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Abstract

When probate disputes arise, an increasing number of courts have been referring those disputes to mediation. Estate planners, however, have been less proactive about drafting wills to include mediation clauses that would anticipate estate disputes and channel them away from litigation. When a will mandates mediation, the will provides a dispute resolution mechanism designed to preserve family harmony, conserve estate assets, and avoid airing the family's "dirty laundry"—objectives common to many testators.

Mediation clauses in wills are no panacea. They are of little value to testators who exalt control over estate assets above all other concerns, and they are unlikely to bind disappointed family members whose primary claim is "against the will" rather than "under the will." Nevertheless, compared to other alternatives frequently employed by estates lawyers (including "no contest" clauses), mediation clauses present significant potential for reducing estates litigation, with its attendant financial and emotional costs.

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I. Introduction

The family that built the Dodge company,[1] the Johnson family of Johnson & Johnson fame and fortune,[2] and the legendary Jarndyce family in Charles Dickens' *Bleak House*,[3] have several things in common—protracted litigation over an estate that involved generations of a family in a bitter dispute, wasting

1. *See* John W. Allen, *Let the Dodge Brothers Drive You Home—Using the Dodge Act and Facilitative Mediation to Resolve Probate and Trust Litigation*, 22 MICH. PROB. & EST. PLAN. J. 8, 8 (2002) (describing a "monumental Michigan probate dispute" that lasted for generations).

2. *See generally* BARBARA GOLDSMITH, *JOHNSON V. JOHNSON* (1987) (detailing the will contest between Johnson family members that followed the father's death).

3. *See generally* CHARLES DICKENS, BLEAK HOUSE (Signet Classic 1964) (1853) (telling the fictional story of *Jarndyce v. Jarndyce*, a will contest involving several generations that ended when the estate had been consumed by legal fees).

of estate assets, embitterment of family members towards each other, and the absence of a mediation clause in the disputed wills. In those and other family disputes over estates, the presence of such a clause might have influenced the other unfortunate events favorably.

At its best, mediation avoids the zero-sum, winner-loser aspects of litigation as a mechanism for dispute resolution[4] and also avoids the havoc that an adversarial process can wreak on relationships. Those features, when combined with mediation's potential cost advantages,[5] explain much of the explosion in the use of mediation to resolve a wide variety of disputes,[6]

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4. *See* Legislative Proposal, Trusts & Estates Section, State Bar of Cal., Enabling Legislation for Court Ordered Probate Mediation 2 (June 9, 2006), http://calbar.ca.gov/calbar/pdfs/legis/T&E-2007-06.pdf (last visited Mar. 26, 2008) [hereinafter Mediation Proposal] (explaining why mediation is better suited for dealing with trust and probate matters). The proposal states:

> [T]raditional litigation does not allow flexible solutions to the issues raised which are unique to trust and probate matters. These matters frequently involve complex estate and income tax issues, support issues for multiple generations of beneficiaries, and similar matters. Mediation allows development of case-specific solutions, while a court is limited to granting the relief requested.

Id.

5. Where mediation resolves a dispute before litigation commences, or before significant discovery if litigation has commenced, its cost advantages are obvious. Since most litigated matters are settled before trial, however, the cost advantage of mediation is controversial where mediation is undertaken once a case is in the litigation stream. *See* JAMES S. KAKALIK ET AL., AN EVALUATION OF MEDIATION AND EARLY NEUTRAL EVALUATION UNDER THE CIVIL JUSTICE REFORM ACT 37 (1996) (finding "no strong statistical evidence that the mediation . . . programs, as implemented in the six . . . [federal district courts] studied, significantly affected . . . litigation costs."). *But see* DONNA STIENSTRA ET AL., REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT: A STUDY OF THE FIVE DEMONSTRATION PROGRAMS ESTABLISHED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, at 16, 18 (1997) (finding some cost and delay reduction in several court-sponsored alternative dispute resolution (ADR) programs). In a summary of mediation questionnaires from September 19, 2002 through February 21, 2003 from New Hampshire's probate mediation program, 80% of the participants said they "strongly agree" or "agree" that "[m]ediation saved time and/or money in this case." STATE OF N.H., SUMMARY OF MEDIATION QUESTIONNAIRES 1 (2003) (on file with the Washington and Lee Law Review). Professor Susan Gary states "research in family law has shown that mediation costs less than litigation in resolving divorce cases." Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 431 (1997).

6. Professors Frank Sander and Stephen Goldberg favor a rule of presumptive mediation:

> Mediation is the only procedure to receive maximum scores on each of these dimensions—cost, speed, and maintain or improve the relationship—as well as on assuring privacy . . . . It is only when the client's primary interests consist of establishing a precedent, being vindicated, or maximizing (or minimizing) recovery that procedures other than mediation are more likely to be satisfactory.

Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOTIATION J. 49, 52 (1994).

including emotionally charged controversies among family members.[7] In recent years, a number of states have developed mediation programs for resolution of probate disputes.[8] Measured by surveys of participant satisfaction, these

7. The explosion in family mediation has primarily been in the divorce context. Ann Skove, Staff Attorney and Senior Analyst for the National Center for State Courts, notes that probate mediation programs are "not growing at the exponential rate we forecasted a few years ago. Given the aging population and increased use of ADR, as well as the nature of probate disputes, we thought probate ADR would become standard practice very soon. It is catching on, but slowly." E-mail from Anne Skove, Staff Attorney and Senior Analyst, National Center for State Courts, to Chris Vermillion, Student Director, Kukin Program for Conflict Resolution, Benjamin Cardozo School of Law (Nov. 3, 2006) (on file with Washington and Lee Law Review); *see also* Ray D. Madoff, *Probate Disputes: A Study of Court Sponsored Programs*, 38 REAL PROP. PROB. & TR. J. 697, 698 (2004) (stating that "the use of mediation for resolving probate disputes has lagged far behind its use in other family matters").

8. The compilation of states below with probate mediation programs is not a comprehensive list. *See* FLA. DISPUTE RESOLUTION CTR., FLORIDA MEDIATION & ARBITRATION PROGRAMS: A COMPENDIUM (18th ed. 2005) (describing probate mediation programs in Florida) (on file with Washington and Lee Law Review); Ronald Chester, *Less Law, But More Justice?: Jury Trials and Mediation as a Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 199–201 (1999) (describing probate mediation programs in Georgia, Hawaii and Oregon); Gary, *supra* note 5, at 434–38 (describing probate mediation programs in San Francisco, California, Hawaii and Oregon); Helen W. Gunnarsson, *Making the Most of Settlement Conferences*, 94 ILL. B.J. 178, 180 (2006) (describing a probate pre-trial mediation program in Illinois); Madoff, *supra* note 7, at 701–18 (reporting on probate mediation programs in five states: California, Florida, Georgia, Hawaii, and Texas); Nat'l Ctr. for State Courts, Alternative Dispute Resolution, http://www.ncsconline.org/WC/Publications/ADR/SelectCat.asp?Topic_ID=28 (last visited Aug. 8, 2007) [hereinafter NCSC] (indicating probate mediation programs that address will contests in twelve states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Kansas, Massachusetts, New Hampshire, Ohio, and Utah); E-mail from Andrea Ayers, Program Manager, Administrative Office of the Tennessee Courts, to Clymer Bardsley, Research Assistant to Lela Love (July 26, 2007) ("Our local probate judges do refer matters to mediation." (quoting Hayden Lait, Tennessee ADRC Chair)) (on file with Washington and Lee Law Review); E-mail from Leslie Ratliff, Executive Secretary, North Carolina Dispute Resolution Commission, to Chris Vermillion, Student Director, Kukin Program for Conflict Resolution, Benjamin Cardozo School of Law (Feb. 5, 2007) (describing probate mediation programs in North Carolina) (on file with Washington and Lee Law Review); E-mail from Art Thompson, Dispute Resolution Coordinator, Kansas Office of Judicial Administration, to Chris Vermillion, Student Director, Kukin Program for Conflict Resolution, Benjamin Cardozo School of Law (Nov. 27, 2006) (reporting on probate mediation programs in Kansas) (on file with Washington and Lee Law Review); E-mail from Doug Van Epps, Director, Office of Dispute Resolution, Michigan Supreme Court, to Chris Vermillion, Student Director, Kukin Program for Conflict Resolution, Benjamin Cardozo School of Law (Nov. 22, 2006) (reporting on probate mediation programs in Michigan) (on file with Washington and Lee Law Review); E-mail from Rachel Wohl, Executive Director, Maryland Mediation and Conflict Resolution Office, to Clymer Bardsley, Research Assistant to Lela Love (July 26, 2007) (stating that there are mediation programs in three of twenty-four counties in Maryland with several other jurisdictions considering creating programs) (on file with Washington and Lee Law Review); *see also* N.J. STAT. ANN. § 1:40-6 (West 2000) (permitting courts in New Jersey "sua sponte and by written order, [to] refer any civil, general equity, or probate action to mediation for an initial two hours"); WASH. REV. CODE ANN. § 11.96A.260-320 (West 1999) (requiring all

programs have been successful.[9]

To date, however, use of mediation in probate disputes has largely been reactive; once a dispute arises, courts offer mediation as an alternative, or, in some states, require the parties to try mediation.[10] In this Article, we explore the opportunities available to a testator who seeks to be proactive—to arrange for mediation of estate disputes before they arise. Well-advised testators might value mediation for multiple reasons, including its potential to preserve family harmony and avoid dissipation of estate assets.

The use of mediation is not practical or advisable, however, in all cases. Doctrinal limitations, in some cases, constrain the power of testators to mandate mediation of estate disputes.[11] In other situations, mediation might frustrate an objective that could be significant for some testators: Strict, "dead-hand" control of estate assets.[12] In some families, the presence of a bully or a wimp

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estate and probate matters brought before the court in Washington to first comply with mediation and arbitration provisions, which include an opt-out provision).

Other states report that cases may get referred to the court's mediation program though there is no formal probate mediation program. E-mail from Lowell Castleton, Senior Judge, Idaho Supreme Court, to Clymer Bardsley, Research Assistant to Lela Love (July 26, 2007) (stating that Idaho does not have formal probate mediation programs or special probate courts, but that significant probate cases may be referred to mediation) (on file with Washington and Lee Law Review); E-mail from Erika Kruse, General Counsel and Director, Alternative Dispute Resolution, Rhode Island Supreme Court, to Clymer Bardsley, Research Assistant to Lela Love (July 27, 2007) (stating that Rhode Island does not have a formal probate mediation program but matters involving wills may be referred to mediation through the Appellate Mediation Program) (on file with Washington and Lee Law Review); E-mail from Julia Orzeske, Executive Director, Indiana Commission for Continuing Education, to Clymer Bardsley, Research Assistant to Lela Love (July 25, 2007) (stating that she knows of "no[] probate mediation programs at the state level [in Indiana], but many counties require mediation before assigning a trial date to civil cases") (on file with Washington and Lee Law Review); E-mail from Carol Paisley, Manager, Mediation, Kentucky Administrative Office of the Courts, to Clymer Bardsley, Research Assistant to Lela Love (July 25, 2007) (stating Kentucky "employs court connected mediators who receive referrals from judges, including probate matters") (on file with Washington and Lee Law Review); E-mail from Sue D. Tate, Director, Oklahoma Alternative Dispute Resolution System, to Clymer Bardsley, Research Assistant to Lela Love (July 26, 2007) (stating that "maybe a dozen" probate cases each year get referred to mediation) (on file with Washington and Lee Law Review).

9. *See infra* notes 34–41 and accompanying text (providing statistical data on participant satisfaction with probate mediation).

10. *See infra* notes 30–31 and accompanying text (breaking down voluntary versus mandatory mediation programs.

11. *See infra* Part III (examining doctrinal limitations on a testator's power to mandate mediation).

12. *See infra* Part II.C (discussing various objectives testators might have and their relationship to mediation provisions).

among the beneficiaries might make an adjudicative process more appealing than a consensual process where a weaker party might be overpowered.[13]

In Part II, we explore the reasons that might induce a testator to include mediation provisions in estate planning documents. Part III examines the variety of estate-related disputes and the doctrinal obstacles that limit the enforceability of mediation provisions. Part IV draws on the model of no contest clauses to outline an incentive-based approach to mediation clauses. Part V explores the counseling and drafting challenges facing lawyers who seek to use mediation clauses in estate planning documents.

II. The Promise of Mediation Clauses in Wills and Other Estate Planning Documents

A. Mediation As a Dispute Resolution Process

Mediation is a process in which a neutral third party (the mediator) without decisional power assists disputing parties to negotiate more effectively.[14] Mediators are trained to encourage parties to listen more

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13. Professor Trina Grillo describes potential harm to women in a mandatory mediation divorce context where the more relationally-oriented woman might be taken advantage of by her male counterpart. *See generally* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991). A sibling who has regularly exercised control in family situations might continue to do that in mediation. *See* Gary, *supra* note 5, at 412. While encouraging the use of mediation, the Commission on National Probate Court Standards warns in its commentary:

> [M]ediation may not be a viable alternative when one of the parties is at a significant disadvantage. Examples include disputes involving persons with severe depression; who are on a medication that affects their reasoning; who have difficulty asserting themselves; who have been physically or emotionally abused by another party; or who perceive themselves as significantly less powerful than the opposing party.

Comm'n on Nat'l Probate Court Standards & Advisory Comm. on Interstate Guardianships, National Probate Court Standards, Standard 2.5.1, http://www.probatect.org/ohioprobate courts/pdf/national_probate_standards.pdf (last visited Mar. 27, 2008). However, similar power imbalances will exist in adjudicative contexts. In both mediation and adjudication, such imbalances can be lessened by the presence of competent counsel.

14. Definitions of mediation abound. Professor James Coben, in a two-hour exercise, produced more than forty definitions from resources on his shelves and institutional websites. *See* E-mail from James Coben, Professor and Director, Dispute Resolution Institute, Hamline University School of Law, to Lela Love (July 12, 2007) (on file with Washington and Lee Law Review); *see also, e.g.*, ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION 8 (rev. ed., 2005) (stating that "mediation is generally understood as an informal process in which a neutral third party with no power to impose a resolution helps the disputing parties try to reach a mutually acceptable settlement"); DWIGHT GOLANN & JAY FOLBERG,

thoughtfully, to develop options, and to target an agreement responsive to the specific needs and characteristics of the various bargaining parties.[15] Mediation ideally inspires parties to understand one another better and to address one another's interests (so that one's own interests are met). This can have the collateral benefit of promoting better relationships among parties. In the context of disputes connected to wills, where family members are disputing in the shadow of a traumatic event—the death of a loved one—and where the long-term relationships of family members are being reconfigured in light of the death, the relationship benefit of mediation may be particularly important.

Several different schools of mediation exist.[16] Descriptors of mediator orientations and practices abound.[17] Consequently, a thoughtful drafter of a

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MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL 95 (2006) (stating that "[m]ediation is a process of assisted negotiation in which a neutral person helps people reach agreement"); Carrie Menkel-Meadow, *Introduction* to MEDIATION: THEORY, POLICY AND PRACTICE, at xiii (Carrie Menkel-Meadow ed., 2001) ("In its simplest and purest form, mediation is a process of facilitated negotiation among two or more parties, assisted by a third-party neutral, to resolve disputes, manage conflict, plan future transactions or reconcile interpersonal relations and improve communications.").

15. While these training targets would be expected in most mediation training programs, it is worth noting that there are some exceptions. For example, a transformative mediation training, based on the theory of Bush and Folger, *supra* note 14, would target techniques to enhance party empowerment and inter-party recognition, rather than strategies to encourage interest-based bargaining and agreement.

16. A sampling of identifiable "schools" of mediation includes the following: As representative of the classical or facilitative school of mediation, see KIMBERLEE K. KOVACH, MEDIATION: PRINCIPLES AND PRACTICES 23–39 (3d ed., Thompson/West 2004) (1994); for the understanding-based school of mediation, see Gary Friedman & Jack Himmelstein, *The Understanding-Based Model of Mediation*, *in* CARRIE MENKEL-MEADOW ET AL., MEDIATION: PRACTICE, POLICY, AND ETHICS 119–21 (2006), and Videotape: Saving the Last Dance: Mediation Through Understanding (Reunion Productions et al. 2001) (on file with Washington and Lee Law Library); for the transformative school of mediation, see BUSH & FOLGER, *supra* note 14, and Videotape: The "Purple" House Conversations: A Demonstration of Transformative Mediation in Action (Institute for the Study of Conflict Transformation, Inc. 2003).

17. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 25 (1996) [hereinafter Riskin, *Grid for the Perplexed*] (dividing the mediation universe into a grid with four quadrants, each defined by the mediator's orientation with respect to two continuums: evaluative-facilitative role and narrow-broad problem definition). More recently, partially in response to criticism of the "evaluative-facilitative" labels, Professor Riskin has revised his grid to focus on "directive" and "elicitive" mediator behaviors. *See generally* Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New New Grid System*, 79 NOTRE DAME L. REV. 1 (2003). For other descriptors, see James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of "Good Mediation"?*, 19 FLA. ST. U. L. REV. 47, 66–73 (1991) (describing three distinct mediator styles labeled "trashing," "bashing," and "hashing it out"); Clark Freshman, *Privatizing Same-Sex "Marriage" Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1705–

mediation clause might want to specify a particular format for the mediation process in keeping with the goals of the testator. In *classical* or *facilitative* mediation,[18] the goal is not only agreement, but also the fostering of better understanding among the parties, which will serve as a foundation for developing an agreement even in cases where no agreement is reached in mediation. A facilitative mediator will want to insure that the parties have explored—in a creative manner—their various options so that the agreement achieved is optimally responsive to the articulated interests of the parties and hence is more durable.

In so-called *evaluative* mediation,[19] a mediator might act more like a judge conducting a settlement conference. Little attention might be given to the development of understanding or an agreement crafted to meet the parties' interests. Rather, the mediator might serve as a quasi-arbitrator without decisional power but with the persuasive power of his neutral role. The mediator's goal would be to attain a settlement—usually one aligned with the

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12 (1997) (describing different understandings of mediation as "private ordering," "community-enhancing," or "community enabling"); Kenneth Kressel et al., *The Settlement-Orientation vs. The Problem-Solving Style in Custody Mediation*, 50 J. SOC. ISSUES 67, 67–83 (1994) (contrasting a settlement orientation and a problem-solving style); Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 21–24 (1997) (exploring the impact of different levels of mediator transparency on the process); Susan S. Silbey & Sally E. Merry, *Mediator Settlement Strategies*, 8 LAW & POL'Y Q. 7, 12 (1986) (describing bargaining and therapeutic styles); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703, 707 (1997) (dividing mediation into three separate models described as "norm-generating," "norm-educating," and "norm-advocating"); Margaret L. Shaw, *Style Schmyle! What's Evaluation Got to Do With It?*, DISP. RESOL. MAG., Spring 2005, at 18 (noting the importance of the timing and duration of a mediator's involvement in a case—e.g., from one day to "eternal involvement").

18. *See* Riskin, *Grid for the Perplexed*, *supra* note 17, at 24 (describing the facilitative mediator). Riskin states:

> [If] the parties are intelligent, able to work with their counterparts, and capable of understanding their situations better than the mediator and, perhaps, better than their lawyers . . . the parties can develop better solutions than any the mediator might create. Thus, the facilitative mediator assumes that his principal mission is to clarify and to enhance communication between the parties in order to help them decide what to do.

Id. For a practicing probate attorney's description of why facilitative mediation is a compelling choice in probate mediation, see Catherine A. Jacobs, *Facilitative Mediation—A Good Option*, MICH. PROB. & EST. PLAN. J., Fall 2002, at 4.

19. *See* Riskin, *Grid for the Perplexed*, *supra* note 17, at 24 (describing the evaluative mediator as assuming "that the participants want and need her to provide some guidance as to the appropriate grounds for settlement—based on law, industry practice or technology—and that she is qualified to give such guidance by virtue of her training, experience, and objectivity").

likely court outcome (in the mediator's view). The mediator would give assessments and make suggestions in order to resolve the conflict.

Complicating the mediation landscape further, some mediators might use a blended style, moving from facilitation to evaluation—back and forth. This continuum or flexibility in approach,[20] from facilitative to evaluative, holds out different possibilities for what mediation can achieve in terms of closure, understanding, and interest-based resolutions. Some argue that having many tools in the mediator's toolbox is a benefit to parties,[21] while others feel that a mediator who *might* evaluate at a point of impasse will thereby make sophisticated parties and their attorneys communicate as they would to a judge or arbitrator (the perceived end-game of the blended process).[22] On this latter view, a mediator who assumes an adjudicative role—even if it is only for a portion of the mediation—would sacrifice some of the openness and candor that a committed facilitator might develop.

In addition to the facilitative or evaluative distinction, mediators differ in a number of other respects: whether, when, and why to conduct meetings—referred to as *caucuses*[23]—with each party separately; what role attorneys (if

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20. *See* Jeffrey W. Stempel, *The Inevitability of the Eclectic*, 2000 J. DISP. RESOL. 247, 248 (2000) (arguing for an "eclectic" approach to mediation where a mediator may employ both facilitative and evaluative techniques—assisting parties find their own solutions and providing guidance as to likely legal outcomes—depending on the context and the disputants); *see also* Shaw, *supra* note 17, at 17 (advocating that evaluation be viewed on a continuum of behaviors—ranging from asking parties questions about their case to suggesting particular settlements—rather than posited as an "either/or").

21. There are several proponents of this view. *See generally* Marjorie Corman Aaron, *ADR Toolbox: The Highwire Art of Evaluation*, 14 ALTERNATIVES TO HIGH COST LITIG. 62 (1996) (describing appropriate uses for mediator evaluation and recommending specific mediator strategies); John Bickerman, *Evaluative Mediator Responds*, 14 ALTERNATIVES TO HIGH COST LITIG. 70 (1996) (asserting parties should have free choice between evaluative and facilitative styles); Stempel, *supra* note 20.

22. *See* Kimberlee K. Kovach & Lela P. Love, *Mapping Mediation: The Risks of Riskin's Grid*, 3 HARV. NEG. L. REV. 71, 99, 102 (arguing that neutral evaluation, rather than party decision-making, will become the dominant focus in a process where the neutral has an evaluative orientation and that mediator evaluation will inhibit open communication among parties); Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 940 (1997) (arguing that "evaluation promotes positioning and polarization, which are antithetical to the goals of mediation").

23. A caucus is a private meeting with less than all parties present. The mediator could meet with the parties only (without attorneys or other support persons), with each side separately (either the party alone, the attorney or attorneys alone or an attorney and client team), or with a grouping of aligned parties who have a particular position with respect to one issue. At least one school of mediation—understanding-based mediation—uses a never-caucus model on the theory that understanding is enhanced by direct communication between parties and their lawyers. *See* Friedman & Himmelstein, *supra* note 16, at 191–21 (describing understanding-based mediation); *see also* Saving the Last Dance, *supra* note 16. As mediation has been

there are attorneys) and parties play in the mediation;[24] whether to use a team of co-mediators;[25] and what issues the mediation will address.[26] Will the mediation, for example, address all negotiable issues between the parties (e.g., communication and interaction between the parties or conduct and attire at family gatherings) or only those cognizable in a lawsuit that could be or has been brought (e.g., the testator's capacity or allocation of the testator's assets)?[27] These variables—use of caucus, role of the parties and attorneys, use of co-mediation, whether a broad or narrow range of issues will be addressed—will have important repercussions for the mediation, its outcome, and what can be achieved by use of the process. Consequently, these variables should be considered, if not explicitly determined, by a careful drafter of a mediation provision.

Unlike litigation and arbitration, none of the mediation models guarantee closure. The mediator lacks power to impose a solution on recalcitrant parties. Indeed, this is one of mediation's primary advantages; solutions are not imposed on the parties, but are instead fashioned by the parties themselves.[28]

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brought into a more legalized, court-connected context, mediators have tended to abandon or minimize the joint session in favor of the caucus. *See* Nancy Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalization?*, 6 HARV. NEGOT. L. REV. 1, 25–26 n.105 (2001).

24. The role of attorneys and parties in mediation has shifted as mediation has been brought into the courts. *See* Welsh, *supra* note 23, at 4 (stating that "disputing parties [have] play[ed] a less central role" as "mediation has been institutionalized in the courts"); *id.* at 25 nn.103–04 (describing a trend in court-connected mediation for reduced—or no—participation of parties and domination of mediation sessions by attorneys).

25. An attorney-psychologist team, for example, might signal that a broad range of issues would be addressed, from relationship issues to legal causes of action. *See generally* Lela P. Love & Joseph B. Stulberg, *Practice Guidelines for Co-Mediation: Making Certain That "Two Heads Are Better Than One,"* 13 MEDIATION Q. 179 (1996).

26. A mediator with a "broad" view of the problem definition, for example, would search for interests underlying the positions parties assert and go beyond the narrow issues that normally constitute a legal dispute. *See* Riskin, *Grid for the Perplexed*, *supra* note 17, at 43 ("A broad problem definition . . . accommodates the parties' underlying interests.").

27. Several commentators have pointed to mediation's ability to address a broad range of issues as a particularly important benefit in probate matters. *See* Lela P. Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RES. L.J. 255, 259 (2001) ("One of the strengths of mediation is its ability to address a range of issues that is far broader than the issues that can be addressed in either arbitration or litigation."); Madoff, *supra* note 7, at 700 (mentioning the utility of mediation in resolving "a variety of issues, not all of which are legal in nature"); *see also* Gary, *supra* note 5, at 413 ("[T]he identifiable legal issues often cloak important emotional, personal, or familial issues. Often the hidden concerns are at the center of the dispute, yet the adversarial process either may not address those concerns or may not be able to resolve those aspects of the problem.").

28. The first standard of the Model Standards of Conduct for Mediators, adopted by the American Bar Association, the American Arbitration Association, and the Association for

No party need view himself as a "loser" in the process and no party should be strong-armed into settlement, though a mediator would be remiss for failing to explore the costs and risks of failing to reach an agreement.

Since the mediator cannot impose a solution, impasse is possible. Typically, mediation fails when one of the parties refuses to continue participating or the mediator makes a judgment that further effort is futile. At that point, the parties turn to more traditional legal mechanisms for resolving their disputes. But the desire to avoid the cost and unpleasantness associated with those mechanisms, together with a natural desire to promote harmony, often provides a significant motivation to make mediation succeed.

B. Mediation in Probate Matters

In recognition of the fit between what mediation offers and what courts and families often want with respect to probate disputes, a growing number of states have begun to experiment with mediation programs in probate courts.[29] Such programs reflect a variety of approaches from mandatory mediation ordered at the discretion of the judge[30] to voluntary mediation requested by the parties.[31] Some use a co-mediation model with an attorney and a nonattorney team.[32] Some programs use volunteer mediators, others fund the mediation (so that it is free for the parties), and others pass on the mediation costs to the parties.[33]

Conflict Resolution, is "Self-Determination: . . . A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome." AM. ARBITRATION ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS 3 (2005).

29. *See supra* note 7 (comparing the rise in family mediation in the divorce and probate context).

30. *See* NCSC, *supra* note 8 (indicating that Alabama, Arkansas, the District of Columbia, and Utah provide for mandatory referrals to mediation); *see also* Madoff, *supra* note 7, at 710, 717 (reporting that Georgia and Hawaii have mandatory referrals to probate mediation).

31. *See* NCSC, *supra* note 8 (indicating that Alaska, Kansas, Massachusetts, New Hampshire provide mediation on a voluntary basis); *see also* Madoff, *supra* note 7, at 714 (reporting that San Francisco County, California, has a voluntary program).

32. *See* NCSC, *supra* note 8 (indicating that Arizona and New Hampshire have such a co-mediation approach).

33. *See id.* (providing typical mediation costs in Colorado, Kansas, and New Hampshire). In Colorado, parties pay $75 per hour per party for the mediation and $40 per party for an administrative fee. *Id.* In Kansas, most parties are required to pay for dispute resolution services. *Id.* In New Hampshire, there is a flat fee of $300 per case; in Utah, the estate or trust pays the mediator's fees. *Id.*; *see also* Madoff, *supra* note 7, at 702, 709, 714 (reporting typical

At least two court-annexed programs that have collected statistical data on satisfaction with their probate mediation programs have found that participants value probate mediation. In the Probate Mediation Program within the District of Columbia Superior Court the statistics for the month of October 2006 indicate that parties are "satisfied" or "very satisfied" with the process in 80% of the cases, with the outcome of mediation in 73% of cases, and with the neutral's performance in 86% of the cases.[34] In a New Hampshire survey of parties and attorneys involved in probate mediation, 94% of respondents agreed or strongly agreed that the mediator was able to facilitate discussion successfully; 86% agreed that the mediator helped explore different options to resolve the dispute; 80% agreed that mediation saved time and/or money; and 97% reported overall satisfaction with the mediation process.[35]

A study examining six court-sponsored programs reports consistent attorney satisfaction and positive regard for the probate mediation programs.[36] Mediation's ability to expose the real issues at the center of the disagreement was highlighted by one attorney.[37] Others noted that getting parties communicating and dealing with personal issues not amenable to court process was useful.[38] Reservations about mediation, however, included that mediation might not work well for all disputes (e.g., where a party is incapacitated)[39] and that high hourly fees on the part of mediators seemed unfair in a mandatory program.[40] One Hawaiian attorney thought that probate disputes were based on family hatred and fights over money, and "nothing resolves family hatred."[41]

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mediation costs in Texas, Georgia, and San Francisco County, California). In Texas, mediators and parties often agree on a flat fee per day, ranging from $750 to $2,500 per side. *Id.* at 702. In Georgia, parties can use court-connected mediators for free or private mediators at their own expense. *Id.* at 709. In San Francisco County, California, the court provides a panel of mediators who serve pro bono. *Id.* at 714.

34. E-mail from Claudette Taylor, Program Manager, Tax, Probate, and Landlord and Tenant Mediation Programs, Multi-door Division, D.C. Superior Court, to Chris Vermillion, Student Director, Kukin Program for Conflict Resolution, Benjamin Cardozo School of Law (Nov. 27, 2006) (on file with Washington and Lee Law Review).

35. STATE OF N.H., *supra* note 5.

36. *See generally* Madoff, *supra* note 7.

37. *See id.* at 707 ("As one lawyer explained, 'Even if mediation does not result in a settlement, it can nonetheless open lawyers' and clients' eyes to the real issues at the center of the disagreement.'").

38. *See id.* at 710 ("[M]ediation gets the parties communicating, and this alone may settle some disputes.").

39. *See id.* ("[M]ediation may be inappropriate when one party is not of sound mind.").

40. *See id.* at 714 ("[S]ome lawyers expressed concern that it is unfair, perhaps even unconstitutional, to impose such high fees in an essentially mandatory system.").

41. *Id.* at 719.

Settlement rates are another measure of success in mediation. In the Fulton County Probate Court in Atlanta, Georgia, one of the pioneering courts in mediating probate disputes, the settlement rate is approximately 65%.[42]

Despite the advantages mediation offers for resolution of estate disputes, lawyers and parties are often reluctant to suggest mediation out of fear that the very suggestion signals weakness in their legal position.[43] Court-ordered mediation overcomes this difficulty. But in the many jurisdictions that do not provide for mandatory mediation or at least encourage the use of mediation for disputing families, a mediation clause in a will might address the reluctance of parties to suggest mediation; mediation would reflect deference to the wishes of the testator rather than signaling deficiencies in the case.

C. The Testator's Objectives: How a Mediation Provision Might Help

A testator who engages a lawyer to draft estate planning documents typically starts with multiple objectives. First, the testator wants to effectuate her plan for distribution of her assets. Testators who write wills—especially testators who write wills that provoke disputes—generally have a strong view about how their assets should be distributed.[44] Often, they have rejected the off-the-rack distribution furnished by intestate succession statutes in favor of a distribution that departs from social norms. For instance, a testator might provide for unequal distribution of assets among her issue, might allocate an unusually large (or small) share to a spouse, or might provide for one or more of her beneficiaries through a spendthrift trust rather than an outright disposition. In each of these cases, the testator's decision might provoke contest.[45] But in each situation, the testator who has gone through the trouble

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42. Ellen E. Deason, *State Court ADR*, DISP. RESOL. MAG., Fall 1999, at 6; *see also* Madoff, *supra* note 7, at 713, 715 (indicating that all attorneys interviewed in the Los Angeles County probate mediation program reported a 70%–90% resolution rate; an 80% settlement rate was reported in San Francisco's probate mediation program).

43. *See* Mediation Proposal, *supra* note 4 ("[A]ttorneys are reluctant to propose mediation in a given matter because of their concern that such a proposal may be viewed as an admission of weakness.").

44. *Cf.* Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 590–99 (1999) (noting that will contests frequently arise when testators have strong views about disposition of their assets that depart from social norms).

45. *See* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 243–46 (1996) (demonstrating that contests are more likely to be successful when the testator's preferences depart most significantly from established social norms).

of making these nontraditional provisions typically wants to assure that her wishes are respected.[46]

Second, the typical testator wants to maximize the value of the assets she passes to her beneficiaries. Avoidance of taxes and probate costs often provide the primary impetus for consulting lawyers about estate matters,[47] and the focus of advertising efforts by estate lawyers suggests that they, at least, believe that potential clients are primarily interested in protecting the value of their estates. Litigation, too, diminishes the size of an estate, and any client who consults a lawyer about estate planning matters does so in the hope that the lawyer will reduce the risk (and potential cost) of litigation over estate issues.

As the use of inter vivos trusts as will substitutes has exploded over the last few decades, lawyers and scholars have identified a third objective common to many testators: Preservation of family privacy.[48] At the most basic level, probated wills are public documents; revocable inter vivos trusts are not. Hence, a person who wants to keep her dispositions private might prefer to use a trust rather than a will to dispose of her assets.[49] But concerns about privacy

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46. While respecting testators' wishes is a central theme in probate law, there are some notable deviations. *See* David Marr, *Patrick White's Return from the Pit*, SYDNEY MORNING HERALD (Austl.), Nov. 3, 2006, at 1 (stating that directives of Patrick White, George Orwell, Franz Kafka, Somerset Maugham, and Emily Dickinson to destroy their papers and manuscripts were not enforced). The "family settlement doctrine"—enshrined in both statutes and case law—favors family settlement of probate issues. *See* Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROP. PROB. & TR. J. 601, 645 (2000) (stating that "the law has favored family settlement of probate issues" for decades). Following this doctrine and absent "fraud, undue influence, or breach of a confidential relationship," courts generally uphold family settlement agreements. *Id.*; *see, e.g.*, Estate of Hodges, 725 S.W.2d 265, 267 (Tex. App. 1986) (upholding a family settlement agreement that gave decedent's daughter a percentage of the estate despite the daughter being specifically disinherited by the will).

47. By one estimate, now a decade old, estate tax collections would be about four times as high if wealthy people did not engage in estate planning—which inevitably involves consultation with lawyers. Edward N. Wolff, Commentary, *The Uneasy Case for Abolishing the Estate Tax*, 51 TAX L. REV. 517, 521 (1996). Avoidance of probate costs has been a major factor in what Professor Langbein has dubbed the "nonprobate revolution." John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1115–16 (1984).

48. *See generally* Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713 (2006); Gary, *supra* note 5, at 424 ("Mediation's beneficial characteristics include the opportunity for privacy and confidentiality . . . .").

49. Professor Foster describes one recent example:

> On July 9, 2004, Marlon Brando's will was filed for probate in Los Angeles Superior Court. A media feeding frenzy ensued. Reporters from across the globe scoured Brando's probate file for intimate details about the reclusive actor's personal life. Within hours, "enquiring minds" learned that Brando left a $21.6 million estate and a truly complex and fractured family. What even the most

extend beyond the size and nature of decedent's dispositions. A decedent who fears contest of her dispositions would undoubtedly prefer to avoid the spectacle of a trial in which her mental capacity, or her susceptibility to undue influence, is the central issue.[50] For most decedents, the fact that the spectacle would not occur until after her death would provide small solace. Because inter vivos trusts are less susceptible to contest than are wills, many have suggested that increased use of trusts has been motivated, at least in part, by the desire to avoid airing of the family's "dirty laundry."[51]

Preservation of family harmony is a fourth objective common to many estate planning clients, albeit one that has received less attention in the estates literature.[52] Most people would prefer to avoid resentments among their relations, friends, and loved ones—their beneficiaries—particularly ones caused by their own actions. Death of a parent or other close family member can deepen existing family fissures and open new ones, especially when some or all of the survivors believe that the decedent has treated them unfairly. Sometimes, there will be no fix to these wounds, and the decedent will have no illusions that the family will become a cohesive unit; the decedent's children may never fully accept his fourth wife, especially when the decedent has left her the bulk of his estate. In other situations, however, a decedent—especially if counseled about the risks and possibilities—would choose to take steps that would heal family divisions.

Mediation will be of little value to the testator whose primary focus is the first of these objectives—controlling the disposition of her assets.[53] But for

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> intrepid reporter could not discover, however, is how Brando's property will be divided. Except for "certain monthly payments" to two female friends, Brando's will devises his entire estate to his "living trust," a document that is not part of the public probate file. Thus, Brando's trust gave him after death what he most craved during life—privacy.

Foster, *supra* note 48, at 714–15 (citations omitted).

50. *See* Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RES. L.J. 241, 241–43 (2001) (describing the advantage of privacy afforded by mediating, rather than litigating, family disputes).

51. *See* Foster, *supra* note 48, at 725 (describing how a court recognized and explained that the basic purpose of a revocable trust is to "avoid publicly concerning family and business plans" (quoting *In re* Estate of Meskimen, 235 N.E.2d 619, 622 (Ill. 1968))).

52. Professor Susan Gary has observed that preservation of family harmony is a "tangential, but important goal" of persons planning for transfer of property after death. Gary, *supra* note 5, at 397.

53. Professor Ronald Chester, an advocate of greater use of mediation to resolve will contests, suggests that this objective should not be important in contest cases. *See* Chester, *supra* note 8, at 176–77 (placing a greater emphasis on family reconciliation than on distribution of assets). He contends that ascertaining testamentary intent is fraught with uncertainty and that focusing on testator's wishes accords the testator too much "dead hand

clients concerned about the other three objectives, mediation presents distinct advantages. Compared with litigation, mediation has the potential to resolve disputes more cheaply and quickly.[54] Mediation sessions are confidential,[55] avoiding public disclosure of family squabbles. And, because mediators can focus on issues broader than the narrow legal dispute in a manner that promotes understanding and ideally achieves an outcome that recognizes key interests, mediation has the potential to preserve family relationships that might be jeopardized by estate litigation. Better relationships might result in reducing future family fights, hence avoiding future costs—both emotional and financial.

In light of the potential mediation has for resolving estates disputes, it is odd that mediation provisions appear so infrequently in wills and trust documents. By contrast, mediation of family disputes has grown exponentially in the divorce arena. Part of the explanation may be that estates lawyers are not sufficiently knowledgeable about mediation to suggest its use. Another part of the explanation, however, may reflect doctrinal obstacles to enforcement of mediation provisions—obstacles we explore in the following Part.

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control." *Id.* at 177. As a result, he favors a focus on family protection and fairness—objectives he believes can best be advanced by mediation. *Id.*

54. *See supra* note 5 (describing the cost advantages of mediation); *see also* Madoff, *supra* note 7, at 700 (stating that "[t]he mediation process is often faster and less expensive than litigation").

55. Evidentiary exclusions limit the use of settlement discussions in subsequent litigation. *See* FED. R. EVID. 408 (excluding the admission of offers to compromise). Also, courts and statutes have created a mediation privilege protecting mediation communications from being divulged in court. *See* Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1179–80 (C.D. Cal. 1998) (creating a federal mediation privilege), *aff'd*, 216 F.3d 1082 (9th Cir. 2000); UNIFORM MEDIATION ACT §§ 4–6 (2003) (creating a privilege for mediation communications and delineating exceptions); *see also* Radford, *supra* note 46, at 635 nn.182–83 (providing examples of state statutes). Furthermore, parties often agree in an agreement to mediate that they will not divulge information outside the mediation, creating a contractual obligation to keep matters confidential. Finally, the Model Standards of Conduct for Mediators, which has been approved by the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution, dictates that mediators are ethically bound to keep matters confidential "unless otherwise agreed by the parties or required by law." AM. ARBITRATION ASS'N ET AL., *supra* note 28, at 6. In the probate context, however, where a guardian *ad litem* represents a child or incapacitated party, the guardian may be required to report back to the court regarding what transpired in mediation. *See* Radford, *supra* note 46, at 635 ("The court appoints the guardian ad litem, who may be obligated to report back to the court on the progress of the case.").

III. The Variety of Estate Planning Disputes

Any effort to provide for mediation as a device for resolving estate disputes among family members (or others) must come to grips with the different contexts in which such disputes might arise. In some circumstances, mediation provisions might have both binding legal effect and considerable moral suasion; in others, because a mediation provision would have neither binding effect nor moral persuasive force, financial incentives play a critical role.

The difference between the binding effect of a mediation clause and its moral force has more significance analytically than it does practically. Even a mediation clause with binding effect does not compel the parties to settle their dispute; the clause merely binds the parties to meet with the mediator, to hear him out, and to engage with other parties long enough to decide or announce that their positions are not bridgeable. Unless a mediation clause explicitly imposes more exacting responsibilities on the parties, the clause will not typically be construed to require the parties to spend a specified number of hours or dollars in mediation. Thus, when one of the parties concludes that the mediation has not succeeded, the mediation is typically over. Nevertheless, when a will drafter can draft a mediation clause with binding legal effect, the drafter can at least assure that a single party cannot choose to ignore the testator's wishes and entirely bypass the mediation process. Further, some research suggests that parties who are mandated to use mediation have success in resolving disputes comparable to those who voluntarily elect to use the process.[56]

A. Will Construction Disputes

Will construction disputes are disputes about the meaning of the will. The parties all concede the will's validity, but disagree about the meaning of the

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56. *See* Jessica Pearson & Nancy Thoenes, *Divorce Mediation: Reflections on a Decade of Research*, *in* MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 9, 14–15 (Kenneth Kressel et al. eds., 1989) (describing studies that found similar success rates in both voluntary and mandatory mediation programs); Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 566 (1997) (stating that studies show little difference between mandatory and voluntary mediation); Frank E. A. Sander, *Another View of Mandatory Mediation*, DISP. RESOL. MAG., Winter 2007, at 16 ("One might think that if parties are compelled to mediate, there would be fewer settlements. The research suggests the contrary, perhaps because once parties get into the process they are swept along by its power and forget how they got there initially.").

words contained within the document. Disputes might arise about the identity of beneficiaries, about the property to which the document refers, or about the time of distribution.

Many of these disputes arise because of the time gap between execution of the will and the time of testator's death. For instance, one of the beneficiaries named in the will may have died, and the question is whether that beneficiary's issue should take their deceased parent's share.[57] Alternatively, after the testator devised specific property to a beneficiary, the testator may have disposed of the property through a lifetime transfer or may have lost the property through a casualty.[58] The issue, then, is whether the named devisee is entitled to other property or to nothing. Or the testator's estate may diminish significantly between the time of the will's execution and the time of testator's death, leading to disputes about which beneficiaries enjoy priority in the remaining property.[59] Statutes and common law doctrines furnish rules for resolution of each of these "time gap" issues, but real life situations do not always fall neatly within the statutory framework, leading to dispute.[60]

Other construction disputes arise not because of the time gap, but instead because of imprecision in drafting. In particular, the will's drafter might have identified beneficiaries without sufficient care: For instance, does a bequest to "nephews and nieces" include children of a spouse's sibling?[61] Alternatively, the will might include inconsistent provisions in different paragraphs.[62] Or, the will's reference to another document may be unclear.[63]

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57. *See, e.g.*, *In re* Estate of Rehwinkel, 862 P.2d 639, 641 (Wash. Ct. App. 1993) (determining whether a son should replace his deceased mother as an heir to her uncle's will).

58. *See, e.g.*, McGee v. McGee, 413 A.2d 72, 73–74 (R.I. 1980) (determining whether grandchildren heirs should receive the proceeds of the sale of a testator's bonds when the purchase of the bonds from the testator's bank account shortly before her death significantly decreased the value of the grandchildren heirs' bequest of the bank account monies).

59. *See, e.g.*, *In re* Estate of Potter, 469 So. 2d 957, 960 (Fla. Dist. Ct. App. 1985) (holding that testator's daughter was entitled to a specific legacy of property and priority over testator's son's bequest of an equal bequest in cash out of a trust because of insufficient funds in the trust upon testator's death).

60. The Uniform Probate Code, for instance, includes provisions governing abatement, UNIF. PROBATE CODE § 3-902 (amended 2002), ademption, *id.* §§ 2-605 and 2-606, and lapse, *id.* § 2-603.

61. *See, e.g.*, Estate of Carroll, 764 S.W.2d 736, 740 (Mo. Ct. App. 1989) (determining that a bequest to nieces and nephews does not include children of a spouse's sibling).

62. *See, e.g.*, *In re* Marine Midland Bank, 547 N.E.2d 1152, 1155 (N.Y. 1989) (dealing with ambiguity created by use of "child" in one clause of a will and "issue" in the next clause).

63. *See, e.g.*, Clark v. Greenhalge, 582 N.E.2d 949, 952 (Mass. 1991) (holding that the doctrine of incorporation by reference gives effect to a will's reference to memorandum prepared by the testator).

In each of these circumstances, disputes are likely to arise about how testator's estate should be distributed. The traditional vehicle for resolving these disputes is the will construction proceeding.[64] Construction proceedings may be brought by the executor of the estate, or by a beneficiary or potential beneficiary unhappy about the executor's proposed distribution of estate assets.[65] Because all of the parties to any potential construction proceeding concede the validity of the will,[66] a testator who includes a mediation provision in the will can legally bind the parties to any will construction dispute. The mediation provision becomes, in effect, the testator's chosen tool for resolving disputes about the meaning of the will, and there would be little reason for courts to veto the tool chosen by a testator. Moreover, because all of the beneficiaries concede the validity of the will as the governing instrument, dispute resolution provisions in the will are most likely to exert moral force on the beneficiaries, who know that the testator—whose property is at stake—preferred mediation as the mechanism for resolution of disputes.[67] As we shall see, however, circumstances are not so felicitous when other forms of dispute arise.

B. The Elective Share and Other Spousal Protection Doctrines

Every state provides a surviving spouse with some form of protection against disinheritance.[68] At common law, dower and curtesy gave surviving wives and husbands an interest in the lands of their deceased spouses.[69] Today,

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64. *See generally* 4 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS §§ 31.1–31.2 (2003) (describing will construction and will construction proceedings).

65. *Id.* § 31.7 ("It is generally held . . . that one entitled to some interest under the will, whose immediate interests may be affected, may bring suit for construction.").

66. *See id.* § 31.10 ("In [a will construction proceeding], regular execution of the will will be assumed.").

67. As Professor Madoff has emphasized, one of the obstacles to mediation of wills disputes is the sense, often shared by the disputing parties, that the dispute should be resolved in accordance with the testator's wishes. *See* Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 177 (2002). Because the testator cannot participate in the mediation, one or more of the parties may be reluctant to mediate out of fear that the result would frustrate testator's intent. *Id.* A testator's expression of a preference for mediation operates to overcome that objection to mediation.

68. *See generally* Ralph Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83 (1994) (providing a survey of current law concerning disinheritance of spouses and children).

69. *See id.* at 89 ("The common law recognized the marital life estate of dower to protect a widow from disinheritance by her husband."). *See generally* POWELL ON REAL PROPERTY §§ 15.04 & 85A.04 (Michael Allan Wolf ed., 2000).

most common law states have replaced dower and curtesy with elective share statutes that give the surviving spouse the right to a percentage of the decedent spouse's estate, regardless of the decedent spouse's wishes.[70]

When a surviving spouse considers electing against a will, the surviving spouse concedes that the will reflects the testator's final wishes, but contends that the testator's wishes are not the last word on distribution of his assets. The electing spouse claims a right to property under the elective share statute, not the will, and whenever the will has not provided the spouse with her elective share, the electing spouse contends that the will must yield to the statute.

Elective share litigation does not typically arise with respect to decedent's probate estate; under most state statutes, it is a simple matter to compute the statutory percentage of the estate and give it to the spouse.[71] Controversy more commonly arises when the decedent spouse has made lifetime transfers to persons other than the surviving spouse, and the spouse challenges the validity of those transfers, contending that they are "illusory,"[72] or a "fraud on marital rights,"[73] or that, for some other reason, the property transferred should be recaptured for the benefit of the estate—so that the surviving spouse can obtain a share of that property. These disputes typically pit the surviving spouse against blood relatives of the decedent. Often, the surviving spouse has not been the decedent's lifetime companion and is not the parent of the decedent spouse's children.[74]

Drafting mediation provisions to account for potential elective share claims presents a challenge. First, mediation provisions in the will do not bind a spouse who asserts elective share rights; he or she is, to use common terminology, electing *against* the will. Second, will provisions are unlikely to

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70. *See* Brashier, *supra* note 68, at 100 ("The elective share is also often called a forced share, because the surviving spouse can force the estate to provide her with the prescribed statutory minimum despite the testator's contrary wishes clearly expressed in his otherwise binding will.").

71. This simplicity has led many to conclude that the elective share is somewhat arbitrary. *See, e.g., id.* at 101–02 ("Simply put, the conventional forced share is highly arbitrary and may in some instances work more harm than good.").

72. *See, e.g.*, S.C. CODE ANN. § 62-7-401(c) (1976 & 2006 Supp.), *construed in* Dreher v. Dreher, 634 S.E.2d 646, 650 (S.C. 2006) (stating that a finding "that a revocable inter vivos trust . . . is illusory for purposes of determining a spouse's elective share rights" will render that part of the trust invalid).

73. *See, e.g.*, MO. REV. STAT. § 474.150, *construed in* Weber v. Knackstedt, 707 S.W.2d 800 (Mo. Ct. App. 1986) (defining those transactions that will "be deemed to be in fraud of the marital rights of [the] spouse").

74. One of the early leading cases was *Newman v. Dore*, 9 N.E.2d 966 (N.Y. 1937), in which the decedent married a woman more than forty years his junior and had, before his death, been engaged in multiple litigations with his younger wife.

exert much moral force on a spouse who is angry at a decedent who has made inadequate provision for his or her needs. Third, the legal structure makes it difficult for the drafter to provide the surviving spouse with an incentive to mediate. The survivor's best alternative to mediation is her statutorily-guaranteed share, and in the situations where the right to election is an issue, the decedent spouse will not want to entice the survivor to mediate by providing the survivor with more on condition that he or she agrees to mediate disputes (a device discussed in Part IV). On the other hand, while there is no binding effect of a mediation provision on a spouse electing against a will, traditional reasons to use mediation—custom-tailored outcomes, speed, privacy, and cost savings—might be persuasive, particularly in light of a testator's directive.[75]

The situation is similar, though not identical, in states that have enacted pre-marital will statutes.[76] These statutes entitle a surviving spouse to an intestate share—or something approximating the spouse's intestate share—in cases where the decedent spouse died leaving a will executed before the marriage. Premarital will statutes are designed to protect against inadvertent disinheritance,[77] not intentional disinheritance, but their effect is similar: They give the surviving spouse a statutory claim with priority superior to that of will beneficiaries, even though the will remains valid for all other purposes. Perhaps in the case of a decedent spouse who did not get around to executing a new will after marriage, the surviving spouse will be less resentful than the intentionally-excluded surviving spouse, so that the survivor might be more inclined to honor the decedent's expressed preferences for mediation, but as with the elective share, a mediation provision has no binding effect on a survivor asserting rights under a pre-marital will statute.

C. Will Contests

Although laymen might loosely refer to construction and elective share proceedings as will contests, the plaintiffs in those proceedings do not, as we

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75. For a description of a successful mediation in a scenario where a widow is considering electing against the will, see Roselyn L. Friedman & Erica E. Lord, *Using Facilitative Mediation in a Changing Estate Planning Practice*, EST. PLAN, Dec. 2005, at 15, 20–21.

76. *See, e.g.*, UNIF. PROBATE CODE § 2-301 (amended 2002) (defining the rights of a spouse under a premarital will).

77. *See* Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 253 (1991) (stating that premarital will statutes are designed to "protect the surviving spouse against unintentional disinheritance").

have seen, contest the validity of the will.[78] In a traditional will contest, one or more parties contend that the will does not reflect the considered wishes of the decedent, and is not entitled to probate.

The grounds for contesting a will fall into two broad categories. The first involves failure to comply with the statutory formalities for execution of a will.[79] For instance, contestants may assert that the testator or the witnesses did not sign the will or that the witnesses did not sign the will in the presence of the testator, as required by statute in some states.[80] As states move to reduce the formalities necessary to sustain the validity of a will, this category of contests may become less common.[81]

The second category of will contests focuses on the testator's state of mind at the time of will execution.[82] Contestants may contend that the testator lacked capacity to execute the will as a result of mental disease or defect.[83] Alternatively, contestants may contend that execution of the will was the product of undue influence exerted by one of the will beneficiaries or by some other person who stood to benefit, in some way, from execution of the will.[84] In an undue influence challenge, contestants assert, in effect, that the will reflects the wishes of the person exerting the influence, not the wishes of the testator.[85] Less frequently, contestants may contend that execution of the will

78. *See supra* Part III.A–B (discussing construction and elective share proceedings).

79. *See, e.g.*, Sean P. Milligan, *The Effect of Harmless Error in Executing a Will: Why Texas Should Adopt Section 2-503 of the Uniform Probate Court*, 36 ST. MARY'S L.J. 787, 791 (2005) (stating that, in Texas, "[f]ailure to comply with the statutory formalities for executing a valid will results in a total invalidation of the will").

80. *See, e.g.*, McCormick v. Jeffers, 637 S.E.2d 666, 668 (Ga. 2006) (deciding a contest on the grounds that witnesses failed to sign the will in the presence of the testator); Phillips v. Najar, 901 S.W.2d 561, 561 (Tex. App. 1995) (deciding a contest on the grounds of inadequate signature).

81. The UPC, for instance, dispenses with any requirement that the witnesses sign in the presence of the testator. UNIF. PROBATE CODE § 2-502 (amended 2002).

82. *See* Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 647 (1987) (concluding, after empirical study, that the vast majority of will contests involve issues of incapacity or undue influence).

83. *See, e.g.*, Barnes v. Marshall, 467 S.W.2d 70, 72–75 (Mo. 1971) (restating the evidence plaintiff provided to demonstrate that the testator lacked mental capacity to make a will).

84. *See, e.g.*, Haynes v. First Nat'l State Bank of N.J., 432 A.2d 890, 892 (N.J. 1981) (questioning whether the will is invalid on the grounds of undue influence because "the attorney, who advised the testatrix and prepared the testamentary instruments, was also the attorney for the principal beneficiary").

85. *See, e.g.*, *id.* at 897 ("Undue influence has been defined as mental, moral or physical exertion which has destroyed the free agency of a testator by preventing the testator from following the dictates of his own mind and will and accepting instead the domination and influence of another." (internal quotations omitted)).

was the product of fraud exerted on the testator by one who stands to benefit from the will.[86]

In both categories of contest, the contestant challenges the binding effect of the will. If the contest is successful, the will is not admitted to probate. As with elective share challenges, this presents a challenge for drafting a mediation clause because the contestants are challenging the validity of the will itself—the very document that includes the mediation clause. If the will falls, the mediation clause falls with it.[87] The proponents of the will might contend that the validity of the mediation clause (and the will itself) ought to be a question for the parties to address in mediation—relying on cases that have held that an arbitration clause is separable from rest of the document that contains it.[88] That argument is less likely to prevail in the context of will contests because contestants are typically arguing that the testator had no capacity to execute the will or that the will reflects the wishes of someone other than the testator; and, unlike the situation of an arbitration clause embedded in an otherwise unenforceable contract, the disputing parties themselves never agreed to the use of the process.[89] Hence, in the case of a contested will, courts are unlikely to

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86. *See, e.g., In re* Roblin's Estate, 311 P.2d 459, 462 (Or. 1957) (declining to find any "sinister implications in the relationship of [the draftsman of the will] and [the husband to the will's beneficiary]").

87. *Cf.* Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 644–45 (1994) ("If the contest is based on lack of testamentary capacity, a successful contest will void the entire will including the no-contest clause.").

88. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403–05 (1967) (holding that when a contract includes an arbitration clause, the Federal Arbitration Act requires arbitration of claims under the contract, unless the allegation of fraud is directed specifically to the arbitration provision in the contract); *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 448 (2006) (determining that the *Prima Paint* rule applies when a party alleges that the contract was void rather than voidable); Southland Corp. v. Keating, 465 U.S. 1, 12 (1984) (extending the *Prima Paint* rule to apply in state as well as federal courts).

89. In *Buckeye Check Cashing*, the Court distinguished cases in which the allegation is that one of the parties never signed the contract, or lacked capacity to contract. *Buckeye Check Cashing*, 546 U.S. at 444 n.1. The Court stated:

> The issue of the contract's validity is different from the issue of whether any agreement between the alleged obligor and obligee was ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, Chastain v. Robinson-Humphrey Co., 957 F.2d 851 (11th Cir. 1992), whether the signor lacked authority to commit the alleged principal, Sandvik AB v. Advent Int'l Corp., 220 F.3d 99 (3rd Cir. 2000); Sphere Drake Ins. Ltd. v. All American Ins. Co., 256 F.3d 587 (7th Cir. 2001), and whether the signor lacked the mental capacity to assent, Spahr v. Secco, 330 F.3d 1266 (10th Cir. 2003).

Id.

hold that the will's mediation clause is binding on contestants.[90] In terms of moral suasion, a contestant who believes that the will itself was the product of undue influence, or inadequate testamentary capacity, is unlikely to conclude that the mediation clause included in that will reflected the wishes of the testator. Nonetheless, a contestant might conclude that it is easier to go through the motions of good faith compliance with a mediation provision than risk the annoyance of a tribunal with a recalcitrant party. And a court might be inclined to suggest or order mediation given the testator's directive (albeit contested), particularly where a probate mediation program is already in place.

As we have seen, a surviving spouse who asserts an elective share right takes little risk: He or she is entitled to the statutory share in any event; the only issue is computation of that share. By contrast, contestants of a will enjoy no statutory entitlement. As a result, even if the testator cannot compel the potential contestant to mediate, the testator can provide incentives for mediation. No contest clauses, the subject of Part IV, demonstrate how drafters have used incentives to influence potential contestants. Similar techniques, as we shall see, hold out promise for testators and drafters seeking to induce contestants to mediate will contest disputes.

D. Trust Documents

In recent decades, the inter vivos trust has made significant inroads into the hegemony of the will as a vehicle for intergenerational transmission of wealth.[91] Many lawyers have counseled their clients to create a revocable lifetime trust, principally to avoid probate costs and delays upon death. When a decedent transfers property to a revocable trust during his or her lifetime, that property does not pass through decedent's estate at death; instead, decedent's successor trustee will continue to administer the property without the need for judicial supervision.[92]

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90. Professor Gary Spitko, writing about arbitration clauses in wills before the *Buckeye* case was decided, relied on *Prima Paint* in arguing that the separability doctrine would permit enforcement of an arbitration clause even when the underlying will itself was subject to contest. E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RES. L. REV. 275, 303–07 (1999). However, Professor Spitko concedes that the Federal Arbitration Act might not be applicable to wills unless those wills have some multistate connection. *Id.* at 305.

91. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1108–13 (1984) (describing the declining use of the probate system and the increase in using other methods to transfer wealth upon death including inter vivos trusts).

92. *See* JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS 538 (3d ed. 2007) (stating that at the

Typically, a lawyer who advises a client to create a revocable trust will also advise the client to execute a simple "pourover will" that simply "pours over" any assets held by the client at the time of his death into the existing inter vivos trust.[93] At any point, if the client decides to change his or her estate plan, the client need only amend the trust instrument; the will can remain intact.

When a decedent uses the inter vivos trust as the basic estate planning document, a mediation provision in a will is of limited value. The provision would have no binding effect on beneficiaries of the inter vivos trust (except with respect to the limited assets that pour over into the trust), and is unlikely to carry much moral force with persons who believe that the will, or the trust instrument, does not reflect the decedent's intent.

Of course, a lawyer could advise that the client include mediation provisions in the trust agreement.[94] The issues with such provisions track those with comparable provisions in a will. Thus, so long as the issues are construction issues, the clause is likely to be effective. By contrast, if the issue involves a spouse asserting elective share rights, the mediation provision is unlikely to be effective. A mediation clause may not be binding on a party who seeks to challenge the validity of the trust instrument itself, but the drafter could structure the agreement to provide incentives to mediate disputes about the instrument's validity, as explained in Part IV.

IV. No Contest Clauses: The Incentive Model

A. Origins and Operation

Although mediation is relatively new to estate disputes, the desire of testators to avoid dissipation of assets and tarnishing of family reputation is not. The no contest clause developed as a response to this desire[95] and serves both

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testator's death "the successor trustee simply distributes the trust principal to the remainder beneficiaries. There is no need to involve a court at all").

93. *See, e.g.*, UNIF. PROBATE CODE § 2-511 (amended 2002) (authorizing testamentary additions to trusts); Clymer v. Mayo, 473 N.E.2d 1084, 1089–90 (Mass. 1985) (illustrating the validity of pourover trusts).

94. *Cf.* Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. REV. 225, 228–29 (noting the importance of including no contest clauses both in wills and in trust instruments).

95. *See* Begleiter, *supra* note 87, at 636 ("Many courts have mentioned, as reason for upholding no-contest clauses, that testators employ such clauses to avoid will contests. Will contests generate family animosity and bring family quarrels and testators' private lives to public view.").

as a model for—and as a useful alternative to—a mediation clause in a will or trust instrument.

The problem for a testator who anticipates—or fears—discord over the provisions of her will is that the testator cannot, by including provisions in the will, bind those parties who contend that the will is altogether invalid. To avoid this problem, will drafters resorted instead to financial disincentives to will contests. Typically, a testator's will would make significant bequests to those persons who might otherwise contest—but bequests considerably smaller than the potential contestants would receive if a contest were successful.[96] The will would then provide:

> If any beneficiary of this will shall contest the validity of, or object to the will, or attempt to alter or change any of its provisions, such person shall be deprived of all beneficial interest under the will, and the share of such person shall become part of the residue, and such person shall be excluded from taking any part of the residue, which shall be divided among the other persons entitled to take the residue.

Consider, for instance, a testator with an estate of $2,000,000, no surviving spouse, and four children. If testator wanted to exclude one of the children, the testator could leave the disfavored child $100,000 in the will and include the quoted provision. If the disfavored child chooses to contest, and the contest is unsuccessful, the child loses the $100,000 bequest. That financial disincentive will not, of course, eliminate all incentives to contest. If the disfavored child's contest were successful, the disfavored child would take $500,000 from the estate because success in the contest would invalidate the no contest clause and result in equal distribution by intestate succession. But the no contest clause would significantly reduce the incentive to contest, particularly in those cases where the contest rests on a weak foundation.

Although a no contest clause provides a disincentive to contest a will, it does not provide ironclad protection against will litigation. First, no contest clauses have spawned considerable litigation over their own scope. Courts have held, for instance, that a no contest clause does not bar a will beneficiary from taking a bequest after the beneficiary has brought a will construction proceeding.[97] Similarly, courts have held that challenges to the executor's

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96. *See generally id.*; Beyer et al., *supra* note 94.

97. *See In re* Estate of Kruse, 86 Cal. Rptr. 491, 493–94 (Ct. App. 1970) (noting that the beneficiary had a valid interest to account for the proceeds of the will to ensure that the will fulfills the testator's intent, and "it would be anomalous . . . to hold that [the beneficiary] must suffer a penalty for exercising a valid and legal right"). For criticism of this approach, see Begleiter, *supra* note 87, at 673 ("With all due respect to the numerous decisions, the beneficiaries would not be bringing these 'construction' actions unless they would benefit from

qualifications,[98] and challenges to the estate's claim to property,[99] do not fall within the scope of standard no contest clauses.[100] Of course, a no contest clause could be drafted more broadly to encompass these claims, but many testators and their lawyers would be uncomfortable with a clause so broad that it forecloses litigation over genuine and unintended ambiguities in the will.[101] Moreover, even an extremely broad no contest clause cannot preclude a spouse from asserting elective share rights because state statutes guarantee the spouse the elective share, regardless of the decedent spouse's expressed intention to cut out any person who contests the will.[102]

Second, some states have restricted enforcement of no contest clauses by making them unenforceable when a contestant has "probable cause" for instituting a contest.[103] The Uniform Probate Code has adopted this approach, which significantly reduces the disincentive to contest.[104] So long as the contestant has a ground for contest that might be treated as probable cause, the contestant might not be so quick to eschew a contest, especially when the possible gains from the contest are large.[105]

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the construction they urge . . . . These are contests couched in the language of construction proceedings.").

98. *See In re* Estate of Hoffman, 119 Cal. Rptr. 2d 248, 252–53 (Ct. App. 2002) (holding that the issue of whether a challenge to an executor's qualification violates a no contest clause turns on "whether the proposed petition is statutorily exempt").

99. *See* Jacobs-Zorne v. Superior Court, 54 Cal. Rptr. 2d 385, 393–95 (Ct. App. 1996) (addressing how a beneficiary's assertion of claims outside of the will, as in whether a community property interest exists, will not trigger a no contest clause).

100. *See generally* Begleiter, *supra* note 87, at 660–75 (providing an overview of how different courts have determined which claims trigger a no contest clause).

101. *See id.* at 676 (providing an example of a broad no contest clause).

102. Even if the surviving spouse is unsuccessful in asserting elective share rights (perhaps because the court concludes that the surviving spouse was not a surviving spouse), a no contest clause may not disqualify the spouse from sharing under the will. *See* Williams v. Williams, 868 S.W.2d 616, 621 (Tenn. Ct. App. 1992) (construing a no contest clause to exclude assertion of elective share rights, without expressly deciding whether a clause that explicitly applies to assertion of elective share rights would bar a spouse from taking under will).

103. *See* Spitko, *supra* note 90, at 297–98 ("[I]n a majority of states, courts will not enforce a no-contest clause if the contestant brought her challenge in good faith and with probable cause.").

104. *See* UNIF. PROBATE CODE § 3-905 (amended 2002) ("A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.").

105. For criticism of the UPC approach, see Begleiter, *supra* note 87, at 640–48 (criticizing approaches to no contest clauses that take into account whether a contestant has probable cause).

B. Mediation Clauses As an Alternative to No Contest Clauses

1. Objectives: Similarities and Differences

Let us assume, for now, that a testator could draft estate planning documents with effective mediation provisions. How well would those provisions accomplish the objectives of testators who might otherwise consider including no contest clauses in their estate planning documents? A testator considering a no contest clause typically might have one (or more) of several objectives. Two of those objectives—preservation of estate assets against the threat of dissipation through litigation costs and avoiding a public airing of the family's "dirty laundry"[106]—would also be advanced by inclusion of a mediation clause.

Consider first the litigation avoidance objective. When a contestant challenges the validity of the will, the litigation expenses associated with defending the will are borne by the estate and, ultimately, by the will's beneficiaries.[107] To the extent a no contest clause deters litigation, the clause increases the funds available for distribution to those beneficiaries. An effective mediation clause might achieve the same objective in a different way. The disputing parties would seek a negotiated resolution more often and without the risks created by a no contest clause. Such resolution would typically be less time-consuming and costly than litigation, but would not insure an out-of-court resolution.[108] Hence, similar to the no contest provision, litigation is minimized and funds available for distribution to beneficiaries are saved—at least to the extent that mediation is successful in resolving the matter.[109]

Next, consider the privacy objective. When a contestant asserts mental incapacity as a ground for contest, litigation typically focuses on the mental health or debilitated physical condition of the testator at the time the will was

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106. *See* Begleiter, *supra* note 87, at 634–39 (identifying prevention of litigation and airing of dirty laundry as objectives served by no contest clauses).

107. *See id.* at 635–36 ("Will contests, with their attendant costs and attorneys' fees, can significantly reduce the bequests beneficiaries actually receive."). John Langbein has noted that the American rule, which does not require the loser to pay the winning party's litigation costs, encourages will contests because the contestants know that the estate will bear its own litigation costs. John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2043 (1994).

108. *See supra* note 5 and accompanying text (describing the cost advantages of mediation).

109. Madoff, *supra* note 7, at 700 (noting that the earlier the mediation is conducted, the more resources the mediation will potentially save).

executed.[110] Undue influence contests focus on alleged abuse of personal relationships with the testator by close family members, sex partners, friends, and advisors.[111] A testator whose dispositions depart from social norms may fear a contest because the trial will expose his or her personal life, and that of his family, to public humiliation or ridicule. To the extent that a no contest clause deters contests, it reduces the prospect that the family's dirty laundry will be aired in public.[112] Once again, an effective mediation clause would provide a different route to the same solution. Mediation sessions, unlike civil trials, are private and confidential,[113] and need not focus on the unseemly details of testator's life, but rather on the current concerns and feelings of the disputing parties. Although a mediation clause would not deter parties from seeking redress, the process of seeking redress would not present the same intrusion on testator's privacy that would be inevitable if a contest proceeded to a public forum like a trial.

By contrast, mediation likely would not be helpful in achieving a third objective associated with a no contest clause: preservation of testator's preferred distributional scheme.[114] When testators choose distribution schemes that differ from social norms, those testators typically have strongly-held views about why particular close relatives should be disinherited. Those views might be highly personal (my son has been inattentive to my needs or married outside

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110. *See* Barnes v. Marshall, 467 S.W.2d 70, 77–78 (Mo. 1971) (describing a great amount of witnesses that were called to testify about the testator's state of mind at the time the will was executed in a contest based on mental incapacity).

111. *See* Haynes v. First Nat'l State Bank, 432 A.2d 890, 897–902 (N.J. 1981) (focusing on the potential for undue influence by the testator's relatives and attorney); *In re* Estate of Gerard, 911 P.2d 266, 270–72 (Okla. 1995) (analyzing the personal relationship of the testator to his wife and to his executor in a contest based on undue influence). For an account of one of the more notorious will contests in recent decades—the contest over the will of Seward Johnson, heir to the Johnson & Johnson fortune—see generally DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993).

112. *See* Begleiter, *supra* note 87, at 636–39 (noting a testator may insert a no contest clause into his will in order to keep his private life private).

113. *See* Andrew Stimmel, Note, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 207–09 (2002) (discussing that mediation, unlike litigation, is confidential and thus avoids the airing of personal matters).

114. *See id.* at 217 (stating that mediation does not focus on the decedent). Stimmel states:

> By its very nature, mediation focuses almost exclusively on the needs and interests of the survivors and not on the preferences of the decedent. A testator, writing his or her will, precisely planning the exact distribution of the assets accumulated over a lifetime, cannot help but feel uneasy when looking forward to the possible mediation process in which his or her carefully laid plans are summarily discarded.

Id.

of my religion) or they might be more philosophical (inherited wealth generates sloth). In either event, a no contest clause increases the likelihood that testator's preferences will be honored: The risk of complete disinheritance will deter a percentage of potential contestants from challenging those preferences.[115] Mediation, by contrast, has the opposite effect. Even when a will does not include a no contest clause, the expense and delay associated with litigation will deter some potential contestants from contesting. By reducing the cost associated with dispute resolution, mediation might encourage parties to seek redress for perceived slights. Moreover, once mediation begins, the process is designed to generate a solution that represents the best resolution for the parties to the dispute; the dead testator is not one of those parties, and is not represented in the mediation (except insofar as the parties to mediation invoke the testator's values and wishes to support their view of an acceptable outcome).[116] A mediation clause, then, would appear to encourage departure from testator's preferred distribution scheme—certainly when compared with a no contest clause, but perhaps also when compared with a will that makes no provision for dispute resolution.

Of course, a mediation provision might be well designed to achieve a separate objective important to many testators: preservation of family harmony. By contrast, a no contest clause is likely to exacerbate resentment between those family members happy with dispositions in the will and those family members who feel mistreated. If the quality of family relations is important to a testator, then a mediation clause is the mechanism of choice for several reasons: Mediation is the only tool designed to improve understanding, allow family members to voice feelings and perspectives in a relatively safe environment, encourage the crafting of a new family configuration in the testator's absence, and address the interests that the parties articulate with respect to the will.[117] In the process of resolving the issues presented by the will contest, family members are given the chance to develop a template for resolution of other issues if and when they arise.[118] Consequently, mediation may well enable a

115. *See* Begleiter, *supra* note 87, at 643 (discussing how a no contest clause does not prevent a potential contestant from objecting to the will, but merely increases the risk that he will receive nothing); Beyer et al., *supra* note 94, at 267 (noting that a no contest clause encourages contestants to investigate potential claims before contesting because of the additional risk of disinheritance).

116. *See* Stimmel, *supra* note 113, at 213 ("[T]he mediation process may in many ways ignore the intent of the testator by altering the distribution that he or she planned.").

117. *See id.* at 210 (emphasizing how mediation is better for maintaining, and even improving, family relations).

118. *See id.* ("[P]articipating in mediation may give the parties a better understanding of one another and the concerns each side has, thereby strengthening avenues of communication

family to create a more collaborative, less litigious relationship going forward.[119] The fulfillment of this objective, however, dictates that some care be used in selecting the type of mediation and the particular mediator because an evaluative mediator who essentially dictates an outcome, keeps the parties separate from one another during the course of the mediation, and addresses only the narrow range of issues cognizable in litigation is far less likely to promote any family harmony objective.

2. Legal Obstacles: Similarities and Differences

Many of the legal obstacles that limit the effectiveness of no contest clauses also operate as a constraint on mediation clauses, but mediation clauses have several advantages that may make them more useful to many testators.

First, consider the similarities. Mediation clauses, like no contest clauses, cannot be effective to preclude a spouse or family members from asserting, in court, statutory rights—most particularly, elective share rights. Because the surviving spouse (or, in the case of pretermitted child statutes, the surviving child) makes no claim under the will, but instead asserts financial rights independent of the will, the will itself does not bind the spouse. Moreover, since the spouse's claim is a claim for the statutory minimum—which is an amount more than testator provided for the spouse in the will—neither a mediation provision nor a no contest provision provides incentives for the spouse to abstain from asserting, in court, his or her statutory rights.[120]

With respect to will contests, neither mediation clauses nor no contest clauses can preclude potential contestants from contesting a will. Because a contest challenges the binding force of the will,[121] the contestant in effect challenges the validity of the no contest or mediation clause, and proponents of the will would be bootstrapping if they invoked the disputed clause as a ground for dismissing (or delaying until after the mediation attempt, in the case of the mediation clause) the will contest. Moreover, neither the mediation clause nor the no contest clause is likely to exert significant moral force on persons who

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and perhaps providing some framework for working together in the future.").

119. *See id.* at 209 ("A . . . beneficial characteristic of mediation is that it can repair, maintain, or improve ongoing relationships." (internal citations omitted)); *see also* Tricia S. Jones & Andrea Booker, *Agreement, Maintenance, Satisfaction and Relitigation in Mediated and Non-Mediated Custody Cases: A Research Note*, 32 J. DIVORCE & REMARRIAGE 17, 25–27 (1999) (indicating cases have lower rates of recidivism and relitigation after mediation).

120. *See supra* Part III.B (discussing the protection to spouses under the elective share statute).

121. *See supra* Part III.C (providing an explanation of grounds for contesting a will).

believe that the will as a whole does not reflect the testator's intent. As a result, the drafter seeking to use either a mediation clause or a no contest clause must rely on incentives to make those provisions effective.

Mediation clauses, however, are likely to enjoy two advantages that no contest clauses do not share. First, courts and legislatures are often suspicious of no contest clauses because they exert significant pressure on close family members not to assert any legal claims.[122] Courts sometimes refer to them as "*in terrorem*" clauses, and some states deny them effect in cases where the contestant had "probable cause" for contest, even if the contest ultimately proves unsuccessful.[123] By contrast, a mediation clause acts to channel redress into a different forum rather than to preclude redress altogether.[124] As a result, one might expect less doctrinal hostility. Moreover, statutes making no contest clauses unenforceable when the contesting party demonstrates probable cause for the challenge do not, by their terms, apply to mediation provisions,[125] which, if properly drafted, operate only to delay recourse to the court rather than to prevent legal recourse altogether.

A second advantage to mediation clauses is their ready adaptability to will construction disputes.[126] A testator's lawyer could theoretically draft a no contest clause that would be triggered by commencement of a will construction proceeding. The no contest clause, however, is an awkward vehicle for avoiding litigation in will construction cases. Few testators would want to include a will provision that prevented beneficiaries from seeking to resolve genuine ambiguities in the will or other elements of an estate plan. As a result, typical no contest clauses do not apply to construction proceedings.[127] Mediation clauses, by contrast, are ideally suited for construction proceedings. A testator concerned about litigation costs could easily direct that any disputes

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122. For criticism of this attitude toward no contest clauses, see Begleiter, *supra* note 87, at 644–47.

123. *See In re* Estate of Shumway, 9 P.3d 1062, 1065–69 (Ariz. 2000) (applying probable cause statute to deny effect to "*in terrorem*" clause).

124. *See* Spitko, *supra* note 90, at 298 (emphasizing that arbitration would still be available to legatees who wish to contest a will).

125. *See* UNIF. PROBATE CODE § 3-905 (amended 2002) (providing that "[a] provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings"). Because a mediation clause does not prevent or penalize institution of proceedings, the clause would appear to fall outside the statute's scope.

126. *Cf.* Ronald Z. Domsky, *In Terrorem Clauses: More Bark Than Bite?*, 25 LOYOLA U. CHI. L.J. 493, 498 (1994) (noting that construction proceedings are not treated as will contests, and do not therefore trigger no contest clauses).

127. *See In re* Estate of Kruse, 86 Cal. Rptr. 491, 493–94 (Ct. App. 1970) (finding that an action to construe a will does not trigger a no contest clause).

over construction of the will be submitted to mediation. The testator could, if she chose, make that provision binding on the parties (all of whom concede the validity of the will, and all of whom take pursuant to the will) or could simply express a preference for mediation and leave it to the parties to honor that preference. To make the mandate (or statement of preference) for mediation both understandable and persuasive, the testator might consider drafting—in their own words—a statement of reasons for using mediation.[128]

V. Counseling and Drafting Issues

If a testator concludes that mediation of disputes over his or her estate is an attractive alternative, the testator and the lawyer must confront a number of other counseling and drafting issues. Principal among them are (1) determining the framework for the mediation; (2) choosing the mediators; and (3) settling on an enforcement mechanism.

A. What Kind of Mediation?

As described in Part I, several different types of mediation exist.[129] If the testator's primary concerns are settlement before trial and hence avoidance of litigation costs and maintenance of confidentiality, *evaluative* mediation[130] might present an attractive alternative. The mediator's goal would be to attain a settlement. The mediator might act like a judge conducting a settlement conference, making assessments and suggestions (often based on the relative

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128. Daniel Bent provides an example of a personal statement a testator or benefactor might use in an instrument directing disputes to mediation:

> In the unlikely event that there should be any disagreement or dispute . . . I would be deeply disappointed if the estate that I have left for the benefit of my family and/or other beneficiaries would result in any negative impact on the relationships among them. Therefore, it is my fervent wish and directive that any such disagreement or dispute be resolved with the utmost civility, decency and consideration, and that all parties resolve it by mediation in good faith through the use of a neutral third-party. It would be to my profound and eternal sorrow that what I have provided in the interest of benefiting my loved ones would lead to any injury to their relationship.

Daniel Bent, *My Bequest to My Heirs: Years of Contentious, Family Splitting Litigation*, HAWAII B.J., Feb. 2004, at 29.

129. *See supra* notes 16–17 and accompanying text (identifying various mediation schools of thought and describing different mediation styles).

130. *See* Riskin, *Grid for the Perplexed*, *supra* note 17, at 24 (describing evaluative mediation).

strength of the parties' legal position) in order to resolve the conflict.[131] The mediator would serve as a quasi-arbitrator without decisional power but with the persuasive power of his neutral role. The development of understanding among the parties, or an agreement crafted to meeting the parties' interests, would be of secondary importance.[132] Evaluative mediation might be attractive to a testator who knows that the parties to any dispute are unlikely to have any significant relationship with one another after the testator's death. For instance, this might be the case when the disputing parties are the testator's children and a spouse who married the testator late in life and failed to develop a relationship with the testator's descendants, or where some of the parties are not relatives at all, but rather friends, charities, or persons with whom the testator has had what once was called a "meretricious relationship." In such situations, the opinions of, for example, a retired judge serving as mediator could be persuasive in ending the dispute. If the objective is settlement only, it will be less important whether the mediator uses a "caucus-only" model (where parties need not confront one another directly),[133] whether the mediator focuses primarily or solely on the legally cognizable issues,[134] or whether the mediator primarily directs herself to the attorneys (rather than the parties).[135]

If, however, testator's goal is not simply agreement, but also fostering a better understanding and relationship among the parties, the testator might prefer *classical* or *facilitative* mediation.[136] Facilitative mediators seek an agreement that is optimally responsive to the articulated interests of the parties.[137] Consequently, development of an understanding of interests is a necessary foundation to agreement.[138] Facilitative mediation will be particularly attractive to a testator who expects and wants his family to have a

131. *See id.* at 26–28 (explaining that an evaluative mediator takes into account many of the same documents and legal positions that a judge would take into account to assess the merits of each side).

132. *See id.* (noting that the evaluative-narrow approach to mediation focuses more on legal positions than on party interests).

133. *See supra* note 23 and accompanying text (describing the use of the caucus in mediation).

134. *Supra* notes 26–27 and accompanying text.

135. *See supra* note 24 and accompanying text (discussing the increasing role of attorneys in mediation).

136. *See supra* note 18 and accompanying text (explaining facilitative mediation).

137. *See* Riskin, *Grid for the Perplexed*, *supra* note 17, at 28–29, 32–34 (describing the importance of the parties' interests in facilitative mediation).

138. *See id.* ("[The] principal strategy is to help the participants define the subject matter of the mediation in terms of underlying interests and to help them develop and choose their own solutions that respond to such interests.").

continuing relationship with one another, even if some members are less than happy about the dispositive provisions of his will. Where facilitative mediation is used, and the testator wants to promote family harmony, to the extent that is possible, the following considerations should inform crafting the process:

- *Participants in mediation.* Critical to the success of mediation is having those participants present who best understand the situation and whose agreement is necessary for a durable outcome.[139] This may include persons, like spouses, who are not directly beneficiaries, but whose support and opinions are critical for mediation to succeed.[140] Additionally, all qualified beneficiaries to the will must be present or represented by someone with authority to agree for them, or else, the agreement reached may not have binding effect.[141] A will drafting attorney might direct that the participants in mediation include both beneficiaries and other interested parties—the group to be determined in consultation with the mediator.

- *Role of parties and attorneys.*[142] In some mediations, lawyers represent the parties, their clients, in the primary spokesperson position. In others, lawyers are excluded altogether or permitted to participate only in subsidiary roles. Arguably, if the relationship among parties is a central goal, the parties themselves should have the primary role in the mediation, with attorneys in a more supportive and protective posture.[143] In some cases, attorneys may excuse themselves

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139. *See* Radford, *supra* note 46, at 624–25 (noting the importance of having affected parties present in mediation).

140. *See id.* ("The mediator may discover early in the process that a settlement is not possible without the presence of other nonparties.").

141. *See id.* at 629 ("One factor that may affect the court's willingness to uphold a mediation agreement is whether the parties who had authority to reach the agreement participated directly or were represented by someone who had authority to agree for them."); *see also* Freeman v. Covington, 637 S.E.2d 815, 817–18 (Ga. Ct. App. 2006) (setting aside a settlement agreement and probate court's order due to the failure to have all parties participate in the settlement and to appoint an independent guardian *ad litem* for a disabled party).

142. *See supra* note 24 and accompanying text (discussing the role of attorneys in mediation).

143. *See* Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, PROB. & PROP., May–June 1995, at 48, 52 (discussing the lawyer's effectiveness in dealing with family emotions). Campisi states:

from mediation sessions—or portions of the mediation—all together, if parties feel that a more collaborative atmosphere would result from the attorney's absence. In such a case, the attorneys could come in at the agreement drafting stage. A will drafting attorney might specify that the parties must be present and actively participate in the mediation.

- *Use of caucus.*[144] Some mediators use a "never caucus" model, eschewing ex parte discussions altogether.[145] Other mediators use an "always caucus" model where they conduct the entire mediation in individual sessions, shuttling back and forth between the parties.[146] Both of these extremes may miss important opportunities for promotion of understanding and responsive agreements. In the highly volatile arena of family disputes, the caucus tool may be particularly useful to allow for "cooling off" and for the expression of interests and concerns about power imbalances that might not surface in a joint session.[147] Also, the caucus provides a setting where mediators can "reality test" with recalcitrant parties about the risks they face and the costs of intransigence.[148] On the other hand, "always-caucus" mediators sometimes lose opportunities to bridge misunderstandings between family

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> The use of lawyers as mouthpieces is generally ineffective to diffuse emotions triggered by a death or a crisis in a family business. Many probate disputes involve a history of the failure of family members to express anger or resentments toward the deceased or other relatives. Mediation provides a good forum for expressing those feelings. Sometimes that catharsis is all that is necessary.

Id.

144. *See supra* note 23 and accompanying text (explaining the use of a caucus in mediation).

145. MENKEL-MEADOW ET AL., *supra* note 16, at 247 (discussing the "never" caucus approach where the mediator is a medium for the free flow of information between the parties); *see also* Friedman & Himmelstein, *supra* note 16, at 120 (describing a "non-caucus" approach to mediation that focuses on the parties understanding each other and each side's perspective).

146. *See* MENKEL-MEADOW ET AL., *supra* note 16, at 247 (describing an "always" caucus mediation approach which emphasizes overcoming impasses between parties via the shuttle diplomacy of the mediator); *see also* Friedman & Himmelstein, *supra* note 16, at 120.

147. *See* MENKEL-MEADOW ET AL., *supra* note 16, at 245 (2006) ("A 'selective caucus' mediator might suggest a caucus when, for example, communication becomes so heated or the parties so volatile that constructive progress is threatened [or] an apparent power imbalance suggests that individual explorations of the underlying dynamic is necessary . . . .").

148. *Id.*

members. Joint problem solving may be particularly useful to future family life. Direct, face-to-face communication, where not all communication will be filtered through a third party, can challenge parties to listen to each other and address new issues. A model where a joint session is the presumptive choice absent a specific reason to use a caucus might be preferred and should at least be considered. A will drafting attorney might specify that the mediation be conducted primarily using joint sessions, but with the caucus available given a particular call for its use.

- *Scope of issues.* In some facilitative mediations—similar to their evaluative counterparts—the issues are limited to those raised by the legal dispute that provoked the mediation,[149] in contrast to mediations where all issues raised by the parties are presumptively fair game for negotiation. Issues that are likely to be raised in negotiations that are beyond the "legal" issues include, for example: communication between family members, conduct at family gatherings and use of family property, the preservation and distribution of family memorabilia, and the support for financial needs—health and educational—of needy family members. A broader scope of issues can: allow for more important needs to be addressed that can result in continued conflict if they are not; allow for beneficial trade-offs; and ultimately enhance understanding by enabling parties to conceptualize what the dispute is "really" about to the various parties.[150] A will drafting attorney might specify that the mediation address all issues raised by the disputing parties even beyond those issues cognizable in court.

- *Timing of mediation.* Finally, while cost savings and prevention of adversarial posturing favors early mediation, sometimes the process of grieving makes issues too raw, and mediation should be postponed—or spread out in sessions

149. One quadrant of the Riskin Grid is facilitative narrow. Riskin, *Grid for the Perplexed*, *supra* note 17, at 28–29. In this mediator orientation, a mediator might focus on legal issues only. *Id.*

150. *See id.* at 32–34 (providing an explanation of a facilitative broad approach that takes into account the underlying interests and reasons for the dispute).

> that allow for recuperation.[151] Certainly, if conservation of estate assets is a concern for a testator, suggesting that mediation be attempted as soon as a dispute arises may save costs associated with discovery and litigation. A will drafting attorney might encourage mediation as soon as a dispute arises absent an agreement to postpone in order to allow for necessary grieving.

In drafting a mediation clause, depending on the priorities among the testator's goals, the testator should at least consider specifying a particular form of mediation or can suggest one form as a "default rule," subject to modification by unanimous consent of the parties to the dispute. In either case, by flagging these issues, the will drafter will encourage a more thoughtful choice of mediation process.

B. Who Are the Mediators?

In considering how the testator might direct the choice of mediator, several considerations come into play. The first is discussed in Part V.A above—that is, what model of mediation is wanted and what practice does a particular mediator follow. Not all mediators can switch models of mediation; on the contrary, most mediators are likely to have a preferred or default process in which they operate most comfortably.

Second, the drafter should consider mediation training, experience in trust and estate mediation, and other expertise. An experienced trusts and estates attorney, despite extensive expertise in his subject matter, may be unqualified to convene a highly emotional group of people who have no inclination to re-direct their hostilities towards problem solving.[152] A trained mediator is

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151. *See* Radford, *supra* note 46, at 637 (emphasizing that mediation timing may need to be adjusted based on the emotional context of the dispute); Campisi, *supra* note 143, at 52 ("The grieving process often dictates when settlement is possible."). Campisi states:

> Grieving is a slow process with a number of distinct stages, including denial, anger and ultimately acceptance of the loss. Forcing parties into mediation too early is often a waste of time. They might not be psychologically able to deal with financial or other issues before reaching a point of acceptance in the grieving process.

Id.

152. Many attorneys feel that expertise in probate matters is important, while others feel that attorney-mediators with probate expertise may be too focused on the legal merits. Madoff, *supra* note 7, at 710. Some court panels have nonlawyers as well as lawyer mediators with no requirement for experience with substantive probate law; others require both bar membership and expertise in probate matters. *Id.* at 699, 702, 706, 709, 712, 715, 718.

comfortable with that challenge. In jurisdictions where courts have developed panels of qualified mediators for probate court, the will could provide for selection of a mediator from the court's panel or by unanimous consent of all parties. Presumptively, the courts will have engaged in a screening process to qualify their neutrals.[153] Where a testator is satisfied that a particular mediator "fits the bill" in terms of both model of mediation and training, a direction or suggestion of a particular person could be helpful, again with an opt-out to another mediator given unanimous party consent.

Third, the drafter should consider whether mediation should be "ad hoc" or "administered." That is, assuming that a particular mediator or panel of mediators is not readily appealing, it may be that the will should refer to a program that offers mediation, qualifies its mediators, and administers the sessions—often streamlining issues of scheduling and having published rules and procedures. The American Arbitration Association[154] and JAMS[155] provide examples of organizations that host a panel of mediators, provide rules of procedure, and scheduling and convening services. These organizations should also be able to "fit the mediator to the fuss"—that is, offer a mediator who fits criteria laid out by the parties.

Fourth, the drafter should consider whether to direct or recommend a co-mediation team. Where, for example, family harmony is the priority consideration, a team consisting of a mediator with expertise in psychology and

153. Qualifications to serve on probate court mediation panels vary. *See, e.g.*, NCSC, *supra* note 8 (indicating varying state requirements). For instance, Alabama requires a minimum of twenty hours of training in an approved training course, and that the mediator be either a licensed attorney with four years' experience in the practice of law or have mediated at least ten cases in the preceding two years; Arkansas requires a minimum of forty hours of training in an approved training course, and either an M.A. or B.A. plus graduate certificate in conflict resolution or mediation or J.D. degree, and participation in two mediations; New Hampshire requires over forty hours of training. *Id.*; *see also* Madoff, *supra* note 7, at 702, 706, 708–09, 712 (indicating varying state requirements). For instance, Texas requires a minimum of forty hours of classroom training; Florida requires forty hours of training, plus observation of two mediations followed by conducting two mediation under supervision, and membership in the Florida Bar for five years; Georgia requires twenty hours of class training, plus observation or co-mediation of five mediations, and four to six hours of specialized probate-specific training; Los Angeles County, California requires thirty hours of training or certification of substantive experience and expertise in probate matters together with agreement to obtain training within one year and completion of ten years of legal practice. *Id.*

154. The American Arbitration Association (AAA) is a nonprofit provider of dispute resolution services. American Arbitration Association, http://www.adr.org/ (last visited Aug. 28, 2007). The AAA maintains a listing of will and trust neutrals and administers cases. *Id.*

155. JAMS (formerly known as Judicial Arbitration and Mediation Services) is a private provider of dispute resolution services that maintains a roster of neutrals and administers arbitration, mediation and other ADR procedures. JAMS, http://www.jamsadr.com/ (last visited Aug. 28, 2007).

another mediator with expertise in trusts and estates matters might be optimal. Sometimes it is helpful for the mediation team to mirror key aspects of the parties. For example, in marital mediation co-mediation teams, often one mediator is female and the other male. One can imagine a scenario where it might be effective to have a younger mediator work with a more mature partner to reflect age differentials among the parties. Or, in cases where unusual complications in terms of tax ramifications will be in play, having one mediator be an expert in process considerations and the other, in tax matters, might be helpful.

The important point here is that while one mediator or co-mediation team might fail, another mediator or team might succeed; thoughtful matching is critical. This is in stark contrast to litigation or arbitration where a decision or award will result regardless of the neutral chosen.

C. Enforcement Mechanisms

1. Precatory and Mandatory Language

A testator can, of course, use purely precatory language to exhort estate claimants to resolve disputes through mediation: "I request, but do not require, that persons asserting a claim to my estate agree to make a good faith effort to resolve any disputes about distribution of my estate through mediation, in accordance with the processes described below." This sort of precatory language might be effective with respect to will construction proceedings, where the disputing beneficiaries all acknowledge the validity of the will as a binding expression of a testator's final intent. But when some set of claimants challenge the validity of the will, precatory language is probably less valuable; those claimants are unlikely to defer to expressed preferences in a document that they contend does not reflect testator's final intent. Even with construction proceedings, the primary advantage of precatory language is the sense it gives to beneficiaries that, in the final analysis, the choice to mediate is theirs, and not the testator's. But that advantage is of limited value because for all beneficiaries, whether or not the language is precatory or mandatory, and whether or not the beneficiary is challenging the existence of a valid will, the mediation clause's existence will allow for a face-saving mechanism; that is, "I am going to mediation to honor the wishes of [the testator] and not because I have a weak case." On the other hand, precatory language has a clear disadvantage: It permits a single beneficiary to block mediation by refusing to mediate and bringing a proceeding for construction of the will.

Mandatory language would remove from a single recalcitrant beneficiary the power to block mediation—but only with respect to will construction issues. Mandatory language, as we have seen, is not likely to bind parties who challenge the validity of the instrument that includes the mandatory language.[156] But including mandatory language requiring mediation will not cause any harm, and may, for some testators, be an attractive first step in channeling estate disputes away from judicial resolution.

Of course, a testator can mandate mediation, but cannot guarantee that the mediation succeeds in resolving disputes among the parties. Mediation by its nature is not a coercive process; the mediator cannot impose a solution on unwilling parties. Mediation might fail for either of two reasons: first, one or more of the parties might act in bad faith, refusing to cooperate with the mediation process, or second, despite good faith behavior by all parties, the mediator (or mediators) is unable to generate a meeting of the minds among those parties. In drafting a mediation clause, the testator and the drafter must decide whether to treat these two possibilities alike or differently.

Penalizing parties who do not mediate in good faith has the potential to create problems for the mediation process.[157] First, requiring a mediator to certify that one of the parties has failed to act in good faith transforms the mediator from a facilitator into a decisionmaker, albeit one with limited decisionmaking power.[158] Parties might then be more likely to view the mediator as a person with power to coerce a settlement, undermining one of the advantages of mediation.[159] Second, if the mediator's determination that a party had not acted in good faith were subject to any form of judicial review, the confidentiality of the mediation process might be jeopardized.[160] Finally,

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156. *See supra* Part III.C (noting that a mediation clause within a will that does not survive a contest will no longer be valid).

157. *See* Carol L. Izumi & Homer C. La Rue, *Prohibiting "Good Faith" Reports Under the Uniform Mediation Act: Keeping the Adjudication Camel Out of the Mediation Tent*, 2003 J. DISP. RESOL. 67, 80–87 (2003) (arguing against a good faith requirement); Kimberlee K. Kovach, *Good Faith in Mediation—Requested, Recommended, or Required? A New Ethic*, 38 S. TEX. L. REV. 575, 606–20 (1997) (recommending the imposition of good faith requirements); John Lande, *Using Dispute System Design Methods to Promote Good-Faith Participation in Court-Connected Mediation Programs*, 50 UCLA L. REV. 69, 86–108 (2002) (finding good faith requirements problematic).

158. *See* Izumi & La Rue, *supra* note 157, at 83 (emphasizing that a good faith requirement obstructs impartiality by transforming the mediator into a decisionmaker).

159. *See id.* ("[T]he parties are the ultimate judge of mediator neutrality . . . [which] would be illusory if there is an indication that the mediator favors a particular position.").

160. *See id.* at 86 (discussing the vital importance of confidentiality in the free exchange of information in the mediation process, an exchange that the parties would curb if they believed that the discussions could be subject to judicial review or available in further legal proceedings).

such a provision might spawn satellite litigation over "good faith"—ironically making a vehicle to increase family harmony, one that promotes further dissension and cost.[161] A testator could nevertheless choose to penalize parties who do not mediate in good faith by providing, for instance, that upon certification by the mediator that one of the parties has not acted in good faith, all costs and attorneys fees associated with litigation of the will construction proceeding shall be charged against the share of the estate awarded to that party. The testator could even impose further penalties as a device to create incentives to reach a mediated solution. But the testator (and her lawyer) should be aware of the drawbacks of imposing a "good faith requirement." Where "good faith" requirements are imposed, they should be simple and objectively ascertainable: e.g., the parties must appear in person for and participate in the mediation session; the attorneys must comply with mediator requests for mediation briefs prior to the session; and the parties should present their perspective and listen to that of the other side.[162]

If the testator chose instead to treat all failed mediations alike, the testator could provide that the parties would be free to bring a judicial construction proceeding after (1) certification by the mediator (or even one of the parties) that the parties cannot reach agreement, or (2) a specified period of time has passed since commencement of mediation. Alternatively, the testator could provide that the dispute be submitted to arbitration in the situation where mediation fails to reach agreement.[163]

2. *Use of Incentives*

As we have seen, persons who seek to contest a will may be neither bound nor inclined to respect a testator's wishes about mediation of disputes. The testator can deal with this problem by directing the will's executor to cooperate in mediating any disputes over distribution of the estate, and by then including language reminiscent of the standard no contest clause:

> If any beneficiary of this will shall contest the validity of the will, or shall seek to modify any of its provisions, without first attempting to

161. *See id.* at 76–77 (providing an overview of various satellite litigation over "good faith" in mediation).

162. *See* Lande, *supra* note 157, at 86 (finding it important to include only objective and clear requirements if "good faith" is required at all).

163. For a thoughtful treatment of drafting multistep ADR provisions, including an arbitration clause, see John R. Phillips, Scott K. Marinsen & Matthew L. Dameron, *Analyzing the Potential for ADR in Estate Planning Instruments*, 24 ALTERNATIVES TO HIGH COST LITIG. 1 (2006).

> resolve disputes about the will's validity or provisions through mediation, such person shall be deprived of all beneficial interest under the will, and the share of such person shall be distributed as if that person predeceased me without leaving issue.

One of the difficulties with ordinary no contest clauses is the relatively large share a testator must leave to potential contestants in order to make the clause effective; if the potential contestant's share is too small, the contestant has little to lose by contesting, and the clause will be ineffective.[164] By contrast, a clause that provides for forfeiture if a party contests without first trying mediation can provide adequate incentives, even if the testator leaves relatively little to the potential contestant. The contestant has little to lose by attempting to mediate the dispute because the contestant could withdraw from the mediation whenever the contestant concluded that the mediation was not likely to lead to a satisfactory outcome. Hence, even a relatively small bequest to potential contestants—perhaps as little as $5,000—would lead a well-advised contestant to participate in mediation rather than heading directly to the probate court to contest the validity of the will.

The testator might want to combine a mediation clause with a no contest clause. For instance, the testator might include standard no contest clause language, but also require the executor to agree to mediate any disputes over the will's validity, and provide that a request for mediation of a dispute shall not constitute a will contest for purposes of the no contest clause.

The testator could also provide an incentive to move from mediation to arbitration by providing that, if mediation fails, a potential contestant who agrees to arbitrate a will contest would not be subject to the forfeiture provision of the no contest clause.[165] Such a provision (which would be addressed, in large measure, to the arbitrators) would include a significant incentive to seek arbitration, rather than judicial resolution, of the will contest. Arbitration, like mediation, would further a family's interest in a potentially faster, more cost-effective resolution, and one that is private.[166] And, unlike mediation, if those

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164. For instance, in Seward Johnson's $400 million estate, even a $10 million bequest to children would have been unlikely to forestall contest if the children believed they had even a 5% chance of success. *See generally* DOBRIS ET AL., *supra* note 92, at 467 (requesting the reader to analyze the effect of the value of an estate on a person's incentive to contest a will, notwithstanding a no contest clause). *But see* Langbein, *supra* note 107, at 2047 (suggesting that a no contest clause, combined with modest bequests to the children, might have forestalled the will contest in the Seward Johnson case).

165. *See generally* Radford, *supra* note 46, at 609–12 & nn.36–50 (describing arbitration and private judging).

166. *See* Richard Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1260–61 (2006) (discussing the meaning and limitations of arbitration

contesting the will agree to arbitrate the matter, and do so in accordance with arbitration statutes, the award of the arbitrator will be final and binding.[167]

A determination of which of these alternatives is most attractive would depend on the inclinations of the particular testator. But each of them demonstrates that a testator can, through the use of incentives, significantly influence the mechanisms used to resolve disputes over distribution of her estate—even if she cannot directly bind parties to mediate or arbitrate those disputes.

D. Trust Instruments

Because the will plays a pivotal role in many contemporary estate plans, a lawyer whose client wants to provide for mediation of estate disputes must consider including mediation provisions not only in the will, but in any inter vivos trust instrument that plays a role in the client's estate plan. In those cases where a testator's will pours all of her assets into an unfunded "standby" trust,[168] including mediation provisions in the trust instrument might not be strictly necessary because broadly-worded language in the will would require (or incentivize) mediation of all disputes over probate assets—which would include the assets poured into the trust. But if the estate plan includes a funded trust[169]—whether revocable or irrevocable—mediation language in the will would not necessarily control disposition of trust assets that do not pass through the probate process. As a result, a parallel provision in the trust instrument is necessary to assure that testator's mediation instructions are effective.

The doctrinal difficulties presented by mediation clauses in inter vivos trust instruments are similar, but not identical, to those presented by mediation clauses in wills. As with will provisions, a mediation clause in a trust instrument would be ineffective with respect to an elective share challenge or similar statutory claim. But the prospect of a successful contest is less of a problem with trusts than it is with wills because the statute of limitations on such contests will typically have expired before the testator's death. As a

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confidentiality).

167. *See* Radford, *supra* note 46, at 610 & n.36 (noting that arbitration decisions are binding).

168. For an example of use of a will that poured estate assets into an unfunded trust, see Clymer v. Mayo, 473 N.E.2d 1084, 1089–90 (Mass. 1985).

169. For discussion of the mechanics of a funded revocable trust, see DOBRIS ET AL., *supra* note 92, at 537–38.

result, a higher percentage of disputes will be construction disputes, which present no obstacles for enforcement of mediation clauses.

VI. Conclusion

For testators who are primarily motivated by the desire to exercise "dead hand" control over the distribution of their estate, mediation clauses are not advisable.[170] However, for testators whose interests include cost saving or maximum distribution of their assets to beneficiaries, privacy of family matters, and promotion of family relationships, drafters should consider including a mediation provision in the will and other estate planning documents.[171]

Unlike the no contest clause that may further embitter unhappy beneficiaries who are put in a gambler's dilemma by the choices the clause gives them, a mediation provision has the possibility of an outcome acceptable to all parties, coupled with the benefit of providing positive direction about family values, collaboration, and the possibility for family growth and change.[172] The no contest clause is a dispute avoidance device, while the mediation clause is a dispute engagement device—offering what may be not only dispute resolution, but also relationship building.[173] Hence, the mediation clause offers a testator one last shot at being a positive family leader.

Other than losing the costs of mediation, which will be deflected from distribution to beneficiaries (which may be *de minimis* depending on the size of the estate—particularly in comparison with litigation costs), there is simply very little to lose by an attempt at mediation, particularly one crafted with attention to the process considerations raised here. And there is potentially much to be gained: an outcome satisfactory to all, minimal costs, and the potential for improving family harmony by improving understanding, collaboration, and the experience of successful resolution.[174]

In *Jarndyce v. Jarndyce*, the legendary case described in *Bleak House* by Charles Dickens, the estate was finally consumed—over the course of several

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170. *See supra* note 53 and accompanying text (noting that mediation is not useful for testators whose primary focus is on controlling disposition of assets).

171. *See supra* Part II.C (providing an overview of how mediation may help to fulfill a testator's objectives).

172. *See supra* Part IV.B.1 (comparing the objectives to be achieved by using no contest clauses to the objectives to be achieved by engaging in mediation).

173. *See id.* (stating that mediation may encourage parties to seek redress for their grievances)

174. *See id.* (discussing the benefits associated with mediation).

generations—by legal fees.[175] The expectant heirs were all disappointed, and the schisms left by the lawsuit ate away at the lives of the characters involved.[176] Could things be different for nonfictional families like the Johnson or Dodge family? Mediation seems worth a try.

175. *Supra* note 3 and accompanying text.

176. *Id.*