The Inappropriate Imposition of Court-Ordered Mediation in Will Contests

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THE INAPPROPRIATE IMPOSITION OF COURT-ORDERED MEDIATION IN WILL CONTESTS

VICTORIA J. HANEMAN*

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I. INTRODUCTION

The concept of inheritance is embraced by the public even though it seems to run contrary to the American ideology of equality of opportunity.¹ Accumulating assets and developing some form of family legacy to pass to our heirs is a process rooted in optimism and hope, and those who cannot realistically anticipate inheriting or bequeathing anything of value nonetheless set great store by their right to do so.² A society that has granted the power to designate one’s successors in ownership must


² For example,

The most puzzling political obstacle to estate tax revision, however, is that the American people do not seem to like heavy taxes on bequests . . . . [A] recent California initiative to repeal the state’s inheritance tax garnered a sixty-four percent positive vote. This was a greater majority than those in favor of a nuclear freeze or against gun registration, issues on a subsequent initiative ballot. The only convincing explanation that has occurred to me for this phenomenon lies in the optimism of the American people. In California, at least, sixty-four percent of the people must believe that they will be in the wealthiest five to ten percent when they die.

necessarily reallocate these property rights. To this end, the freedom of the individual to designate his heirs is a foundational norm that permeates doctrine in the law of wills, and as a result, the idea of testator intent has reached near-mythical stature. Our courts facilitate testamentary intent unless doing so contravenes established law or public policy.

A will is a direct expression of testamentary intent that is said to be the source of litigation more than any other legal document. Complex emotional and personal issues can easily transform inheritance into a destructive process. A probate court considers a broad range of contested matters, such as objections to financial accounting, petitions for the removal and surcharge of fiduciaries, and charges of breach of fiduciary duty. Will contest cases generally arise from a claim that the testator lacked capacity or the will is invalid. While most jurisdictions treat a will

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3 Ashbel G. Gulliver & Catherine J. Tilson, Classification of Gratuitous Transfers, 51 YALE L.J. 1, 2 (1941) (“One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power.”).


5 There is no universally accepted definition of “testamentary intent.” See Scott T. Jarboe, Note, Interpreting a Testator’s Intent From the Language of Her Will: A Descriptive Linguistics Approach, 80 WASH U. L.Q. 1365, 1365 (2002) (quoting Andrea W. Cornelison, Dead Man Talking: Are Courts Ready to Listen? The Erosion of the Plain Meaning Rule, 35 REAL PROP. & TR. J. 811, 811 (2001)) (“The ordinary standard [for determining testamentary intent] . . . is simply the meaning of the people who did not write the document. The fallacy consists in assuming that there is or ever can be some one real and absolute meaning. In truth, there can only be some person’s meaning; and that person, whose meaning the law is seeking, is the writer of the document . . . .”).

6 “[E]mpirical study suggests that ‘[w]ill contests rarely occur, perhaps on the order of one in one hundred or so cases.’” John H. Langbein, Will Contests, 103 YALE L.J. 2039, 2042 n.5 (1994) (reviewing DAVID MARGOLICK, UNDUE INFLUENCE: THE EPIC BATTLE FOR THE JOHNSON & JOHNSON FORTUNE (1993)) (citing Jeffrey A. Schoenblum, Will Contests: An Empirical Study, 22 REAL PROP., PROB. & TR. J. 607, 614 (1987)). “Because, however, there are millions of probates per year, one-in-a-hundred litigation patterns are very serious.” Id.

7 Perhaps this is because “[b]equeathing something to others is an expression of caring about them, and it intensifies those bonds. It also marks, and perhaps sometimes creates, an extended identity.” ROBERT NOZICK, THE EXAMINED LIFE 30 (1989).


9 A will is a direct expression of the decedent’s intent, and the decedent who has taken the steps to execute a will is said to be testate. There are many reasons why a decedent fails to execute a will and dies intestate: poor access to resources, insufficient resources to bear the expense, an unwillingness to contemplate death, or no interest in inheritance. The intestacy rules ensure that the failure to execute a will does not exclude this decedent from the inheritance process. Lawrence L. Waggoner, Marital Property Rights in Transition, 59 MO. L. REV. 21, 29-32 (1994). See generally Alyssa A. DiRusso, Testacy and Intestacy: The Dynamics of Wills and Demographic Status, 23 QUINNIPIAC PROB. L. J. 36 (2009).
contest as if it is merely an in rem probate proceeding, it may be distinguished as a hybrid action that is both civil and probate in character. The only relief possible in a will contest claim is a court order to deny or allow probate of some or all of the will in question.

Following the successful implementation of court-ordered mediation programs in divorce and family law cases, similar programs are being adopted to mandate the use of mediation in will contest cases. Although the appeal of such programs may be cynically attributed to the judicial system’s persistent concern with docket control, it has also been suggested that the use of mediation to resolve will contest cases will eliminate costly, winner-take-all litigation. Resolving disputes while preserving relationships is a legitimate objective in light of the fact that the controversies arising from wills and trusts often involve individuals who have some form of familial or continuing relationship.

The process of mediation shapes settlement without rigid deference to legal rules, and the intent of the testator may necessarily be marginalized as an impediment to reaching an agreement. The testator is not represented at the negotiating table, and to the extent that one of the parties feels that he is carrying out the wishes of the deceased, he may become unyielding in his position and unlikely to consider a

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11 Eunice L. Ross & Thomas J. Reed, WILL CONTESTS § 1:2 (2d ed. 1999) (stating that will contests are analytically no different from filing an objection to an executor’s accounting or the payment of a claim).

12 Id.


14 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, 197 (2002).

15 As compared to litigation involving entities or unrelated individuals, “[s]tudies have shown that it is generally the adult children bringing the will contests, with 71.3% brought by the children or stepchildren and 13.2% by the spouses.” Melissa Street, Note, A Holistic Approach to Estate Planning: Paramount in Protecting Your Family, Your Wealth, and Your Legacy, 7 PEPP. DISP. RESOL. L.J. 141, 142-43 (2007).

negotiated outcome.\footnote{17} Perhaps it is best said that the substantive law of wills focuses on the property rights of the deceased, while mediation resolves the disputes of the living.

Mediation settlements that are shaped or driven by non-legal considerations are not problematic, unless and until the process of mediation is designed and imposed upon the parties through state action (namely, the judicial system). Because the approach taken in mediation ineradicably strains against the legal rules applied by the courts adjudicating those same cases, a legitimate question arises as to whether or not instituting court-ordered mediation programs that mandate mediation in will contest cases is appropriate.\footnote{18} The contention of this Article is not that mediation is inappropriately used by the parties to a will contest case, but instead that \textit{court-ordered} mediation is inappropriate. This Article begins in Section II with a brief overview of the mediation process. Section III considers court-ordered mediation and probate disputes. The inappropriate imposition of court-ordered mediation in will contest cases is discussed in Section IV. Finally, an easily implemented solution that marries process with policy is proposed in Section V.

\section*{II. AN OVERVIEW OF MEDIATION\footnote{19}}

Mediation is an informal dispute resolution process\footnote{20} that utilizes a trained third party facilitator to oversee “communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”\footnote{21} Perhaps one of the most attractive features of mediation is that it is a process that is not fully formed and may therefore be shaped in a number of different ways.\footnote{22} Mediators utilize a myriad of different techniques,\footnote{23} and becoming too entrenched in one style or...
approach limits the mediator’s ability to respond to important factors that will impact a successful outcome—such as the nature of the dispute and the relationship between the parties. As a result of this flexibility and adaptability, there are numerous activities bearing no relation to one another that nonetheless may all be fairly characterized as mediation.

Several factors distinguish mediation from other dispute resolution processes. An element of voluntariness characterizes mediation, and even when court-ordered, the parties must choose to cooperate with one another to reach resolution. Mediation is a non-binding process in which the parties retain complete control over decision-making, and no final judgment or result is imposed upon the parties at the conclusion of the process. The emphasis is upon generating a solution that is acceptable to both parties. The process of mediation is facilitated by a neutral third

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24 Mediators take many different approaches to direct all energies towards settlement. In assisting the parties, mediators will direct focus to what each party is willing to do, as opposed to what each party expects from the other. He or she will also assist in generating options. Creative options will be considered without being immediately discarded, and sometimes the most outlandish ideas will be recast into workable solutions that satisfy the needs of all parties involved. See generally Dwight Golann, Mediating Legal Disputes: Effective Strategies for Neutrals and Advocates (2009); Pyles, supra note 22, at 277-78.

25 See Leonard L. Riskin, Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed, 1 HARV. NEGOT. L. REV. 7, 8 (1996) (“[A] bewildering variety of activities fall within the broad, generally-accepted definition of mediation . . . . Some of these processes have little in common with one another.”).

26 Dr. Iur. Ulrich Boettger, Efficiency Versus Party Empowerment—Against a Good Faith Requirement in Mandatory Mediation, 23 REV. LITIG. 1, 12 n.52 (2004). See also Andreas Nelle, Making Mediation Mandatory: A Proposed Framework, 7 OHIO ST. J. ON DISP. RESOL. 287, 287 (1992) (“[M]ediation is doubly voluntary: it is entered into voluntarily and it produces a result which is solely based on the parties’ agreement.”).

27 J. Brad Reich, Attorney v. Client: Creating a Mechanism to Address Competing Process Interests in Lawyer-Driven Mediation, 26 S. ILL. U. L.J. 183, 199 n.76 (2002). Though agreements can be drafted and signed, so as to be enforceable, no one imposes any arrangement upon either of the parties. See Bethany Verhoef Brands et al., The Iowa Mediation Service: An Empirical Study of Iowa Attorneys’ Views on Mandatory Farm Mediation, 79 IOWA L. REV. 653, 683-84 (1994).

The role of the mediator is to assist participants towards settlement without manipulation or coercion.  

Outside of these defining characteristics, mediation need not follow an established structure.  Before the mediation process begins, most mediators engage in some type of preliminary meeting with each party, to make introductions and discuss any information that should be known in advance of the process. It is common for a joint session to be conducted at the outset of mediation to allow each party (or counsel for each party) to briefly summarize his claim. After the joint session, the work of the mediator begins in earnest, as he meets with the parties to frame the issues and explore possible solutions. Some mediators will keep the parties separated until a resolution is reached, while others avoid the use of private caucuses.  

Mediation usually concludes when either the terms of a settlement are reached or the parties are not able to settle. In the latter case, the parties may be unhappy with any settlement that they were coerced into accepting.

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29 This person is neutral in that he should have no stake in the outcome of the dispute and no bias in favor of one party over another. The belief is that a mediator’s neutrality provides him with an unobscured view of the merits of the case to assist with creative resolution. James J. Alfini, Evaluative Versus Facilitative Mediation: A Discussion, 24 FLA. ST. U. L. REV. 919, 921 (1997). See also Alison E. Gerencser, Alternative Dispute Resolution Has Morphed into Mediation: Standards of Conduct Must Be Changed, 50 FLA. L. REV. 843, 847-48 (1998).

30 Amanda L. Marutzky, Making a Deal with the Devil: A Mediation Approach to Mitigating the Negative Effects of Church Conflict, 10 PEPP. DISP. RESOL. L.J. 303, 315 (2010). Even if the parties would be unable to settle without the assistance of a mediator, they would understandably be unhappy with any settlement that they were coerced into accepting.

31 There has been much debate as to the number of stages in the mediation process; anywhere from two to nine stages have been advocated, including introduction, joint session, private caucuses, and agreement. See John T. Blankenship, The Vitality of the Opening Statement in Mediation: A Jumping-Off Point to Consider the Process of Mediation, 9 APPALACHIAN J.L. 165, 180 & n.103 (2010).

32 A preliminary meeting may be in-person or by conference call. Paul R. Gupta & Sunni Yuen, JAMS Materials, in RESOLVING TECHNOLOGY AND MEDIA DISPUTES BEFORE TRIAL 92 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Ser. No. 914, 2007). The mediator may also use the preliminary meeting to establish important ground rules; for example, the mediator may explain that no personal attacks will be allowed, or that everyone will have unlimited time to be heard and the party speaking should not be interrupted. Gabriel P. Soto, Environmental Regulatory Mediation, 8 TEX. TECH. ADMIN. L.J. 253, 258-59 (2007).

33 Anthony C. Piazza, How Mediators Operate: A Mediator’s View, in HOW ADR WORKS 127, 131-32 (Norman Brand ed., 2002). The mediator is listening to identify underlying interests and obstacles to settlement. This is also a valuable opportunity for counsel, as this may be the first time that one party will have to listen to the opponent’s summary of the strengths of his case, affording an assessment of both opposing counsel and client. Richard M. Calkins, Caucus Mediation—Putting Conciliation Back Into the Process: The Peacemaking Approach to Resolution, Peace, and Healing, 54 DRAKE L. REV. 259, 287-88 (2006); Joshua J. Engelbart, Federal Mediation Privilege: Should Mediation Communications Be Protected From Subsequent Civil & Criminal Proceedings?, 1999 J. DISP. RESOL. 73, 76 (1999).

34 Private caucuses provide an excellent opportunity for the mediator to speak directly to the parties without communications being filtered through counsel. The parties can openly discuss issues and express emotions that they may not wish to reveal to the opposing party. Ronald Chester, Less Law, But More Justice?: Jury Trials and Mediation, 37 DUQ. L. REV.
confirmed and reduced to writing.\textsuperscript{35} or the mediator determines that a resolution will not be reached.\textsuperscript{36}

Settlement is unlikely to occur unless the parties understand and accept two important concepts. First, each party must come to the mediation table with some willingness (however tenuous) to compromise. A major—perhaps insurmountable—barrier exists when a party is stubbornly entrenched in his own position.\textsuperscript{37} Further, all participants must appreciate and respect the confidentiality of the proceeding.\textsuperscript{38} Mediation does not function properly without assurances of confidentiality because “if the process is to work, [parties must] fully disclose to the mediator their needs and tactics—-not only those that have been publicly revealed, but also their private views and internal arrangements.”\textsuperscript{39}

\textsuperscript{35} Written agreements are preferred over oral, as memories can be unreliable. Alejandro V. Cortes, \textit{The H-2A Farmworker: The Latest Incarnation of the Judicially Handicapped and Why the Use of Mediation to Resolve Employment Disputes Will Improve Their Rights}, 21 OHIO ST. J. ON DISP. RESOL. 409, 435 n.159 (2006) (noting that some courts have refused to enforce oral settlement agreements—which are more likely to be misunderstood or disagreed on by the parties). \textit{See also} David C. Albalah & Jesse D. Steele, \textit{For Business Dispute Solutions, Process Matters}, 11 CARDOZO J. CONFLICT RESOL. 385, 387 n.6 (2010) (“[T]he settlement agreement must be drafted and signed, before ‘settlor’s remorse’ can creep in. The risk of losing a settlement explodes exponentially if the parties leave the mediation room without a signed document in hand.”). The mediator’s role is to ensure there is a meeting of the minds on the agreement, that all terms are clear and understood, and that the parties are prepared to commit to the agreement on the table. Ellen A. Waldman, \textit{Identifying the Role of Social Norms in Mediation: A Multiple Model Approach}, 48 HASTINGS L.J. 703, 716 (1997). The mediator should also ensure that the agreement will be enforceable later should some future conflict arise. If a mediator has knowledge that one or both of the parties have a past history of breaching settlement agreements, it is generally advisable to refer the parties to a different resolution process. Robert B. Moberly, \textit{Ethical Standards for Court-Appointed Mediators and Florida’s Mandatory Mediation Experiment}, 21 FLA. ST. U. L. REV. 702, 717 (1994) (“A mediator must not knowingly assist in forming an agreement that would be denied judicial enforcement because of fraud, duress, overreaching, the absence of bargaining ability, or unconscionability.”).


\textsuperscript{37} Moberly, \textit{supra} note 35. at 717 (“[I]f the mediator believes that either party has become unwilling or unable to meaningfully participate, mediation should be suspended or terminated.”).


The many advantages of mediation have been a catalyst for its growing popularity. Mediation is cost-effective as compared to other alternative dispute resolution processes or litigation. The borders of settlement are flexible, and thus the parties are able to explore untried, unusual or maverick agreements. Although the parties are bound by a written agreement when mediation concludes in settlement, both parties have agreed to the terms of the negotiated outcome and there rarely seems to be a breach of the agreement. Perhaps the most beneficial aspect of mediation is that it provides a means to resolve disputes without destroying long-

There are several theories of law that, in combination with state statutes and court rules, serve to protect disclosures made during mediation. See James M. Assey, Jr., Comment, *Mum’s the Word on Mediation: Confidentiality and* Snyder-Falkinham v. Stockburger, 9 GEO. J. LEGAL ETHICS 991, 949-99 (1996). Those participating in mediation (including the mediator) cannot be forced to testify regarding statements made or documents prepared for mediation. *Id.* A number of cases that address the issue of confidentiality in mediation wholeheartedly support this conclusion. See NLRB v. Joseph Macaluso, Inc., 618 F.2d 51, 54 (9th Cir. 1980) (concluding that the public interest in assuring the effectiveness of the mediation process outweighed other conflicting public interests); Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979) (comparing the absence of confidentiality in mediation to a high-stakes poker game, with participants cleverly and deceptively playing a game to deceive, as opposed to striving for a just solution); Ryan v. Garcia, 33 Cal. Rptr. 2d 158, 162-63 (Cal. Ct. App. 1994) (finding that the settlement agreement was inadmissible in court, even to prove the fact that there was a settlement).

40 Mediation is the most popular “form of alternative dispute resolution among the 1,000 largest . . . corporations.” HENRY S. KRAMER, ALTERNATIVE DISPUTE RESOLUTION IN THE WORKPLACE § 4.02[1] (Supp. 2003).

41 Americans are “disenchanted with the legal system because it is virtually unavailable to persons of average means, yet it is the only forum for resolving disputes with certainty.” Frank Evans & Teresa Stanton Collett, Symposium, *The Lawyer’s Duties and Responsibilities in Dispute Resolution, Foreword*, 38 S. TEX. L. REV. 375, 375 (1997). See also Hoken S. Seki, *Perspective: Effective Dispute Resolution in United States-Japan Commercial Transactions*, 6 NW. J. INT’L. L. & BUS. 979, 1003 (1984) (noting the irony that “[i]n any times, the total costs of litigation in the United States far surpass the amount of money or economic value which is in dispute between the parties.”). The process of pretrial discovery in the U.S., often referred to as a “fishing expedition” by other nations, is expensive, burdensome and time-consuming for parties. Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 569 (1992); Yoshio Ohara, Symposium, *Judicial Assistance to be Afforded by Japan for Proceedings in the United States*, 23 INT’L. LAW. 10, 21 (1989). Instead of entering mediation after all discovery is completed, attorneys are realizing that they can utilize this process when they have enough information to understand the dispute. Colloquy, *Clients Driving Increased Use of Alternative Dispute Resolution*, ILL. LEGAL TIMES 16 (1994).

42 See Colloquy, supra note 41.

43 With mediated settlements, the parties reach consensus after their own active participation, which may be the primary reason that these agreements are rarely breached. See Peter N. Thompson, *Enforcing Rights Generated in Court-Connected Mediation—Tension Between the Aspirations of a Private Facilitative Process and the Reality of Public Adversarial Justice*, 19 OHIO ST. J. ON DISP. RESOL. 509, 511 (2004) (“The dearth of contested cases supported the notion that parties enthusiastically comply with mediated settlement agreements. Empirical studies further reinforced the belief that mediation participants came away from mediations happy, compliant, and satisfied.”).
term relationships. There is less cause for hostility if a dispute is resolved without the formal declaration of a “winner” and both parties feel as if their primary interests and needs have been satisfied.

III. COURT-ORDERED MEDIATION AND PROBATE DISPUTES

Mediation is a process of facilitated negotiation in which participation by the parties is either voluntary or mandatory. With the former, the parties to the dispute have agreed to use mediation and generally hire their own mediator. With mandatory or court-ordered mediation, a court order requires the parties to use mediation. In both instances, the process is non-binding and no settlement is forced upon the parties. This section explores mandatory or court-ordered mediation programs in the United States and considers the use of court-ordered mediation to resolve will contest cases.

An increasing number of states are developing court-ordered mediation programs. Although such programs vary widely, generally cases are referred on either a categorical or discretionary basis. That is to say, either a statute provides that certain categories of civil cases will proceed through mediation or judges are given the discretion to refer appropriate cases to mediation. The courts will order the appropriate cases to mediation, issue procedural rules to regulate the program, and certify the mediators. Court-ordered mediation does not raise any obvious constitutional concerns, as the parties are not expected or required to settle.

These programs are intended to serve the public interest—a case that is settled through mediation is one less case on the burgeoning court dockets, resolved with less time and expense to both the parties and the judicial system. However,

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44 Moberly, supra note 35, at 709.

45 “A dispute is a problem to be solved together, not a combat to be won.” Holly A. Streeter-Schaefer, Note, A Look at Court Mandated Civil Mediation, 49 Drake L. Rev. 367, 368 (2001).

46 See Colloquy, supra note 41.


51 For example,
concerns have been raised about court-ordered mediation. Mediation interposes another layer of expense for those parties who want to proceed to litigation but are forced, by court order, to suffer through the process.\textsuperscript{52} Further, an important characteristic of mediation is that the parties control the decision-making process, and some commentators insist that coercing the parties to submit to mediation contradicts the consensual and cooperative nature of the process.\textsuperscript{53} Critics assert that “coercion \textit{into} the mediation process translates into coercion \textit{in} the mediation process, creating undue settlement pressures that produce unfair outcomes.”\textsuperscript{54} Voluntariness is eroded when a court strips from the parties the choice to participate, 

\begin{quote}
[T]he North Carolina and Maine studies indicate that mediated settlements usually do not replace trials, which are costly to both litigants and the court system. The North Carolina study indicates that the program did not reduce litigants’ costs, nor did mediated settlement increase plaintiffs’ satisfaction compared to conventional settlement. Most cases settled in mediation would have settled anyway. One judge said upon hearing our results, “What difference does it make how a case settles, as long as it settles?” Looking at it from this point of view, one might well conclude that it would be preferable to make general civil mediation purely voluntary rather than court ordered.

If programs of court-ordered general civil case mediation are continued, their rather weak showing in the evaluative research suggests that court administrators should evaluate them and look for possible improvements.

Clarke & Gordon, supra note 49, at 336. \textit{See also} Donna Shestowsky, \textit{Disputants’ Preferences for Court-Connected Dispute Resolution Procedures: Why We Should Care and Why We Know So Little}, 23 OHIO ST. J. ON DISP. RESOL. 549, 559 (2008) (“In establishing their programs, many contemporary courts echo these two core originating values of ADR. The preambles of statutes and local court rules that establish some court programs suggest that their primary goals are to improve court efficiency or save money.”).

\textsuperscript{52} Patricia Hughes, \textit{Mandatory Mediation: Opportunity or Subversion?}, 19 WINDSOR Y.B. ACCESS JUST. 161, 189 n.121 (2001) (citing L. BOULLE & K.J. KELLY, \textit{MEDIATION: PRINCIPLES, PROCESS, PRACTICE} (Canadian Edition) 19-20 (1998) (“perfunctory participation by litigants with the result that ‘the mediation could constitute an expensive exercise in futility . . .’.”)). \textit{See also} Streeter-Schaefer, supra note 45, at 385 (“‘You can’t avoid being sued, but you should have the right to answer before the jury, instead of having settlement virtually extorted from you by piling on extraordinary costs of litigation in the form of settlement conferences.’”) (internal citation omitted); Tony Biller, Comment, \textit{Good Faith Mediation: Improving Efficiency, Cost, and Satisfaction in North Carolina’s Pre-Trial Process}, 18 CAMPBELL L. REV. 281, 288 (1996) (“Another concern is that mandatory mediation will decrease judicial efficiency and increase costs. Satellite litigation may be instituted upon a belief that the opposing party failed to properly mediate.”).

\textsuperscript{53} Roselle L. Wissler, \textit{The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts}, 33 WILLAMETTE L. REV. 565, 572-73 (1997). \textit{See also} Jeff Kichaven & Deborah Rothman, \textit{Lawyers Speak Out on Justifying Court Mediation to Their Clients}, 21 ALTERNATIVES TO HIGH COST LITIG. 149, 166 (2003) (“Eric Joss, a partner in the Los Angeles office of Paul Hastings Janofsky & Walker, says: ‘The key element is the openness of the parties to mediation as a dispute resolution mechanism. The chances of success are diminished if either side is a reluctant participant. It’s not always an insurmountable hurdle, but is a hurdle.’”).

\textsuperscript{54} Wissler, supra note 53, at 565 (emphasis added).
as well as the timing of that participation. In cases involving complex emotional issues, such as will contests, an ill-timed mediation may be particularly traumatic for parties with unresolved or fresh emotions such as grief or guilt.

On the other hand, many parties would not find their way to a mediator absent a court order. Lawyers who are “occasional players” in the court room may be unfamiliar with the process. Further, mandating mediation allows counsel to circumvent the stigma of being misperceived as weak at the suggestion that the dispute be voluntarily submitted to mediation, either by opposing counsel or his own client.

The use of mediation has flourished within certain types of litigation, but it has gained less momentum in other areas. Its application to will contest cases seems to have gained traction as part of a larger movement in the United States to encourage the use of alternative dispute resolution through court-ordered mediation programs. While these programs differ from state-to-state, there is also variation within each state when the programs are established at the county or courthouse level. Most

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56 Id. at 1605 n.276 (“I have been struck, in the course of conversations with women who have undergone the mandatory mediation process, by how often these women have said, ‘I felt as if I were raped.’”).

57 Kichaven & Rothman, supra note 53, at 166.

58 Id.

59 Lela P. Love & Stewart E. Sterk, Leaving More than Money: Mediation Clauses in Estate Planning Documents, 65 WASH. & LEE L. REV. 539, 549 (2008). See generally Gary, supra note 10; Brian C. Hewitt, Probate Mediation: A Means to an End, 40 AUG RES GESTAE 41 (1996) (observing that though there has been initial success of mediation as applied to civil disputes, the mediation of probate disputes has lagged behind other areas of litigation); Ray D. Madoff, Mediating Probate Disputes: A Study of Court Sponsored Programs, 38 REAL PROP. PROB. & TR. J. 697 (2004); 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 (2000).

60 For example, the Probate Court in Dallas, Texas created one of the first formal programs for the mediation of probate disputes. See Madoff, supra note 59, at 702. In Florida, general guidelines and rules applying to mediation are set forth in state statute, but each county administers its own mediation program and so the programs vary greatly from county-to-county. Id. at 704-05. Fulton County in Atlanta, Georgia has required mediation for all probate disputes since 1990, and parties are threatened with dismissal of their case if they refuse to participate in mediation. Id. at 707-08. The California Superior Court in Los Angeles established the Probate Court Supervised Mediation Program in 1997 in which virtually all probate cases are referred to mediation, while San Francisco has adopted an informal, voluntary program of mediation. Id. at 714-15. County mediation programs across California widely vary in both staffs and resources. Some programs have “large professional staffs of mediators, all of whom are experienced mental health professionals; in other counties, there may be only one mediator with little professional training.” Grillo, supra note 55, at 1553. Additionally, “some [California] counties have extensive office facilities in which to house their mediation program and provide the opportunity to have several meetings with the mediators; in others, mediation takes place in the twenty minutes before court in a hallway.” Id. In Illinois, Cook County’s Mediation Program allows parties to opt out of mediation and instead pursue trial...
court-ordered mediation programs handle a broad range of civil cases, although there are a small number of programs dedicated exclusively to probate disputes and will contest cases. Some courts refer probate cases to mediation on a voluntary basis while others route all probate disputes to mediation.

With the escalating number of court-ordered mediation programs comes a corresponding surge in criticism about the way in which such programs are being used by the courts, and it is unclear that this process is suited to resolve these

Perceptions of Dispute Resolution Procedures: An Ex Ante and Ex Post Longitudinal Empirical Study, 41 CONN. L. REV. 63, 98 (2008). At the county-funded Citizens’ Dispute Program in Memphis, Tennessee, parties filing a complaint are given the option of mediation and “[t]he party against whom the complaint would be filed can choose between a lawsuit and mediation, if it is a civil case, or, if it is a criminal case, an arrest warrant or mediation.” Jill Richey Rayburn, Note, Neighborhood Justice Centers: Community Use of ADR—Does It Really Work?, 26 U. MEM. L. REV. 1197, 1222 (1996). See also Cynthia A. Savage, Recommendations Regarding Establishment of a Mediation Clinic, 11 CARDOZO J. CONFLICT RESOL. 511, 542-49 (2010) (listing the numerous and varied court-sponsored and community-sponsored mediation options in and around New York City and Denver, Colorado).

An ever-evolving list of mediation programs are being designed and implemented, which makes it near-impossible to provide a comprehensive list of all the programs specific to probate litigation. See Love & Sterk, supra note 59, at 542 n.8 (listing many probate mediation programs which have been implemented).

Madoff, supra note 59, at 699 (“[T]o overcome reluctance by the parties to use mediation, some judges require that all disputes go to mediation before they can proceed in court.”). In Florida, probate cases are handled by the Circuit Civil Mediation Program. Judges regularly order probate cases to mediation, and the parties have ten days from the date of the order to select their mediator or one will be appointed. Id. at 705-06. Since 1990, the Fulton County Probate Court in Georgia refers mediation for all probate disputes before a case will be placed on the judge’s calendar. Id. at 707-09. Los Angeles established the Probate Court-Supervised Mediation Program, and once the court has assigned a case for court-supervised mediation, the parties have thirty days to engage in mediation efforts. Id. at 710-12 (2004). See also Roger Jellenik, Probate Court Mediation Pilot Program, S.C. LAW., July 2008, at 20-22 (“On August 23, 2007, the Supreme Court of South Carolina issued an Administrative Order adopting a pilot program for mediation in our state’s probate courts . . . . [P]robate courts handle different kinds of cases, and the application of mediation may depend to some extent upon what kind of case is to be heard . . . . [A] probate court is required to refer all contested guardianship and conservatorship proceedings to mediation, but referral of all other cases is a matter of judicial discretion.”); Chester, supra note 34, at 199-200 (discussingprobate mediation programs in Hawaii and Oregon. “The courts in Hawaii are so serious about ADR that if the court refers a case to mediation either on its own motion or that of one of the parties, participation is mandatory . . . . Although Oregon’s courts can also order mandatory mediation, this option is rarely exercised.”). See generally Streeter-Schaefer, supra note 45 (discussing mandatory mediation programs for civil disputes in Indiana, Nevada, North Carolina, Delaware, Louisiana, Alabama, Montana, and Maine). Other states with mandatory mediation programs include: California, Florida, and Texas. Harold Baer, Jr., The Past and Future of ADR, in 4 BUS. & COM. LITIG. FED.CTS. § 44:3 (Robert L. Haig, ed., 2d ed. 2010).

See Robert A. Baruch Bush, Staying in Orbit, or Breaking Free: The Relationship of Mediation to the Courts Over Four Decades, 84 N.D. L. REV. 705, 705 (2008) (“The acceptance and use of mediation by courts—at the state and federal level—has grown steadily over the last several decades. Today, mediation is a central element in the overall case-management system of many courts, and this phenomenon continues to grow unabated. At
Probate matters, and will contest cases in particular, often involve familial relationships, and it is not uncommon for power imbalances to arise within a family unit as a result of gender, age, or personality. There will be cases in which this power imbalance is not obvious to the mediator. Assuming the mediator identifies any power disparities, she may adjust the mediation process accordingly—although a question remains as to whether shifting the process in this way compromises the mediator’s role as an unbiased, third-party neutral.

Further, the process of mediation may not be ideally suited to resolve will contest cases involving estate plans that may have been the product of intensive *inter vivos* tax planning. In such cases, mediated settlement may have a profound impact upon tax liability and reporting obligations for the estate, as well as beneficiaries who are not directly involved in the controversy. In the hands of a mediator without sufficient experience in both taxation and probate law, tax consequences may arise as the unintended consequence of a mediation settlement. Although most jurisdictions have some minimum requirements to ensure that the mediator is trained in mediation, there is usually no articulated requirement that the mediator be an attorney or have knowledge of the law of wills.

Court-ordered mediation may be ill-suited to resolve will contest cases—which are often highly charged, emotional controversies—as a matter of poor timing. Courts will frequently mandate mediation at a specific phase of each case, and this

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64 Madoff, *supra* note 59, at 698.

65 “In some families, the presence of a bully or a wimp among the beneficiaries might make an adjudicative process more appealing than a consensual process where a weaker party might be overpowered.” Love & Sterk, *supra* note 59, at 543-44. See also Gary, *supra* note 10, at 411-12.


67 Hewitt, *supra* note 59, at 44.

68 For example,

[In Florida, m]ost attorneys stated a preference for choosing their own mediators rather than using those in the court-affiliated program. As one attorney said: There is a court affiliated program, but most sophisticated probate lawyers don't use it. There are probably 12-14 lawyers in the South Florida area who specialize in probate litigation. The litigation is usually very involved. Most of the certified mediators are not probate lawyers or do not have background in probate or tax—so the lawyers find that it is better to choose their own mediator.

Madoff, *supra* note 59, at 707.

69 A frequent attorney criticism of court-ordered mediation is that time and money were wasted with a mediator who was not qualified. “Thus, for example, the mediator for all probate disputes in the court-sponsored program in Collier County, Florida is an experienced mediator but is not an attorney and has no particular training in probate law.” *Id.* at 722.

70 *Id.* at 724. (“Programs with mandatory mediation, such as those in Georgia and Los Angeles, often provide standing orders for mediation before the judge hears the case.”).
type of standardization in timing preys upon a grief-stricken party.\textsuperscript{71} Further, ordering a case to mediation before discovery\textsuperscript{72} is more likely to shift settlement away from an end-result based upon the law to one shaped by social norms,\textsuperscript{73} which is particularly problematic with regard to will contest cases and explored further in Section IV.

IV. THE INAPPROPRIATE IMPOSITION OF COURT-ORDERED MEDIATION IN WILL CONTESTS

Mediation has been embraced by courts over the last few decades, owing largely to the desire—though arguably self-serving—to reduce the number of cases on the court docket. This Article neither supports nor critiques the use of court-ordered mediation in litigation cases generally, but instead suggests that some types of cases may be inappropriate for court-ordered mediation because of the substantive law underlying the controversy. This section explains why court-ordered mediation contravenes the substantive law applicable to will contest cases and explains why court-ordered mediation is inappropriate in these cases.

The law of succession and inheritance in every jurisdiction in the United States is steeped in centuries old legal tradition and slow to embrace change.\textsuperscript{74} Our concept of inheritance is built upon freedom of testation, namely, the right to control the disposition of one’s life possessions and wealth at death.\textsuperscript{75} Facilitating the testamentary intent of the decedent is therefore pivotal to respecting foundational property rights at death.\textsuperscript{76} Subject to limited exceptions and statutory formalities, every decedent has the right to designate her heirs and distribute her property in any manner that she so chooses,\textsuperscript{77} provided that she takes the affirmative step of

\textsuperscript{71} Although early mediation can allow resolution of a dispute before positions have hardened, it may also be unproductive if emotions (such as grief) are fresh. \textit{Id.}

\textsuperscript{72} \textit{Scott R. Belhorn, Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms, 20 OHIO ST. J. ON DISP. RESOL. 981, 988 (2005) (“Mediating early—that is, before formal discovery—not only saves transaction costs, but it also increases the likelihood that the parties will honor efficient extra-legal social norms.”).}

\textsuperscript{73} \textit{Id. at 990. (“Empirical evidence and theoretical support from this field over the last decade suggests that informal, decentralized methods of social control (i.e., social norms) create incentives that are as powerful determinants of rational choice as are legal rules.”).}

\textsuperscript{74} “The law of every United States jurisdiction was derived from the English model set forth in either the Statute of Frauds of 1677 or the 1837 Wills Act.” Haneman, supra note 4 (citing Charles I. Nelson & Jeanne M. Starck, \textit{Formalities and Formalism: A Critical Look at the Execution of Wills}, 6 PEPP. L. REV. 331, 345 (1979)).

\textsuperscript{75} \textit{Lee-ford Tritt, Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code, 61 ALA. L. REV. 273, 280 n.21 (2010).}

\textsuperscript{76} \textit{See supra note 5 and accompanying text.}

\textsuperscript{77} \textit{See Melanie B. Leslie, Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract, 77 N.C. L. REV. 551, 552 (1999) (“In the ideology of American wills law, the testator is a rugged individualist. He owes no duties to family or friends. He generally is free to distribute his estate to whomever he pleases, subject only to a limited duty to his spouse. His motives, whether benevolent or spiteful, are of no concern. His estate is responsible for his torts and bound by his express contracts, but any other expectations 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.”).}
executing a will. A will is a direct expression of the decedent’s intent, and it is an instrument that does far more than merely dictate a distribution. In drafting a will, the decedent goes through a reflective process of inventorying her assets, measuring interpersonal relationships, and weighing the wants or needs of important people in her life. When the decedent connects a beneficiary to an asset, this choice is worthwhile—and respecting this choice is essential in an inheritance system built upon freedom of testation.

The emphasis upon the dead hand of the testator is a common-law thread that is woven throughout the fabric of judicial decisions in will contest cases. Ordinarily, the only relief available in these cases is a court order to deny or allow probate of some or all of the will in question. The inheritance scheme created by the testator changes only to the extent that the court rules on the merits and strikes all or part of the contested will, or probates an entirely different instrument. Although the rare judicial decision evidences a vacillation from the bench between effectuating the intent of the testator and facilitating a fair result, the scale remains tilted in favor of the former.

Conversely, the fairness of the result plays a central role in the process of mediation, therefore implicitly shifting focus to the needs and rights of the living. Advocates of mediation contend that it is ideal for the emotionally-charged family disputes that drive will contest cases specifically for this reason—the win-win approach of this dispute resolution process appeals to a family’s sense of fairness. The rhetoric of mediation is one of reasonableness and compromise, and not one of...
right and wrong. The process deemphasizes legal principles, as well as related principles of fault and blame, and the parties are discouraged from shaping the contours of settlement based upon that which they perceive to be their legal rights and entitlements. It is understood that a compromised settlement is not always the legally-correct result.

Unfortunately, mediation rejects the primacy of testamentary intent in resolving the will contest. The intent of the testator may be nothing more than an obstacle to mediation, in that the main actor is deceased and his views are therefore not represented at the negotiating table. Testamentary intent may be wielded as both a shield and a sword by grieving participants who can easily become entrenched in the belief that the testator “would have wanted this” and “I am going to carry out what I know his [sic] wishes are.”

At the Roscoe Pound Conference of 1976, Harvard Professor Frank E.A. Sander was invited by Chief Justice Warren Burger to present a paper in which he imparted several groundbreaking notions that have earned him regard as a pioneer in the field of alternative dispute resolution. Professor Sander envisioned a multi-door courthouse offering a “rich variety of different processes, which . . . may provide far more ‘effective’ conflict resolution” and suggested that rational criteria be developed “for allocating various types of disputes to different dispute resolution processes.”

No longer novel or revolutionary, many federal and state courts have incorporated mediation as a stage in the civil litigation process through their court-ordered mediation programs. And though many programs vest the presiding judge with the power to exclude a case from court-ordered mediation as a matter of subjective determination, these programs generally have not developed and do not apply rational criteria whereby certain types of cases are wholly exempt from court-ordered mediation.

85 Grillo, supra note 55, at 1559-60.
86 Id.
87 “Rather . . . [settlements occur] because our trial system has become unworkable. The American trial has been bludgeoned by lengthy delays, high attorneys’ fees, discovery wars . . . and the world’s most extensive collection of cumbersome procedures.” Albert W. Alschuler, The Vanishing Civil Jury, 1990 U. Chi. Legal F. 1, 5–6 (1990).
88 Madoff, supra note 16, at 177-78. “‘There is a shadow at the table who can’t speak and can’t inform the discussion.’” Id. at 178.
89 Id.
91 Id. at 402.
92 For example, “Indiana’s court-annexed mediation rule also allows the judge to terminate the mediation process for good cause at any time and return the case to the court’s docket,” Streeter-Schaefer, supra note 45, at 374. Similarly, North Carolina’s mandatory mediation program “allows the parties to file a motion to stop mediation before the mediation occurs. The court may grant the motion if good cause is shown.” Id. at 375. Louisiana’s court-mandated mediation program “provides that all parties with authority to negotiate and enter binding agreements must attend the court-annexed mediation.” Id. at 376 (emphasis added).
Court-ordered mediation is problematic as applied to will contest cases as a whole. Mediation’s forward-looking view runs contrary to the backward-focused view that is central to the law of wills. Although the legal process is replete with gaps, contradictions, and ambiguities, the incorporation of mediation as a mandatory stage in the lifecycle of a will contest case is a contradiction that has been blessed by the court system. This Article contends that unintended consequences may arise from this contradiction. Although mediation can and should exist outside of the judicial system, it is problematic for it to be incorporated into the system through court-ordered mediation programs when the process perverts underlying rules of law that the court is expected to enforce should the mediation fail.

In assessing the value and efficiency of court-ordered mediation, empirical data has been gathered regarding the perceptions of judges, attorneys, and parties. In California, even domestic violence cases are referred to mediation under the state’s mandatory mediation program—it “is the only state that does not provide a complete exemption from mediation in cases where domestic violence has occurred.” Kerry Loomis, Comment, Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court, 35 CAL. W. L. REV. 355, 355-56 (1999).

In a similar vein, it has been suggested that will contest cases may not be appropriate cases for jury verdict, because juries seem to be focused upon the fairness of the disposition of property to the living—an approach that is wholly incompatible with the law. See Athanas, supra note 80, at 545-47. See also Frances H. Foster, The Family Paradigm of Inheritance Law, 80 N.C. L. REV. 199, 237 (2001) (providing that “[r]eformers have emphasized the particular threat that juries pose to nonconforming wills. They argue that in mental capacity cases, juries ‘are more disposed to work equity for the disinherited than to follow the law’ or the testator’s wishes.”).

Judge Cardozo observed that “[d]eep beneath the surface of the legal system, hidden in the structure of the constituent atoms, are these attractions and repulsions, uniting and dissecvering as in one unending paradox.” BENJAMIN N. CARDozo, THE PARADOXES OF LEGAL SCIENCE (1928), reprinted in SELECTED WRITINGS OF BENJAMIN NATHAN CARDozo 251, 255 (Margaret E. Hall ed., 1947).

Minnesota has a well-established program of court-ordered mediation, in which judges routinely order parties to participate in mediation, even when the parties and counsel advise that mediation is not appropriate. A January 2003 survey of trial judges resulted in some judicial responses to one question in the survey that bear careful examination and underscore the possibility that justice is not done through mandatory mediation. For example: “‘Mediated settlement should be based on application of law to facts, not on fear of the unknown.’ (Judge # 129)”; “‘If party is entitled to dismissal then they shouldn’t be coerced to settle.’ (Judge # 143)”; “‘If there is an unanswered question of law, the parties cannot effectively mediate.’ (Judge # 20).” McAdoo & Welsh, supra note 90, at 413.

The contention of this Article is not that all settlement is inappropriate, but that settlement of will contest cases through court-ordered mediation is inappropriate.

commentator observed that all of the data, considered cumulatively, suggests that “to achieve the goals of substantive justice, procedural justice, and efficient justice . . . [in part,] Courts should clarify that their primary objectives are to provide outcomes that are: perceived as fair; consistent with the rule of law; and likely to be durable.” When a court endorses and mandates a process that is inconsistent with the rule of law, the court is making it possible for the parties to avoid the rule of law and is therefore undermining the ability of lawmakers to establish a rule of law. Consequently, a court must exclude those cases from mandatory mediation that are determined to be inconsistent with the rule of law, and this determination should be made by filtering cases at two levels: on a categorical basis after an analysis of foundational rules, and also a case-by-case basis after an application of law to facts.

On a categorical basis, will contest cases should be excluded from the court-ordered mediation process. Because mediation is inconsistent with the idea of testamentary intent, a mediator cannot be expected to respect the intent of the testator in structuring a settlement. Court-ordered mediation forces a will contest into a dispute resolution process beyond the reach of legislators. Although the right to accept or reject settlement is vested with the parties, this degree of voluntariness does not mitigate the threshold coercion of the parties into the process. Mandatory mediation inappropriately imposes an obstruction on the right of access to the courts when the mediation process itself contravenes the substantive law of the case. Any other approach erodes the rule of law the courts are meant to apply—namely, effectuating the intent of the testator. Undoubtedly, less judicial emphasis upon effectuating the intent of the testator would be lauded by many as a positive, modern change. It is problematic, however, for this type of change to result unintentionally—as unintentional change is often accompanied by unintended consequences.

98 McAdoo & Welsh, supra note 90, at 425.

99 This Article explores only the former and not the latter, because most court-ordered mediation programs vest the court with the authority to exclude disputes from the process on a case-by-case basis. See supra note 62.


101 In a seminal case, a British Court held that “to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court[s].” Halsey v. Milton Keynes Gen. NHS Trust, [2004] EWCA (Civ) 576, [9] (appeal taken from Eng.).

102 This Article does not contend that such change would necessarily be bad, but only that such change should not occur unintentionally through court-ordered mediation.

103 For example, the settlement of will contest cases that is shaped by notions of fairness, lay emotion and non-legal considerations may bring us closer to system in which inheritance rights are determined in accordance with an heir’s conduct towards the decedent—both rewarding positive behavior and penalizing negative acts. China has implemented a scheme of inheritance that is a similar behavior-based model. Frances H. Foster, Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment, 32 U.C. DAVIS L. REV. 77, 81 (1998).
V. TOWARDS SOLUTIONS: THE APPROPRIATE APPLICATION OF MEDIATION TO WILL CONTESTS

Mediation has grown in popularity over the past two decades, and it is impossible to ignore the practical benefits of the process.\(^\text{104}\) The inappropriate application of court-ordered mediation to will contest cases is not cause for wholesale deconstruction, but it is cause for rethinking the possibility of a style of carve-out that responds to the identifiable flaws.\(^\text{105}\) The flaw in referring will contest cases to court-ordered mediation is rooted in inconsistency: the court is mandating a dispute resolution process that disregards the intention of the testator in shaping a resolution. This section explores easily implemented solutions that will resolve the conflict between law and process.

A probate court considers a broad range of contested matters in addition to will contest cases, such as objections to a financial accounting, petitions for the removal and surcharge of fiduciaries, and charges of breach of fiduciary duty.\(^\text{106}\) Although court-ordered mediation is not appropriate in will contest cases, as explained in this section of this Article, these cases are easily carved-out and categorically excluded from the process.\(^\text{107}\) Further, it may be appropriate to use court-ordered mediation in the many other types of probate disputes.\(^\text{108}\)

\(^{104}\) For example, in the early 1980s, many in the negotiation field were strongly attracted by a new “theory” that appeared, arguing that negotiation did not have to be a zero-sum game with winners and losers . . . . Some of the central notions of the theory soon impacted the mediation field as well. Most important among these notions was the concept that conflicts could and should be seen not as struggles for position, but as problems in how to meet seemingly (but not necessarily) incompatible needs and interests. The “problem-solving” or “integrative” view of conflict and negotiation . . . became the basis for the view that mediation should also be seen as a process for addressing conflicts through creative, mutual problem-solving, not just a process of settling cases in the shadow of expected court outcomes . . . .

The needs-and-interests language was the core of the new negotiation theory, reflecting the changed view that negotiation was not an adversarial battle for positions but rather a mutual problem-solving process aimed at uncovering and integrating needs and interests. The needs-and-interests language, essentially absent from early mediation literature, appeared in texts on mediation soon after 1980 and gradually became central to an understanding of what mediation does.

Bush, supra note 63, at 720-22.

\(^{105}\) Judge Cardozo observed that “there are more methods to be applied than one, that there is more than one string to harp upon, is in itself a forward step and a long one upon the highway to salvation.” BENJAMIN N. CARDOZO, THE GROWTH OF LAW, AND THE METHOD OF JUDGING, IN SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 211, 214 (Margaret E. Hall ed., 1947).

\(^{106}\) Cumming, supra note 8, at 1300.

\(^{107}\) “When litigation arises from disputes over an estate plan, it is typically in the form of a will contest.” Street, supra note 15, at 142. However, will construction disputes also arise, in which all parties concede to the will’s validity but disagree as to the meaning of words or provisions in the will. The interpretation of the words may affect the identity of beneficiaries
The inappropriate application of court-ordered mediation to will contest cases is a problem that may also be solved through a simple change in programmatic design: mediation that is court-ordered because it is the intent of the testator. This intent may be inferred from the testamentary instrument itself, or alternatively, from a statutory form that is executed by the testator and submitted to probate with the testamentary instrument.

This proposition requires that the testator make some form of lifetime election in favor of mediation. Until such a time that mediation is as widely known and understood by the average layperson as litigation, the process of mediation must be explained to the testator. There is no question that mediation has numerous features that may make it more desirable than litigation, however the competent estate planner may not assume that mediation is desirable to each of his clients. An election in favor of mediation introduces a degree of uncertainty into the estate plan of the testator, as he cannot be certain as to how assets will be distributed after his death.

This may be a particularly relevant consideration for the testator who is aware of power imbalances among his beneficiaries. If it is known to the testator that the

or property. Love & Sterk, supra note 59, at 555-56. For purposes of this Article, will construction disputes are encompassed under will contests.


Abraham Lincoln once wrote, “‘Discourage litigation’ . . . . ‘Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.’” Brian Dirck, Lincoln the Lawyer 67 (2007).


See Chester, supra note 34, at 202 (stating that “[e]ven the most capable mediator may not be able to defeat years of domination by one individual over another”); Susan N. Gary, Mediating Probate Disputes, 13 Prob. & Prop. 10, 13 (1999) (stating that power imbalances are always a concern in mediating probate disputes, as power imbalances may be implicit among siblings or family members from different generations); Madoff, supra note 59, at 700 (stating that power imbalances “may cause people to agree to settle in ways that do not truly reflect their best interests”); Williams, supra note 110, at 844 (stating that “in cases where one party has significantly less bargaining power than the other,” a mediator may simply facilitate the wishes of the stronger party).
strength of one of his beneficiaries overshadows a weaker beneficiary, he may be strongly opposed to mediation for fear that the outcome will be capitulation instead of equitable settlement.\textsuperscript{112}

The fully-informed testator wishing to make an election in favor of mediation would ideally execute a standardized form to do so. A standardized form may be adopted on a statewide basis and made widely available through the Internet.\textsuperscript{113} This form would allow the testator to express his intent that post-mortem conflicts be submitted to mediation. The form may also include clauses that may be selected by the testator to incentivize the beneficiaries and contestants to submit in good faith—for example, a clause providing that all or part of the attorneys’ fees for both parties will be paid from the estate assets if settlement occurs not more than two hundred days from date of death.

If the testator fails to execute the statutory form, intent may nonetheless be inferred from the language of the testamentary instrument itself.\textsuperscript{114} Some estate planners may build mediation clauses into the estate plan, seeking to reduce the likelihood of costly (both emotionally and financially) and time-consuming litigation after his death.\textsuperscript{115} Although it is uncertain whether or not such clauses will be enforced, they nonetheless evidence the testator’s intent to resolve a post-mortem dispute through mediation versus litigation.\textsuperscript{116} Conversely, a no-contest clause may

\textsuperscript{112} “In some families, the presence of a bully or a wimp among the beneficiaries might make an adjudicative process more appealing than a consensual process where a weaker party might be overpowered.” Love & Sterk, supra note 59, at 543-44. See also Gary, supra note 10, at 411-12.

\textsuperscript{113} Many states have standardized probate forms and make them available online at no charge—some examples include California, Colorado, Connecticut, Georgia, Maryland, Michigan, New Hampshire, Rhode Island, South Carolina, Washington, and Wisconsin. See Technology—Probate, 21 PROB. & PROP. 50, 50-51 (2007). See also 15 KATHERINE W. LAMBERT, WISCONSIN PRACTICE SERIES § 5:36 (9th ed. 2010).

\textsuperscript{114} The notion of using ADR vehicles in the probate context is certainly not new. George Washington’s will included the following item, which, in essence, mandated binding arbitration of any disputes arising from the administration of his estate:

“[T]hat all disputes (if unhappily they should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding: two to be chose by the disputants each having the choice of one, and the third by those two—which three men thus chose 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.”

Hewitt, supra note 59, at 41 (quoting Will of George Washington (July 9, 1799)).

\textsuperscript{115} For purposes of this Article, an estate planner is an attorney who has done or is doing estate planning on behalf of a client. Estate planning is the method by which a client passes his wealth to his beneficiaries and involves more than simply drafting a will.

\textsuperscript{116} A mediation clause may not be enforced either because it is not contractually agreed to by the beneficiaries, or in the case of the will contest, the validity of the underlying instrument containing the clause is disputed. See Love & Sterk, supra note 59, at 561 (“[T]he 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 . . . . [U]nlike the situation of an
evidence that the testator does not intend a dispute to be referred to mediation. The testator may have included a no-contest clause to prevent the public airing of family disputes, preserve his preferred distributional scheme, or to deter expensive litigation.\textsuperscript{117} Arguably, none of these objectives are served by court-ordered mediation: The family dispute is placed on the public record when the contestant files the will contest case; a mediated settlement will undoubtedly alter the intended distributional scheme; and a contestant otherwise deterred from litigation may file a claim with the knowledge that it will be ordered into mediation.

Relying upon the language of the instrument itself is the less desirable approach only because it introduces uncertainty. If the will contest is filed to dispute the validity of the underlying will, it may be problematic to look at that same instrument to determine testamentary intent.\textsuperscript{118} A standardized form, implemented on a statewide basis, provides a safe harbor for the testator by allowing mediation to be applied to any probate dispute arising from his estate.

A state that endorses mediation as a dispute resolution process may be inclined to substitute an opt-out approach over the opt-in approach suggested above. Under both systems, the testator has input on whether or not probate disputes may be ordered to mediation. Superficially, neither system gives greater or lesser rights than the other. However, the opt-out system infers permission for mediation unless a testator objects, whereas the primary objective of the programmatic change suggested in this Article is to clearly evidence the intent of the testator. An opt-out approach does not accomplish that goal, as any number of testators may fail to opt-out due to estate plan obsolescence, procrastination, or ignorance.

VI. CONCLUSION

An irony inheres where the legal system mandates a dispute resolution process that perverts the underlying rule of law that courts have purported to embrace for centuries—effectuating testator intent in will contest cases.\textsuperscript{119} Will contest cases are

\textsuperscript{117} Id. at 567-68.


\textsuperscript{119} See Fischer v. Heckerman, 772 S.W.2d 642, 645 (Ky. Ct. App. 1989) (“The right of a testator to make a will according to his own wishes is jealously guarded by the courts, regardless of a court’s view of the justice of the chosen disposition.”); \textit{In re Estate of Janney}, 446 A.2d 1265, 1266 (Pa. 1982) (“It is settled in this Commonwealth, as in New Jersey, that the intention of the testator is of primary importance, the lodestar, cornerstone, cardinal rule.”); Clark v. Connor, 117 S.E.2d 465, 468 (N.C. 1960) (“The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy.”); MacDonald v. Manning, 239 A.2d 640, 644 (R.I. 1968) (“Our primary obligation is to ascertain, if possible, the testator’s dispositive intent.”); Farmers & Merchs. Bank of Keyser v. Farmers & Merchs. Bank of Keyser, 216 S.E.2d 769, 772 (W. Va. 1975) (“The paramount principle in construing or giving effect to a will is that the intention of the
not suited for court-ordered mediation without the consent of the testator, because testamentary intent is laid to waste by a mediated settlement that alters the dispositive plan set forth in the will. When the judicial system incorporates a process that weighs the needs and wants of the living, thereby unintentionally turning focus away from the intent of the testator, it undermines the property rights of the decedent. A larger question emerges: Are the foundational rules in the law of wills suited to the evolving needs of modern society, or are they merely a relic of the common law? Until this question is answered, a shifting of these rules should not arise as an unintended consequence of court-ordered mediation. The inappropriate imposition of court-ordered mediation to will contest cases may be remedied through an easily implemented legislative solution that resolves the conflict between law and process.

To a great extent, this discussion is really an indictment against those courts that indiscriminately order most or all of the cases on their dockets to mediation without regard to the nature of the underlying claim. Perhaps our court system is no longer equipped to deal with the number and complexity of cases flooding the dockets, but judicial economy is not a sufficient justification for the courts to indiscriminately mainstream mediation. It is problematic for civil courts to mandate a dispute resolution process that may by its very nature contravene important policy considerations at the core of the substantive law applicable to a given case. This is a call for careful examination of court-ordered mediation programs to determine which types of cases should be categorically excluded from the process, or what simple adjustments need to be made to include these cases.

120 The American system of inheritance is built upon the foundation of donative freedom. Ralph C. Brashier, Disinheritance and the Modern Family, 45 CASE W. RES. L. REV. 84, 133 (1994).