NOTE

Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code

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I. INTRODUCTION

It has been suggested that a will is more likely "to be the subject of litigation than any other legal instrument."[1] Despite the best intentions of the testator in deciding the appropriate distribution of the estate and the best efforts of the attorney in drafting a will that clearly and unambiguously reflects those intentions, there will often be those relatives who believe that they should have received more under the will. This belief can trigger a legal attack on the will and result in lengthy and costly litigation, which may ultimately leave both sides worse off emotionally, and possibly financially as well.

Applying mediation to will contests has the potential to avoid the costs, time delays, and the adversarial, winner-take-all atmosphere of litigation.[2] By bringing the parties together to work through the monetary interests, as well as the underlying emotional issues which are frequently at the center of will contests, mediation can resolve the disputes while maintaining the family relationships that may otherwise be devastated by litigation.[3] Part II of this Note examines the different reasons for and methods of contesting a will. Part III examines several ways in which certain features of the current probate system may actually encourage litigating will contests. Part IV explains why mediation is a particularly suitable method of dispute resolution for will contests. A general introduction to the Uniform Probate Code is provided in Part V, while Part VI proposes amending the Uniform Probate Code to include a provision specifically encouraging—or possibly

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[1] Dennis W. Collins, *Avoiding a Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 7 (2000).

[2] Stanard T. Klinefelter & Sandra P. Gohn, *Alternative Dispute Resolution: Its Value to Estate Planners*, 22 EST. PLAN. 147, 147 (1995).

[3] *Id.*

even requiring—mediation prior to the initiation of any litigation of probate matters.

II. THE WILL CONTEST

A will is an instrument by which a person makes a disposition of his or her real and personal property, to take effect after that person's death.[4] Provided that certain formalities are followed and barring some limited exceptions, the testator is generally free to direct the distribution of his or her estate in whatever manner the testator desires.[5] It is the testator's intent that is of utmost importance when a court is called upon to give force to the

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[4] BLACK'S LAW DICTIONARY 1592 (7th ed. 1999).

[5] Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. REV. 551, 552 & n.1 (1999). Professor Leslie, emphasizing the autonomy of the testator in American wills law, expounds further:

> [T]he testator is a rugged individualist. He owes no duties to family or friends . . . . His motives, whether benevolent or spiteful, are of no concern . . . . [E]xpectations he may have fostered during his life are irrelevant. If his will devastates family members, that is entirely beside the point. Who deserves to share in his estate is his decision alone to make.

Id. (emphasis added) (citations omitted). Professor Leslie argues, however, that courts at times disregard the testator's intent when it violates the reciprocity norm inherent in trust-based relationships. *Id.* at 590. *See also* Ronald Chester, *Inheritance in American Legal Thought*, *in* INHERITANCE AND WEALTH IN AMERICA 23, 23–32 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998) (discussing the strong cultural tradition of donative freedom in Anglo-American law). That strong tradition of testamentary freedom remains even more important in the United States than elsewhere in the world. Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 133 (1994).

language of a will.[6] It is not surprising, then, that the "law of will contests focuses on ensuring that the true intent of the testator is carried out."[7]

A. *Possible Motivations Driving Will Contests*

Inherent in the testamentary freedom to benefit those whom the testator favors and so chooses to benefit is, of course, the corresponding freedom to refrain from benefiting certain others.[8] If a party is dissatisfied with the share

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[6] Volmer v. McGowen, 99 N.E.2d 337, 339 (Ill. 1951) ("The cardinal rule of testamentary construction to which all other rules must yield is to ascertain the intention of the testator from the will itself and effectuate this intention, unless contrary to some established rule of law or public policy."); Union Sav. Bank & Trust Co. v. Alter, 132 N.E. 834, 834 (Ohio 1921) ("The controlling object in the construction of a will is the ascertainment and declaration of the intention of the testator . . . . "); Sellers v. Powers, 426 S.W.2d 533, 536 (Tex. 1968) ("It is fundamental that the primary concern of the court in will construction is the determination of the testator's intent and the effectuation of that intent as far as is legally possible."). Similarly, the Uniform Probate Code preserves this focus on testamentary intent by providing that even writings that fail to adhere to wills formalities may still be treated as proper wills if it can be shown by "clear and convincing evidence that the decedent intended the writing to constitute . . . the decedent's will." UNIF. PROBATE CODE § 2-503 (amended 1998).

[7] Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 174 (1999). This focus on testamentary intent, however, may be illusory; the scheme of distribution of property may have greater effect on the outcome of will contests than the testator's final wishes. *See id.* at 175. *See also* 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, 275–87 (1999). Professor Spitko asserts that, despite our society's commitment to the ideal of testamentary freedom, "[i]n practice, however, the law disfavors testamentary dispositions that deviate from the norm; it prefers gifts to the testator's legal spouse and close blood relations over gifts to other potential beneficiaries." *Id.* at 276. *See also* Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236 (1996) (describing an unwritten rule that "many courts are as committed to ensuring that testators devise their estates in accordance with prevailing normative views as they are to effectuating testamentary intent").

[8] The right to disinherit is not absolute, however. Every United States jurisdiction, except Georgia, provides some form of protection from disinheritance for the surviving spouse. Alan Newman, *Incorporating the Partnership Theory of Marriage into Elective-Share Law: The Approximation System of the Uniform Probate Code and the Deferred-Community-Property Alternative*, 49 EMORY L.J. 487, 489 n.16 (2000). In the majority of states, a surviving spouse is entitled to a certain fractional elective share of the deceased spouse's estate, regardless of what may have been provided in the will. *Id.* at 494. In community property states, all property acquired during the marriage through the efforts of either spouse (not including property acquired by gift or bequest) belongs equally to both and no elective share is necessary. *Id.* at 489 n.15, 16. Five jurisdictions (Arkansas, the District of Columbia, Kentucky, Michigan, and Ohio) still retain the right of dower,

allotted by the testator, that party will be able to gain a larger share only by contesting the will and proving that the will (or part thereof) is invalid.[9] Pure greed certainly can be one of the primary motivations in initiating a will contest, but issues of fairness play a major role as well.[10] The desire for fairness can cause conflict when different family members have contrasting ideas of what constitutes a fair distribution of the decedent's property.[11] A widely accepted principle of estate distribution is that "people equidistant in kinship from the deceased have in some sense equal claim on the estate" and should therefore receive substantially equal shares.[12] These traditional notions of fairness are complicated, however, by the increasing prevalence of non-traditional families.[13] Divorce and remarriage, stepchildren, and children born to unmarried parents have created family structures that are difficult to prioritize in terms of the individual's relationship to the decedent.[14] Additionally, non-traditional relationships such as same-sex couples, unmarried heterosexual couples, and those involving an older decedent and a younger beneficiary may drive disputes.[15] The will contest may reflect the contestant's disapproval of the "inappropriate" relationship or resentment at losing an expected inheritance to someone whose relationship with the decedent was viewed by the contestant as somehow improper.[16]

Other notions of fairness may stem from the relationships between the testator and the beneficiaries during the testator's life. The adult child who

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under which the surviving spouse is entitled to a life estate in all or part of the deceased spouse's lands. *Id.* at 493 & 494 n.31.

[9] Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance*, 32 WAKE FOREST L. REV. 397, 415 (1997).

[10] *Id.* at 416. Wills are contested for various reasons, but certain situations should immediately put the estate planning attorney on notice regarding the increased likelihood of post-mortem conflict: "a desire to limit the gift to or disinherit a spouse; total disinheritance of a child or children; disparate treatment of children; children from a prior marriage; dead-hand control through conditional gifts; 'locking up' the assets through trusts; and nonfamily gifts." John A. Warnick, *The Ungrateful Living: An Estate Planner's Nightmare—The Trial Attorney's Dream*, 24 LAND & WATER L. REV. 401, 408 (1989).

[11] Gary, *supra* note 9, at 416–17.

[12] *Id.* at 417 (quoting Sandra L. Titus et al., *Family Conflict over Inheritance of Property*, 28 FAM. COORDINATOR 337, 338 (1979)).

[13] Gary, *supra* note 9, at 419–21; *see also* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 228–35 (2001) (describing the redefining of the modern family beyond the conventional definition: "a legally married husband and wife, and the children of that marriage").

[14] Gary, *supra* note 9, at 417.

[15] *Id.* at 419.

[16] *Id.*

remains at home to care for an aging parent may well expect a larger share of the estate to compensate for his or her sacrifice during the decedent's final years, while the adult child who moves far from home may nonetheless believe that distributing equal shares among the siblings is most fair.[17] Along those same lines, when the testator makes a substantial testamentary gift to a charity or other non-family recipient, expectations of the family members frequently conflict with the intent of the testator.[18]

Similarly, the monetary share itself may not be an issue of dispute, but the distribution of personal assets of the deceased may produce great conflict.[19] Certain items of personal property may have great sentimental value attached, value that varies from person to person and is difficult to quantify.[20] A child's tea set, for example, may have little monetary value extrinsically; to those family members whose childhood memories are filled with recollections of tea parties with grandma, however, the importance of the toy may rise to an extraordinary level. The item may not even be one on which the decedent placed any great sentimental value, yet the emotional attachment another family member places on such an item may give rise to inter-family conflict and ultimately result in a will contest.[21]

B. *Methods of Contesting Wills*

The specific procedures for contesting wills may differ from jurisdiction to jurisdiction, but generally there are four grounds on which to challenge a will despite its compliance with statutory formalities: undue influence, lack of testamentary capacity, fraud or duress, and forgery.[22]

Undue influence occurs when one person is so psychologically dominated by another that the former cannot help but carry out the wishes of

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[17] *Id.* at 417–18.

[18] *Id.* at 418–19. An example of a will contest arising from a testator's decision to leave a substantial gift to charity is Bevier v. Pfefferle, No. 97-1019A, 1999 Ohio App. LEXIS 4920 (October 22, 1999), in which family members contested the will of a decedent who left $325,000 to her local animal shelter in order for it to care for her cat. Michael Sangiacomo, *Widow's Will Leaves Questions; Humane Society Was Told to Care for Cat from Estate*, PLAIN DEALER, Nov. 19, 1999, at 1B.

[19] *See* Brian C. Hewitt, *Probate Mediation: A Means to an End*, RES GESTAE, August 1996, at 41, 43. "Significant attachment to isolated items of personal property often represents the genesis of probate disputes. If those items of personal property can be identified and addressed to the satisfaction of all parties, the ultimate economic division of the family pie may become less important." *Id.* at 43.

[20] *See id.*

[21] *Id.*

[22] Chester, *supra* note 7, at 175.

the latter.[23] A will executed by someone under the undue influence of another does not accurately reflect the true intention of the testator and should be given no weight by the court.[24] Effectively, that individual in signing the will says, "This is not my wish, but I must do it."[25] The standard test for determining undue influence is the "substitution test:" whether the testator's mind was controlled by another person to such an extent that his will is in effect the will of that other person.[26]

The second ground, lack of testamentary capacity, relates to whether the testator actually knows and understands his or her own actions in making a will and the effects that it will have.[27] To contest a will on the grounds of testamentary incapacity, the contestant must show that, at the time of execution of the will, the testator lacked capacity to understand (1) the nature of his or her act, (2) the nature and extent of his or her property, or (3) his or her relation to those persons who are the natural objects of his bounty.[28] If one lacks the mental capacity to know and understand one's property, family, and plan of disposition, one surely lacks the requisite intent to dispose of that property in a particular way.

A will may also be challenged on the grounds of fraud "when [it] has been brought about through lies told to the testator."[29] Similarly, when a

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[23] Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 578 (1997).

[24] *Id.* at 578–79.

[25] *Id.* at 579.

[26] Chester, *supra* note 7, at 175. Proving undue influence requires an inquiry into the state of mind of the now-deceased testator at the time the will was executed, and thus relies entirely on circumstantial evidence. Madoff, *supra* note 23, at 581. Professor Madoff outlines four elements of proof necessary to show undue influence:

> 1) a confidential relationship existed between the testator and the person allegedly exercising the influence; 2) the confidant played some role . . . in the formulation, preparation, or execution of the will; 3) the testator was susceptible to undue influence; and 4) the testator made a testamentary gift to the confidant which was unnatural.

Id. at 582–83.

[27] Section 2-501 of the Uniform Probate Code (1990) requires only that the testator be "of sound mind," and at least eighteen years of age; Restatement (Third) of Property sets forth the generally accepted standard of mental capacity to make a will:

> [T]he testator . . . must be capable of knowing and understanding in a general way the nature and extent of his or her property, the natural objects of his or her bounty, and the disposition that he or she is making of that property, and must also be capable of relating these elements to one another and forming an orderly desire regarding the disposition of the property.

RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.1(b) (Tentative Draft No. 3, 2001).

[28] Chester, *supra* note 7, at 176.

[29] Madoff, *supra* note 23, at 579.

"will is brought about [by] threats of harm to the testator," it may be contested on the grounds of duress.[30] Both situations defeat the intent of the testator—fraud by denying the testator access to the true facts necessary to make an informed decision as to distribution, and duress by forcing the testator to agree to do something he or she would not otherwise do, absent the threat of force. In neither case is the true intent of the testator accurately reflected in the will.

A will contest under any of these doctrines presents a difficult situation for the prospective contestant. The contestant must either show the "wrongdoing" of another (under fraud, duress, forgery, or undue influence) or show that the decedent lacked the mental capacity to handle his or her own affairs (under the lack of capacity doctrine). Especially in family situations, where the "wrongdoer" may be a family member or trusted friend of the deceased, this is an emotionally painful process. It would be just as distressing for the contestant to be placed in a position of having to prove that his or her own parent was mentally incompetent at the time the will was made. These uncomfortable choices can be avoided through the use of mediation to settle will contests in lieu of litigation.

III. CERTAIN COMMON FEATURES OF PROBATE INVITE WILL CONTESTS

It might be said that the current system of probate administration, while not necessarily encouraging will contests, possesses several features that invite litigation concerning wills and an individual's testamentary capacity.[31] One of these is the absence of a forced share provision for disinherited children.[32] Though many jurisdictions provide that some "default" share of the estate be given to the surviving spouse,[33] even if specifically disinherited by the testator, provisions granting similar treatment to disinherited children

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[30] *Id.*

[31] *See* John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 (1994) (reviewing DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993)). "The United States is the home of capacity litigation. Claims of undue influence or unsound mind, which occupy so prominent a place in American probate law, are virtually unknown both on the Continent and in English and Commonwealth legal systems." *Id.* at 2042. *See also* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 134–36. (1990). "Post-mortem probate creates a situation in which excluded heirs are invited to challenge the will and use the testator's expressed intentions to destroy the instrument, question the giver's sanity, and line their own pockets with property that was never intended to be theirs." *Id.* at 137.

[32] Langbein, *supra* note 31, at 2042.

[33] *See, e.g.*, UNIF. PROBATE CODE § 2-202 (amended 1998) (providing the surviving spouse with an elective share of the decedent's estate).

are rare.[34] The obvious effect of this testamentary freedom is that testators have great control in dividing their estates in whatever manner they believe best suits the situation and their personal wishes. The unintended consequence is that allowing for liberal disinheritance of children creates a ready-made class of potential plaintiffs, upset at their treatment, feeling wronged, and ready to sue.[35]

Another feature of the current system that may be said to invite litigation is the availability of a trial by jury for probate disputes.[36] In attempting to sway lay jurors rather than an experienced and knowledgeable judge, the contesting side can pursue a strategy less focused on determining the testator's capacity and actual intent and instead attempt to play on the emotions of the jury, thereby eliciting sympathy for the "unfairly" disinherited party, and stirring animosity for the beneficiary named in the will.[37] It is an emotional appeal, rather than a factual or legal one, and jurors may be tempted to substitute their own ideas of fairness rather than evaluate the will's validity.[38]

The current system also lacks a "loser pays" provision.[39] Litigation is expensive and requires parties to pay for depositions, court reporters, expert testimony, attorneys' fees, and various other expenses. The current system, under which each side bears its own costs, encourages contestants to pursue even those claims with a low probability of success.[40] If the contestant loses,

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[34] *See* Collins, *supra* note 1, at 31. There is no system similar to spousal protection available for "protection [of] children—not even for minor children." *Id.* (quoting THOMAS L. SHAFFER, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS, 68 (2d ed. 1979)). Collins goes on to explain that the Nebraska Probate Code does have certain provisions benefiting mainly dependent children under very specific circumstances. *Id.*

[35] *See* Langbein, *supra* note 31, at 2042.

[36] *Id.* at 2043. "American law is unique in undertaking to resolve will contests by means of a civil jury trial." *Id. See also* UNIF. PROBATE CODE § 1-306 (amended 1998) (providing that a party may demand a trial by jury where a question of fact exists).

[37] *See* Langbein, *supra* note 31, at 2043. As an example, consider the following piece of advice to trial attorneys dealing with will disputes: "Contestant's counsel should be sensitive to the weight of his burden: the law and the public have an aversion to 'greedy heirs.' To overcome the stigma of the 'ungrateful living,' the contestant should be portrayed, as the facts will permit, as the caring relative of the deceased." Warnick, *supra* note 10, at 447.

[38] Collins, *supra* note 1, at 32–33.

[39] Langbein, *supra* note 31, at 2043. Outside the United States, it is common to require the losing party to cover the litigation costs of the winner. *Id.*

[40] Langbein, *supra* note 31, at 2043 (describing the Seward Johnson will contest as a "strike suit—that is, a holdup staged by disgruntled heirs to induce a settlement . . . .") (citations omitted). The Uniform Probate Code provides that the personal representative of the estate may be reimbursed for litigation costs, including defending against will contests, from the estate itself. UNIF. PROBATE CODE § 3-720 (amended 1998).

he or she is responsible for only the costs the contestant incurred in pursuing the challenge.[41] If the contestant wins, however, the will is denied probate, and the contestant takes an intestate share presumably larger than what was provided in the will.[42] A provision that the contestant pays not only his or her own costs of litigation, but also the costs of the estate in defending the unsuccessful challenge, would discourage contestants from pursuing farfetched claims."[43]

Finally, procedures for validating the will prior to the testator's death are uncommon in the United States.[44] Sometimes called ante-mortem probate, the process allows the testator to bring an action to resolve capacity and undue influence issues prior to death, and results in an order declaring the will free from testamentary defects.[45] In the majority of jurisdictions, however, the current process involves what Professor John H. Langbein calls the "'worst evidence' rule[:] [w]e insist that the testator be dead before we investigate the question whether he had capacity when he was alive."[46] The

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[41] *Id.*

[42] *See, e.g.*, Olsen v. Olsen, No. 99-2059, 2001 WL 246570, at *6 (Iowa App. 2001) (finding the testator's will invalid and directing that the property be distributed through state intestacy laws).

[43] Langbein, *supra* note 31, at 2043. Note that the burden of paying just one's own litigation costs can be substantial and may provide a significant deterrent to contesting a will. Jeffrey P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change, in* INHERITANCE AND WEALTH IN AMERICA 173, 188 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

[44] Only Arkansas, North Dakota, and Ohio have provisions that allow the testator to obtain a determination of capacity while still alive. Leopold & Beyer, *supra* note 31, at 169. The Ohio ante-mortem statutes, for example, provide the following mechanism: the testator must petition the probate court for a declaratory judgment as to the validity of his or her will; the testator, all those named as beneficiaries, and all those who would take by intestacy must be made parties in the proceeding; the court then conducts an adversarial proceeding, the result of which is to determine the validity of the will as to form, testamentary capacity, and freedom from undue influence; if the will is declared valid, it is placed in a sealed envelope to which only the testator has access during his or her lifetime. Tracy Costello-Norris, *Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?*, 9 CONN. PROB. L.J. 327, 338–40 (1995). However, if the testator does access the will and remove it from the court's possession, the previous declaration of validity is lost. OHIO REV. CODE ANN. §§ 107.084(B) (West 1994).

[45] Costello-Norris, *supra* note 44, at 338–40.

[46] Langbein, *supra* note 31, at 2044.

> [T]he trier of fact is called upon to evaluate decedent's state of mind without having the benefit of observing him or her. Proof to support or defeat a will is in the form of documents and statements of other persons such as attesting witnesses, medical professionals, family members and friends.

best witness as to what are the true intentions of the testator is, of course, the testator himself or herself; the fact that wills are contested after the death of the testator prevents examination of the most accurate and compelling evidence available and often prevents the true wishes of the decedent from being followed.[47]

IV. MEDIATION IS PARTICULARLY WELL-SUITED FOR DEALING WITH WILL DISPUTES

Disputes over estates are distinctively different from the majority of disputes that ultimately give rise to litigation.[48] Generally, most civil litigation is about money—how much has one party been harmed and how much should one party pay the other to compensate for that injury. At first glance, will contests are also about money—one party (or more) feels that the will represents an inequitable distribution and therefore contests the will in order to secure his or her "fair" share of the estate.[49] It is easy to say that most will disputes result from pure greed on the part of those who did not receive what they were expecting under the will.[50] This, however, would be an overly simplistic view that would ignore the many underlying factors further below the surface, such as sibling rivalry, grief at the loss of a loved one, sentimental values placed on certain items in the estate, and other emotional issues related to family dynamics.[51] While the parties may appear to be arguing over trivial assets of apparently insignificant monetary value, the actual controversy may well run much deeper.[52] While solutions to commercial disputes can often be worked out by applying cost/benefit analysis, family disputes are much more complicated and much more

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Charles F. Gibbs & Colleen F. Carew, *Surrogate's Practice and Proceedings: On the Increased Granting of Summary Judgment in Will Contests*, 226 N.Y.L.J. 3 (2001).

[47] Dara Greene, Note, *Antemortem Probate: A Mediation Model*, 14 OHIO ST. J. ON DISP. RESOL. 663, 666 (1999).

[48] Klinefelter & Gohn, *supra* note 2, at 147.

[49] *See* Paul P. Didzerekis, *Mediation in Probate*, MAIN HANDBOOK OF THE ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION § 22.2. ("While probate deals with money primarily, there are also pieces of personal property, real property, and a whole range of family and emotional issues adding to the complexity of [the] situation[.]").

[50] *Id.*

[51] Rosenfeld, *supra* note 43, at 185–86; Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, PROB. & PROP., May/June 1995, at 48, 50.

[52] *See* Campisi, *supra* note 51, at 50; *see also* Rosenfeld, *supra* note 43, at 184 (describing an instance of estate litigation over dishes and a car that was actually motivated as much or more by the contestants' feeling that they had been wronged).

subtle.[53] Understanding the sometimes hidden origins of disputes in probate is necessary when analyzing whether and when mediation is an appropriate method to resolve the dispute.[54]

Mediation has several characteristics that are particularly beneficial when dealing with intra-family disputes such as will contests.[55] In mediation proceedings, a neutral third party assists the parties in communicating with one another, airing their concerns, and developing their own solutions.[56] One advantage that mediation offers is the potential to keep the proceedings confidential.[57] The matters discussed during a probate dispute are usually of a very personal nature.[58] When the testator's mental capacity is the focus of the will contest, these charges are much more easily handled in private than in public.[59] Regardless of whether it is ultimately determined that the testator did or did not have the capacity to create the will, the mere accusation that a loved one was incompetent may be embarrassing for the family or harmful to the reputation of the deceased, and is often emotionally difficult for the person making the claim.[60] Additionally, resolving the dispute may require addressing the underlying family relationships, past actions, and hurt feelings, with the corresponding potential for embarrassment.[61]

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[53] Campisi, *supra* note 51, at 50. "Freud and Jung have much more to do with resolving such [family] disputes than Coke and Blackstone." *Id.*

[54] Gary, *supra* note 9, at 413.

[55] Eric Atkins, *Estate Mediation Helps to Prevent Family Warfare*, 20 LAW. WKLY. 26, Nov. 10, 2000. Mr. Atkins quotes Mr. Malcom Archibald, chairman of the subcommittee that drafted a rule making mediation mandatory for all estate matters in Toronto and Ottawa, Canada. He notes:

> Most people you talk to feel estates is an area where mediation is just a natural. People have so many agendas and background and family fights that if you can address the issues in the non-interest-based way that mediation works, then you may help save a family from destroying itself. Mediation is highly desirable in estate matters.

Id.

[56] SARAH R. COLE ET AL., MEDIATION: LAW, POLICY & PRACTICE § 1:1 (2d ed. 2001).

[57] Gary, *supra* note 9, at 424. The Uniform Mediation Act provides: "[A] mediation communication is privileged . . . and is not subject to discovery or admissible in evidence in a proceeding unless waived . . . . " UNIF. MEDIATION ACT § 4(a), 7A U.L.A. 78 (Supp. 2002).

[58] 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, 634 (2000).

[59] Gary, *supra* note 9, at 424.

[60] Gary, *supra* note 9, at 424, 444.

[61] It is also apparent that the more famous the participants and the more sordid the details (and the greater the sums of money involved), the more likely a public will contest

When the dispute rises to the level of litigation, the courtroom itself is usually open to the public, possibly requiring testifying witnesses to reveal potentially awkward and upsetting family details before a courtroom full of strangers.[62] Witness testimony is recorded and transcribed, and it becomes a matter of public record.[63] On the other hand, when the parties agree to mediate, they can also provide that the discussions will remain confidential by signing a non-disclosure agreement.[64] Confidentiality has two major benefits: first, it prevents the public airing of dirty laundry, which preserves family dignity and keeps private matters private, and second, it is believed that participants will speak more openly and honestly in a setting in which they know what they say will not be revealed publicly.[65] This in turn contributes to a freer, more candid dialogue between the parties and leads to a greater probability of disclosing and addressing the "real" underlying issues that may be at the heart of the dispute—family-related emotions.[66]

A second beneficial characteristic of mediation is that it addresses the emotional aspects of the dispute and not just the legal issues.[67] Sometimes a

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will be turned into a "media event" with all the associated media frenzy and lack of privacy that accompanies media events. *See* Madoff, *supra* note 23, at 571–74. Consider the lengthy and very public legal battle for the estate of oilman J. Howard Marshall, one of the two richest men in Texas. In June of 1994, former Playboy Playmate and sometimes-actress Anna Nicole Smith, then 26, married the Texas billionaire, then 89, who died less than fourteen months later. The ensuing legal battle pitted the young widow against her 60 year old stepson, E. Pierce Marshall, and included legal proceedings to determine rightful possession of J. Howard's ashes (the probate court ordered the ashes split, and two separate funeral services were held), charges of libel by Pierce against Ms. Smith, claims of tortuous interference with an *inter vivos* gift by Ms. Smith against Pierce, and discovery abuses by Pierce for which the bankruptcy court awarded Ms. Smith almost $450 million in compensatory damages, later reduced to $44 million. *See In re* Marshall, 275 B.R. 5 (Bankr. C.D. Cal. 2002) (giving a comprehensive history of the proceedings). Media attention over the course of the six year conflict elevated the dispute to the level of spectator sport.

[62] Radford, *supra* note 58, at 634.

[63] Gary, *supra* note 9, at 425.

[64] *Id.*; *see also* Bill Ezzell, Student Article, *Inside the Minds of America's Family Law Courts: The Psychology of Mediation Versus Litigation in Domestic Disputes*, 25 LAW & PSYCHOL. REV. 119, 128 (2001) (pointing out that the non-public nature of mediation sessions "'prevents families' lives, weaknesses, and personal problems from being unnecessarily exposed"). Of course, confidentiality is not mandatory, and the parties may alternatively decide that retaining the potential to disclose is more appropriate.

[65] Gary, *supra* note 9, at 424; Radford, *supra* note 58, at 634.

[66] L. Therese White & Bill White, *Managing Client Emotions: How a Mediator Can Help*, 56 DISP. RESOL. J. 15, 19 (2001).

[67] *See* Gary, *supra* note 9, at 425–27. *See also* White & White, *supra* note 66, at 16 (pointing out that attorneys, "[h]aving been trained in the logic-driven rigors of fact-

party is less concerned about the actual estate distribution than about having the opportunity to voice grievances.[68] Hurt feelings and a failure to communicate among the surviving family often prove a greater barrier to resolving the dispute than do the actual monetary concerns.[69] Simply having a forum where emotional issues can be discussed is often sufficient.[70] Whether the grievances are toward other beneficiaries who received more than their "fair" share, or even toward the decedent himself or herself,[71] mediation provides a healthy opportunity to clear the air and address the underlying concerns of the parties.

There are two additional areas in which mediation provides an emotional benefit to the participants. First, those who participate directly in the dispute resolution process experience a sense of control and empowerment that leads to greater satisfaction with the outcome that they themselves helped to forge.[72] Second, participants in mediation avoid the emotional trauma of litigation. Litigation, with its constant delays, arcane rules, and adversarial, winner-take-all atmosphere, can be confusing, frustrating, and emotionally draining for participants—stresses that are intensified when family members oppose one another in the courtroom.[73]

A third beneficial characteristic of mediation is that it can "repair, maintain, or improve ongoing relationships."[74] Where families are involved,

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finding, analysis, and debate," may be particularly ill-suited to "address highly charged matters of the heart and spirit").

[68] Gary, *supra* note 9, at 427.

[69] Chester, *supra* note 7, at 197 (quoting Dan Gulden, *A Sampling of Common Situations in Probate Mediation Cases*, THE CAUCUS (Justice Center of Atlanta, Inc., Atlanta, Ga.) Feb. 1992).

[70] Campisi, *supra* note 51, at 52. Campisi further explains:

> The use of lawyers as mouthpieces is generally ineffective to diffuse emotions triggered by a death or a crisis . . . . 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. See also White & White, *supra* note 66, at 19 ("[A] simple clearing of the air can move numerous conflicts to resolution. Only then can the unseen emotional complexities surrounding a case surface.").

[71] *See* Campisi, *supra* note 51, at 50 ("Absent parties are often more important than named litigants in [probate disputes]. The decedent is often a significant player, as survivors seek to redress some wrong to their departed loved one.").

[72] *See* Gary, *supra* note 9, at 427; *see also* Ezzell, *supra* note 64, at 127–28 (describing the benefits of active participation in crafting post-divorce plans in domestic relations cases).

[73] *See* Gary, *supra* note 9, at 428.

[74] *Id.*

the confrontational nature of "litigation—a pitched battle fought in a courtroom—is often especially painful, almost unseemly, in [estate matters]."[75] The adversarial process is likely to aggravate hostility between disputing parties,[76] which decreases the likelihood that any sort of positive relationship will survive the ordeal. Because it does not address the emotional and intangible factors, litigation will not resolve the conflict and might actually aggravate the existing conflict between the parties.[77] When maintaining the relationship between the parties is itself a goal, mediation is much better suited than litigation because it typically brings the parties together, voluntarily in most cases, to discuss their concerns and to attempt to work out a mutually acceptable solution.[78] There is no loser after mediation and no sense that "the jury got it wrong," or that "the judge made a mistake"—beliefs often held by the unsuccessful party after litigation. In mediation, both parties are successful because they have worked together to find a solution. Also, participating in mediation may give the parties a better understanding of one another and the concerns each side has, thereby strengthening avenues of communication and perhaps providing some framework for working together in the future.[79]

The fourth beneficial characteristic of mediation is its flexibility. Courts are limited in the kinds of remedies they can order, while mediation allows the parties to craft a solution unique to the circumstances and the parties.[80] The mediated solution may take into account both monetary and sentimental value of estate assets or allow for some type of sharing arrangement between the parties.[81] Mediators have the latitude to "think outside the box" and make imaginative suggestions about including additional incentives in the

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[75] Klinefelter & Gohn, *supra* note 2, at 147.

[76] JAY FOLBERG & ALLISON TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 10 (1984). In interpersonal disputes, "the tendency of courts to look backwards and produce winners and losers is least responsive to the needs of the parties, who usually are seeking to resolve present controversies and avoid future disputes." Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 6 (1985).

[77] Didzerekis, *supra* note 49, § 22.2.

[78] *See* Gary, *supra* note 9, at 428. Professor Gary also notes that mediation has been very successful in custody cases where family issues are paramount and maintaining continuing relationships is important. *Id.* at 429. "[W]hile lawsuits are temporary, family relationships are permanent," and it is often better to work out an agreement in the interests of long-term family harmony than to be victorious in the courtroom. Didzerekis, *supra* note 49, § 22.2.

[79] Gary, *supra* note 9, at 428.

[80] *Id.* at 429; *see also* Hewitt, *supra* note 19, at 43.

[81] Greene, *supra* note 47, at 681.

bargaining process.[82] In addition, litigation is most often divided into an "us versus them" scenario under which parties must reshape their concerns so as to conform to one of two diametrically opposed sides. In family situations, however, there are often more than two sides to every story. Mediation allows the full expression of several competing viewpoints so that each party's concerns are addressed.

Another advantage of mediating will disputes is the efficiency of mediation as compared to litigation.[83] The informality of the mediation process allows for greater flexibility in scheduling and results in meetings being held more quickly and disputes being resolved sooner.[84] Mediation is often less expensive than litigation because disputes are settled more quickly, thereby reducing attorneys' fees. In addition, court costs, such as court reporter and transcript fees, are avoided entirely.[85] For a smaller estate, the costs of litigating a will dispute may be prohibitively disproportionate to the actual amount at issue; it may simply not be worth the cost of pursuing the matter through litigation when considering the expected benefit of prevailing.[86] If mediation can resolve the issue at a reduced cost, however, some of those who would have accepted the undesirable outcome in order to avoid litigation costs may now be able to protect their interests through mediation.[87] Finally, since mediation proceedings are not confined to a specific courtroom at an assigned date and time, mediation is more convenient for working parties and others who require scheduling flexibility.[88]

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[82] Didzerekis, *supra* note 49, § 22.2 (suggesting that to facilitate agreement, unique incentives may be added, such as an apology, a job at the family business, or a non-disclosure clause). These are items that are beyond the power of a court to order, but that may be exactly the catalyst necessary to broker agreement among the disputants.

[83] Radford, *supra* note 58, at 642–43. *See also* Didzerekis, *supra* note 49, § 22.2 (explaining that in probate disputes where traditional settlement will not work, mediation is the fastest way to disburse the money from the decedent's estate).

[84] Radford, *supra* note 58, at 642–43. Compare the relative speed of mediation with the particularly lengthy and fiercely fought will contest over the estate of Paul Ciaffoni who died in 1974 leaving an estate valued at $8 million. Marissa N. Scarvel, *Potential Heir May Not Revoke Disclaimer of Interest in Estate*, PA. L. WKLY., Nov. 26, 2001, at 6. Litigation has been ongoing ever since, with the most recent development occurring on November 13, 2001 when the Superior Court of Pennsylvania ruled that the decedent's grandson could not now revoke the disclaimer he effected in 1978. *In re* Estate of Ciaffoni, 787 A.2d 971 (Pa. Super. Ct. 2001).

[85] Radford, *supra* note 58, at 642.

[86] Gary, *supra* note 9, at 431.

[87] *Id.*

[88] Radford, *supra* note 58, at 643.

Of course, mediation of will contests is not without its drawbacks, and there are certain practical and ideological difficulties.[89] From a practical standpoint, the parties' grief at the loss of a loved one will affect the way in which the parties mediate; mediation itself can be a highly emotional undertaking, and the mediation may have to be delayed until the grieving process has progressed.[90] Another potential pitfall is apparent when one recognizes that the family dynamic follows the participants into the mediation. There are certain power imbalances that develop among family members over time, and there exists a risk that disparities in family status may translate into disparities in bargaining power, allowing a more powerful party to exert control over a weaker party during the mediation.[91] Both of these potential complications, however, can be overcome with the presence of skilled mediators trained to deal with and compensate for both emotional issues and power imbalances among various parties.[92]

As discussed earlier, the underlying issues in a will contest may have little to do with the actual estate and may be much more the result of longstanding animosity within the family.[93] Although mediation may still be helpful in these situations, the more entrenched parties are in their long-held positions, the less open they will be to compromise, and the less likely it will be that the mediation is successful.[94] There may very well be situations where family animosity has reached such a level that not even the most skilled mediator could successfully broker a mutually acceptable agreement.

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[89] Gary, *supra* note 9, at 432–33.

[90] *Id.* at 432.

[91] Radford, *supra* note 58, at 638; Gary, *supra* note 9, at 432–33. When elderly family members are participants in the mediation, for example, the mediator should be especially aware of a variety of possible power imbalances. Radford, *supra* note 58, at 638–39. For example, the family matriarch may dominate her family by controlling them emotionally, possibly by manipulating feelings of devotion or guilt. *See id.* at 639. Alternatively, the kindly grandmother may immediately acquiesce to the demands of others, a response conditioned by a lifetime of tending to the needs of others first. *See id.* Increasing age may lead to decreased independence—an elderly participant may be almost totally dependent on his or her family, and diminished bargaining power may result. *See id.* at 638–39.

[92] Whatever the underlying cause, a competent mediator must have training and experience in methods of balancing power between parties. Susan D. Hartman, *Mediation of Disputes Arising in Adult Guardianship Cases*, RES GESTAE, April 1998, at 41, 41; *see also* White & White, *supra* note 66, at 18–19 (explaining that a good mediator is capable of dealing with such emotionally-charged situations).

[93] Gary, *supra* note 9, at 433.

[94] *Id.* at 433; *see also* Ezzell, *supra* note 64, at 133 ("Placing fearful or warring parties in the same room can lead to a further split between them as the informal rules of procedure and decorum [in the mediation process] allow both sides to pour out years of anger and frustration upon the other.").

In such situations, resort to litigation remains an option and is not foreclosed by attempting mediation first.

From a more ideological standpoint, there are two objections to mediation in will contests. First, mediation agreements do not establish precedent to aid in the resolution of future similar disputes.[95] To the parties actually involved in a will contest, however, setting long term precedent for use by others is rarely of primary importance; they simply want to resolve their own individual disputes in the manner that best suits their interests.[96] Note also that the decision to engage in mediation does not foreclose the option of a party to litigate later if no mutually acceptable solution is forthcoming.

Second, the mediation process may in many ways ignore the intent of the testator by altering the distribution that he or she planned. This may seem troublesome in a society that so respects private property and the testamentary freedom that allows people to dispose of their property at death as they see fit.[97] This becomes less troubling once we realize that, should the testamentary disposition be concluded as the testator intended, the beneficiaries become owners of the property and are then free to do with it as they see fit. Since we would have no objections if parties then engaged in negotiations to alter that distribution (a mutually agreed-upon swap), it becomes less of a problem to think of beneficiaries engaging in mediation prior to the actual distribution.

V. A BRIEF INTRODUCTION TO THE UNIFORM PROBATE CODE AND THE UNIFORM LAW PROCESS

The Uniform Probate Code (UPC) is one of more than two hundred uniform state laws drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) since its inception in 1892.[98] The UPC

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[95] Gary, *supra* note 9, at 433. (discussing one of the potential problems with mediation in probate situations); Leandra Lederman, *Precedence Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 221 (1991) ("[A] trial is a prerequisite to precedent, and precedent is the cornerstone of our common law system.").

[96] Gary, *supra* note 9, at 433 ("Creating a precedent is generally not a concern in probate . . . . "); Lederman, *supra* note 95, at 256 ("[I]n general, the public has a stronger interest in precedent than do private litigants" and much less interest in whether any particular case settles.).

[97] *See supra* notes 5 & 6 and accompanying text.

[98] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 103RD YEAR 1271 (2001). The NCCUSL is comprised of over three hundred commissioners,

began in 1963 as an effort to update the Model Probate Code, but after six years of work by NCCUSL and the House of Delegates of the American Bar Association, the finished project had developed into a more comprehensive and more innovative device for influencing state legislation.[99] Idaho became the first state to adopt the UPC in 1971.[100] Today, a total of eighteen states have enacted it in whole or in substantial part, and most other states have enacted portions of it.[101]

The UPC is an attempt to standardize the law of wills, intestate succession, and the probate process.[102] With people in the United States becoming increasingly more mobile, uniformity of family property law was thought to be a significant improvement over the variety of local statutes that vary from state to state.[103] The UPC was designed, in part, to shorten and simplify the probate of estates and to promote an efficient system of probate administration.[104] It contains provisions on intestate succession, the elective share available to the surviving spouse, wills, nonprobate transfers, administration of probate, and trust administration.[105] The UPC, however,

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each a legal professional appointed by his or her state as representative to NCCUSL. Uniform Law Commissioners website, About NCCUSL, *at* http://www.nccusl.org/nccusl/aboutus.asp (site updated June 18, 2002) [hereinafter About NCCUSL]. The primary mission of NCCUSL is "to promote uniformity in the law among the several States on subjects as to which uniformity is desirable and practicable." NCCUSL CONST. art. 1 § 1.2.

[99] Lawrence H. Averill, Jr., & Hon. Ellen B. Brantley, *A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code*, 17 U. ARK. LITTLE ROCK L.J. 631, 636 (1995).

[100] *Id.*

[101] Uniform Law Commissioners website, Uniform Probate Code, A Brief Overview *at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upcabo.asp (last updated June 18, 2002) [hereinafter Brief Overview]. The eighteen states that have enacted all or a substantial part of the UPC are: Alaska, Arizona, Colorado, Hawaii, Idaho, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, North Dakota, Pennsylvania, South Carolina, South Dakota, Utah, and Wisconsin. Uniform Law Commissioners website, Uniform Probate Code, Legislative Fact Sheet, *at* http://www.nccusl.org/nccusl/uniformact_factsheet/uniformact-fs-upc.asp (last updated June 18, 2002).

[102] Averill & Brantley, *supra* note 98, at 634–35; Brief Overview, *supra* note 101.

[103] Brief Overview, *supra* note 101.

[104] *Id.*

[105] *See, e.g.*, UNIF. PROBATE CODE (amended 1998) art. II pt.1, pt.2, pts.5 & 6; art. VI, art. III, and art. VII, respectively. Since the UPC covers such a wide range of areas, passage of the entire act at one time is unlikely. Brief Overview, *supra* note 101. To allow for the "gradual alignment of state codes through the periodic enactment of portions of the national model," the UPC has been "reformulated" into smaller, freestanding sections that mirror portions of the UPC. *Id.* For example, the provisions in UPC Article VI, dealing with nonprobate transfers at death, are also duplicated in three

like any uniform code or model act, is not itself law; it is merely a document representing what the Uniform Law Commissioners think would be a good law.[106] A uniform code like the UPC is little more than a grand academic exercise until a state legislature enacts it.[107]

The UPC, however, is a very influential academic exercise. Because of the participants and the drafting process, a uniform code carries significant persuasive weight on state legislators when contemplating reform in their own statutory codes.[108] First, the Uniform Law Commissioners are comprised of judges, lawyers, and law professors chosen by state governors or state legislative sources to draft these uniform acts.[109] They are accomplished and prominent professionals in their fields and posses a certain legal sophistication that would be lacking in most state legislatures.[110] The Commissioners have been described collectively as an "elite legislature," and the combined thoughts and ideas of such learned individuals, as incorporated

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other smaller, separate uniform acts: Uniform Nonprobate Transfers at Death Act, Uniform Multiple-Person Accounts Act, and Uniform TOD Securities Registration Act. *Id.*

[106] James J. White, Ex Proprio Vigore, 89 MICH. L. REV. 2096, 2096 (1991). Professor White explains further,

> [NCCUSL] is a legislature in every way but one. It drafts uniform acts, debates them, passes them, and promulgates them, but that passage and promulgation do not make these uniform acts law over any citizen of any state. These acts become the law of the various states only *ex proprio vigore*—only if their own vitality influences the legislators of the various states to pass them.

Id.

[107] *See id*; *see also* Fred H. Miller, *Realism Not Idealism in Uniform Laws—Observations from the Revision of the UCC*, 39 S. TEX. L. REV. 707, 723 (1998) (equating an amendment to a Code promulgated by NCCUSL to a report from an interim legislative study committee).

[108] Gail Hillebrand, *What's Wrong with the Uniform Law Process?*, 52 HASTINGS L.J. 631, 642 (2001) (explaining the likely impact on state legislators of the recent draft revision of the Uniform Commercial Code: "[T]he content of uniform law drafts does influence what happens in State Legislatures. When you come into a Legislature with a 200-page document claimed to be the product of eight years of study, legislators don't want to second-guess that."); *see also* Patrick A. Randolph, Jr., *The Future of American Real Estate Law: Uniform Foreclosure Laws and Uniform Land Security Interest Act*, 20 NOVA L. REV. 1109, 1110 n.2, 1127 (1996) (explaining that the Uniform Land Security Interest Act has influenced state legislatures as they consider and revise their own mortgage laws, despite the fact that it has not been adopted fully in any United States jurisdiction).

[109] About NCCUSL, *supra* note 98.

[110] White, *supra* note 106, at 2096.

in the final product of their group efforts, should be recognized to carry considerable persuasive weight.[111]

Second, the deliberative process used in drafting and revising uniform codes strives for consensus and a code that can actually be enacted by a majority of state legislators.[112] A drafting committee of six or more commissioners is selected to review and discuss proposed acts, and the input and participation of interest groups that may be affected by the proposed code is solicited.[113] The drafting process can take several years, with periodic meetings held across the country.[114] The tentative drafts are submitted to an executive committee for review and then to the entire conference at least two annual meetings, during which each act is considered section by section by the assembled commissioners.[115] A proposed act has yet one more obstacle to pass: each state votes on the uniform code, and only those acts approved by a majority of states are officially adopted as Uniform Codes.[116] A proposed act that undergoes this process and survives to the Uniform Code stage is the result of a highly deliberative process involving some of the most knowledgeable legal minds in the area; as such, a Uniform Code should have and does have significant persuasive effect, regardless of whether it is ultimately enacted by state legislatures.[117]

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[111] *Id.* "[T]he product of such an elite legislature is technically superior to the product of most state legislatures and at least the equivalent of what Congress itself could produce." *Id.*

[112] Randolph, *supra* note 108, at 1127 ("Uniform laws are designed to be fair and balanced, but also to pass in all state legislatures."); Fred H. Miller, *The Future of Uniform State Legislation in the Private Law Area*, 79 MINN. L. REV. 861, 868, (1995) (describing the open and inclusive nature of the drafting process). The consensus-building process includes soliciting affected interest groups for their input and even their participation. *Id.*

[113] Miller, *supra* note 112, at 868. Normally a representative of the American Bar Association also advises the committee. *Id.*

[114] Hillebrand, *supra* note 108, at 631.

[115] About NCCUSL, *supra* note 98.

[116] *Id.* The procedure for Model Acts is the same. "Legislatures are urged to adopt Uniform Acts exactly as written, to 'promote uniformity in the law among the states.' Model Acts are designed to serve as guideline legislation, which states can borrow from or adapt to suit their individual needs and conditions." *Id.*

[117] The Uniform State Law process is not without critics. For criticisms of the process, see Hillebrand, *supra* note 108, and Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569 (1998).

VI. AMENDING THE UNIFORM PROBATE CODE TO INCLUDE A DISCRETIONARY MEDIATION CLAUSE

Two of the primary goals of probate reform are to reduce litigation and to facilitate estate planning.[118] Mediation in the will dispute context is certainly well suited to meeting the first of these two goals. The main goal of mediation, of course, is to promote settlement between the parties, thereby avoiding the more formal and costly litigation process altogether.[119] The interest-based nature of mediation, in which parties work together with the aid of a third party neutral to resolve their disputes, strives for a win/win solution, as opposed to the power-based or rights-based nature of litigation, which almost invariably results in a win/lose outcome.[120] When maintaining family harmony is itself a goal of the dispute resolution process, as it is when family members are parties in opposition, the option that provides the possibility that both parties will be satisfied with the outcome is clearly superior to the option that results in victor and vanquished.[121] Mediation is much more suitable for addressing the unique emotional aspects and family dynamics of will disputes than traditional litigation.[122]

As to facilitating estate planning, however, the availability to the survivors of mediation may have the opposite effect by requiring additional precautions by the testator to ensure that his or her testamentary intentions are ultimately carried out. By its very nature, mediation focuses almost exclusively on the needs and interests of the survivors and not on the preferences of the decedent.[123] 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. This foresight, however, may have the beneficial effect of causing the testator to be much more clear about his testamentary intentions, to adhere more closely to the statutory formalities, to dot every "i" and cross every "t," both

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[118] Mary Louise Fellows, *Traveling the Road of Probate Reform: Finding the Way to Your Will (A Response to Professor Ascher)*, 77 MINN. L. REV. 659, 660 (1993).

[119] UNIF. MEDIATION ACT prefatory note, 7A U.L.A. 67 (Supp. 2002); *see also id.* § 2(1) at 71, defining mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."

[120] Radford, *supra* note 58, at 640 n.212.

[121] *See* Ezzell, *supra* note 64, at 127 ("[M]ediation mirrors more effectively the behavior necessary for good on-going family relations than does the adversary system" of litigation.) (citations omitted).

[122] *Supra*, Part IV.

[123] Foster, *supra* note 13, at 238.

figuratively and literally, in order to ensure that the estate plan is "impregnable."[124]

This is not to say that there is no place for mediation in the area of will contests; quite the opposite is true. In addition to the numerous advantages of mediation over litigation already discussed, there are several other factors that favor an increased role for mediation in the probate context.

First, there is no reason why a testator cannot provide specifically in his or her will that disputes with regard to the will are to be settled by mediation.[125] The careful testator (or more likely the testator's attorney) will often include contingent gifts to provide alternative dispositions if certain circumstances are extant at the time of death.[126] Planning for potential disgruntled heirs, whether through *in terrorem* clauses or mediation/arbitration clauses, is as sensible as planning for any other contingency.

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[124] Warnick, *supra* note 10, at 408–25. The *in terrorem* clause can be a particularly effective method for preventing will contests. *See generally* Gerry W. Beyer et al., *The Fine Art of Intimidating Disgruntled Beneficiaries with* In Terrorem *Clauses*, 51 SMU L. REV. 225 (1998).

> Under a typical *in terrorem* provision, the beneficiary is presented with a choice of either (1) accepting the gift under the will . . . or (2) contesting the instrument with the hope of upsetting the testator's . . . intended disposition and, instead, receiving a greater share of property through intestacy, under a prior will, or via some other means, but with the concomitant risk of triggering a forfeiture of all benefits if the contest fails.

Id. at 227. Note, however, that the Uniform Probate Code has a provision invalidating the no-contest clause if the contestant had probable cause for initiating the proceedings. UNIF. PROBATE CODE § 2-517 (amended 1998).

[125] Klinefelter & Gohn, *supra* note 2, at 150. For example, George Washington's will included provision for disputes to be settled through arbitration:

> [A]ll disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding;—two to be chosen by the disputants—each having the choice of one—and the third by those two—which three men then chosen, shall unfettered by law, or legal constructions, declare their sense of the testator's intention; and such decision is, to all intents and purposes, to be as binding on the parties as if it had been given in the Supreme Court of the United States.

Id. at 152.

[126] For example, a testator wishing to keep a family heirloom in the family may provide as follows: "I give my Great Grandmother's gold wedding band to my daughter-in-law, Anne, if still married to my son, Bob, at the time of my death, and if not, then to my granddaughter, Cathy." The well-drafted will may include several layers of contingent beneficiaries to account for various "unforeseen" possibilities.

Second, the law already favors family settlement of probate issues.[127] "Family settlement agreements are encouraged in situations where there is a reasonable or substantial basis for believing that prolonged or expensive litigation will result over the proceeds or distribution of an estate, the estate will be depleted, and family relationships will be 'torn asunder.'"[128] This "family settlement doctrine" is based on the notion that property devised by will is vested immediately in the beneficiaries, who may then do with it as they please.[129] Under this "family settlement doctrine," courts will generally enforce a family settlement agreement absent fraud, undue influence, or the breach of confidential relationship.[130] Whether that agreement is produced through negotiation or mediation should be of no consequence to the court in determining whether to give the agreement effect.

Third, the Uniform Probate Code already contains provisions regarding the enforceability of separate agreements among beneficiaries. The personal representative is obligated to abide by the terms of a written agreement by beneficiaries altering the shares, interests, or amounts they would receive either under a will or through intestacy. Beneficiaries cannot alter the shares of others, of course, and the agreement is not binding on those beneficiaries not a party to it.[131] Settlement agreements of will contests and other controversies may be submitted to the court for approval, in which case they become binding not only on the parties to the agreement, but also on those

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[127] Radford, *supra* note 58, at 645. *See, e.g., In re* Estate of Hodges, 725 S.W.2d 265 (Tex. App. 1986) (upholding a family settlement agreement which provided a percentage of the estate to a daughter specifically disinherited by the decedent, despite the inclusion in the will of a forfeiture clause). "A family settlement agreement is an alternative method of administration in Texas that is a favorite of the law." *Id.* at 267.

[128] Fleisch v. First Am. Bank, 710 N.E.2d 1281, 1283 (Ill. App. Ct. 1999) (invalidating an agreement to accelerate the distribution of the corpus of a spendthrift trust in the absence of a genuine family controversy).

[129] *Hodges*, 725 S.W.2d at 267.

> When a person dies leaving a will, [. . .] all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees; [. . .] subject to the payment of the decedent's debts. This provision leaves the beneficiaries of an estate free to arrange among themselves for the distribution of the estate and for the payment of expenses from that estate.

Id. (citations omitted).

[130] Radford, *supra* note 58, at 645; s*ee, e.g.*, Faulkner v. Faulkner, 257 S.W.2d 570, 572 (Ark. 1953) (refusing to enforce a settlement agreement among decedent's family where information was withheld from the widow that the children were obligated to disclose).

[131] UNIF. PROBATE CODE § 3-912 (amended 1998). The agreement is also subject to the rights of creditors and taxing authorities. *Id.*

unborn, unascertained, and who are unable to be located.[132] The UPC makes no mention of what method may be used to arrive at such agreements; that decision is left presumably to the local probate court or the parties themselves.

Fourth, numerous jurisdictions around the country have taken up the cause of alternative dispute resolution.[133] What began in the 1970s as a way to clear overcrowded judicial dockets and reduce the strain on scarce judicial resources has taken on a life of its own.[134] With the goal of promoting efficiency and reducing cost while simultaneously providing an effective and more "consumer friendly" experience to disputants, courts have instituted mediation options for numerous types of cases,[135] including probate cases.[136]

The next logical step, then, is to include in the Uniform Probate Code a section specifically encouraging the use of mediation to settle will contests. As previously discussed, the UPC already has provisions dealing with certain agreements among will beneficiaries or heirs.[137] These sections serve as a codification of the widely accepted Family Settlement Doctrine, but provide no direction as to what procedures may be used to arrive at that agreement.[138] A provision giving the Court discretion to require mediation in certain types of cases would go a long way toward promoting the use of mediation in will dispute contexts.

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[132] UNIF. PROBATE CODE § 3-1101 (amended 1998). The Court must find that the controversy was pursued in good faith, that parents properly represented the interests of their minor children, and that notice was properly given. UNIF. PROBATE CODE § 3-1102 (amended 1998). "The only reason for approving a scheme of devolution which differs from that framed by the testator or the statutes governing intestacy is to prevent dissipation of the estate in wasteful litigation." *Id.* cmt.

[133] Gary, *supra* note 9, at 434–38; COLE ET AL., *supra* note 56 at § 5:3.

[134] COLE ET AL., *supra* note 56 at § 5:2.

[135] Gary, *supra* note 9, at 434–38; *see* COLE ET AL., *supra* note 56, at §§ 12:2–12:14.

[136] *See, e.g.*, HAW. PROB. R. 2.1 ("The Probate Court may direct parties to participate in mediation[.]") Hawaii amended its probate rules in 1996: the probate court may now refer cases to mediation, and if the referral is based on either the motion of a party or of the court, participation in the mediation is mandatory. Gary, *supra* note 9, at 435. An Oregon court may also refer a case to mediation upon the motion of one party or upon the motion of the court. Even if there is no motion made, the court, if it thinks the dispute is appropriate for mediation, may explain to the parties that mediation is available and encourage the parties to attempt to resolve their dispute in that manner before pursuing litigation. *Id.* at 436. *See also* Ronald T.Y. Moon, *Visions of a New Legal System: Could There Be a Legal System That Better Incorporates the Strengths of ADR and Existing Legal Institutions?*, 15 REV. LITIG. 475 (1996) (explaining Hawaii's depth of commitment to the full and effective utilization of ADR methods).

[137] *See infra* notes 131–32 and accompanying text.

[138] UNIF. PROBATE CODE §§ 3-912, 3-1101, and 3-1102 (amended 1998).

Some jurisdictions simply make mediation available to those who desire it and give parties the option of whether or not to avail themselves of that opportunity.[139] "Mediation is a voluntary process, and it works best if the parties participate willingly."[140] But a lack of familiarity with mediation on the part of both parties and attorneys may cause mediation to be overlooked or discounted as a viable option.[141] Parties may need something more along the line of a judicial nudge in the right direction to actively consider mediating their dispute, something more than just being educated about the process.

Some jurisdictions have enacted legislation limiting judicial discretion and requiring parties to pursue mediation in certain situations.[142] For several reasons, it is a better policy to allow the Court discretion to steer certain cases to mediation rather than requiring all will contests to engage in mediation. First, not all cases can benefit from mediation. The main advantage to mediation over litigation is mediation's ability to preserve long-term relationships that may be damaged by the adversarial, winner-take-all mentality of litigation.[143] To parties who may not even know one another, however, preserving relationships may not be of paramount importance.[144]

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[139] *See, e.g.*, COLO. REV. STAT. § 8-43-205 (2001) "(1) Any party involved in a claim arising under articles 40 to 47 of this title *may request mediation* services by filing a request for mediation services with the division. However, mediation shall be *entirely voluntary* and shall not be conducted without the consent of all parties to the claim." (emphasis added).

[140] Gary, *supra* note 9, at 441.

[141] Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 912–14 (1997). Lawyers' resistance may stem from a number of factors, including a lack of understanding of the mediation process, the perception of mediation as a threat to the attorney's economic livelihood, philosophical differences between the familiar adversarial process and the win/win goal of mediation, as well as simple inertia. *Id.* In deciding whether to participate in mediation or pursue litigation, parties are strongly influenced by the suggestions of their attorneys. *Id.* at 912.

[142] *See, e.g.*, ME. REV. STAT. ANN. 19-A, § 251(2) (2001) "Except as provided in paragraph B, prior to a contested hearing . . . when there are minor children of the parties, the *court shall refer* the parties to mediation." (emphasis added). Paragraph B provides that the court may waive the mediation requirement for extraordinary cause shown. *Id.* Should the Court determine that a party failed to make a good faith effort in mediation, it may dismiss the action, render a default judgment, or order the offending party to pay costs and attorneys fees, among other remedies. *Id.* at § 251(4).

[143] *See* Ezzell, *supra* note 64, at 127.

[144] For a case in which mediation would likely have very little probability of success, either in resolving the dispute or in salvaging the underlying relationships, see *In re* Tyner's Estate, 106 N.W. 898 (Minn. 1906) (involving a will contest between the sons of testator's first marriage and their stepmother). Only two months after the death of his

Second, not all parties are willing or able to mediate.[145] Another advantage to mediation is its ability to address the emotional aspects of disputes in ways that litigation cannot.[146] Nevertheless, there will inevitably be situations where the emotions are so intense, the parties so intractable, or the convictions so deeply held that there is no possibility of the two sides working together successfully, and mandatory mediation may simply exacerbate the situation.[147]

Somewhere in the middle of the spectrum between totally voluntary participation and mandatory mediation is the appropriate degree of judicial involvement in the steering of parties toward mediation: an approach that allows a judge some leeway to encourage where appropriate and order where necessary, depending upon the judge's assessment of which cases can benefit from mediation and which cannot. This Note proposes that the following text be included in Article 3, Part 11 of the Uniform Probate Code:

§ 3-1103. [Encouraging Mediation]

The probate court may refer cases involving will contests and probate disputes to mediation. Cases may be referred upon the motion of a party, by agreement of all parties, or upon the court's own motion, after considering the totality of the circumstances. Good faith participation in the mediation is mandatory in all cases that the court refers to mediation, unless, upon a showing of good cause, the court waives the mediation requirement.

VII. CONCLUSION

Will contests are relatively rare events, but the devastation to family relationships that often accompanies a will contest gives the problem weight beyond its numbers.[148] This Note has discussed how mediation is uniquely suited to resolve such family disputes by addressing the underlying

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first wife, testator married the second wife, who "evidently took a dislike to the [minor] children, and soon began a systematic effort to drive them from the home," efforts that included infliction of corporal punishment, denying them the same food that other family members ate, and "depriv[ing them] of proper and necessary clothing and schooling." *Id.* at 899–900.

[145] Gary, *supra* note 9, at 441–42.

[146] White & White, *supra* note 66, at 19.

[147] Gary, *supra* note 9, at 441–42.

[148] Chester, *supra* note 7, at 174. Family litigation has been compared to the doomsday machine in the movie Dr. Strangelove, which cannot be disabled once activated. "In many ways a family lawsuit resembles the 'Doomsday Machine.' Its destructive power can't be recalled. Everyone loses. Nobody wins." Gerald Le Van, Litigation:—The Family "Doomsday Machine" (unpublished article, on file with the author).

emotional concerns and family dynamics, while preserving the family relationship. This Note has also explained why litigation, with its polarizing, winner-take-all mentality, is just as ill-suited to address the same concerns. Despite its effectiveness and suitability to probate matters, mediation is still not commonly used in resolving will disputes, possibly because attorneys are unfamiliar with its concepts or untrained in its application.[149] Adding a mediation provision to the Uniform Probate Code would serve to publicize this alternative approach to conflict resolution, lending the authority of the National Conference of Commissioners on Uniform State Law, while giving mediation a stamp of credibility and ensuring more widespread application to resolve probate matters.

[149] Chester, *supra* note 7, at 199 (describing court-based ADR programs as "in their infancy").