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Susan N. Gary

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The Greatest Heritage is the Love of a Family: The Larson Case and the Mediation of Probate Disputes

Susan N. Gary
Associate Professor of Law, University of Oregon

In 1981, two brothers, Ben and William Larson, began litigation that would last for four years.¹ By the time the lawsuit ended, the “winning” brother was dead,² and the other brother was bitter and estranged from the family of his only sibling.³ Although one can only speculate, had the brothers chosen mediation, rather than litigation, to resolve their dispute, both brothers might have achieved a better outcome.

When Gladys Larson died, she left a will that gave seven-eighths of her estate to her son, William, and one-eighth of her estate to her son, Ben.⁴ A prior will, executed in 1970 while Gladys’ husband Oliver was still alive had left her estate to her husband, and if he did not survive, in equal shares to her two sons.⁵ Gladys’ husband died in June 1973, and Gladys executed a new will in September of that year.⁶ Although the court’s opinion does not directly state Gladys’ reasons for changing her will, two phrases suggest her motives. The court notes that “Gladys depended on William for assistance in caring for her property and in some financial matters”⁷ In addition, the opinion cites a letter from Ben to his mother in which Ben agrees that “Bill should be compensated for his excellent attention to your needs”⁸ Those statements, combined with the information that William lived in Eugene, Oregon, near his mother and father, and that Ben lived near San Francisco,⁹ suggest that William bore the brunt of caring for his mother and father as they aged. It appears that William helped during his father’s final illness and then continued to assist his mother, who relied on him increasingly after

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1. See *Larson v. Naslund*, 700 P.2d 276, 278 (1985).
 2. See *id.* at 277 n.1.
 3. Interview with John Gartland, attorney of record for Eunice Larson (Jan. 31, 2000).
 4. See *Larson*, *supra* note 1, at 277.
 5. See *id.*
 6. See *id.*
 7. See *id.* at 278.
 8. *Id.* at 281.
 9. See *id.*

his father died. Ben was farther away and although he likely maintained contact with his father and mother, he was not there to visit or help on a daily basis. A letter from Ben to his mother suggests that they were not estranged, but rather that he was puzzled and hurt by the change in the will.¹⁰

In October 1980, Ben learned that his mother had executed a new will in 1973 reducing his share of her estate from one-half to one-eighth.¹¹ In December he visited his mother in Eugene and asked her to change the will. In February 1981, following a telephone call with his mother, he wrote her a letter expressing his hurt feelings.¹² Ben's pain and raw emotions are evident in the letter: "I thought you loved us both equally . . . Pop loved us both and treated us fairly—I always thought you would too."¹³ Sadly, Ben predicts the estrangement from his brother that his mother's estate will cause: "A lop sided estate . . . makes things very difficult between Bill and me."¹⁴ The tone of the letter suggests that Ben's distress is caused as much, or more, by the feeling that his mother does not love him as by the financial loss the new will represents.

The court's opinion provides no information as to how Gladys responded, but she did not change her will. Indeed, she had anticipated Ben's dissatisfaction and had included a "no contest" clause in her will in an at-

10. See *Larson*, *supra* note 1, at 281 (reproducing the February 1981 letter in its entirety).

11. See *generally*, *id.* at 277. Because Gladys and Oliver Larson had executed mirror wills, each leaving his or her estate to the survivor and then to the two boys, Gladys' estate represents the combined estates of Ben and William's parents. See *id.*

12. See *id.* at 281. The letter reads: "Dear Mom, It was so good to talk to you tonight on the phone, my thoughts are very much with you and I wish that I might be close at hand. Had I not chosen to develop my career in the San Francisco area, things might have been different. However, just as you and Pop found it necessary to leave Roseburg and then Klamath Falls in search of expanded job opportunities, moving to the Bay Area seemed the most sensible thing for me to do. In the meantime, the lines of communication have somehow fallen away though I truly thought you understood my family and I all care for you just as we did for Pop, and I always thought you cared for Bill and me equally, though recent events do not seem to bear that out. I wonder if you truly realize the hurt you have dealt me and the girls by not including me in discussions of your affairs. As I have told you, Bill should be compensated for his excellent attention to your needs, but it is difficult to understand that you care so little for me that you have chosen not to discuss matters or arranged for us to be represented *equally* in the balance of the estate. That is saying that you do not care for us equally. If this is the case, I think an explanation is in order that led to this decision. A lop sided estate not only leaves me with the feeling that you do not care, but makes things very difficult between Bill and me. Our family is small enough without creating animosity between brothers. The greatest heritage any of us can leave is the love of a family. It seems to me you should set the stage by arranging your affairs so Bill and I share on an equal basis. Bill will agree, I am certain, or I have greatly misjudged him. Pop loved us both and treated us fairly—I always thought you would too." (Emphasis in original.)

13. *Id.*

14. See *id.*

tempt to forestall a lawsuit.¹⁵ Despite the clause, which reduced the share of anyone contesting the will to one dollar,¹⁶ Ben brought a will contest following his mother's death.

In his lawsuit, Ben argued that the 1973 will should be held invalid on the grounds of undue influence or lack of mental capacity to make a will.¹⁷ The trial court found no evidence that William had exerted undue influence in connection with the will, and further that Gladys had the requisite mental capacity to execute the will.¹⁸ On appeal, the Court of Appeals of Oregon reviewed the case *de novo* and upheld the lower court's rulings.¹⁹ In addition, the appellate court reversed the trial court's determination that the no contest clause should not be applied because probable cause existed to challenge the will.²⁰ The appellate court upheld the no contest clause, with the result that Ben's share of the estate was reduced from one-eighth of the estate to one dollar.²¹

In reaching their decisions, both courts applied the legal rules of undue influence²² and mental capacity.²³ Although William assisted his mother with her financial matters, the courts found no evidence that William had exerted undue influence, causing her to change her will.²⁴ His helpfulness likely influenced her actions, but the influence he had as a caring son was not undue in legal terms. The courts also found that Gladys, although elderly, did not lack

15. See *Larson*, *supra* note 1, at 278-79.

16. See *id.*

17. See *id.* at 278.

18. See *id.*

19. See *id.*

20. See *id.* at 278-80 (holding that Oregon law did not provide an exception to enforcement of no contest clauses on the ground that the contestant had probable cause to bring the will contest and that instead Oregon law prevented enforcement of a no contest clause only if the clause was unlawful or violated public policy).

21. See *Larson*, *supra* note 1, at 278.

22. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 176-77 (6th ed. 2000) (explaining that a will procured by undue influence will be invalidated because someone has substituted his or her wishes for the dispositive intent of the testator, and that establishing undue influence commonly requires proving that the testator was susceptible to influence, that the influencer had the opportunity and the desire to influence, and that the influencer's control of the testator's mind resulted in will provisions that are unnatural).

23. See *id.* at 163 (explaining that the mental capacity required to make a will is low and that it is only necessary that the testator understand the nature and extent of her property and the objects of her bounty).

24. See *Larson*, *supra* note 1, at 278.

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mental capacity when she executed her will.²⁵ From the facts provided in the
opinion, the courts' legal determinations appear correct.

In analyzing the case, neither court could consider the nonlegal issues involved in the dispute. The courts could not consider the brothers' differing views of fairness or construct a solution that mended rather than divided the family. The brothers might have been able to resolve the dispute through negotiation and settlement, but once the litigation began, the adversarial process probably pushed the brothers farther apart and made reconciliation less likely. Imagine instead the possible outcome if the brothers had first tried mediation.

The potential emotional benefits associated with the use of mediation are particularly striking in this case. Ben's letter describes his feelings of hurt and his need to feel loved. Perhaps what he needed most was to hear that his mother did love him. William might have addressed this concern during the mediation, perhaps explaining to Ben that their mother changed her will to compensate William for years of care giving and not out of any lack of love for Ben. William might also have benefited emotionally by being able to talk with Ben about the burden he had shouldered in caring for their parents. William might have wanted Ben to understand the cost in his life of assisting their parents for many years.

If the brothers had chosen to work with a mediator, then throughout the mediation the mediator would have helped Ben and William communicate with each other. A mediator could have assisted them in listening as well as talking and in trying to understand each other's concerns. Being able to talk about their mother and not merely about the money in the estate could have refocused the dispute. Working on communication skills during the mediation could have helped Ben and William rebuild their relationship, and enabling them to function as brothers outside the mediation. In a family situation such as this, mediation may be more likely than litigation to enable the disputants to maintain an ongoing relationship in the future. Since the parties must work together during the mediation to develop a solution to their conflict, the parties may develop communication and problem solving skills that will aid them in the future. Mediation is less likely than litigation to drive family members further apart.

The court was limited in the solution it could reach: either the will was valid, in which case William got the entire estate less one dollar, or the will was invalid and Ben and William split the estate equally. Through mediation, Ben and William would have had the opportunity to create their own solution. They could agree to split the estate in some other way, perhaps giving

25. *See id.*

three-fourths to William in recognition of his assistance to their mother and one-fourth to Ben to give him somewhat more of his expected inheritance. In addition, the "solution" would have included Ben's hearing that his mother did love him and William's being able to express to Ben the difficulty of caring for their parents.

Mediation could also have benefited the brothers by saving them time and money. Mediation can often be conducted more quickly than litigation, and a mediated solution in this case might have resolved the dispute in a few months rather than four years. Perhaps through mediation the brothers could have reconciled before William's death. The expense of litigating this dispute was likely highly disproportionate to the value of the estate. Both brothers would like have saved a significant amount of money using mediation.

Finally, mediation could have allowed the brothers to keep this painful family matter private. Litigation is a matter of public record, but mediation in general is confidential. If the parties agree to confidentiality, the parties and the mediator must all keep discussions that occur during the mediation confidential. The only public document would have been the settlement agreement filed with the probate court.

Thus, mediation could have allowed the brothers to address the emotional issues present in this dispute, to form their own solution rather than being bound by the legal strictures, to rebuild rather than destroy their fraternal relationship, and to keep the dispute private. In pursuing mediation they would likely have saved both time and money, perhaps resolving the matter while William was still alive so that Ben and William could have shared a sense of family before William's death.

The Larson case provides a good example of the potential usefulness of mediation in the probate context. At the time the case was litigated, none of the lawyers involved considered mediation as an alternative to litigating the case.²⁶ Although the use of mediation as a form of dispute resolution has in-

26. See interview with John Gartland, *supra* note 3. Mr. Gartland represented William's former wife in this probate dispute. A litigator for many years, Mr. Gartland's family law practice introduced him to mediation some years after the Larson case. As he became more familiar with mediation and its benefits for his clients, he became a trained mediator himself. For several years he used both litigation and mediation to help his clients resolve their disputes. Now his practice consists exclusively of working with mediated disputes, either as a mediator or as a lawyer representing a client in mediation. When the author developed a mediation role-play based on the Larson case, she solicited the help of Mr. Gartland, now a prominent mediator in Eugene, Oregon, to play the part of the mediator without realizing that he had been involved in the case as

creased throughout different areas of the law in the years since the Larson case, the use of mediation to resolve probate disputes is not yet commonplace.

The Larson case became the basis of a role-play that was presented at the Joint Program of the Sections on Alternative Dispute Resolution and Donative Transfers, Fiduciaries and Estate Planning in Washington, D.C. on January 7, 2000. The essays that follow are based on presentations made as part of that program. The quote in the program title, "The Greatest Heritage Is the Love of a Family": Using Mediation to Resolve Probate Disputes," comes from Ben Larson's letter to his mother.²⁷ His letter demonstrates his concern that he would lose that heritage; mediation could, perhaps, have saved this heritage for Ben and his brother.

To create a better understanding of the usefulness of alternative dispute resolution in probate, the following essays examine the advantages of mediation as an alternative to litigation. The authors explore the sets of circumstances in which the use of mediation will be of particular benefit and discuss situations in which mediation is already in use. The essays also describe means to increasing the acceptance of using mediation to resolve probate disputes. This collection of essays makes the case for the greater use of mediation in the probate setting.

Professor Radford sets forth the benefits of mediation, discussing particular advantages and disadvantages in the probate context. She also describes the use of mediation or mediators in the estate planning process. As she notes, planning to prevent litigation after a death can have significant family benefits. Of particular concern are situations involving a family business. A facilitator or mediator can act as a neutral third party, helping the lawyer and the family plan for a successful intergenerational transition of the business.

Professor Love advocates including dispute resolution provisions in wills in situations in which testators express concerns about family conflict. She then contrasts mediable issues with legal issues, explaining that most disputes involve non-legal as well as purely legal issues. The litigation process will address only the legal issues, but if the parties mediate the dispute they can consider all mediable issues – non-legal as well as legal. In some disputes the non-legal issues may be the crux of the problems between the parties and litigation will be unable to address, let alone resolve, these issues. By allowing the disputants to consider a wider range of issues involved in a dispute, medi-

a litigator. In reviewing the case again after so many years, Mr. Gartland said that he was struck by the pain the family suffered and by the potential for a better outcome that mediation would have offered

27. See *supra* note 12 (reproducing the text of the letter).

ation may yield a better result for both parties. Regardless of whether the parties ultimately use mediation or litigation, however, the lawyer should be aware of all the issues and assist the client in understanding what the legal system can and cannot accomplish.

Professor Chester explains that the non-legal issues in will contests are often of greater concern to the disputants than the non-legal issues. He suggests that will contests are family disputes first and legal or financial disputes second. For this reason, the laws that courts use to resolve will contests are not effective in meeting the needs of the people involved in the contests. Professor Chester describes a successful mediation program in Fulton County (Atlanta), Georgia. He discusses possible resistance to implementing similar programs elsewhere, but argues that such programs will yield better results for many people contemplating a will contest. He advocates greater use of mediation, at least as a first approach before litigating a will contest.

Professor Volkmer focuses on the role law professors can have in the process of institutionalizing mediation, noting the need to provide opportunities for mediation and to make mediation more accessible to all segments of society. Professors prepare students for their role as counselors at law and instill the conflict management skills that remain crucial for lawyers who practice in estate planning and probate. Further, law professors can assist state and local bar associations in educating practicing lawyers and the public about the usefulness of mediation.

