

# Better to Play Dead? Examining North Carolina’s Living Probate Law and Its Potential Effect on Testamentary Disposition

## ABSTRACT

*On August 11, 2015, North Carolina became the fifth state in the nation to permit a “living probate” proceeding. Like the laws of the four states before it, the new North Carolina law empowers a court to decide the validity of an individual’s will while that individual is still alive. Generally, if the court determines the will is valid, that order is binding. In North Carolina, however, it may not be. In this state, an interested party may challenge a will after the testator has died, even though a court has already found the will valid based on evidence presented by the testator himself. This possibility should not exist. Allowing a post-mortem will contest in this situation destroys the desirability of living probate as an estate planning tool.*

*This Comment first offers a brief overview of living probate in North Carolina before analyzing benefits and concerns commonly associated with the proceeding. After establishing that the advantages of living probate make it a workable option for many individuals, discussion then turns to the effects of North Carolina’s flawed provision. Because allowing a post-mortem will contest of an already validated will effectively renders living probate pointless, the North Carolina General Assembly should remove the provision entirely.*

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## INTRODUCTION

Roman Blum, a “Holocaust survivor and real estate developer,” died alone in a Staten Island hospital at the age of ninety-seven.<sup>1</sup> No one came forward to claim his body so, after some time, the morgue released it to his lawyer.<sup>2</sup> Without living children and having divorced his wife of nearly fifty years before her death, Mr. Blum’s graveside ceremony was attended by only a few friends and fellow Holocaust survivors.<sup>3</sup> But Mr. Blum, although not rich in family or friends, was rich nonetheless. He had money. Lots of money. The problem, however, is that he left no will directing the disposition of his forty-million-dollar estate.<sup>4</sup> The result? If no legal heir is found, Blum’s property—“the largest unclaimed estate in New York State history”<sup>5</sup>—will be held by the state of New York in perpetuity.<sup>6</sup>

One of Mr. Blum’s few friends perhaps summarized it best: “[h]e was a very smart man but he died like an idiot.”<sup>7</sup> Still, others who knew Mr. Blum refuse to accept that he died giving no direction for his estate. One friend believes that Mr. Blum drafted a will instructing that his fortune be

1. Julie Satow, *He Left a Fortune, to No One*, N.Y. TIMES (Apr. 27, 2013), <http://www.nytimes.com/2013/04/28/nyregion/holocaust-survivor-left-an-estate-worth-almost-40-million-but-no-heirs.html> [https://perma.cc/MAJ3-9BTX].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *See In re Estate of Menschenfred*, 128 N.Y.S.2d 738, 744 (N.Y. App. Div. 1954) (“With reference to the personal estate of persons dying intestate without next of kin, it appears to [be] the uniform practice of the state . . . to take such property, and hold it . . . .” (quoting *Johnston v. Spicer*, 13 N.E. 753, 760 (N.Y. 1887))). *See also* Isabel Fattal, *Holocaust Survivor’s \$40 Million Estate Lingers*, TABLET (June 6, 2014, 6:33 PM), <http://www.tabletmag.com/scroll/175239/holocaust-survivors-40-million-estate> [https://perma.cc/R7WR-2L2J].

7. Satow, *supra* note 1.

used “to build a home for children.”<sup>8</sup> Although this Comment presumes that Mr. Blum drafted such a will, no will has ever been found, resulting in an intestacy nightmare.<sup>9</sup> First, an “international search for heirs” led to “more than 400 emails . . . making claims to Blum’s estate.”<sup>10</sup> Then, litigation ensued in 2013 when official claims were filed, including one from an alleged heir of Mr. Blum’s professed ex-lover.<sup>11</sup> In the end, if no claim proves successful, Roman Blum’s fortune will pass to the State of New York.<sup>12</sup> But, if his desire really was to build a home for needy children, this result is unjust.

Unfortunately, this issue is not uncommon. “[S]cholars believe that wills are the ‘subject of [more] litigation than any other legal instrument.’”<sup>13</sup> Lost wills, drafting issues, changed circumstances, and even non-conventional estate plans<sup>14</sup> lead to testamentary dispositions contrary to the intent of testators. How can one avoid these issues? While there are certainly many ways to try, an often-overlooked method is living probate:<sup>15</sup> the opportunity for a would-be testator to prove the validity of his will prior to death, lock in his intent, and even stave off a caveat proceeding by a disgruntled heir.

On August 11, 2015, Governor Pat McCrory signed a law making North Carolina the fifth state to permit living probate proceedings.<sup>16</sup> In

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8. *Id.*

9. See Fattal, *supra* note 6.

10. *Id.*

11. *Id.*

12. Satow, *supra* note 1.

13. Taren R. Lord-Halvorson, Note, *Why Wait Until We Die? Living Probate in a New Light*, 37 OKLA. CITY U. L. REV. 543, 552 (2012) (quoting Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958)).

14. “Numerous commentators have noticed that testamentary plans that conform to social norms, such as providing for members of the decedent’s family, are likely to be upheld; while wills that seek to dispose of a testator’s property in a less conventional manner are often defeated on various grounds . . . .” Irene D. Johnson, *There’s a Will, but No Way—Whatever Happened to the Doctrine of Testamentary Freedom and What Can (Should) We Do to Restore It?*, 4 EST. PLAN. & CMTY. PROP. L.J. 105, 106 (2011).

15. Black’s Law Dictionary defines living or “antemortem probate” as “[p]robate in which the living testator of a will petitions the court to determine the legal validity of the document submitted as the testator’s will.” *Probate*, BLACK’S LAW DICTIONARY (10th ed. 2014). Generally, “[t]he court determines whether the document was properly executed in compliance with statutory formalities and was the product of the testator’s free will, and whether the testator possessed testamentary capacity.” *Id.* If approved, “and the testator does not revoke it, the will is immediately established at the testator’s death as the testator’s final will.” *Id.*

16. See Act of Aug. 11, 2015, ch. 28A, sec. 2, § 28A-2B-1(a), 2015 N.C. Sess. Laws 527, 533 (codified as amended at N.C. GEN. STAT. § 28A-2B (2015)). See also Theodora A.

short, living probate law allows a petitioner to seek a declaration that his will is valid prior to death.<sup>17</sup> By doing so, a would-be testator adds finality to his intent while alive and requires those wishing to contest the will to face the testator if they feel the will's terms are unfavorable.

While appearing straightforward, North Carolina's living probate law nevertheless has strict requirements and potential drawbacks. To better determine whether living probate is a viable option for certain individuals, this Comment begins in Part I with an overview of North Carolina's law and its relationship to more common forms of probate. Part II then turns to several drawbacks and benefits one should consider prior to instituting a living probate proceeding. Then, with that general understanding and living probate's potential in mind, Part III discusses a puzzling, and potentially troubling, provision of the North Carolina statute, which allows a contest even after a will is certified as valid. This provision discourages the use of living probate and works counter to the purpose of the law. Accordingly, this Comment concludes with a proposition: the North Carolina General Assembly should remove the language allowing for a will contest after completion of living probate.

## I. AN OVERVIEW OF LIVING PROBATE IN NORTH CAROLINA

North Carolina's living probate law is based on the contest model of living, or ante-mortem, probate.<sup>18</sup> Dating back to 1976, this model is currently the only living probate system used in the United States.<sup>19</sup> Under this model, the operation of the law makes the term "living probate" deceptive because the "the actual probating of a will [still] occurs after a

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Vaporis, *New Law in North Carolina Allows "Living Probate,"* BLACK SLAUGHTER BLACK ATTORNEYS AT LAW (Aug. 20, 2015), <http://lawfirmcarolinas.com/blog/law-north-carolina-living-probate/> [<https://perma.cc/DG8B-27Z5>] ("North Carolina is the fifth state to enact a Living Probate statute."); Andrea C. Chomakos & E. Graham McGoogan Jr., *North Carolina Changes Trust Code and Permits "Living Probate,"* LEXOLOGY (Aug. 19, 2015), <http://www.lexology.com/library/detail.aspx?g=b20155d2-d01b-4c8a-85af-a2dbd56cbf42> [<https://perma.cc/6VH3-FNL2>] ("[F]our other jurisdictions (Alaska, Arkansas, North Dakota and Ohio) have enacted similar statutes, the first being North Dakota in 1977.").

17. See N.C. GEN. STAT. § 28A-2B (2015).

18. Compare Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 166 (1990) (describing the adversarial proceeding between the testator and prospective heir), with § 28A-2B (describing living probate proceedings in North Carolina).

19. Lord-Halvorson, *supra* note 13, at 549.

testator's death."<sup>20</sup> The crucial difference is in "[t]he timing of will validation."<sup>21</sup> Living probate "allows for pre-death validation" as opposed to post-mortem validation.<sup>22</sup> Thus, living probate is more appropriately viewed as a supplement to, rather than an alternative for, the traditional method of proving a will,<sup>23</sup> a characteristic evident in the structure of North Carolina's statute itself.

The hallmark of both the contest model and North Carolina's law is the creation of an adversarial situation between the testator and the prospective heirs.<sup>24</sup> Issues regarding capacity, compliance, and undue influence or duress may be resolved by a declaratory judgment.<sup>25</sup> This is accomplished as follows:

[Generally, the] statute grants standing to the testator, any heir under intestacy, or any beneficiary defined in the will. A guardian ad litem represents any unascertained heirs or beneficiaries, or they can be represented by virtual representation (someone with a similar interest represents the unascertained beneficiary). The presumptive takers may also contest the validity of the will.<sup>26</sup>

With these principles in mind, discussion now turns to living probate in North Carolina, specifically.

Section 28A-2B of the North Carolina General Statutes begins with the requirements and process for proving a will or codicil prior to death. The process initiates when a petitioner<sup>27</sup> "requests a judicial declaration that confirms the validity of that person's will or codicil."<sup>28</sup> This request is filed in a petition with the clerk of superior court,<sup>29</sup> in the county in which

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20. See Forrest J. Heyman, Note, *A Patchwork Quilt: The Case for Collage Contest Model Ante-Mortem Probate in Light of Alaska's Recent Ante-Mortem Legislation*, 19 ELDER L.J. 385, 388 (2012) (citation omitted).

21. *Id.*

22. *Id.*

23. *See id.*

24. See Leopold & Beyer, *supra* note 19, at 166 (citing Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death?*, 37 OHIO ST. L.J. 264, 274-75 (1976)); *see also* N.C. GEN. STAT. § 28A-2B (2015).

25. Lord-Halvorson, *supra* note 13, at 549 (citing Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1073 (1980)).

26. *Id.* (citations omitted).

27. Anyone "who is a resident of North Carolina and who has executed a will or codicil may" be a petitioner under this article. N.C. GEN. STAT. § 28A-2B-1(a) (2015).

28. *Id.* § 28A-2B-1(d).

29. *Id.* § 28A-2B-1(b). Along with the petition itself, the petitioner must "file the original will or codicil." *Id.* § 28A-2B-3(b).

the petitioner is domiciled.<sup>30</sup> Once filed, the proceeding continues as a “contested estate proceeding governed by Article 2 of Chapter 28A of the General Statutes.”<sup>31</sup> Essentially, a living probate proceeding mirrors the process for traditional, post-mortem probate under North Carolina law with one key difference—a would-be testator is alive to present evidence of his own intent.<sup>32</sup>

Once given notice, interested parties can contest the validity of the will or codicil.<sup>33</sup> To do so, they may either “file a written challenge . . . before the hearing or make an objection . . . at the hearing.”<sup>34</sup> Upon challenge or objection, the clerk will move the case to superior court, where it is then treated as “a caveat proceeding.”<sup>35</sup> If, on the other hand, no interested party brings a contest and the clerk decides that the document would be probated were the petitioner deceased, the clerk enters an order affirming its validity,<sup>36</sup> and affixes “a certificate of validity to the [original] will or codicil.”<sup>37</sup>

Returning to the story of Roman Blum, one advantage of living probate is evident. Suppose Mr. Blum, having no surviving wife or children, did draft a will and intended to have his fortune used for building and maintaining a home for children in his community. Were he a resident of North Carolina with a will, living probate would have allowed him to lock in that intention before his death. With no other interested parties, and especially none willing to face him while alive, the court would have likely granted his petition, and stored his will in the courthouse. But, while living probate would be advantageous to a man like Mr. Blum, or a person with a potentially contentious will, what effect does it have on individuals whose circumstances are more common? As described in Part II, the best answer to this question is, it depends on how the individual weighs the benefits and drawbacks of living probate.

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30. *Id.* § 28A-2B-2. The petition must contain the following information: (1) a statement specifying the North Carolina county of residence, (2) a statement that the will complies with North Carolina law and was made with testamentary intent, (3) a statement of testamentary capacity, (4) a statement certifying the absence of duress or undue influence, and (5) a statement identifying all interested parties, including minors. *See* §§ 28A-2B-2(a)(1)–(5).

31. *Id.* § 28A-2B-1(b).

32. *See id.* (“[T]he petitioner shall produce the evidence necessary to establish that the will or codicil would be admitted to probate if the petitioner were deceased.”) (emphasis added).

33. *See id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* § 28A-2B-3(b).

## II. WEIGHING THE PROS AND CONS OF LIVING PROBATE

In weighing the pros and cons of living probate, individuals must recognize the likelihood that litigation will ensue.<sup>38</sup> Along with this litigation risk are other concerns to consider in deciding whether living probate is worth the effort. However, certain benefits also accrue through use of the proceeding. In the end, individuals will weigh the costs and benefits of living probate differently, making the best decision when considering their own circumstances.

### A. Drawbacks of North Carolina's Living Probate

North Carolina's living probate law has several disadvantages compared to traditional probate. This Comment discusses five concerns: (1) testator's loss of confidentiality, (2) beneficiary's fear of disinheritance, (3) beneficiary's increased costs, (4) testator's potential disposition of property during life, and (5) testator's subsequent changes to the will.

#### 1. Confidentiality

Besides litigation, one apparent downside of living probate is the associated loss of confidentiality.<sup>39</sup> The North Carolina statute addresses this concern, albeit incompletely. After validity of a will is certified, parties have the option—because probated wills and codicils are generally public documents—to make a motion sealing the contents of the estate file if they wish for them to be confidential.<sup>40</sup> Upon such motion, the contents of the estate file will generally not be released to any person other than the petitioner, the petitioner's attorney, or a reviewing court, except by order of the clerk.<sup>41</sup>

There are, of course, exceptions to this general rule. For example, any interested party, “for the purpose of probate or other estate proceedings,” may request that the file be unsealed upon the death of the petitioner.<sup>42</sup> Another exception allows the court to release the contents of the file to

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38. See Lord-Halvorson, *supra* note 13, at 559–60.

39. See *id.* at 559; see also Heyman, *supra* note 20, at 392 (“[C]ritics have stated that the confidentiality of the proceeding is problematic, as the contest model proceedings would make a testator’s devise public.” (citing Fellows, *supra* note 25, at 1073)); Dara Greene, Comment, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 672 (1999) (“The largest concern with observers of the model is that the will must become part of the public record.”).

40. See § 28A-2B-5.

41. *Id.*

42. *Id.*

another person for “good cause shown.”<sup>43</sup> The statute fails to define what amounts to “good cause,” and there is currently no North Carolina caselaw construing this particular provision. However, North Carolina courts have discussed good cause in other contexts, holding that it requires both good cause and specificity with regard to “the grounds demonstrating such good cause.”<sup>44</sup> In the living probate context, the question of whether there has been a proper showing is for the clerk to decide and is subject to judicial review.<sup>45</sup>

Motions to seal the contents of an estate file do not shield the contents from interested parties, even if the motion is granted. First, because the statute requires notice to all interested parties, those individuals would have access to “the contents of the Will, the dispositive plan, the identity of the executor,” and any other information included in the file in order to decide whether to challenge it.<sup>46</sup> As a result, anyone concerned with adverse family relations might shy away from living probate because of “family members . . . learn[ing] about less-than-favorable dispositions.”<sup>47</sup> Second, as discussed above, interested parties may request that the file be unsealed upon the death of the petitioner.<sup>48</sup>

As with any concern, only the would-be testator can decide which probate approach is preferred. The decision of whether to initiate a living probate proceeding will depend, in large part, on a person’s own nature and the nature of his family relations. Regardless, interested parties will eventually know the disposition. However, in post-mortem probate a deceased individual does not have to face the backlash.

## 2. *Fear of Disinheritance*

Along those same lines, a second concern regarding living probate is that “beneficiaries may withhold [otherwise valid] will challenges because such challenges may lead to disinheritance.”<sup>49</sup> For example, if a will beneficiary is concerned that a petitioner lacks the requisite testamentary capacity or believes that the petitioner has been subject to undue influence

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43. *Id.*

44. *See* Albemarle Mental Health Ctr. v. N.C. Dep’t of Health & Human Servs., 582 S.E.2d 651, 654 (N.C. Ct. App. 2003) (noting that “good cause” is an aspect of an agency’s decision that may be reviewed by a trial court upon petition for judicial review) (citations omitted).

45. *See* § 28A-2B-5.

46. Chomakos & McGoogan, *supra* note 16.

47. Heyman, *supra* note 20, at 392.

48. *See* § 28A-2B-5.

49. Heyman, *supra* note 20, at 393 (citing Fellows, *supra* note 25, at 1073–74).

while drafting his will, public policy prohibits probate of the will.<sup>50</sup> That is to say, a good-faith will contest should be encouraged if made to challenge testamentary capacity or protect testamentary intent. However, since living probate petitioners are alive, one could easily alter the will in light of any challenges from presumptive takers.<sup>51</sup> Thus, an interested party might ignore a potential issue, choosing to avoid an ante-mortem will contest and potential disinheritance. This concern is legitimate; a good-faith post-mortem will contest brought by a similarly-situated beneficiary would bring legal fees and court costs, but would not put the beneficiary's inheritance at risk.<sup>52</sup>

### 3. *Unnecessary Costs*

A third concern is that beneficiaries ultimately bear the costs of living probate proceedings.<sup>53</sup> However, this concern has little merit. No matter when a will contest is filed—whether it be during a living probate proceeding or after a testator's death—costs may be apportioned at the court's discretion.<sup>54</sup> Therefore, probate and any subsequent will contest costs may always be apportioned in a way that lessens a beneficiary's share. On the other hand, petitioning for living probate might be a waste of time and money if there is no significant risk of a post-mortem contest. Although the risk of contest remains an important consideration, the advantages, described in Section II.B, may still weigh in favor of living probate.

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50. *Ryan v. Wachovia Bank & Tr. Co.*, 70 S.E.2d 853, 856 (N.C. 1952).

51. *Lord-Halvorson*, *supra* note 13, at 549–50.

52. North Carolina courts have held that, even if a will contains a no-contest or forfeiture clause barring inheritance if an interested party challenges a will, “a bona fide inquiry [into] whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself.” *Ryan*, 70 S.E.2d at 856.

53. *Heyman*, *supra* note 20, at 392 (citing *Fellows*, *supra* note 25, at 1073).

54. *See* N.C. GEN. STAT. § 28A-2B-6 (2015) (“Costs . . . incurred by a party in a proceeding under this Article shall be taxed against any party, or apportioned among the parties, in the discretion of the court . . . .”); *id.* § 6-21(2) (“Costs . . . shall be taxed against either party, or apportioned among the parties, in the discretion of the court [regarding] . . . [c]aveats to wills and any action or proceeding which may require the construction of any will . . . .”); *see also In re Estate of Ward*, 389 S.E.2d 441, 442 (N.C. Ct. App. 1990) (“[A] will *caveat* is a claim that the will involved is invalid, and its expense is a cost of court taxable ‘against either party, or apportioned among the parties, in the discretion of the court.’” (quoting § 6-21)).

#### 4. *Disposition During Life*

A fourth issue is the likelihood that a living probate petitioner consumes or disposes of his property before death.<sup>55</sup> While possible, this same risk is present when a will is drafted, stored, and probated after death. The ambulatory<sup>56</sup> nature of a will leaves individuals free to use their property as they see fit during life, even if they intend to later dispose of it by will. Therefore, the risk is no greater under a living probate proceeding than it is under the traditional method of probate. The difference is that, under living probate, the beneficiary knows of the potential bequest and therefore is aware when the testator takes action affecting it.

#### 5. *Subsequent Changes to Will*

A final issue associated with living probate is that “will [challenges] may arise multiple times when testators write codicils” or draft subsequent wills.<sup>57</sup> This concern is unique to living probate because, unlike post-mortem probate proceedings where the court validates a will and all codicils at one time, any subsequent will or codicil invites a contest. Multiple contests may be cost-inhibitive for either party and significantly curtail the advantages of living probate. Thus, an individual not reasonably certain that his current will is the one he would like probated, or who makes frequent updates to his testamentary plan, may opt to forgo the proceeding.

Still, North Carolina’s living probate law attempts to abate the subsequent document concern. In North Carolina, if a will or codicil is declared valid, a petitioner may move for an “order that the will or codicil cannot be revoked” unless the revocation is officially declared valid under another living probate proceeding.<sup>58</sup> The petitioner may make a similar motion to require an additional proceeding for any subsequent will or codicil filed.<sup>59</sup> Moving for such orders is advisable. Without a court order, a will or codicil declared valid in a living probate proceeding may be

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55. Heyman, *supra* note 20, at 392 (citing Fellows, *supra* note 25, at 1073).

56. “Capable of being altered or revised; not yet legally fixed.” *Ambulatory*, BLACK’S LAW DICTIONARY (10th ed. 2014).

57. Heyman, *supra* note 20, at 393 (citing Fellows, *supra* note 25, at 1074).

58. § 28A-2B-4(b).

59. *Id.*

revoked or modified by a later-written document<sup>60</sup> or by some other method,<sup>61</sup> and the protections of living probate are abandoned.<sup>62</sup>

Failing to make the appropriate motion allows an interested party to bring a contest to any subsequent document.<sup>63</sup> These subsequent contests potentially render pointless the time and effort spent probating the original will or codicil. Of course, if the new will or codicil accurately reflects the would-be testator's intent, then testamentary freedom is frustrated when the court gives no legal effect to the new documents. However, it is only by motion of the living probate petitioner that such an event would occur, and the petitioner is on notice that another proceeding is required to give effect to any subsequent document. Any subsequent proceedings raise the risk of subsequent contests. The risk, though, is entirely within the petitioner's control, and is one he could easily manage while alive.

### B. *Benefits of North Carolina's Living Probate*

Despite concerns with living probate proceedings, they certainly present benefits as well. This Comment discusses three benefits: (1) evidence of testator's intent, (2) preempting frivolous litigation, and (3) preventing a lost will.

#### 1. *Evidence of Intent*

The greatest of these benefits is the strength of evidence available for the proceedings.<sup>64</sup> In living probate proceedings, the testator is available to address questions regarding his capacity and to testify as to his intent.<sup>65</sup> Therefore, neither a judge nor jury can subjectively question intent and reconstruct the document.<sup>66</sup>

Proving the testator's capacity is more difficult in a traditional post-mortem proceeding. In such proceeding, it is the proponent of the will—not the challenger—that must prove capacity, despite the

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60. See *id.* § 31-5.1(1) (“A written will, or any part thereof, may be revoked . . . [b]y a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills . . .”).

61. See *id.* § 31-5.1(2) (“A written will, or any part thereof, may be revoked . . . [b]y being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another person in the testator's presence and by the testator's direction.”).

62. See *id.* § 28A-2B-4(c).

63. *Id.*

64. See Heyman, *supra* note 20, at 392.

65. See § 28A-2B-1(b).

66. Lord-Halvorson, *supra* note 13, at 543.

unavailability of the testator.<sup>67</sup> Under post-mortem probate, “judges and jurors often evaluate the testator’s scheme by their own standards of what a fair and normal distribution should be,” so the opportunity for a successful, yet spurious, will contest is significantly higher.<sup>68</sup> This is particularly true if a disposition is non-conventional. Transfers effective at death are subject “to meticulous examination,” while the same transfer would not be scrutinized if made during the donor’s life.<sup>69</sup> By accelerating the timing of will validation into the life of a would-be testator, issues of frustrated intent are avoided simply by having the would-be testator take the stand.

## 2. *Preempting Frivolous Litigation*

Another significant benefit, as alluded to in Section II.A, is that “living probate decreases the number of post-mortem will contests by declaring the testator’s will valid before” his death.<sup>70</sup> If a would-be beneficiary has legitimate grounds<sup>71</sup> to bring a will contest, he or she may do so at the time that the would-be testator seeks the living probate declaration. Of course, the challenger has to face the would-be testator when making his claim. This reduces the opportunity for a challenger motivated by greed or the desire to embarrass the testator to “strike it rich” because, unlike a post-mortem contest where “the penalty suffered [if unsuccessful] will be little more than disappointment,”<sup>72</sup> if a challenger mounts a malicious ante-mortem attack, the living probate petitioner can change his will and remove the challenger altogether. The result is less frivolous litigation and testamentary disposition that reflects the true desires of the petitioner.<sup>73</sup>

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67. See Leopold & Beyer, *supra* note 18, at 139.

68. *Id.* at 137 (citations omitted).

69. *Id.* at 138. (“The paradox existing between inter vivos and testamentary transfers strongly suggests that post-mortem probate fails to protect not only the testator’s intent, but also the basic rights and principles associated with the ownership of property. This paradox . . . can be easily illustrated with stories in which wealthy testators intend that their bounty be devised to deserving charitable organizations only to become the subject of ridicule and accusation at the hands of their heirs and devisees.” (citations omitted)).

70. Lord-Halvorson, *supra* note 13, at 557 (citations omitted).

71. Such as “ensur[ing] that deserving heirs do not lose their portion of a decedent’s estate as a result of fraud, improper influence, or insufficient capacity.” Leopold & Beyer, *supra* note 18, at 134.

72. *Id.* at 135 (citations omitted).

73. See *id.* at 135–36.

### 3. *Preventing Lost Wills*

Another benefit of living probate—and one particularly important in a situation like Roman Blum’s where friends believe that a will exists but none was found—is that the will is kept safely at the courthouse once it is certified as valid.<sup>74</sup> This is critical considering the rebuttable presumption that a lost will last seen in the testator’s possession has been revoked.<sup>75</sup> This presumption may be overcome with evidence showing its absence was not due to any act of the testator.<sup>76</sup> If this presumption is not rebutted, however, and no other document controls the disposition, the testator’s property passes according to the state’s intestacy law.<sup>77</sup> This possibility is avoided through the use of living probate. At the death of the petitioner, the court probates his valid will immediately, and closing the estate can be significantly easier.

Of course, anyone interested in living probate will weigh the benefits and the concerns differently. Risks that are present for some may not be for others, and individual life circumstances are important considerations. However, one final consideration, unique for North Carolina residents, must also be weighed. A major provision of the law eliminates the benefits just discussed and works counter to the purposes of living probate.

### III. THE CASE AGAINST ALLOWING A POST-MORTEM CHALLENGE TO A PREVIOUSLY VALIDATED WILL

While living probate may not be for everyone, it certainly has broad appeal. Someone who anticipates a will contest can accelerate the litigation process into his life, force potentially disgruntled individuals to face him, and likewise lock in his intent.<sup>78</sup> However, the North Carolina General Assembly must have thought these outcomes too absolute. North Carolina’s living probate statute expressly permits a post-mortem challenge, even after certification of a will or codicil as valid and absent any act of revocation.<sup>79</sup> Although the exception applies only in limited circumstances, its very inclusion in the statute discourages the use of living

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74. See generally N.C. GEN. STAT. § 28-2B (2015).

75. *In re Will of McFayden*, 635 S.E.2d 65, 70 (N.C. Ct. App. 2006) (quoting *In re Will of Jolly*, 366 S.E.2d 600, 601 (N.C. Ct. App. 1988)).

76. *In re Will of McFayden*, 635 S.E.2d at 70.

77. See generally N.C. GEN. STAT. § 29 (governing intestate succession in North Carolina).

78. Heyman, *supra* note 20, at 388 (quoting John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63, 63 (1978)).

79. See § 28A-2B-4(a).

probate and does little to reassure the fearful petitioner. Instead, the exception gives interested parties a second bite at the apple.

A. *The North Carolina Exception and Its Associated Flaws*

Under a typical contest model living probate system, a will or codicil deemed valid is a final, binding judgment.<sup>80</sup> This is true in North Carolina where, generally, a decision of validity is “binding upon all parties to the proceeding” and the right to file a caveat to the will or codicil is extinguished.<sup>81</sup> However, North Carolina also allows a party to move for permission to file a caveat, despite the previous living probate proceeding, if he can show that the petitioner was under such significant duress or coercion that he would not have disclosed it at the hearing.<sup>82</sup> While there is no case law available to explain what this evidence must look like, the statute requires that it be “clear and convincing,”<sup>83</sup> which is a fairly high standard. Generally, it requires “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain.”<sup>84</sup>

Concerns about duress or coercion in a living probate proceeding do not justify this provision. First, the court would likely catch and address the issues targeted by the exception at the initial living probate proceeding. Second, the harm done in allowing a second contest, likely after the petitioner’s death when the petitioner can no longer speak for himself, outweighs any potential benefit.

The North Carolina exception invites many of the aforementioned concerns while considerably diminishing the general benefits and advantages of living probate.<sup>85</sup> The average person seeking these benefits will certainly be dissuaded upon discovering that the time, effort, and costs associated with the proceeding may be wasted. For example, the exception eliminates the evidentiary benefit of living probate. If a party provides clear and convincing evidence of duress or coercion, then the only evidence of testamentary intent or capacity is indirect and subject to interpretation by a judge or jury.<sup>86</sup> Further, the exception all but eliminates the decrease in

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80. Leopold & Beyer, *supra* note 18, at 167 (citing Howard Fink, *Ante-Mortem Probate Revisited: Can an Idea Have a Life After Death*, 37 OHIO ST. L.J. 264, 275 (1976)).

81. § 28A-2B-4(a).

82. *Id.*

83. *See id.*

84. *Clear and Convincing Evidence*, BLACK’S LAW DICTIONARY (10th ed. 2014). “This is a greater burden than preponderance of the evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.” *Id.*

85. *See supra* notes 69–82 and accompanying text.

86. Leopold & Beyer, *supra* note 18, at 138–40.

post-mortem will contests associated with living probate. A key “purpose of ‘living probate’ is to require dissatisfied [individuals] to speak up at [a] hearing where . . . [a will’s validity is established] ‘once and for all time.’”<sup>87</sup> Contrary to that purpose, the North Carolina exception keeps the door to potential “monetary gain” open, encouraging spurious will contests after the testator’s death.<sup>88</sup>

*B. Proposal: Remove Post-Mortem Challenge from North Carolina’s Living Probate Statute*

Alaska, Arkansas, North Dakota, and Ohio, the only other states that currently have living probate statutes, do not include a provision allowing a post-mortem will contest.<sup>89</sup> North Dakota was the first of these states to adopt a living probate procedure, which is based on the contest model and functions much like the North Carolina law.<sup>90</sup>

One notable difference, however, is that a finding of validity under North Dakota law is “binding in North Dakota unless and until the plaintiff-testator executes a new will *and* institutes a new proceeding . . . naming the appropriate parties to the new proceeding as well as the parties to any former proceeding.”<sup>91</sup> This provision of the North Dakota statute differs from North Carolina living probate law in two primary ways. First, despite the binding nature of a finding of validity in North Carolina, the petitioner controls whether a subsequent will or codicil can revoke the documents declared valid in a living probate proceeding.<sup>92</sup> In North Dakota, the opposite is true: “a subsequent will or written revocation [alone] is insufficient to negate the ante-mortem probate” decision, and a new proceeding must always occur for a subsequent will to

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87. JAMES B. McLAUGHLIN, JR. & RICHARD T. BOWSER, 1 WIGGINS WILLS & ADMINISTRATION OF ESTATES IN N.C. § 11:9.50 (4th ed. Supp. 2015).

88. See Leopold & Beyer, *supra* note 18, at 135 (citation omitted).

89. See generally ALASKA STAT. §§ 13.12.530–590 (2012) (governing living probate in Alaska); ARK. CODE ANN. §§ 28-40-201 to -203 (West 2015) (governing living probate in Arkansas); N.D. CENT. CODE ANN. §§ 30.1-08.1-01 to -04 (West 2008) (governing living probate in North Dakota); OHIO REV. CODE ANN. §§ 2107.081–085 (West 2014) (governing living probate in Ohio).

90. Compare Leopold & Beyer, *supra* note 19, at 169–71 (analyzing The North Dakota Ante-Mortem Probate Act), with N.C. GEN. STAT. § 28A-2B (2015) (governing North Carolina’s living probate procedure).

91. N.D. CENT. CODE ANN. § 30.1-08.1-03 (West 2008) (emphasis added).

92. See N.C. GEN. STAT. § 28A-2B-4(b) (“[U]pon the motion of the petitioner or the court, the court may order that the will or codicil cannot be revoked and that no subsequent will or codicil will be valid unless the revocation or the subsequent will or codicil is declared valid in a proceeding under this Article.”).

be valid.<sup>93</sup> Second, beyond the revocation provision, there is no other limiting language in the North Dakota law and a will certified as valid under that statute cannot be contested by a party that had the opportunity to challenge the will during living probate.<sup>94</sup>

Ohio, which implemented a living probate statute in 1978, follows a similar approach as North Dakota.<sup>95</sup> Ohio law provides that “[a]ny judgment . . . declaring a will valid is binding . . . as to the validity of the will on all facts found, unless provided otherwise . . . .”<sup>96</sup> The limiting language here, like in North Dakota, refers to methods of revocation,<sup>97</sup> but also goes further. Ohio explicitly allows an individual who should have been, but was not named in the probate action, to challenge the validity of a will.<sup>98</sup> However, unlike in North Carolina, named or properly represented parties are barred from challenging the will.<sup>99</sup>

Both the Arkansas and Alaska living probate laws operate similarly.<sup>100</sup> Neither state explicitly allows a post-mortem will contest, and North Carolina should follow suit. Currently, under North Carolina law, beneficiaries can contest the validity of a will either before or at a living probate hearing.<sup>101</sup> This provides ample opportunity to discover a challengeable ground and the court can make an objective determination if a challenge is brought at that time. Protecting a would-be testator’s intent, established by the best evidence of all—the would-be testator himself—is of utmost importance in a court system that is supposed to be “jealous[ly] watchful[] over the freedom of testamentary disposition.”<sup>102</sup>

Understandably, it concerned the North Carolina General Assembly that a would-be testator under higher levels of external pressure would not act according to his own testamentary intent at the living probate proceeding. However, the clerk of court decides whether “the will or

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93. Leopold & Beyer, *supra* note 18, at 171.

94. *See* N.D. CENT. CODE ANN. § 30.1-08.1-03.

95. *See id.* at 169.

96. OHIO REV. CODE ANN. § 2107.084(A) (West 2014).

97. *See id.* § 2107.33 (governing revocation of wills previously declared valid).

98. *Id.* § 2107.71(B).

99. *See id.*

100. *See* ARK. CODE ANN. § 28-40-203(b) (West 2015) (“A finding of validity pursuant to this subchapter shall constitute an adjudication of probate. However, such validated wills may be modified or superseded by subsequently executed valid wills, codicils, and other testamentary instruments, whether or not validated pursuant to this subchapter.”); ALASKA STAT. § 13.12.560 (2012) (“A person, whether the person is known, unknown, born, or not born at the time of a proceeding . . . including a person who is represented by another person . . . is bound by the declaration . . .”).

101. N.C. GEN. STAT. § 28A-2B-1(b) (2015).

102. *Mackall v. Mackall*, 135 U.S. 167, 172 (1890).

codicil would be admitted to probate if the petitioner were deceased.”<sup>103</sup> To do so, the clerk uses the same fact-finding procedures, looks for the same red-flags, and transfers any challenges to superior court; just as the clerk would during a post-mortem probate proceeding.<sup>104</sup> The legislature should not allow a do-over. Despite the high clear and convincing evidence standard and limited permissible grounds for bringing a post-mortem will contest,<sup>105</sup> the North Carolina exception destroys a fundamental reason anyone would want to initiate a living probate proceeding. Why seek validity if it is challengeable later?

In the end, allowing an interested party to contest a will declared valid in a living probate proceeding discourages the use of living probate in North Carolina and works against the law’s purposes. It destroys the petitioner’s choice that any revocation or subsequent will or codicil must be declared valid in another living probate proceeding. Further, the exception makes the law useless in the eyes of individuals fearing a contest they cannot defend themselves. The advantages of a living probate statute without this exception far outweigh any associated protection of a potential beneficiary’s interest. Therefore, the North Carolina General Assembly, in furtherance of freedom of testation, should remove the language allowing a post-mortem will contest.

#### CONCLUSION

Some things are out of human control; others are not. Roman Blum could not control death but he could control his money and its disposition when he died. Regardless of whether he actually intended to use his fortune to provide housing for needy children or had other plans for his estate, he could have benefitted from a living probate proceeding. His will, if indeed he had one, would not be lost. Neither his testamentary capacity, nor his testamentary intent, would have been in question. While alive, he could have ensured his will meant what he wanted it to mean. Instead, he died alone and all of these questions remain.

It is true that the decision to use a living probate proceeding is highly individualized and it is important for those considering it to weigh the law’s benefits and concerns against their own circumstances. As discussed in this Comment, the benefits are great and the North Carolina General Assembly has strengthened the proceeding by addressing many common concerns. However, in its current form, North Carolina’s law is flawed.

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103. N.C. GEN. STAT. § 28A-2B-1(b).

104. *See id.*

105. *See id.* § 28A-2B-4(a).

For many, the mere possibility of a post-mortem will contest means wasted time, effort, and money, and the removal of a primary incentive otherwise offered by the law. Therefore, the North Carolina General Assembly should remove the provision allowing such contests, and a finding of validity in a living probate proceeding should remain binding, no matter what the circumstances.

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