fee is reasonable.[40] Some examples are the number of hours expended, the attorney's customary rate, the result achieved, the risk of nonpayment, and other material factors a court deems appropriate.[41] Notably, courts should also take into account the actions of both parties during the course of litigation, particularly each party's respective discovery postures,[42] to determine if any attorney fees were created unnecessarily.[43]

One way in which the corpus of the estate may be protected is by setting a ceiling for the total amount of fees that may be allowed to either side individually and both sides in the aggregate.[44] Another is the peculiar practice that courts sometimes follow, "to award a fee

40. *See, e.g.*, Szczepanski v. Newcomb Med. Ctr., Inc., 661 A.2d 1232 (1995) (citing Rendine v. Pantzer, 661 A.2d 1202, 1226-31 (1995)).

41. *See id.* at 1238-39. A contingent fee agreement negotiated between attorney and client may inform the court's decision or may have little bearing on the ultimate fee award. Similarly, a provisional fee agreement that may be negotiated between the adverse parties is not determinative. *See* Walzer, *supra* note 27.

42. For example, in recent years New Jersey courts have held "that probate litigation is subject to offers of judgment—tools litigants can use to win legal fees from opponents who decline reasonable settlement offers." Henry Gottlieb, *Offer of Judgment Applies in Probate: R. 4:58 Makes No Exception for Will Contests, and Judge Won't Create One*, N.J.L.J., Oct. 4, 2004. Essentially, offers of judgment, codified in New Jersey via Court Rule 4:58, encourage settlement by allowing the party that makes an early settlement offer to recoup its attorney fees from its adversary should its adversary reject the offer and then ultimately lose the case on the merits. *See id.* Although New Jersey provides certain exceptions to the application of Rule 4:58, a 2004 superior court decision determined offers of judgment can be utilized in the probate arena. *Id.* However, the facts of that case are instructive in determining whether a judge may, in her discretion, decide to apply Rule 4:58; namely, the will contestant in that case was not only subject to Rule 4:58 sanctions, but was also not awarded attorney fees via the application of Rule 4:42-9(a)(3) because the court felt her claim was not reasonable. *See id.*

43. *See Szczepanski*, 661 A.2d at 1243. Courts then shift the fee onto the offending party, creating an "award" for the victimized party. *See* Walzer, *supra* note 27. Of course, in the probate context this punitive fee may not be borne by the party acting in bad faith, but rather by the estate. Additional factors for courts to consider in the probate context include the size of the estate; the amount of the estate in jeopardy; the nature and extent of the jeopardy; the particular skill and judgment shown, including an attorney's standing for skill and integrity; and overhead expenses borne by the attorney. Clapp, *supra* note 33.

44. An appropriate number that fees should not exceed is typically calculated based on a percentage of the estate. Clapp, *supra* note 33. "Thus, regardless of the amount of work done by counsel, the court . . . may impose a limit on the portion of the estate that should go to all counsel." *Id.* However, "the maximum allowance to any particular counsel is so much a matter that has to be resolved on the basis of the circumstances of the case, that it cannot be reduced to a mathematical formula. *Id.*

lesser in amount than what an attorney should fairly charge his client."[45]

Finally, a formula has been created in New Jersey for determining the award of counsel fees in the probate context.[46] Employing this method, courts take into account the reasonableness of the rate based on the type of work performed and adjust this number based on other factors, including the result achieved,[47] before multiplying the total by the number of hours reasonably expended.[48]

3. Reasonableness of Cause

The negative aspects presented by the application of Rule 4:42-9(a)(3) do not occur when the contestant is successful.[49] In fact, when this outcome occurs it is precisely because the rule has accomplished its stated goal.[50] However, the problems become immediately apparent when the contestant fails in his suit and the will is admitted to probate, since the rule obviously countenances an award to unsuccessful contestants who had "reasonable cause for contesting the validity of the will."[51] Application of the rule in this context operates at the judge's discretion[52] to determine what claims are reasonable.[53]

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45. *Id.*

46. *See In re* Trust of Brown, 517 A,2d 893 (N.J. Super. Ct. Law Div. 1986). "The *Brown* formula is analogous to the 'lodestar' method, which is used by the courts in awarding counsel fees under fee-shifting statutes, such as those found under the Consumer Fraud Act." Paul F. Cullum & Cathleen T. Butler, *The Fight for Counsel Fees in Will Contests*, N.J.L.J., Feb. 5, 2007, at S-11.

47. *See Brown*, 517 A.2d at 900.

48. "The *Brown* formula is calculated by: (1) taking the basic, reasonable rate for ordinary probate work; and (2) adjusting the rate upwards or downwards when other factors suggested by the rules and cases are presented." Cullum & Butler, *supra* note 46. "Generally, most judicial opinions with respect to an award of counsel fees in probate litigation offer little analysis as to how the court determines the reasonableness of the fees awarded." *Id.*

49. *See supra* note 31 and accompanying text.

50. "The rationale behind R. 4:42-9(a)(3) is to promote 'judicial inquiry as to the legal integrity of the offered testamentary disposition, where there is reasonable warrant for that course in the particular facts and circumstances.'" Cullum & Butler, *supra* note 46, at S-10 (quoting *In re* Caruso, 112 A.2d 532, 537 (1955)).

51. *See supra* notes 30-31 and accompanying text.

52. This level of discretion is often problematic for attorneys seeking payment for services rendered: "The question of the power of the court to allow attorney fees in a proceeding to probate or contest a will is one upon which there is even less general agreement than upon the question of costs." LaMere, *supra* note 39, at 173 n.2 (quoting 3 PAGE ON THE LAW OF WILLS §26.148, at 347-48 (William J. Bow & Douglas H. Parker eds., 1961)).

53. "[T]he criteria for a court to consider in awarding counsel fees to a losing party in a will contest is whether there was 'reasonable cause' for the challenge." Cullum & Butler, *supra* note 46.

Unfortunately, there is not exactly a plethora of caselaw regarding what constitutes a reasonable claim,[54] and the rule itself is similarly silent on this issue.[55] In *Caruso*, the Supreme Court of New Jersey held that a cause is reasonable when a "factual background reasonably justifying the inquiry as to the testamentary sufficiency of the instrument by the legal process."[56] That court has also held that the award of counsel fees for both parties is appropriate "[e]xcept in a weak or meretricious case."[57] As there is admittedly a "low threshold" for establishing what constitutes reasonable cause based on the wording of Rule 4:42-9(a)(3)[58] and little judicial guidance from the caselaw, it appears fair to say that parties are more or less "at the mercy of the court" for a determination of whether an award is appropriate in a particular context.[59]

II. THE PROBLEM: EXAMPLES OF THE BIZARRE MOTIVATIONS BEHIND A FEW REPRESENTATIVE FRIVOLOUS SUITS

A. Empirical Concerns

At the outset, it should be noted that scholars are well aware of the difficulties inherent in locating data regarding the frequency of probate litigation.[60] Two reasons are commonly cited. First, this type of suit, and especially the specific issue of an attorney fee award, is infrequently appealed—meaning there is less chance of guidance vis-à-vis a published opinion at the appellate level.[61] Second, the threat of costly litigation is often enough to encourage out-of-court settlement before proceedings are even instituted.[62] Because of this, it is a commonly held belief that the actual incidence of challenges is far greater than evidenced by the number of reported cases.[63]

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54. *See infra* Part II.B.

55. *See* Cullum & Butler, *supra* note 46.

56. 112 A.2d 532, 538 (N.J. 1955). The court did not provide instructive examples of what types of "factual background[s]" are necessary to "justify the inquiry."

57. *In re* Reisdorf, 403 A.2d 873, 876 (1979). What constitutes a weak or meretricious claim? They occur "when either a contestant lacks standing to pursue such a claim or when a loser in a will contest contributes to the invalidity of the challenged will." Cullum & Butler, *supra* note 46.

58. *Id.*

59. *Id.*

60. *See, e.g.*, Cavers, *supra* note 12, at 442-43; Langbein, *supra* note 12, at 64, 66.

61. *See* Cavers, *supra* note 12, at 442 n.6.

62. This phenomenon is often referred to as a strike suit. *See* Langbein, *supra* note 12, at 66 & n.14 (citing Cahn, *Undue Influence and Captation: A Comparative Study*, 8 TUL. L. REV. 507, 518 (1934)).

63. Not surprisingly, scholars predict that the likelihood of a contest suit increases with the value of the estate. Cavers, *supra* note 12, at 443 n.7 ("One may fairly assume that contests are more frequent among large estates.").

As such, it is difficult to demonstrate with any certainty that fee-shifting regimes, like the one embodied by Rule 4:42-9(a)(3), encourage litigation that ultimately is wasteful to New Jersey estates. However, will contests within the state do seem to find motivation in a number of bizarre areas, and such representative cases, which often arise out of issues of the plaintiff's standing or grounds for bringing the suit, demonstrate the lengths to which plaintiffs in these suits are willing to go to bring action—even if such evidence is admittedly anecdotal. This supposition is bolstered further by the fact that the incidence of probate litigation is on the rise.[64]

B. Some Representative New Jersey Cases

The most popular types of will contest suits are "disputes that arise over a testator's dispositive scheme."[65] In order to institute this kind of suit, a party must have standing—that is, the contestant must be able to show he would be injured by the admission to probate of the will in question.[66] The reality of the situation is slightly more cynical: to have standing, a party must have a direct pecuniary interest in the will.[67]

The case of *In re Hand's Will*[68] is illustrative of the peculiar controversies standing issues can bring about. In that case, the testator's daughter challenged her father's will on the ground that he and the plaintiff's mother had an agreement to execute reciprocal wills[69]—despite the fact that the plaintiff stood to take more under the father's *subsequent* will.[70] Rather than seeking to prevent the will's admission to probate, the plaintiff daughter sought to equitably enforce the alleged contract against her mother.[71] This example demonstrates the type of illogical, self-destructive suits plaintiffs can bring.

In addition to having the requisite standing to bring action, a contestant must have grounds for contest.[72] New Jersey recognizes nine classifications an allegedly aggrieved party can rely on as a

64. *See* Thomas D. Begley, *Litigation in Probate Court*, *in* THE PROBATE PROCESS FROM START TO FINISH IN NEW JERSEY 60 (2004).

65. *Id.* at 61.

66. *See generally In re* Myers' Will, 119 A.2d 129 (N.J. 1955).

67. Begley, *supra* note 64, at 64.

68. 230 A.2d 408 (N.J. Super. Ct. App. Div. 1967).

69. For a discussion of reciprocal wills, see JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 288-89 (7th ed. 2005).

70. *See Hand's Will*, 230 A.2d at 409-10.

71. *See id.* at 410-12. The court ultimately ruled plaintiff lacked standing to bring a suit seeking to enforce an alleged contract on equitable grounds. *Id.* at 412-13.

72. *See id.* at 65.

ground to contest a will: "1) noncompliance with formalities; 2) lack of testamentary capacity; 3) ambiguity of language; 4) fraud; 5) forgery; 6) mistake; 7) duress; 8) revocation; 9) undue influence."[73] Three of the most popular of these grounds—noncompliance with formalities, lack of testamentary capacity, and undue influence—create particular scenarios in which bizarre examples of will contests can occur.

A party wishing to assert that the administrative procedures necessary to execute a will were not properly followed would argue on the grounds of noncompliance with formalities.[74] For example, because New Jersey is one of only a few states[75] to require the testator's signature—and does not allow a proxy's signature—to execute a will,[76] a contestant might argue along those lines. Such was the case in *In re Bullivant's Will*,[77] *In re Beggans' Will*,[78] and *Hildreth v. Marshall*.[79] Furthermore, a testator must display and express a satisfactory intent to create her will, which was the issue in *In re Supery's Estate*.[80]

While contestants often rely on the grounds that the testator lacks the requisite capacity to draft or execute a will, such claims do not usually find success.[81] This is especially true because New Jersey presumes the testator was of sound mind to make a will.[82] Despite this effectively explicit presumption against the contestant, such claims abound in New Jersey. For example, in *In re Rein's Will*, the court upheld a will over a contestant's claim that the testator lacked capacity because he was absent minded.[83] In *In re Baker*, the court held that a testator possessed of an insane delusion could still have the requisite capacity to draft a will,[84] and in *In re Phillips* that

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73. *Id.* Of these theories, "the most popular challenge raised in a will contest is the existence of undue influence." *Id.*; *see also* LaMere, *supra* note 39, at 173 ("The doctrine of undue influence is frequently invoked in the probate process as it is one of the leading causes of action raised by individuals who wish to contest wills.").

74. Begley, *supra* note 64, at 65.

75. *See id.* at 66.

76. *See* N.J. STAT. ANN. 3B:3-4 (West 2006).

77. 88 A. 1093 (N.J. 1913) (plaintiff alleging will invalid because testator had made only a mark to signify his name).

78. 59 A. 874 (N.J. Prerog. Ct. 1905) (plaintiff alleging will invalid because testator had written only his initials to signify his name).

79. 27 A. 465 (N.J. Prerog. Ct. 1893) (plaintiff alleging will invalid because testator had not written in correct, legal name to signify his intent to execute instrument).

80. 147 A.2d 777 (N.J. 1959).

81. Begley, *supra* note 64, at 66.

82. This position was articulated by the court in *In re Blake's Will*, 117 A.2d 33 (N.J. Super. Ct. App. Div. 1955), *rev'd on other grounds*, 120 A.2d 745 (N.J. 1955).

83. 50 A.2d 380 (N.J. Prerog. Ct. 1947).

84. 90 A. 1009 (N.J. Prerog. Ct. 1914).

position was reinforced, despite a contestant's objection that the testator was clinically insane.[85] Finally, the court in *In re Gillingham's Will* held that capacity could survive even the contemporaneous effects of alcohol or drugs.[86] It is unclear precisely what would inspire plaintiffs to instigate suits that have little or no chance of success, but certainly it can be assumed that the fee-shifting provisions of Rule 4:42-9(a)(3) do nothing to dissuade plaintiffs from going to court.

Contestants who wish to challenge a testator's will most often rely on grounds of undue influence.[87] Undue influence must exist at the time the will is executed[88] and should be demonstrated by the following factors: (1) the testator was susceptible to influence, (2) there existed a confidential relationship between the testator and the influencer, (3) the influencer used this confidential relationship to secure a change in the testator's dispositive plan, (4) there was in fact some actual change in the will, and (5) this actual change is an unconscionable result.[89]

Plaintiffs who rely on grounds of undue influence often face a steep burden of proof.[90] This is because, generally, it's a much easier task to accuse an adversary who had a confidential relationship with the testator of wrongdoing than it is to actually prove any such malevolent action took place.

The difficult burden to be overcome on the way to success does not deter all plaintiffs. Examples of claims alleging suspicious circumstances sufficient to shift the burden include accusations of spreading false stories about a testator's property,[91] taking advantage of a testator who is in a weakened condition,[92] or situations giving rise to a particularly strange plan of disposition.[93] In the case of *Haynes v. First National State Bank*,[94] the testator's will favored the daughter who cared for her, a demonstrative case of

85. 50 A.2d 862 (N.J. Prerog. Ct. 1947).

86. 52 A. 690 (N.J. Prerog. Ct. 1902).

87. Undue influence "amounts to coercion, which may be exerted mentally, morally, or physically, provided it be such as to constrain the testator to do that which is contrary to his own volition." Begley, *supra* note 64, at 71 (quoting Alfred C. Clapp, 5 N.J. PRACTICE § 60 (3d ed. 1982)).

88. *Id.* at 72 (quoting *In re* Davis' Will, 14 N.J. 166 (1953)).

89. *Id.* Some variance in the factors is allowed. Clapp, *supra* note 87, § 61.

90. *Id.* However, this burden shifts if the plaintiff can raise the presumption of undue influence by showing the influencer's confidential relationship with the testator also included suspicious circumstances. *See id.*

91. *See In re* Ulrich, 130 A. 806 (N.J. Prerog. Ct. 1925).

92. *See In re* Weeks' Estate, 103 A.2d 43 (N.J. Super. Ct. App. Div. 1954).

93. *See In re* Estate of Lehner, 360 A.2d 383 (N.J. 1976).

94. 432 A.2d 890 (N.J. 1981).

a confidential relationship sufficient to raise concerns of undue influence.[95] Complicating matters was the suspicious circumstance in which the daughter recommended that the testator rely on the daughter's lawyer to draft the testator's will.[96] The court ultimately held the will void for undue influence.[97]

The factual considerations at work in these cases show the lengths to which only a small sample of plaintiffs are willing to go to contest a will, even when they have little hope of success. Although no direct causal link can be proven between the incidence of these suits and Rule 4:42-9(a)(3),[98] it is easy to see how the rule emboldens spiteful plaintiffs to bring suits they might otherwise not contemplate: "Will contests, like most family litigation, can be acrimonious. Jealousy, pride and greed are involved. Not only money is at stake. The heirs may fight just as bitterly over tangible personal property that may have little intrinsic value, but symbolizes their parents' love."[99] A statutory scheme that allows this sort of malicious litigation is destructive to the estates of New Jersey testators and requires an alternative system.

III. THE SOLUTION: AN ALTERNATE POLICY THAT COULD PROVIDE A MORE EFFICIENT MEANS TO A MORE EQUITABLE END

Regardless of whether Rule 4:42-9(a)(3) has a detrimental effect on New Jersey estates by encouraging litigation, the point is moot if there are no alternative methods that might better protect the wishes of the testator, while still affording contestants the opportunity to challenge a will. While there are some improvements that may be made to the existing law, the best option is to allow the testator to face potential contestants in court under some sort of modified antemortem scheme.

A. Modifications to Existing Law

The search for a viable alternative scheme should begin by examining those remedies that are least invasive to the current system. The simplest suggestion would be to encourage judges to exercise their power to levy sanctions against attorneys who bring frivolous suits, since this remedy is already in place. First, Rule 4:42-

95. *Id.* at 897.

96. *Id.*

97. *Id.* at 904.

98. In other words, to date no contestant has yet admitted the opportunity presented by Rule 4:42-9(a)(3)'s fee shifting provision served as the impetus for his suit.

99. Begley, *supra* note 64, at 87.

9(a)(3) itself fully contemplates such an outcome.[100] Second, judges could instead look to Rule 1:4-8,[101] New Jersey's court rule that deals with sanctions, to provide further remedial weapons.[102] Given the nature of judicial discretion and the fact that both are already available, it is difficult to determine whether either of these options would achieve a meaningful result.

Several scholars have suggested that testators consider more carefully the use of nonprobate systems of transfer: will substitutes.[103] Such schemes are fully contemplated by existing law,[104] although they operate without traditional probate mechanisms.[105] While these instruments may better insulate the testator from capacity challenges,[106] they often necessitate a significant sacrifice during the testator's lifetime,[107] particularly

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100. This is because Rule 4:42-9(a)(3) allows for, but does not require that, the contestant's attorney fees to shift and be paid out of the estate: "If probate is granted, *and it shall appear that the contestant had reasonable cause* for contesting the validity of the will or codicil, the court *may* make an allowance to the proponent and the contestant, to be paid out of the estate." N.J.R. 4:42-9(a)(3) (2007) (emphasis added).

101. The rule states in relevant part:

> By signing, filing or advocating a pleading, written motion, or other paper, an attorney . . . certifies that to the best of his or her knowledge, information, and belief . . . the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

N.J.R. 1:4-8(a)(2). The opposition may move the court to sanction the opposition, *see* N.J.R. 1:4-8(b), or the court may do so on its own initiative, *see* N.J.R. 1:4-8(c).

102. A useful analog is the federal level and its use of Federal Rule of Civil Procedure 11 in the context of fee shifting. *See generally* Howard D. DuBosar & Ubaldo J. Perez, Comment, *Ask Questions First and Shoot Later: Constraining Frivolity In Litigation Under Rule 11*, 40 U. MIAMI L. REV. 1267 (1986); Daniel H. Fehderau, Comment, *Rule 11 and the Court's Inherent Power to Shift Attorney's Fees: An Analysis of Their Competing Objectives and Applications*, 33 SANTA CLARA L. REV. 701 (1993); Byron C. Keeling, *Toward a Balanced Approach to "Frivolous" Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 PEPP. L. REV. 1067 (1994).

103. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108-16 (1984) (noting that life insurance policies, pension accounts, bank brokerage and mutual fund accounts, revocable inter-vivos trusts, and joint tenancies are displacing the probate system); DUKEMINIER ET AL, *supra* note 69, at 30-31, 299-345.

104. Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 145-147 (1990) (considering as probate alternatives in terrorem clauses and self-proved wills, before ultimately deciding both systems fail to fully protect testator's interests postmortem).

105. *See* Langbein, *supra* note 103, at 1109.

106. *See* Langbein, *supra* note 12, at 67.

107. This sacrifice occurs vis-à-vis the decrease in alienability of testator's property—a harm borne by society as well as the testator. *See* DUKEMINIER ET AL., *supra* note 69.

when compared to the revocability and ambulatory nature of a will.[108]

Another alternative is to attempt to make the will execution ceremony as unassailable as possible. For example, videotape may be used to memorialize the scene and demonstrate the testator's capacity.[109] In such a case, the attorney will often read provisions of the will back to the testator, asking that she explain the motivation for particularly uncommon bequests.[110] Parties relying on this method may submit the tape as evidence, allowing the testator to effectively "testify" at a postmortem proceeding.[111] However, this "testimony" is a poor substitute for the in-court testimony that can be provided by a living testator as part of an antemortem hearing.[112]

B. Drafting an Antemortem Option

Generally, individuals who wish to execute a will need only be of legal age and sound mind to do so,[113] provided they follow certain statutory formalities designed to ensure the will is in accordance with the testator's wishes.[114] Most states validate wills by admitting them to probate only after the testator has died.[115]

However, this is not the only option: the will may be validated during the testator's lifetime, an alternative known as antemortem

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108. For example, revocable inter-vivos trusts can be misconstrued as conveyances and necessitate judicial determinations of their own. Joint ownership with survivorship rights changes the legal effect of a testator's title to property from total to partial ownership. Outright gifts are irrevocable. *See* Leopold & Beyer, *supra* note 104, at 141-45.

109. *See* Langbein, *supra* note 12, at 67-68.

110. *Id.* at 68.

111. Leopold & Beyer, *supra* note 104, at 147-48.

112. The author had the opportunity to observe such a tape while working in probate court. Although only one example, it clearly demonstrates the deficiencies of this method. Throughout the ceremony, the attorney instructs the testator, who is disinterested and out of sorts, as to precisely what to do and say. Of course, any perception that the testator lacked capacity could not be meaningfully examined for accuracy by the trier of fact—the testator was dead.

In this particular case, not only was the validity of the will challenged on grounds of undue influence, the contestant was the main beneficiary under the original will. Not surprisingly, this is often the case. *See* Langbein, *supra* note 12, at 68.

113. *See* DUKEMINIER ET AL., *supra* note 69, at 202.

114. Although there can be significant variation from state to state, these formalities generally involve the necessity of putting the will in writing, the procedure for signing the will, and the requirement of two or more disinterested witnesses who can attest to the testator's mental state. *See, e.g., id.*

115. Leopold & Beyer, *supra* note 104, at 133; *see also* Tracy Costello-Norris, Note, *Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?*, 9 CONN. PROB. L.J. 327, 327 (1994) (observing that even in those states that do have an antemortem alternative, postmortem probate is still an option).

or living probate.[116] Although an underutilized model, antemortem probate is by no means a new concept.[117] In the United States, Michigan was the first jurisdiction to allow for antemortem probate, by statute in 1883,[118] although the provision was quickly struck down as unconstitutional two years later.[119] Despite this initial misstep, North Dakota,[120] Ohio,[121] and Arkansas[122] have since enacted antemortem statutes. That these statutes have existed for several decades seems a testament to their efficacy. That more states have not followed suit, however, raises questions regarding the negative aspects of antemortem provisions, and a more in-depth analysis is required to examine whether an antemortem statute would be a viable improvement over New Jersey's current statutory scheme.

1. Positive Aspects of an Antemortem Regime

Although the jurisdictions subscribing to antemortem probate are few, the reasons for implementing such a system are myriad. As Professor John Langbein has pointed out, "[A] living probate

116. Leopold & Beyer, *supra* note 104, at 133. For example, once a testator has written and executed a will, he or she may voluntarily petition the court to formally adjudicate the will's validity. All beneficiaries named in the will, as well as any heirs not provided for in the will—but who might otherwise expect to take under the state's intestacy statute—are considered defendants and must challenge the will as part of the proceeding. *See infra* Part III.B.1.

117. *See* Leopold & Beyer, *supra* note 104, at 148-65 (following the history of antemortem probate from biblical times to the proposed additions to the Uniform Probate Code); *see also* Cavers, *supra* note 12, at 443-44.

118. Cavers, *supra* note 12, at 443-44 & n.12.

119. Lloyd v. Wayne Circuit Judge, 23 N.W. 28 (1885). Even in striking down the act because it authorized a judge to tread outside the scope of constitutionally granted power, Cavers, *supra* note 12, at 444, the court recognized the need for improvement: "[T]he *post mortem* squabblings and contests on mental condition . . . have made a will the least secure of all human dealings, and made it doubtful whether in some regions insanity is not accepted as the normal condition of testators." *Lloyd*, 23 N.W. at 30 (opinion of Campbell, J.).

120. N.D. CENT. CODE § 30.1-08.1-01 (2007). The statute, which was enacted in 1977, allows a proceeding to validate the will as to requisite signature, attestation by witnesses, capacity of testator, and freedom from undue influence. *Id.*

121. OHIO REV. CODE ANN. § 2107.081 (West 2007). The statute was enacted in 1978 and currently provides:

> A person who executes a will allegedly in conformity with the laws of this state may petition the probate court . . . for a judgment declaring the validity of the will. . . . The petition 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 . . . had the testator died at the time of filing the petition with the probate court.

Id. § 2107.081(A).

122. ARK. CODE ANN. § 28-40-202 (West 2007). The statute was enacted in 1979 and is materially equivalent to the Ohio statute.

system . . . promises to yield better results from the same body of substantive law, by improving the procedure and the evidence used to determine the question of capacity."[123]

First, and most importantly, the testator is alive and able to defend challenges to her testamentary plan in person.[124] As an obvious corollary, the star witness of the contest is available to testify regarding issues of capacity, undue influence, and fraud.[125] Thus, rather than depending upon the speculation and conjecture that are hallmarks of postmortem probate suits,[126] antemortem proceedings bring the testator into court, alleviating this concern.

Another benefit of antemortem probate is that it assures that the testator's property will be devised in a way that is in accordance with her wishes.[127] In other words, not only is the testator able to appear in court to confront concerns about the validity of the will, she is also present to answer questions about the meaning of confusing wording within the will, insuring all dispositions are properly carried out.[128] Along similar lines, the court's examination of the will's provisions will help prevent lapse due to technical errors in the language of the will.[129]

A third area in which antemortem probate eclipses the postmortem alternative is with respect to the actual court proceeding that ensues.[130] While some argue that antemortem probate requires litigation that may ultimately prove needless,[131] the litigation it does involve is almost certainly preferable to that which occurs after the testator's death. For one thing, the proceeding is certain to be expedited by the ready availability of evidence to both parties[132]—

123. Langbein, *supra* note 12, at 66-67.

124. Timothy R. Donovan, *The Ante-Mortem Alternative to Probate Legislation in Ohio*, 9 CAP. U. L. REV. 717, 720 (1980). Because testation is essentially a property right—the right to dispose of one's possessions at death—the fact that antemortem probate affords the testator an opportunity to personally defend that right against challenge in court makes it extremely enticing.

125. *Id.*

126. Langbein, *supra* note 12, at 67.

127. Donovan, *supra* note 124, at 720.

128. *See* Costello-Norris, *supra* note 115, at 327.

129. Daniel A. Friedlander, Comment, *Contemporary Ante-Mortem Statutory Formulations: Observations and Alternatives*, 32 CASE W. RES. L. REV. 823, 825 (1982). This is a benefit that has nothing to do with preventing frivolous will challenges, but is still vitally important to protecting the correct distribution of the estate—and testator's wishes.

130. For an example of what an antemortem proceeding looks like, see, e.g., Langbein, *supra* note 12, at 67-68.

131. *See* discussion *infra* Part III.B.2.

132. *See* Horst v. First Nat'l Bank, No. CA-8057, 1990 WL 94654, at *2 (Ohio Ct. App. June 25, 1990). "Since the relevant corroborating evidence in testamentary

evidence that may demonstrate undue influence on the testator or fraud by another party, or evidence to refute such claims.[133] In addition, the course of dealings between the parties promises to be more respectful of the testator, since she can avoid the postmortem disparagement of mind and body incident to traditional probate.[134]

Finally, there are incidental benefits to incorporating an antemortem probate system into the current scheme. For instance, the testator has the opportunity to bring a malpractice suit against an attorney who has mismanaged the estate by drafting the will poorly or providing inadequate counsel.[135] A further advantage to antemortem probate is that it is not compulsory.[136] Only those testators who seek to ensure, with absolute certainty, that their estates will be free from postmortem attack need rely on this option.[137] Moreover, litigation is not contemplated in every model.[138] Thus, because antemortem probate can effectively ascertain the validity of a will,[139] via an expedient proceeding that will benefit from the presence of the testator[140] and contemporaneous evidence regarding the claims of both parties,[141] it is a viable option that should be considered as a remedy for deficiencies in New Jersey's current system.

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competency litigation concerns only that period of time immediately surrounding the will's execution, the acceleration of its contestation to a point prior to the testator's death can only serve to upgrade is quality." *Id. Horst* is one Ohio case upholding the state's antemortem statute, Eunice L. Ross & Thomas J. Reed, WILL CONTESTS § 8:21 (2d ed. 2006), although it was first declared constitutional in *Cooper v. Woodard*, No. CA-1724, 1983 WL 6566, at *2 (Ohio Ct. App. July 27, 1983).

133. *See* Langbein, *supra* note 12, at 67 ("However novel the concept of living probate, it responds to purposes that have long been emphasized at common law in the best evidence rule.").

134. Donovan, *supra* note 124, at 720.

135. Costello-Norris, *supra* note 115, at 328. This emphasis on professional accountability and liability will likely motivate attorneys as well, providing for testators additional protection from ineffective assistance.

136. For an example of the seamless way in which antemortem probate could mesh with New Jersey's current system, see *infra* Part III.B.4.

137. Probate itself is optional, since a testator who has no interest in disposing of her property in a particular way may simply choose not to draft a will and allow her estate to pass through intestacy. *See* Cavers, *supra* note 12, at 440 ("The function of our testamentary law is to provide an efficient procedure for the transmission of property upon death in accordance with the will of its owner. Since its employment is optional, it can discharge that function only if it is generally regarded as satisfactory by those who may use it.").

138. *See* discussion *infra* at Parts III.B.3, III.B.4.

139. Langbein, *supra* note 12, at 66-67.

140. Donovan, *supra* note 124, at 720.

141. Ross & Reed, *supra* note 132, § 8:21.

2. Negative Aspects of an Antemortem Regime

Although there are a number of positive factors that weigh in favor of implementing some form of antemortem option for testators, it is worth examining the negative aspects of this relatively underutilized area of the law to ensure it is an appropriate remedy and feasible alternative. Two major areas of concern are usually voiced regarding antemortem provisions.

First, antemortem provisions may offer a solution in search of a problem—that is, such statutes may encourage testators to validate their will by a court proceeding when in fact a postmortem challenge might never be in the offing.[142] Although a proponent of an antemortem provision may be tempted to respond, "better safe than sorry," such a position is not always axiomatic when it comes to will contests. For example, while overprediction in the probate context might have the positive effect of protecting the estate from frivolous litigation, it may do damage to familial relations if the heirs apparent[143] feel the antemortem proceeding wrongfully anticipates a postmortem suit.[144] Once in court, these heirs "who may have been loathe to start trouble may then decide to finish it."[145]

In other words, the same fault this Note observes in the application of Rule 4:42-9(a)(3) may also be a characteristic of an antemortem proceeding—namely, it may squander needlessly the funds of the estate.[146] Since adjudicating the validity of a will in an antemortem proceeding would necessarily involve court costs and attorney fees in its own right,[147] overprediction by a testator could result in the withdrawal of a portion of the testator's estate to fund the antemortem proceeding,[148] funds that might have gone to the beneficiaries[149] of the will were no postmortem challenge to occur.

The second concern raised by detractors of the antemortem system is that it forces potential contestants into court at a time

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142. This is the phenomenon of overprediction. *See* Langbein, *supra* note 12, at 73.

143. In other words, relatives who would be eligible to take an intestate share (i.e., "[t]hose persons who would be [testator's] heirs if he were to die at the moment of the suit"), of which they are disinherited by the will in question. *See id.* at 72 & n.32.

144. *Id.* at 73. In addition to feeling slighted, heirs may have some misgivings about contesting a relative's testamentary capacity in an antemortem proceeding because that very relative is in court.

145. *Id.*

146. *Id.*

147. *Id.*

148. On the other hand, this *certain* initial outlay would remove the uncertain *possibility* of postmortem litigation that could be even more costly.

149. To put it bluntly, testator is effectively betting that there will be a postmortem proceeding that will be more costly to the estate than an antemortem proceeding—and gambling with the beneficiaries' interests in the process.

when they may be less able or less willing to contest the will than they otherwise might be at the testator's death.[150] This could be for a number of reasons. For one thing, it may be difficult to foresee the eventual value of the estate[151]—since the testator's death may be years or decades away—so heirs apparent will have a difficult time judging whether contesting the will at present is a worthwhile financial investment.[152] A corollary to this is the free rider problem, whereby some heirs may have their interests litigated by others similarly situated without bearing the costs of such action.[153] Finally, and perhaps most importantly, there is the inherent difficulty in determining who the heirs are or who they will be at the time of the testator's death.[154] If the will is drafted while the testator is relatively young, it is quite possible interested heirs apparent may predecease the testator—or may yet be born.[155]

A final problem not enumerated above involves the issue of the testator's privacy. A necessary evil of antemortem proceedings is that the will must not only be executed, but must also become part of the public record.[156] Normally, publication takes place after the testator's death,[157] when she is sufficiently insulated from the negative reactions certain parties might have to her bequests. This kind of publicity may be something the testator wishes to avoid during her lifetime, but it is also tied to the idea of antemortem probate.

3. Proposed Modifications to Antemortem Schemes

Building on the positive aspects of the antemortem regime, several alternative designs have been posited that build on the traditional system. These alternatives are known as the contest model, the conservatorship model, and the administrative model.[158]

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150. Langbein, *supra* note 12, at 73-75.

151. That is, its value at the date of distribution to beneficiaries. For outright gifts in a will, this date is the testator's death.

152. *See* Langbein, *supra* note 12, at 74.

153. *See id.* at 75.

154. *Id.* at 74. As Professor Langbein points out, "[A] fundamental maxim of property law [is] *nemo est haeres viventis*, commonly rendered as 'the living have no heirs.' Heirship arises at the moment of the ancestor's death." *Id.*; *see also* Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 30 (1885) (opinion of Campbell, J.).

155. Langbein, *supra* note 12, at 74. Clearly this is a problem, since the former set of heirs will have little incentive to contest a will if they are not likely be around to receive their share, and the latter set is not afforded the opportunity to contest at all.

156. But in antemortem probate's defense, it must be reiterated that antemortem probate is simply an alternate option.

157. Friedlander, *supra* note 129, at 837.

158. *See* Leopold & Beyer, *supra* note 104, at 65-69.

The contest model[159] is so named because it goes the farthest toward placing the testator and prospective heirs in an adversarial posture.[160] In this model, heirs who are not yet ascertained or not yet born are represented by a guardian ad litem.[161] In determining whether to declare the will valid, the court would consider factors such as the signatures, the number of witness at execution, and concerns of capacity and undue influence.[162] A will adjudged valid would be filed with the court and could only revoked by relitigation.[163] Although the adversarial nature of the contest model goes most directly to the issue of validity, it probably provides the greatest opportunity for familial unrest.[164]

The conservatorship model[165] sidesteps problems of unknown heirs and family unrest by appointing a conservator to litigate the interests of the respective heirs and beneficiaries.[166] However, a situation in which a third party with no interest in the outcome of a case litigates claims on behalf of interested parties is not well supported in the American legal system, and because of this issues of notice crop up almost immediately.[167] Additionally, the will becomes part of the public record after the proceeding.[168]

The administrative model[169] involves more significant changes and requires a two-step process. First, empowering legislation is enacted.[170] Second, the statutory requirements for contesting a will

159. This model was first proposed by Professor Howard Fink in his article *Ante-Mortem Probate Revisited: Can An Idea Have Life After Death?*, 37 OHIO ST. L.J. 264 (1976). Professor Fink even goes so far as to draft a model statute. *Id.* at 274-75.

160. *See* Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1073-74 (1980).

161. Fink, *supra* note 159, at 274-75. Professor Fink essentially argues that litigation by the existing heirs would be sufficient to protect the interests of heirs that had yet to present themselves.

162. Fink, *supra* note 159, at 274.

163. *Id.* at 275. This touches on another deficiency of the antemortem system: After a will is adjudged valid it becomes much more difficult to modify it by codicil or to revoke it altogether.

164. *See* Leopold & Beyer, *supra* note 104, at 167. It should be noted, however, that Professor Fink's model most closely parallels the statutes in existence today.

165. The conservatorship model was created by the aforementioned Professor John Langbein. *See* Langbein, *supra* note 12, at 78-80.

166. *See* Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and Procedural Due Process Limitations on Succession*, 78 MICH. L. REV. 89, 91-96 (1980); Fellows, *supra* note 160, at 1074-75.

167. Langbein, *supra* note 12, at 78-79.

168. This is the problem of protecting the testator's privacy touched on above. *See supra* pp. 122-23. In Professor Langbein's defense, the same issue arises in Professor Fink's contest model and, indeed, in any model proposing declaratory measures.

169. *See* Alexander & Pearson, *supra* note 166, at 112-19.

170. *See* Fellows, *supra* note 160, at 1075-77.

are revised.[171] This model deviates from the previous examples in that rather than staging what is effectively a condensed will contest hearing, the court engages in an ex parte examination to determine the will's validity.[172] This model provides meaningful protection for the testator's privacy, something left wanting in the other alternatives, because it dispenses with the notice requirement by not classifying notice as a constitutional necessity.[173] Instead, a conservator is appointed to represent the beneficiaries and heirs, although their interests are not technically being litigated.[174] One drawback of this model is that it does not insulate the estate from future attack—and thus fails to display the very characteristic that makes antemortem probate so attractive—since the ruling determines only the validity of the will.[175] It also requires significant modifications to existing statutory schemes in addition to the creation of antemortem provisions.[176]

4. A Proposal for New Jersey

Having examined the positive and negative aspects of antemortem probate and considered some of the different variations of the doctrine, we turn now to the most appropriate scheme for New Jersey. The aim of this plan should be the protection of three things: the testator's privacy in disposing of her property, the beneficiaries and heirs' right to challenge the will if they believe it to be invalid, and the estate's interest in being admitted to probate without being subject to frivolous litigation.

Rather than instituting an action for declaratory judgment regarding the validity of her will,[177] a testator domiciled or possessing title to property in New Jersey should initially have the option to voluntarily execute her will in a ceremony[178] performed in the presence of a notary public associated with the surrogate's court

171. *See* Alexander & Pearson, *supra* note 166, at 112.

172. *See id.*

173. *See id.* at 112, 115. Assumedly this is because the only issue before the court is whether the will is valid, vis-à-vis the testator's possession of the requisite capacity to draft the will and the propriety of the execution ceremony.

174. The conservator is required to interview the testator to determine capacity, but not allowed to know the devises in the will except in certain cases. *See id.* at 114.

175. *See id.* at 115.

176. *Id.* at 117.

177. Reliance on a declaratory judgment is one of the downfalls of alternative models discussed above. *See supra* Part III.B.3.

178. There is no need for this ceremony to differ in any way from that currently employed in New Jersey to give legal effect to the will, so applicable statutes will not require alteration. *See* N.J. STAT. ANN. 3B:3-1 to -12 (West 2006). The proposed ceremony is simply being performed at the surrogate's court rather than at an attorney's office or the testator's home.

of the county where the testator resides.[179] This effectively allows the state, vis-à-vis the notary in the surrogate's employ, to pass on the subject of the will's validity, which will bolster the will's legitimacy in the event subsequent litigation should arise.

Following the will's execution, letters will be mailed from the surrogate's court to the named beneficiaries of the will and the testator's heirs apparent.[180] The heirs apparent, if not also named as beneficiaries, will be informed that the testator has executed a will from which they will receive no disposition. The beneficiaries will be informed only of their own share.[181] Once on notice, these parties will have a limited period of time to challenge the legitimacy of the will. After the window has closed, the will is adjudged valid.[182]

Should the beneficiaries or heirs apparent decide to bring action, the resultant proceeding will be streamlined and cost-effective. If there are multiple challenges, current New Jersey statutes provide ample opportunities for those claims to be joined.[183] Of course, the main benefit from engaging in the process prior to the testator's death is that the testator will be available to appear in court where the judge can draw a conclusion regarding her capacity. Moreover, the court will appoint a doctor, subject to the approval of both parties,[184] who will examine the testator and testify as to her mental state. The challengers will have the opportunity to put on theories regarding fraud and undue influence, and contemporaneous evidence to promote or refute such claims should be much more readily available than it would be in a postmortem suit. Ultimately, the

179. The notary could conceivably provide additional attestation of the testator's sound mind. Charging the testator a nominal fee for the ceremony should help defray the cost to the state of hiring at least one such officer for every county, but the state's greatest savings will ideally come from the reduction in unnecessary contest suits this new provision will help to effect.

180. For an interesting discussion of notice concerns in the antemortem context, see Alexander & Pearson, *supra* note 166, at 97-111.

181. It could certainly be argued that the beneficiaries need not be informed even of their own respective share, since their potential individual disposition should have no effect on their decisions to challenge the will. However, divulging only each beneficiary's own share seems to be a workable compromise between the competing interests of beneficiaries in notification and testators in privacy.

182. This places the parties in the posture they would normally assume: the challengers as plaintiffs and the testator or executor as defendant. However, note that this actually controverts the normal makeup of an antemortem action, which is instituted by the testator and forces the challengers to defend. *See* Langbein, *supra* note 12, at 73-74.

183. *See* N.J.R. 4:27-1, :28-1, :29-1, :29-1, :30 (2007).

184. Although judges may have the power to appoint an expert, there is no specific provision in New Jersey Court Rules or Evidence Rules. *See* 2C N.J. PRACTICE RULES 706 [II] (3d ed. 2006).

court will admit the will to probate if adjudged valid or declare it void if not.

Admittedly, this proposal is not without its own problems. First, in the interest of protecting the notification rights of beneficiaries and heirs apparent, it will probably be necessary to repeat this process each time the testator revises her will. Second, it may be difficult for challengers to put together a claim of undue influence without knowing the contents of the will in its entirety. Third, it is entirely possible that some of the testator's heirs are yet to be born.[185]

In responding to these criticisms, it should be noted that this plan is not submitted as a system to be forced upon testators.[186] The normal avenues of intestacy and postmortem probate will still be in place and probably the majority of testators will not feel it necessary to go through the antemortem process—nor should they. However, for those testators who worry about the effects subsequent postmortem litigation may have on their estate, this alternative plan provides a relatively inexpensive and expedient way for testators to ensure their wishes will be carried out after they are gone.

Such is the appropriate outcome. Wills exist as a method for planning and realizing the testator's right to devise her property at death in whatever manner she sees fit.[187] The testator's rights are paramount, not those of any potential challengers to her testamentary plan, and in as much as this proposal can give effect to those rights and protect the testator's estate it is a worthwhile addition to the current system.

CONCLUSION

Probably the most beneficial aspect of an antemortem regime is the fact that it would not exclude the current system or require significant modifications to effect its proposed changes. Testators would be free to choose to probate their wills antemortem or could simply allow the traditional postmortem system run its course. At the same time, the positive aspect of Rule 4:42-9(a)(3),[188] which provides the financial opportunity for contestants to bring genuine questions regarding the legitimacy of a will to light, would remain functional in its current context.

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185. *See supra* note 161 and accompanying text.

186. As Professor Cavers puts it, "The risk of occasional injustice would not be obviated [by an antemortem scheme]; only the Utopian can hope for this." Cavers, *supra* note 12, at 447.

187. *Id.* at 445 ("[T]he effectuation of the testator's intention is the primary concern of the law.").

188. *Id.* at 445 ("[T]he effectuation of the testator's intention is the primary concern of the law.").

While the positive aspects of Rule 4:42-9(a)(3) could be preserved, the negative aspects could be significantly neutralized. This is especially important because frivolous litigation that drains the assets of a testator's estate has two distinct victims.

First and most obviously, the beneficiaries find that their beneficial interest is reduced. Residuary beneficiaries may see a particularly significant reduction in their award as it is by definition made up of whatever funds remain after the estate has distributed specific interests to named beneficiaries and paid creditors—including attorneys. Moreover, if the litigation is protracted and the attorney fees are particularly costly, even the beneficiaries of specific bequests under the will may see their awards reduced after other funds have dried up.

Second, frivolous litigation robs testators of their right to devise property at death in whatever way they see fit. Testators labor their entire lives to build up the corpus of their estates, but in a relatively short period of time attorney fees can undo that hard work and careful planning. If the funds are withdrawn from the estate in this fashion they will obviously not be available to pass through the testator's preferred plan. Testators deserve better than to see the property that they seek to pass on to their successors destroyed in such a needless fashion.

The question of attorney fees awards in the probate context is one that has important implications on professional responsibility. The goal of Rule 4:42-9(a)(3) is to increase access to the courts in the interests of justice, precisely the motivation behind the American rule. At the same time, attorneys have a duty to see that justice is carried out in the application of the Rule 4:42-9(a)(3). While the rule may have the functional result of doing undue destruction to estates because of the malevolent actions of parties to will contest litigations or because judges are unwilling to enforce the exceptions to the rule in cases where frivolous suits have been instigated, the rule also suffers from the exploitative maneuvering of attorneys who see the rule as providing a blank check drawn on the funds of an estate. While antemortem probate has the positive effect of taking many of these concerns out of the equation, thereby offering a viable alternative to the pitfalls of the current scheme, it is perhaps disheartening that such a change is necessary simply because attorneys seem unwilling or unable to advise their clients appropriately.

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