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February 2, 2021

House Judiciary Committee
North Dakota State Legislature
Attn: Chairman Klemin

RE: House Bill 2223 – A bill relating to Ante-Mortem Probate

Dear Chairman Klemin:

I am a partner in the law firm of Crowley Fleck PLLP and have served as the Chair of the Real Property Section of the State Bar Association of North Dakota since 2017. The State Bar Association has taken a neutral stance on this particular bill and provides technical assistance. I submit this written testimony independently in opposition to Senate Bill 2223.

I. THE ANTE-MORTEM PROBATE PROVISIONS ARE OF LIMITED USE.

North Dakota is one of only five states to have adopted an ante-mortem probate process. The North Dakota statute is infrequently used. It provides an opportunity for a testator to validate his or her own will prior to death. The practical advantages of doing so are limited. Few testators would desire to go through the probate process to confirm what he or she already believes to be true – that the executed will is properly witnessed and valid, that the testator was of sound mind and possessed the requisite capacity, that the decision to make the will was done without duress or undue influence. While it is touted as a brilliant solution to end will contests; it does not and will not. *See Antemortem Probate is a Bad Idea: Why Antemortem Probate Will Not Work and Should Not Work*, 85 MSLJ 1431, 1455-1457 (2017).

Testators who are of questionable capacity are unlikely to subject themselves to a legal determination that the will is in fact valid. Testators whom have intentionally disinherited a child or loved one are unlikely to announce such a decision publicly as required by the ante-mortem process.

II. THE DEFINITION OF "INTERESTED PARTY" INCLUDES PARTIES THAT SHOULD NEVER BE ABLE TO AVAIL THEMSELVES TO THE ANTE-MORTEM PROBATE PROCESS.

NDCC 30.1-01-06(25) defines "Interested Person." While this proposed bill adopts similar but not identical language ("interested party"), the definition of Interested Person includes a number of potential parties such as creditors, beneficiaries of life insurance policies or bank accounts, and

"any other having a property right in or a claim against a trust estate or the estate of a decedent, ward, or protected person."

This may allow such parties to attack the validity of a will in order to secure a more favorable result. Expanding the current statute to allow "interested parties" in all likelihood will serve to increase the number of will contests if anything at all.

While the bill attempts to limit these "interested parties" to those who have obtained consent from the testator, one must question whether or not the testator has the capacity to give such consent if it is also argued that the testator lacked capacity to form a will or was subjected to undue influence. In other words, this limitation may not be the best gate keeper to prevent illegitimate use.

III. BY EXPANDING THE NUMBER OF INDIVIDUALS PERMITTED TO COMMENCE AN ANTE-MORTEM PROBATE PROCEEDING, THE INTERESTS OF THE TESTATOR ARE DIMINISHED.

The Uniform Probate Code places a great deal of weight on preserving and protecting the intent of the testator. The testator has sole authority to execute a will, to revoke a will, to amend or change a will. Ultimately this is a basic tenant of American society, the ability to dispose of one's property as he or she sees fit. Furthermore, it is long held that heirs and devisees have no interest in the testator's property until the moment of death. This bill suggests otherwise and permits heirs, devisees, and a number of others to make a claim to the testator's estate before the body is even cold.

Testamentary capacity is presumed and the burden of proving the lack thereof is upon the contestant to the will. In re Estate of Stanton, 472 N.W.2d 741 (N.D. 1991). Similarly, the claim of undue influence must be proven by the person contesting the will and that mere suspicion is not enough. *Estate of Ostby*, 479 N.W.2d 866, 871 (N.D.1992).

The ante-mortem probate process is an adversarial one. The concept adopted by North Dakota is referred to as the "Contested Model." Permitting interested parties, guardians, conservators, nominated personal representatives, attorney in fact allows these permitted individuals to put the testator on the defensive and can further be used to harass the testator.

The testator is forced to expend money on attorneys and witnesses in order to even participate in the ante-mortem process. In addition to the monetary price that the testator must pay, it is a mental and physical burden upon the testator as well. Participation in court proceedings, testifying, witnessing family disharmony as those you love fight over your belongings in front of you, and in some cases being forced to face a court's determination that you are no longer competent.

Testators that intentionally disinherit individuals for valid reasons, or sometimes no reason at all, often do not want that disinherited party to know. They do not want to face the animosity or create disharmony while they are still alive. They may realize that they could very well change their mind at a later point in time. The ante-mortem probate process forces the testator to commence another action and notify everyone again if the change is to be made. If this bill were to take effect, an ante-mortem probate process initiated by a permitted party will make it more difficult for the

testator amend his or her will because of the process that is required once a court has validated the will.

IV. THE BELIEF THAT THE ANTE-MORTEM PROBATE PROCESS PROVIDES FOR THE BEST EVIDENCE IS A MISNOMER.

The strongest argument for the ante-mortem probate process is the availability of the testator to prove the validity of the will and confirm the testator's intent. Allowing other third parties the benefit of commencing an ante-mortem probate does not necessarily achieve such a goal. One of the permitted parties could and often does commence the ante-mortem probate process when the testator no longer has the capacity to testify or provide any valuable information about the execution of the will.

The *Sanford v. Murdoch* case is prime example of this problem. *Sanford v. Murdoch*, 285 S.W.3d 620 (Ark. 2008). The testator in this case, Marilyn Martin executed a will and revocable trust in 2002 which provided ultimate disposition of her property to her mother, if living, and if not to an animal shelter in Las Vegas, Nevada. In 2007, Ms. Martin was diagnosed with a malignant brain tumor. Immediately, Ms. Martin amended her trust to provide that following the death of her mother,10% of the trust assets would be given to the animal shelter and the remaining balance split between two friends. Ms. Martin's comprehension and memory problems continued to worse. Months after her diagnosis, her niece traveled to Arkansas from California to visit her. Following the visit, Ms. Martin revoked her Power of Attorney and executed an entirely new will leaving everything to the niece. The niece then commenced a petition for ante-mortem probate to validate the new will. By this point in time the niece had moved Ms. Martin to California. Ms. Martin passed away prior to the ante-mortem proceeding being concluded. Lay witnesses testified that Ms. Martin "did not know was what going on" at the time the most recent will was executed, while her physician deemed her "still decisional" which the court put significant weight on.

This scene of events illustrates the grave possibility that one whom exerts undue influence actually uses the ante-mortem probate process to affirm what would otherwise be an invalid will. The use of undue influence convinces the testator that they should not provide any inheritance to an opposing individual, and they often convince the testator that the opposing individual cannot be trusted to act as personal representative or attorney in fact.

The inclusion of guardians and conservators indicates that the authors of this bill have already recognized the fact that the testator has been deemed to lack appropriate capacity and is of limited benefit to any ante-mortem probate process.

Additionally, those parties that may have credible evidence or allegations of the testator's lack of capacity or being subject to undue influence are often unlikely to raise those concerns during an ante-mortem probate proceeding. It may be difficult to face a parent with evidence of capacity or raise the issue out of fear of being removed from the will entirely by upsetting the testator.

Additional information and more in-depth analysis is provided in the included law review article, "The Case Against Living Probate" by Mary Louise Fellows as published in the Michigan Law Review (1980).

Respectfully,

Blaine T. Johnson