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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

A Holistic Approach to Estate Planning: Paramount in Protecting Your Family, Your Wealth, and Your Legacy

Melissa Street*

I. INTRODUCTION

“THE GREATEST HERITAGE ANY OF US CAN LEAVE IS THE LOVE OF A FAMILY”¹

The most stable of familial relationships between adult siblings can be shaken to its very core when it comes to receiving inheritances after their parents' deaths. In addition, many times the real and personal property, parents intend to gift to their children is passed on and used in a manner that the parents never would have imagined or desired. This is because most parents typically do not share their estate plans with their children while they are still living in order to avoid any controversy that may arise.² Rather, their estate plans only become known after their deaths.³ Such secrecy can destroy family, the gifts, businesses, and property left behind.⁴

The method by which one generation passes wealth on to the next, usually their adult children, is referred to as estate planning.⁵ Creating an estate

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¹ Susan N. Gary, *The Greatest Heritage is the Love of a Family: The Larson Case and the Mediation of Probate Disputes*, 1 PEPP. DISP. RESOL. L.J. 233, 234 n.12 (2001).

² David Gage, et al., *Holistic Estate Planning and Integrating Mediation in the Planning Process*, 39 REAL PROP. PROB. & TR. J. 509, 510 (2004).

³ *Id.*

⁴ *Id.*

⁵ David Gage & John A. Gromala, *Mediation in Estate Planning: A Strategy for Everyone's Benefit*, ELDER'S ADVISOR, THE JOURNAL OF ELDER LAW AND POST RETIREMENT PLANNING (November 2002), available at <http://www.mediate.com/articles/gromala7.cfm>.

plan involves much more than simply preparing a testator's will.⁶ Estate planning encompasses a broad area of laws, from wills and trusts, to property and tax, to insurance and employee benefits.⁷ Over the years, it has become "a highly complex and specialized field in which tax and financial experts fine-tune plans to minimize taxes and maximize economic gain."⁸ Thus, what begins as the charitable intent of testators to pass gifts on to their loved ones, becomes tax-centered.⁹ Wealthy testators will spend large sums of money and time working with attorneys to create their estate plans.¹⁰ Unfortunately, sometimes testators do not know how best to pass on their wealth to the next generation.¹¹ Typically there is no communication with the children and other beneficiaries during this estate planning process.¹² Thus, sleeping giants, in the form of litigation and interfamilial controversy, will awake after the testator's death.¹³

When litigation arises from disputes over an estate plan, it is typically in the form of a will contest.¹⁴ Studies have shown that it is generally the adult children bringing the will contests, with 71.3% brought by the children or

⁶ See HAROLD WEINSTOCK & MARTIN NEUMANN, *PLANNING AN ESTATE: A GUIDEBOOK OF PRINCIPLES AND TECHNIQUES STUDENT EDITION* § 1.2 (2005). For instance, a well-executed estate plan will make the "best utilization of assets during the owner's lifetime." *Id.* That being so, a masterful estate plan must "provide for such lifetime needs as funds for children's education, income for retirement, replacement of income in the event of disability, and management of the estate in the event of incapacity." *Id.* In addition, the estate plan also will "provide for the disposition of assets on death in such a way that the estate being passed on is maximized and is left in accordance with the wishes of the decedent and the needs of the family." *Id.* at § 1:3. Furthermore, it must minimize taxes, thereby allowing an estate owner to have more wealth during his or her life and to provide for his or her family after their death. *Id.* at § 1:4.

⁷ ROBERT J. LYNN, *INTRODUCTION TO ESTATE PLANNING IN A NUTSHELL* 1 (5th ed. 2004).

⁸ Gage & Gromala, *supra* note 5.

⁹ *Id.* See also Roselyn L. Friedman & Erica E. Lord, *Using Mediation to Stem the Tide of Litigation in the Ocean of Family Wealth Transfers*, 59 *DISP. RESOL. J.* 37 (Nov 2004-Jan 2005) ("The estate planning process often focuses heavily on transfer tax minimization, while failing to fully address sensitive non-tax considerations underlying family dynamics.").

¹⁰ Gage & Gromala, *supra* note 5.

¹¹ *Id.*

¹² See Liz Pulliam Weston, *Time to Talk*, L.A. TIMES, available at <http://www.latimes.com/business/investing/la-famtalk-story1a,1,4069419.story> ("[I]n some families talking about money is more difficult than talking about sex—which makes estate-planning discussions painful to start . . .").

¹³ Gage & Gromala, *supra* note 5. Originally, litigation over inheritances was not a major concern because attorneys would typically represent an entire family as well as the family business or farm. Friedman & Lord, *supra* note 9, at 37. Thus, an attorney would be very familiar with the family dynamics and therefore would be more apt to create an estate plan that all could agree on. *Id.* Because of today's rules of professional responsibility, it is typically no longer possible for an attorney to represent multiple generations without creating conflicts of interests. *Id.*

¹⁴ Gage, *supra* note 2, at 510.

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stepchildren and 13.2% by the spouses.¹⁵ In our litigious society today, it is now acceptable for families to enter into court in opposition to each other, but the result can often devastate families.¹⁶ Will contests “can rupture and realign the social fabric of families, and keep millions of dollars tied up in litigation for years . . . [they] often involve large estates, and can create decades of ill-will in families.”¹⁷ Testators who spend their lives accumulating wealth do not want it wasted on court room battles.¹⁸ Furthermore, the court room provides limited options to disputing parties¹⁹ and many times the legal causes of actions that families bring forth, such as undue influence and incapacity, are just a smokescreen for deeper-seated issues.²⁰

So what can a testator do to avoid having his or her family and property potentially ripped apart after death? Alternatives exist that can aid a testator in preventing will contests. The most popular of these alternatives employ mediation, a form of alternative dispute resolution.²¹ Mediation is “particu-

¹⁵ Ronald Chester, *Disinheritance and the American Child: An Alternative from British Columbia*, 1998 UTAH L. REV. 1, 4 (1998).

¹⁶ Friedman & Lord, *supra* note 9, at 38.

¹⁷ Ronald Chester, *Should American Children Be Protected Against Disinheritance?*, 32 REAL PROP. PROB. & TR. J. 405, 409–10 (1997) (quoting Jeffrey P. Rosenfeld, *Will Contests: Legacies of Social Change*, INHERITANCE AND WEALTH IN AMERICAN 184 tbl.8.4 (Robert K. Miller & Stephen J. McNamee eds., 1998)).

¹⁸ Lela Porter Love, *Mediation of Probate Matters: Leaving a Valuable Legacy*, 1 PEPP. DISP. RESOL. L.J. 255, 258 (2001).

¹⁹ 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). Potential lawsuits related to inheritance involve invalidating the will by showing: (1) failure to adhere to will formalities; (2) use of ambiguous language; (3) testamentary incapacity or undue influence; (4) trustee breach of fiduciary duty; (5) survivorship for distribution; and (6) fraud. *Id.* at 415–16.

²⁰ Love, *supra* note 18, at 259. “Often parties dig in on money demands when what they want is recognition for their efforts or their suffering, an apology, a thank you or a sign of love or affection.” *Id.* at 262. When one thinks back to their own family arguments, they usually involve such things as “plans, hosting and cooking arrangements for family events, upkeep and use of family property, behavior towards spouses and in-laws, communication among various family members, public or third party communication regarding family matters, and disposition and allocation of family property and memorabilia.” *Id.* at 260. These are not the type of issues that constitute grounds for court action. *Id.* Additionally, a will contest may just be the continuation of an ongoing life time dispute between the particular beneficiary and decedent. Gary, *supra* note 19, at 419. For instance, when a beneficiary receives less of an inheritance than the decedent’s much younger second spouse, homosexual partner, or spouse of a different race. *Id.* at 419-20. Of course some beneficiaries are just interested in a bigger piece of the inheritance pie, but many times, the money is not so much at issue as are the elements of fairness and love in receiving a similar portion to that of other beneficiaries. *Id.* at 416.

²¹ Gage, *supra* note 2, at 510–11. Mediation is possibly the oldest and most frequently used ADR technique. Mary F. Radford, *Professional Contribution: Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L.J. 241 (2001). It is also unique to any other form of alternative dispute resolution because a neutral party does not impose a

larly well-suited to resolving and even avoiding conflicts over family wealth transfers.”²² It has been remarkably successful in relationally-sensitive areas of the law where it is important that parties are able to maintain relationships in the future.²³ Mediation is most commonly utilized by surviving heirs in the probate context.²⁴ Of course, this undoubtedly means that the testator has died and a dispute has arisen. Although it is beneficial for families who find themselves in such a predicament, a better solution exists. Estate planners and mediators have begun to unite during the planning stages of the estate, rather than after the testator’s death.²⁵ Their aim is to make a preemptive strike on any future family conflicts.²⁶ The “central innovation” of this method of mediation is open communication among the entire family, not only the testators, during the planning stages.²⁷ Some have named this new use of mediation, “holistic estate planning,” because of its focus not only on the transfer of wealth and tax issues, but on the underlying desires, fears, love, resentment, goals, and other issues that are inherent in a family unit and should not be ignored.²⁸ Holistic estate planning “is in its infancy,”²⁹ but there is evidence to suggest that it will become more and more

decision on the parties, but instead assists the parties in reaching a settlement themselves. Ray D. Madoff, *Mediating Probate Disputes: A Study of Court Sponsored Programs*, 38 REAL PROP. PROB. & TR. J. 697, 700 (2004).

²² Friedman & Lord, *supra* note 9, at 37.

²³ Gary, *supra* note 19, at 398. For instance, mediation has been very successful in divorce. *Id.* Divorce has been described as “the paradigm for the useful application of mediation.” *Id.* at 401 (quoting John S. Murray, et al., PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 273–336 (1989)). Not only are there heated emotional issues involved, but the parties typically need to maintain an ongoing relationship and, if children are involved, flexible solutions over custody issues. *Id.* at 401. In fact, studies have shown “that parties who mediate their divorce settlements tend to be more satisfied both with the process and the outcome than those who litigate or negotiate.” *Id.* at 403.

²⁴ See Radford, *supra* note 21, at 250; Gage, *supra* note 2, at 510.

²⁵ Gage, *supra* note 2, at 510.

²⁶ See John A. Gromala, *The Use of Mediation in Estate Planning: A Preemptive Strike against Potential Litigation*, 2 CA. TR. & EST. Q. 29 (1996).

²⁷ Gage, *supra* note 2, at 511.

²⁸ *Id.* at 510. The word holistic is defined as “relating to or concerned with wholes or with complete systems rather than with the analysis of, treatment of, or dissection into parts. Holistic medicine attempts to treat both the mind and the body. Holistic ecology views man and the environment as a single system.” Dictionary.com, at <http://dictionary.reference.com/search?q=holistic>. Others refer to this form of mediation during the estate planning process as “process consultation.” Radford, *supra* note 21, at 646. Just like holistic medicine, holistic estate planning:

[L]ooks beyond the narrow view and sees the full picture of the person’s life. The process involves all principal players in planning the transition, including both benefactors and adult beneficiaries. Holistic estate planning uses an expanded definition of wealth that includes intangible personal and family assets, as well as tangible ones.

Id.

²⁹ Gromala, *supra* note 26, at 31.

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essential and prevalent as more people transfer wealth and the costs of doing so rises.³⁰

In fact, our society is amidst the largest wealth transfer in history, with an estimated \$41 trillion to be transferred between 1998 and 2052, as the baby-boomer generation ages and dies.³¹ Although testators in the past may have been reluctant to talk about the choices in gifts they give to their children, there is evidence that holistic estate planning will increasingly begin to catch on with the coming of age of the baby boomers.³² The baby boomer generation is more educated than their parents and they have a better understanding of the complex social and emotional factors inherent in a family, making them more receptive to the holistic approach.³³

This comment will take an in-depth look at the art of holistic estate planning. Part II will walk through an overview of how the holistic estate planning process works. Part III will discuss certain familial circumstances that have the most to gain from the holistic approach. Part IV will give a brief overview of other alternatives to litigation and their disadvantages. Part V will conclude this article.

II. HOLISTIC ESTATE PLANNING: AN OVERVIEW

“ESTATE PLANNING CONCERNS DEATH AND TAXES . . . [BUT IT] IS PRIMARILY ABOUT A LARGER SUBJECT, AND THAT IS PEOPLE”³⁴

The primary goal of holistic estate planning is to take preventative measures to avoid a future problem rather than to solve an existing dispute.³⁵

³⁰ Friedman & Lord, *supra* note 9, at 37.

Many [baby] boomers will also be dealing with the costs and details of inheritance. High probate costs in some states, particularly California and New York, mean that even relatively modest estates can benefit from some estate planning. Estates worth more than a certain exemption amount (\$1 million in 2006), are also subject to federal estate taxes that can go as high as 55%. Lack of planning can be expensive, even with parents who have few assets.

Liz Pulliam Weston, *Time to Talk*, L.A. TIMES, available at <http://www.latimes.com/business/investing/la-famtalk-story1a,1,4069419.story>

³¹ Friedman & Lord, *supra* note 9, at 37.

³² Gage, *supra* note 2, at 512.

³³ *Id.*

³⁴ Gary D. Williams, *Weighing the Costs and Benefits of Mediating Estate Planning Issues Before Disputes Between Family Members Arise: The Scale Tips in Favor of Mediation*, 16 OHIO ST. J. ON DISP. RESOL. 819, 853 n.9 (2001) (quoting JEROME A. MANNING, *ESTATE PLANNING: HOW TO PRESERVE YOUR ESTATE FOR YOUR LOVED ONES* xi (2d ed. 1992)).

³⁵ Gromala, *supra* note 26, at 29.

All interested parties discuss the estate plan openly to ensure that everyone's voice is heard and that any possible conflicts can be identified and remedied prior to death.³⁶ Families are able to create their own solutions to problems while everyone is still alive, rather than after death, when they must settle for solutions imposed on them by the court.³⁷ In addition, while typical estate planning focuses mainly on tax benefits, holistic estate planning, while still allowing for tax benefits, also addresses personal issues that typically go unaddressed and eventually lead to much more money lost in court battles.³⁸

So how does holistic estate planning work? The process, of course, begins like the normal estate planning process.³⁹ Testators, typically a married couple, will approach an estate planner and express their desire to create an estate plan.⁴⁰ An estate planner will conduct an initial interview posing extensive questions about their family, goals and assets.⁴¹ An estate planner that is advocating the holistic approach should focus these questions on three main areas: individuals, family relationships, and the estate planning process.⁴² These types of questions will undoubtedly make testators realize and understand the need to involve their children in the process.⁴³

Next, the mediator will be introduced on the scene.⁴⁴ First and foremost, the mediator will have the important task of understanding the unique characteristics of the family.⁴⁵ Once all preliminary matters have been resolved between the testators, estate planner and mediator, it will be time to

³⁶ Gage, *supra* note 2, at 510–11 (stating that the central innovation of holistic estate planning is the full involvement of the adult beneficiaries in conversations with their parents in the early stages of the planning process, which allows the broadest range of concerns to be addressed).

³⁷ Radford, *supra* note 21, at 250.

³⁸ *Id.* at 251.

³⁹ Gage, *supra* note 2, at 537. Its important to remember that the holistic approach takes nothing away from the standard estate planning process, it simply improves upon it. *See id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 530–31. The initial focus of the interview sets the stage for the tone of the estate planning process. *Id.* If an estate planner sticks with narrow tax sensitive subjects in their questioning, that will be the focus of the estate plan. *Id.*

⁴² *Id.* For instance, questions should focus on: the testators' concerns for themselves as a couple and for each other individually, their hopes and fears for their children, the values they would like to pass on to their children, concerns about other particular relationships within the family such as between siblings, how the estate plan will affect any relationships between particular individuals, and any negative feelings towards the estate planning process from past experiences perhaps with their own parents. *Id.* at 531–32.

⁴³ *Id.* at 532.

⁴⁴ *Id.* at 537.

⁴⁵ *Id.* The mediator will begin accomplishing this task by meeting with the testators and asking about their family and personal goals. *Id.* It is important to note that the holistic approach is uniquely applied to each family and is always different, because no one family is exactly alike. *See id.* The parents, estate planner, and mediator will then decide who to invite in the process, taking special consideration of children's spouses, a drug-addicted child, or an estranged child. *Id.* at 538.

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involve the entire family.⁴⁶ In general, mediation does not have mandatory procedures that must be followed.⁴⁷ The holistic approach is based on the typical mediation process which is organized in four steps: (1) mediator's introduction; (2) parties' opening; (3) caucus; and (4) settlement.⁴⁸ During the mediator's introduction, the process is explained, making clear that it is a voluntary process in which the parties can leave at any time, and the mediator is only to serve as a facilitator not a decision-maker.⁴⁹ The mediator will also usually lay out the ground rules at this time.⁵⁰ Next, the parties' opening gives each party an opportunity to express their view of the conflict or rather "their side of the story."⁵¹ Then each party will participate in a caucus with the mediator, which is a private meeting between each individual party and the mediator.⁵² These meetings help to clear up misunderstandings and are confidential.⁵³ Finally, the mediator brings the parties back together and encourages a settlement.⁵⁴ During this time, parties are in open dialogue with each other and significant issues are raised in front of everyone.⁵⁵ After all parties have had an opportunity to speak, the mediator will encourage parties to generate ideas for resolution.⁵⁶

⁴⁶ See *id.* at 537–38.

⁴⁷ 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, 624 (2000).

⁴⁸ Madoff, *supra* note 21, at 700–01.

⁴⁹ *Id.* at 701. "Although neutral, a mediator is not a passive party. The mediator may play a variety of roles, including facilitator, communicator, educator, resource expander, reality check and devil's advocate, guardian of the details, reconciliator, and interpreter." Radford, *supra* note 47, at 622. Additionally, the mediator is not to act as a judge in any way. *Id.* at 626. Furthermore, the attorney has the lead role and the mediator will not question the attorney's advice. *Id.* at 649 (quoting John A. Gromala, *The Use of Mediation in Estate Planning: A Preemptive Strike against Potential Litigation*, 2 CA. TR. & EST. Q. 30 (Fall 1996)).

⁵⁰ Radford, *supra* note 47, at 626 ("Typical ground rules include: (1) Do not interrupt the other party, (2) Be respectful of the other party, (3) Maintain flexibility, (4) Retain confidentiality.").

⁵¹ Madoff, *supra* note 21, at 701. The mediator may ask questions to clarify issues but otherwise, everyone else is to remain silent as the party is given their chance to speak. Radford, *supra* note 47, at 626.

⁵² Madoff, *supra* note 21, at 701.

⁵³ *Id.* Because of this confidentiality, parties can be more free to speak about "sensitive issues or simply to vent emotions." Radford, *supra* note 45, at 626. In some cases, the majority of the mediation occurs during these private caucuses when the most openness can be achieved. *Id.*

⁵⁴ Madoff, *supra* note 21, at 701.

⁵⁵ See Radford, *supra* note 47, at 627.

⁵⁶ See *id.* The mediator may also suggest ideas for resolution. *Id.* The important thing to remember is that it is the parties involved that decide on a resolution and not the mediator who imposes the resolution.

While a typical mediation involves opposing unrelated parties in conflict, holistic estate planning involves a family, and mediation serves to bring forth any potential conflicts that exist or may arise in the future.⁵⁷ The holistic approach is able to explore the more subjective and personal issues that sometimes go unnoticed in the typical estate planning process. The meetings with various groups within an entire family such as siblings and grandchildren aid to stimulate discussion of sensitive family related issues.⁵⁸ Also, each individual is given an opportunity to meet confidentially with a mediator so as to guarantee that no one is “harboring a hidden agenda or sitting on an explosive resentment.”⁵⁹ Family members’ differences are analyzed in order to prevent any conflicts that may arise by confronting them before a plan is created rather than after.⁶⁰

One particularly successful method employed by the holistic approach is a family retreat where family members engage in conversations to explore “personal, familial, and financial aspects of the anticipated transition.”⁶¹ The family retreat would last anywhere from two to four days, leaving enough time for certain issues to come to the surface and be fully understood, while maintaining a timeframe that can fit into everyone’s schedule.⁶² The meetings during the family retreat are organized by a mediator who acts as an independent third party and not as an attorney.⁶³ The testators may bring their attorney or accountant along for professional advice during these meetings.⁶⁴ The role of the mediator is to act in unity with the testators’ attorney to facilitate the design of an estate plan that effectively portrays the testamentary intent of the attorney’s clients.⁶⁵ Openness and candor are achieved because the mediator keeps individual meetings confidential from the larger group meetings unless the individual requests otherwise.⁶⁶ Therefore, each family member is able to feel free to discuss all personal issues

⁵⁷ See Gage, *supra* note 2, at 517–18.

⁵⁸ *Id.* at 512.

⁵⁹ *Id.* at 518.

⁶⁰ *Id.*

⁶¹ *Id.* at 512.

⁶² *Id.* at 539.

⁶³ *Id.* at 535.

⁶⁴ *Id.*

⁶⁵ Radford, *supra* note 21, at 251. Mediators possess different skills than attorneys, because mediators are usually trained in family therapy or communications. *Id.* The mediator’s goal is to be an active listener and to encourage the family to talk, both to each other and the mediator. Gage, *supra* note 2, at 536. In addition, the mediator is not to give advice or to influence decisions in any way. *Id.* His or her purpose is only to spark conversation and to encourage resolution. *Id.*

⁶⁶ Gage, *supra* note 2, at 536. “Many state statutes and ADR rules require that mediation remain private,” which means that not only will an individual’s conversation be kept private from other family members, but all family meetings will be kept confidential from the public. Friedman & Lord, *supra* note 9, at 38.

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without fear that they may hurt another family member.⁶⁷ Keeping the family affairs private can be especially advantageous to siblings who want to live and work in the same social and business circles.⁶⁸ At the end of the family retreat, the mediator will be able to work with the attorney to create a final estate plan that is more satisfactory to all involved.⁶⁹ Through the use of these methods, holistic estate planning serves to avoid conflicts between family members that would lead to a breakdown of family relationships, resulting in legal battles.⁷⁰

III. BENEFITS AND DRAWBACKS OF HOLISTIC ESTATE PLANNING

“THE RECEIVER IN THE CAUSE HAS ACQUIRED A GOODLY SUM OF MONEY BY IT, BUT HAS ACQUIRED TOO A DISTRUST OF HIS OWN MOTHER, AND CONTEMPT FOR HIS OWN KIND”⁷¹

A. *Benefits of Holistic Estate Planning*

The holistic approach to estate planning has many unique benefits for a testator who is willing to go the extra mile. Some of the most rewarding aspects include the avoidance of future conflicts causing costly litigation,⁷² and preservation and strengthening of the family.⁷³ Additionally, testators

⁶⁷ Gage, *supra* note 2, at 536. During these private meeting the individual can also work with the mediator to understand what the individual most needs to see expressed in the estate plan. *Id.*

⁶⁸ Radford, *supra* note 21, at 241.

⁶⁹ Gage, *supra* note 2, at 512.

⁷⁰ *Id.*

⁷¹ CHARLES DICKENS, BLEAK HOUSE 389 (Nicola Bradbury ed., Penguin Books 2006) (1853). Bleak House, by Charles Dickens, is a classic work of English fiction that examines the litigation system. The novel chronicles a lawsuit, Jarndyce v. Jarndyce, in which disputing family members and their attorneys contest a will over a period involving several generations. Many of the characters become embittered and alienated from their family in the process. The assets of the estate ultimately are entirely consumed by legal fees and court costs.

Love, *supra* note 18, at 256 n.12.

⁷² *Id.* “[C]arefully conducted family meetings ensure that there will be no surprises or hidden agendas after the parents die. The likelihood of conflict is decreased by obviating the need for children to deal with complicated and emotionally charged estate matters at a time when they are most vulnerable emotionally.” Gage, *supra* note 2, at 534.

⁷³ See Gage, *supra* note 2, at 532.

Families become stronger when they gather together with assistance to reflect and discuss what it means to them to be a family, what is most important to them as a family, what their values are, and how they can help one another to achieve their individual and collective goals. These conversations frequently lead to compelling

are provided with an open forum to not only address the realities of their final years with their family, but to share important values they want to pass down to future generations.⁷⁴ Furthermore, beneficiaries are benefited by gaining a more comprehensive understanding of the gifts they will receive,⁷⁵ while also retaining lasting and loving memories of the testators long after they are gone.

Typically, holistic estate planning is best utilized with adult children who are no longer dependent on their parents to be fed, housed, and educated; but instead have their own careers, families, and values.⁷⁶ Moreover, there are certain familial circumstances that would benefit greatly from holistic estate planning. Some of the most pertinent are families who have: (1) a family business, (2) divorce and remarriage, (3) intentions to elevate one child as trustee or executor, and (4) significant real property.⁷⁷

discussions about the role of money in personal happiness and the family members' commitment to one another, their communities, and society. They occasionally lead to establishing trusts and foundations for supporting philanthropic endeavors as a family.

Id.

⁷⁴ Gage, *supra* note 2, at 531. Holistic estate planning gives testators "a clear understanding about how they will be cared for under various scenarios. More than anyone, children are the most likely people to ease the weight felt by parents in dealing with the transition. Family meetings can prepare children for what lies ahead during the parents' remaining years." *Id.* at 532. Holistic estate planning also provides the testators with an opportunity to express their values and beliefs, which otherwise may go unaddressed or improperly expressed in a will. *Id.* This is an important advantage to the holistic approach that is often lost in the typical estate planning process. *Id.* Testators can bring the focus of their estate planning to the values they wish their children to recognize and hopefully continue carrying on, always remembering their parents and how they were raised. *Id.* This will prevent the transfer of "money unaccompanied by values." *Id.* (quoting EILEEN GALLO & JON GALLO, SILVER SPOON KIDS: HOW SUCCESSFUL PARENTS RAISE RESPONSIBLE CHILDREN xvii (2001)).

⁷⁵ Gage, *supra* note 2, at 533.

Dialogues with adult children give parents an opportunity to explain their rationale for the intended distribution of assets and possessions, especially any unequal distributions to children, gifts to others, and philanthropic gifts. Because children must live with their parents' decisions, it makes sense for parents to provide them with a foolproof way of understanding their rationales for those decisions.

Id. Furthermore, withholding information about inheritances "creates a breeding ground for suspicion, misunderstanding, and even paranoid thinking." *Id.* By sharing this information upfront, beneficiaries don't have to guess and can focus on their own careers and personal goals with all the facts.

Id.

⁷⁶ *Id.* at 515.

⁷⁷ *Id.* at 520, 530.

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1. Family Business

Studies have shown that only about one-third of family businesses survive a transfer to the next generation.⁷⁸ What is even more interesting is that only ten percent of these failures can be attributed to tax issues.⁷⁹ This undoubtedly means these businesses are not failing for financial reasons.⁸⁰ A family business can rarely be passed on to the next generation without some type of planning and discussion with all parties involved.⁸¹ Usually the adult children will become business partners or take over the business entirely.⁸² Testators will make assumptions that their children will be business partners or even that their children actually want to be involved in the business.⁸³ Either they are unaware or unwilling to accept the fact that their children will not be an effective team, or that some do not want to be a part of the family business.⁸⁴

Including the successors to a family business in the discussion of how assets will be managed and how the business will be run is imperative to keep the harmony and to reduce the animosity that can emerge between siblings. Often such animosity can result in “life-long resentments caused by parents’ seemingly autocratic control over their children’s lives from the grave.”⁸⁵ Holistic estate planning is of crucial importance to a family with a business because there are essential business matters that must be discussed in order to take the family business in the direction that is best for the entire family.

⁷⁸ Radford, *supra* note 47, at 647.

⁷⁹ *Id.*

⁸⁰ *Id.* It has been said that “personal interactions among successors are six times more detrimental to business successions than transfer taxation.” *Id.* (quoting Michael D. Allen, *Succession Strategies for the Family Business, Ali-Aba Est. Plan for the Fam. Bus. Owner Course of Study Materials* 4 (1998)).

⁸¹ Gage, *supra* note 2, at 520.

⁸² *Id.*

⁸³ *See id.* at 523. For instance, in one family business scenario, “the sons mutually decided that regardless of how financially advantageous it might be to continue the business, their interpersonal difficulties made it unlikely they would ever enjoy working together or trust one another sufficiently to be partners.” *Id.* at 523. In another situation the son “hated the business and wanted no part of it,” and he “had been afraid to tell his father because of the great sentimental value that he perceived his father attached to the business.” *Id.* at 526.

⁸⁴ *Id.* at 522–23.

⁸⁵ *Id.* at 521.

2. Disinheriting or Not Treating Children Equally

The United States is one of the only modern nations that still allows parents to disinherit their children.⁸⁶ There are many reasons why a testator may disinherit a child. Sometimes it may be for the simple fact that he or she has enough wealth of their own, while other siblings are in more need.⁸⁷ Another cause for conflict is when children are treated unequally in an estate plan.⁸⁸ For instance, when one child lives closer to the testator and spends considerable time taking care of the testator, he or she may consequently be rewarded in the will.⁸⁹ These types of situations can be extremely traumatic for all involved if there is no discussion before the death of the testator.⁹⁰ Children's relationships with each other may be destroyed merely because they misunderstand the reasons for being treated unequally.⁹¹ Holistic estate planning would allow an adult child to hear the motives for disinheritance or unequal treatment from the testator's own mouth, leaving no room for misunderstanding and preventing the breakdown and destruction of sibling relationships.

3. Divorce and Remarriage

Divorce and remarriage have become a commonality in this day and age, where it is not surprising for people to be married a second or third time.⁹² This presents a whole new set of issues in the estate planning con-

⁸⁶ Chester, *supra* note 17, at 406. One reason may be because our society believes in the utmost importance of "individual control over property, even after death." *Id.* at 406–07.

⁸⁷ See Gage, *supra* note 2, at 529. For instance, a mother left her one million-dollar estate to her daughter while completely disinheriting her son who was already well off. *Id.* After the funeral, the son was shocked when he discovered that his mother had not left anything to him. *Id.* As a result, he rarely speaks to his sister and his memories of his mother are "tainted by the memory of being cut out of her life at the very end." *Id.*

⁸⁸ *Id.* at 530.

⁸⁹ Gary, *supra* note 1, at 233.

⁹⁰ Gage, *supra* note 2, at 530. "Families face realignments in status and power wherever disinheritance occurs. There ensues a period of in-fighting and mutual recriminations which can drag on for months regardless of how much or how little is at stake." Chester, *supra* note 17, at 410.

⁹¹ One example of this can be seen in the Larson case. Gary, *supra* note 1, at 233. When Gladys Larson died she left a will giving seven-eighths of her estate to her son William and one-eighth to her son, Ben. *Id.* A previous will created while her late husband had still been alive, left her entire estate to her husband, but if he did not survive then to her sons in equal shares. *Id.* William had lived much closer to his mother in her later years and had assisted his mother in many day to day matters such as caring for her property and financial matters. *Id.* Ben was incredibly hurt. *Id.* The family was ripped apart by the litigation that ensued. *Id.* This type of situation could have been prevented by bringing all the family members together before the death of the testator and talking openly about the testator's intentions and motives.

⁹² Chester, *supra* note 17, at 410.

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text. In fact, the problem is fairly large, with one-third of will contests involving divorce and remarriage, most of which are brought by children and stepchildren.⁹³ It can be very difficult for a testator to prioritize relationships between stepchildren and their own children without generating conflict.⁹⁴ Some children may live with the testator while others do not.⁹⁵ Both sets of children have differing needs that the testator wants to address in his or her estate plan.⁹⁶ It is important that everyone understands the testator's motivations, and this is not possible unless the testator communicates with everyone. Families that have dealt with divorce and remarriage already have challenges in establishing and maintaining family unity, and they do not need any more. Therefore, blended families are prime candidates for the holistic estate planning approach and all of its benefits.

4. Trustee or Executor Related to Testator

One of the most essential decisions to make during the estate planning process is designating a trustee. Many testators will select one of their children to serve as trustee, making the decision even more complicated.⁹⁷

Most people are right when they say that their families are unique. It is never more true that no two families are alike than when it comes to blending two families together. It is hard enough to get natural siblings to blend together at times. But in the case of many second marriages, the parents' task is more difficult Second marriages, whether there are children from both parents or only one parent, require a different approach to estate planning.

COLLEEN BARNEY & VICTORIA COLLINS, BEST INTENTIONS: ENSURING YOUR ESTATE PLAN DELIVERS BOTH WEALTH AND WISDOM 123 (2002).

⁹³ Chester, *supra* note 17, at 411. Mary Louise Fellows conducted a study in which out of 745 will writers, 28% stated they would leave nothing to children from previous marriages and 29% stated they would leave a small portion to children from previous marriages. *Id.* at 410 n.23.

⁹⁴ Gary, *supra* note 19, at 417.

⁹⁵ Friedman & Lord, *supra* note 9, at 38.

⁹⁶ *Id.*

⁹⁷ BARNEY & COLLINS, *supra* note 92, at 99. Factors to consider in selecting a child as beneficiary include: (1) the expectations and perceptions of other beneficiaries, especially other children; (2) skills of a particular child necessary to act as trustee; and (3) the particular child's ability to work with another family member as co-trustee. *Id.* at 99. There are also various pitfalls that a testator must be aware of when selecting a child as trustee. For instance, many testators cannot accept the reality that their family members may not be able to work together. *Id.* at 100. Furthermore, testators may believe they know the expectations and perceptions of their various beneficiaries, when they truly have no idea. *Id.* Additionally, "[s]ometimes in an effort to spare their children's feelings, parents fail to look at their children honestly and make decisions based on real life. Instead, they treat very different children the same." *Id.* at 98. The truth of the matter is that a testator cannot always know the hidden feelings of their children, especially as they get older and cease to share with the testator any sibling rivalry issues. *Id.* at 100.

Without thoughtful consideration, such a decision can create animosity and suspicion between siblings.⁹⁸ As trustee, the sibling is given access to confidential information and management responsibilities over the other siblings' inheritance which can lead to problems.⁹⁹ Another common problem that a trustee faces is dividing personal effects between siblings, which "could really turn out to be anything but equal."¹⁰⁰ When a sibling is to make that decision as a trustee, it gets even more difficult.¹⁰¹ These challenges can be alleviated by the holistic estate planning approach of promoting discussion between the testator and children, thereby preventing ill will between family members and providing a smooth transition period and term of office for the trustee.¹⁰²

5. Large Property Owners

a. *Vacations Homes*

One type of property that carries considerable problems is the vacation home.¹⁰³ The ownership of vacation property has increased dramatically over the last decade and now "one out of every seven homeowners over age 65 also owns a second home that must be factored into their estate."¹⁰⁴ While some family members may have very fond memories of a vacation home and would like to see it stay with the family, other members may only

⁹⁸ Gage, *supra* note 2, at 530.

The fiduciary, not the beneficiaries, will control the management of the property until the estate or trust is distributed. If the fiduciary is a family member, other family members equidistant in relationship to the decedent may feel slighted. If the fiduciary is a beneficiary of the estate, the conflict of interest may lead to perceived inequities.

Gary, *supra* note 19, at 423.

⁹⁹ Gage, *supra* note 2, at 530. For instance, when Victoria Cox was appointed trustee of her father's estate she faced many challenges. Interview with Victoria Cox, Trustee of the Matthew A. Cox Family Trust, in Los Angeles, Cal. (Dec. 29, 2005). Her siblings grew suspicious of her and to keep the peace she did things like refusing her own fee so as to appear equal in the eyes of her siblings. *Id.*

¹⁰⁰ BARNEY & COLLINS, *supra* note 98, at 19.

¹⁰¹ For instance, Victoria Cox found it difficult to remain fair while distributing items in the house (silver, crystal, china, guns, and jewelry) among her brothers and sisters. Interview with Victoria Cox, Trustee of the Matthew A. Cox Family Trust, in Los Angeles, Cal. (Dec. 29, 2005). If Victoria and her siblings had sat down with her father while he was still alive and discussed which personal items would go to whom, then this problem could have been completely avoided. *Id.* Instead, some siblings still today harbor some resentment for either items they believe they should have received or how the items were distributed and sold. *Id.*

¹⁰² Gage, *supra* note 2, at 530.

¹⁰³ *Id.* at 527.

¹⁰⁴ *Id.*

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have a detached interest in the property and would rather sell it.¹⁰⁵ For the parents “there is often a naïveté about the ease with which siblings can share and manage the properties.”¹⁰⁶ It is extremely difficult for anyone to co-own a piece of property, let alone siblings with families of their own.¹⁰⁷ Therefore, the family must communicate their feelings towards the particular piece of property so the testator can plan for it in the future in a way that is beneficial to all. Holistic estate planning provides the forum in which the testator can ensure this.

b. Ranch, Farm Land, and Land Trusts

When a testator owns large amounts of real property, such as hundreds of acres of ranch or farm land passed down through generations, disputes arise between the older generations and the younger generations on what to do with the land in the future.¹⁰⁸ Often times, the main estate planning objective of a testator who owns a ranch or farm is the preservation of their land so it will be passed down to the younger generations.¹⁰⁹ One struggle for creating an estate plan in this scenario is balancing the interests of those children who participate in the farm or ranch business and those who do not participate.¹¹⁰ As development of new houses and malls encroaches upon neighboring lands and the younger generations no longer wish to be farmers, many times the property passed down through inheritance ends up being sold to developers.¹¹¹

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 528.

¹⁰⁷ *Id.* at 534.

When parents have ideas about leaving assets to their children jointly, or having some or all of their children co-manage trusts or other assets, sharing these ideas with their children gives the children an opportunity to voice their concerns about the wisdom of the ideas. This is critically important [because] the parents would essentially be making them partners.

Id.

¹⁰⁸ Telephone Interview with Becky Ruffalo, President of Central Arizona Land Trust, in Prescott, Ariz. (Jan. 4, 2006) (hereinafter Ruffalo Interview).

¹⁰⁹ MODERN ESTATE PLANNING § 45.02(1) (2004). See also Donald H. Kelley & David A. Ludtke, ESTATE PLANNING FOR FARMERS AND RANCHERS § 2.02 (1980) (“A strong desire of the farm parents . . . is that of insuring succession of their farming unit to one or more of their children. Coincident with this desire often runs a parallel wish to achieve equitable treatment in inheritance among those children continuing to operate the family enterprise and those children who have committed their lives elsewhere.”).

¹¹⁰ MODERN ESTATE PLANNING § 45.05 (2004).

¹¹¹ Ruffalo Interview, *supra* note 108.

For the testator who feels it is imperative that his or her land continue in existence and remain within the family, there will be little he or she can do after death if successors decide to sell. Land trusts across the country act against the rapid disintegration of open land to developers by working with families who own land.¹¹² A land trust is a non-profit organization working to conserve land by land or conservation easement acquisition.¹¹³ Frequently property owners will approach a land trust with a desire to plan for the future of their land so that it will remain undeveloped and in their family.¹¹⁴ If their land has significant conservation values then the land trust will work with the family to attempt to preserve it.¹¹⁵ Essentially, the land trust will pay the family for a conservation easement, thereby satisfying the younger generations with money that would have been received from developers (although of course not as much), while at the same time preserving the land and the family's ownership.¹¹⁶ It is of the utmost importance that the entire family understands and agrees upon the decision to preserve the land so there is no possibility of a legal challenge by one of the heirs after the testator has died.¹¹⁷ Holistic estate planning can play an extremely important role here in aiding the family to come to an agreement that will preserve valued land that not only benefits their own family but society as a whole.¹¹⁸

¹¹² Land Trust Alliance, available at <http://www.lta.org/faq/>.

¹¹³ *Id.* A conservation easement is a legal device by which a landowner can make an agreement with a nonprofit or governmental entity to place permanent limits on the use or development of property. UNIFORM CONSERVATION EASEMENT ACT § 1(1) (1981). Conservation easements play a very important role these days in allowing land trusts to protect "wildlife habitat, historic structures, recreation land, and other real property perceived as being threatened by development." Alexander R. Arpad, *Private Transactions, Public Benefits, and Perpetual Control Over The Use of Real Property: Interpreting Conservation Easements as Charitable Trusts*, 37 REAL PROP. PROB. & TR. J. 92, 94 (2002).

¹¹⁴ Ruffalo Interview, *supra* note 108.

¹¹⁵ *Id.*

¹¹⁶ *See infra* note 118 (The land trust would have purchased a conservation easement for \$3.5 million, but the land was later sold to a developer for \$20 million.).

¹¹⁷ Ruffalo Interview, *supra* note 108. The Central Arizona Land Trust keeps an endowment fund for each conservation easement in case there is a legal suit in the future. *Id.*

¹¹⁸ One family that the Central Arizona Land Trust attempted to aid in preserving their land for future generations was the Young family. *Id.* The head of the family, Gary Young, contacted the Land Trust. *Id.* The Young's Farm is located in Dewey, Arizona and boasts crops of a wide variety of farm goods such as sweet corn, pumpkins, squash, and turkey. *Id.* The farm also is an educational tool for thousands of children in the area, teaching them the importance of agriculture. *Id.* In addition, each year community festivals and other social activities are held at Young's Farm. *Id.* The farm is located between Prescott and Prescott Valley, an area bursting in population and growth. *Id.* The Central Arizona Land Trust attempted to save the farm by raising enough money to buy a conservation easement on the Young Farm land for the development rights, priced at \$3.5 million. *Id.* Unfortunately, they were unable to raise the money. *Id.* The Young farm was recently sold for around \$20 million to a private individual who will develop the land. *Id.* Holistic estate planning

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B. Drawbacks to Holistic Estate Planning

The biggest drawback to holistic estate planning is that many testators want to avoid any conflict between heirs while they are living and thus keep their estate plans a secret until after they are gone.¹¹⁹ They are not ready or confident enough to face the issues that may be dug up during the open approach of holistic estate planning.¹²⁰ Another drawback is the possibility that beneficiaries will not be willing to share their own personal feelings and issues for fear of disappointing their parents, not getting what they want, or any other number of reasons.¹²¹ Holistic estate planning does not ensure the resolution of all the family problems but instead it strives for “an efficient, pragmatic resolution of specific estate-related issues.”¹²² The fact of the matter is that the use of holistic estate planning requires more work by both the client and the family.¹²³ This means more expense for the client at the outset and more work for the planner.¹²⁴ Another potential drawback is if testators have children in their twenties or younger.¹²⁵ There is a fear that giving these young adults the knowledge that they will receive large sums of money would corrupt their drive to make their own living.¹²⁶ Additionally, a testator with young children would have no use for the holistic approach by bringing the children in to discussion because they have not yet developed into their own person apart from their parents.

may have aided this family. It turns out that only one of Gary Young’s five children wanted to remain on the land and work as a farmer. *Id.* The other children wanted to sell the land to developers. *Id.* Better communication about why it was important to preserve this land and why Gary Young, the head of the family, did not want to sell it, may have helped. Perhaps those who wanted to keep the farm were outnumbered, but at least the holistic approach would ensure that all family members have a complete understanding of the intent of each family member so no one is harboring feelings of being slighted.

¹¹⁹ Gage, *supra* note 2, at 516-17.

¹²⁰ *Id.*

¹²¹ *Id.* at 519.

¹²² *Id.*

¹²³ *Id.* at 520.

¹²⁴ *Id.* at 520.

¹²⁵ *Id.* at 515.

¹²⁶ *Id.* On the other hand, bringing these children into the estate planning process at such an age can help young adults understand the significance of money and begin thinking about how to spend it wisely. *Id.* One day they will receive the money and it is best that the testators have provided them with an education that prepares them to handle the inheritance, rather than to be surprised one day with a large sum of money. *Id.*

IV. A LOOK AT OTHER ALTERNATIVES AND THEIR DISADVANTAGES

“EVENTUALLY CLOSET PLANS ARE SPRUNG UPON SURVIVING FAMILY MEMBERS, AND THE ELEMENT OF SURPRISE, EVEN IF THE NEWS IS GOOD, CAN PRODUCE BIG PROBLEMS”¹²⁷

For a testator who wants to avoid having his or her family ripped apart in court over probate matters, there are a limited number of options. Holistic estate planning is a very recent development in mediation.¹²⁸ Other alternatives have been around longer, such as mediation in probate, mediation provisions in a will, ante-mortem probate statutes, and revocable living trusts.

A. Mediation of Probate Matters

Mediation has most commonly been applied in the context of resolving probate matters.¹²⁹ Various states have implemented court-sponsored mediation programs.¹³⁰ Depending on the state, a court may submit a case to mediation or the parties may decide on it voluntarily.¹³¹ Some courts not only advise mediation but make it mandatory.¹³² The most significant advantages of mediation that make it particularly well-suited for probate matters are: (1) avoiding the considerable cost of litigation while preserving family assets,¹³³ (2) having a neutral third party generate the underlying issues,¹³⁴ (3) maintaining the privacy of family affairs,¹³⁵ (4) addressing a

¹²⁷ Radford, *supra* note 21, at 251 n.55 (quoting Gerald LeVan, *Intergenerational Accord Eases Estate Planning*, NAT'L L.J., Dec. 9, 1996).

¹²⁸ Friedman & Lord, *supra* note 9, at 37.

¹²⁹ Gary, *supra* note 19, at 398.

¹³⁰ See Madoff, *supra* note 21, at 698.

¹³¹ Radford, *supra* note 47, at 617. For instance, the Los Angeles Superior Court has a program that encourages mediation because “[c]ontested estate, trust, conservatorship and other matters covered by the Probate Code are uniquely appropriate for court-supervised mediation in the interests of prompt, efficient and economical dispute resolution.” Cal. L.A. Super. Ct. R. 10.200, available at <http://www.lasuperiorcourt.org/courtrules/>. Compare this to Hawaii’s program in which mediation is mandated, with rules stating, “[t]he probate court may refer probate, trust and guardianship of the property (guardianship) cases in the state of Hawaii to mediation. Cases may be referred upon a motion of a party, by written stipulation of all parties, or upon the courts own motion. Participation in the mediation is mandatory in all cases that the court refers to mediation.”

Hawaii Probate Rules, Exhibit A, Rule 1, available at http://www.courts.state.hi.us/page_server/LegalReferences/271A7DD039E757A8EAE7AD4B72.html.

¹³² Radford, *supra* note 47, at 618. Mediation is always voluntary. Gary, *supra* note 19, at 398. Even when it is mandated by the court, the agreement reached is only binding if all parties agree to it. *Id.*

¹³³ Love, *supra* note 18, at 256.

¹³⁴ Gary, *supra* note 19, at 399.

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broader range of issues from monetary to relational,¹³⁶ (5) preserving family relationships, and (5) reaching an agreement that is created by the parties rather than the court and is binding only if all parties agree voluntarily.¹³⁷

Yet there are disadvantages to the mediation of probate disputes as well.¹³⁸ First of all, during mediation of probate matters, mediators usually discover that most will contests could have been prevented if the heirs and testators had sat down and discussed the estate plan issues before death.¹³⁹ By the time families enter into probate mediation, conflicts have already arisen and “irreparable harm” to relationships has been suffered.¹⁴⁰ A second issue discovered in probate mediation is that many times parties are merely looking for “an ‘emotional’ result—an apology perhaps—or an opportunity to vent anger over a situation they perceive as unfair.”¹⁴¹ If that apology should come from the testator or anger be vented towards the testator, it is too late.¹⁴² Questions go unanswered and issues go unresolved without the testator available to explain his or her intentions. Another problem with relying on probate mediation is that many jurisdictions “provide little or no informal opportunity for probate dispute mediation.”¹⁴³ Therefore, if probate mediation is not available, a family has no choice but to resort to litigation. Yet another overarching problem is that probate mediation inevitably means the testator has died.¹⁴⁴ Sometimes the grief over the loss of a loved one makes it difficult for the parties to resolve any conflicts during the grieving process.¹⁴⁵ It can be difficult for those grieving to see the

¹³⁵ Love, *supra* note 18, at 256. “There is no form of civil litigation more acrimonious and more conducive to the public display of soiled linen and the uncloseting of family skeletons than is the will contest.” David F. Cavers, *Ante Mortem Probate: An Essay in Preventive Law*, 1 U. CHI. L. REV. 440, 441 (1934).

¹³⁶ Love, *supra* note 18, at 256.

¹³⁷ Gary, *supra* note 19, at 398.

¹³⁸ Radford, *supra* note 21, at 250–51.

¹³⁹ Gage, *supra* note 2, at 511.

¹⁴⁰ Radford, *supra* note 21, at 250.

¹⁴¹ *Id.* at 243.

¹⁴² Typically, “[p]robate disputes are difficult to mediate because the person whose views are most relevant, namely the testator in a will or the settler of a trust, is dead and not able to participate in the mediation.” Madoff, *supra* note 21, at 699.

¹⁴³ Madoff, *supra* note 21, at 698.

¹⁴⁴ *Id.*; see also Williams, *supra* note 34, at 844 (noting “overwhelming grief usually adversely affects the mediation process”).

¹⁴⁵ Gary, *supra* note 19, at 398. “Major losses—particularly those that end a relationship such as death . . . can trigger psychological earthquakes, rocking our foundations and affecting how we perceive and experience our interests, our positions and our openness to resolution.” David A. Hoffman, *Mediation and the Meaning of Life*, 11 DISP. RESOL. MAG. 4 (2005).

issues clearly, thus making it easier to let an attorney handle the controversy, rather than actively participating in the resolution by sitting down with other family members and openly facing the pain and hurt they may be feeling.¹⁴⁶ A final problem for probate mediation is that mediators “operating in a court or litigation-connected context” may have a tendency to focus more on the legal causes of action at issue rather than delving into the more difficult personal issues that may be essential to a true and long-lasting resolution.¹⁴⁷ Because these mediators are essentially working under the shadow of the court, they tend to take a more narrow approach to issue identification and shy away from asking the parties to speak on *all* the underlying issues.¹⁴⁸ A “rich mix of issues” is invaluable to the process for optimal results and the parties gain much more when they share on a broader scheme.¹⁴⁹

Therefore, although probate mediation does carry with it many of the inherent benefits of the mediation process, the fact that it occurs after the testator’s death in a court context makes it an unsuitable alternative for a testator who truly wants his or her family to remain far away from the courthouse.

B. Mediation Clause in Will

Another option available to testators is to consider mediation provisions in their wills.¹⁵⁰ Such a provision would stipulate that beneficiaries resolve any problems through mediation.¹⁵¹ By expressing such a desire in the will, testators effectively communicate their views on the matter and are able to

¹⁴⁶ Gary, *supra* note 19, at 422.

A common by-product of grief is anger. Although the anger may result from confronting the loss of the decedent, the survivor may attribute the anger to another cause, such as the actions of other family members, seen as unfair or greedy by the survivor. In the early stages of grief, a survivor may want to blame someone for the death and may redirect his feelings of anger toward family members or friends of the decedent. Further, the loss of an anticipated inheritance may be magnified by the feelings of loss over the death of a loved one.

Id.

¹⁴⁷ Love, *supra* note 18, at 261.

¹⁴⁸ *See id.* at 261-62.

¹⁴⁹ *Id.* at 262.

¹⁵⁰ *Id.* at 257.

¹⁵¹ *Id.* Sample language for a mediation provision in a will:

In keeping with my desire that our family remain strong and harmonious, any disputes arising under this Will shall be resolved by mediation. The estate shall pay the cost of the mediation. I recommend the following mediators be considered: AAA (NYC); BBB (Chapel Hill, NC); and CCC (Palm Beach, FL).

Id. at 265.

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control, to an extent, any disagreements that arise after their deaths.¹⁵² Additionally, on a deeper level, testators are passing on their values of working together rather than against each other to resolve conflict.¹⁵³ A mediation provision does have advantages over the typical no-contest clause.¹⁵⁴ A no-contest clause works to disinherit a beneficiary who contests the will.¹⁵⁵ However, a no-contest clause fails to prevent a determined beneficiary to litigate; rather, it disinherits the loser of litigation.¹⁵⁶ Furthermore, there is the potential that a court will not even recognize a no-contest clause.¹⁵⁷ Of course, the inherent fault of a mediation provision is that although it ensures that the family will choose mediation over litigation, it still comes with all the faults of the mediation of probate matters discussed above.

C. *Ante-Mortem Probate*

Ante-mortem probate acts in a similar vein to that of holistic estate planning, both having the similar objective of producing certainty for the testator.¹⁵⁸ Currently, three states have adopted ante-mortem probate: North Dakota, Ohio, and Arkansas.¹⁵⁹ It has yet to catch on anywhere else, probably because of its failings.¹⁶⁰ These states use the “contest” model of ante-mortem probate in which a testator enters an adversarial proceeding against any persons that he believes may bring a will contest, such as disinherited children.¹⁶¹ This method seems to lack appeal for both the testator, who must initiate an expensive and time-consuming process, and the beneficiar-

¹⁵² *Id.* at 258. The mediation provision can “provide that the estate or trust pay for the mediation, name the site of the mediation and identify suitable mediators—all issues that can be difficult to resolve once conflict is underway.” *Id.*

¹⁵³ *Id.* at 259.

¹⁵⁴ *Id.* at 257–58.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 265 n.10.

¹⁵⁷ *Id.* at 265 n.11. Some jurisdictions either do not enforce no-contest clauses, or hold them to violate public policy. *Id.*

¹⁵⁸ See Calvin Massey, *Designation of Heirs: A Modest Proposal to Diminish Will Contests*, 37 REAL PROP. PROB. & TR. J. 577, 579 (2003).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (Ante-mortem probate is best applied to situations dealing with a potential will contest for testamentary incapacity or undue influence).

¹⁶¹ *Id.* There are three forms of ante-mortem probate: (1) contest model, (2) conservatorship model, and (3) administrative model. *Id.* at 578 n.3. The contest model basically works like a will contest but before the testator dies. *Id.* The conservatorship model employs a court-appointed guardian ad litem whose duty is to protect the “interest of disinherited heirs and displaced devisees.” *Id.* at 578–79 n.3. Finally, the administrative model would take an ex parte approach. *Id.* at 579 n.3.

ies, who must “incur the wrath of a testator by openly challenging the testator’s capacity or the nature of relationships between the testator and the beneficiaries under the proffered will.”¹⁶² Obviously, a testator must have an idea of who he thinks will bring a will contest in order to effectively utilize this strategy. If a testator does not know that one of his heirs will feel cheated by his will, then ante-mortem probate will be useless to him. Also, if a will is declared invalid for some reason through the ante-mortem process, it simply brings the testator back to the drawing board, where he will create a new will that may have new issues causing a will contest.¹⁶³ In fact, an ante-mortem probate decree can always be attacked for alleged fraud during the proceedings.¹⁶⁴ This contest model still serves to bring family members into court which will undoubtedly lead to animosity and ill-will among family members. The testator is looking for a certainty that his estate plan will be upheld and that his loved ones will not be dragged through legal battles and years of litigation. Ante-mortem probate has yet to give the testator this kind of certainty.

D. Revocable Living Trusts

The revocable living trust is another alternative available to the testator. The revocable living trust is set up during the testator’s lifetime by transferring assets to a trust and reserving the right to revoke.¹⁶⁵ On the grantor’s death, the trust will become irrevocable and trust assets are administered and distributed in accordance with the provisions of the trust.¹⁶⁶ The trustee holds legal title, and thus probate will be avoided.¹⁶⁷ This type of trust is difficult for a dissatisfied heir to contest for a few reasons.¹⁶⁸ First of all, the revocable living trust is not a public document so it will be difficult for contesting heirs to know the “merits of the suit,” and thus will be taking a big risk.¹⁶⁹ Furthermore, it is very difficult to unwind all the transactions that have taken course over the lifetime of such a trust, making it less likely to be successfully challenged.¹⁷⁰ On the other hand, this type of trust can be attacked on grounds of incapacity or undue influence just as a will can.¹⁷¹

¹⁶² *Id.* at 579.

¹⁶³ Massey, *supra* note 158, at 579.

¹⁶⁴ *Id.*

¹⁶⁵ WEINSTOCK & NEUMANN, *supra* note 6, at 171–72.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ Massey, *supra* note 158, at 579.

¹⁶⁹ *Id.* at 580.

¹⁷⁰ *Id.* at 579.

¹⁷¹ *Id.*

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Consequently, the revocable living trust is indeed an alternative that will likely discourage beneficiaries from contesting a will but it will not altogether eliminate them.¹⁷²

V. CONCLUSION

“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”¹⁷³

Abraham Lincoln was perhaps one of the earliest advocates of mediation when he wrote those lines. When testators are planning for their deaths, the words of Abraham Lincoln should ring loud. The first concern of testators is the happiness of their loved ones. Unfortunately, however much testators may love someone, they may not know how to transfer their wealth in a means that will prevent conflicts. As a consequence, instead of making someone’s life better, testators instead create grief for their loved ones, such as an estranged relationship with a sibling, feelings of being unloved by the testator, and legal fees from years of litigation. When testators imagine their death, they typically think of how their loved ones will remember them. The last thing testators want to imagine is their family members cursing their name long after they are gone. Holistic estate planning employs the techniques of mediation to ensure that testators are successful in passing on a positive legacy that will last for generations. A family business, divorce and remarriage, an adult child as trustee, and large real estate holdings are areas in which testators are at particular risk if they do not share their estate plans with their families and consider conflicting views. There are a few options available to testators who want to keep their family out of court; namely, mediation of probate matters, mediation provisions in the will, ante-mortem probate statutes, and revocable living trusts. Unfortunately, all these fall short in some way or another. Holistic estate planning alone is paramount in protecting your family, your wealth, and your legacy.

¹⁷² *Id.*

¹⁷³ PETER LOVENHEIM, *MEDIATE, DON’T LITIGATE: HOW TO RESOLVE DISPUTES QUICKLY, PRIVATELY, AND INEXPENSIVELY—WITHOUT GOING TO COURT* 3 (1989) (citing *THE WRITINGS AND SPEECHES OF ABRAHAM LINCOLN* 15) (Philip Van Doren Stern ed., 1961).

