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Lela Porter Love

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Lela Porter Love[1]
Professor of Law, Benjamin N. Cardozo School of Law

A death in the family and dispositions in wills can cause conflict, often coupled with grief. The following story is an example of this phenomenon.

> *A mother dies leaving her son 80% of her residuary estate. Her daughter, who believed she was going to receive 50% of the estate, contests the will. The son claims that their mother changed the will to compensate the son for his care during the prolonged illness leading to the mother's death. The daughter, who was geographically distant, felt that her brother froze her out of family matters and now is taking her inheritance too. The daughter feels that the will reflects that her mother did not love her equally, and that her brother, by failing to keep in touch, distanced her mother from her. On the other hand, the brother feels that he was abandoned by his sister and saddled with enormous responsibilities in taking charge of his mother's affairs. His marriage fell apart during his mother's illness, and his sister never even acknowledged the hardship he endured. Now the brother and sister are fighting over what she should receive under the mother's will.*[2]

If this matter is resolved in court through an adversarial proceeding, the contest will waste considerable assets that could be enjoyed by the brother and sister. Perhaps more alarming, from the mother's point of view if she could follow the events after her death, litigation will result in animosity and estrangement between her children. Not only have these siblings lost their mother, they will be on their way to irrevocably losing each other.[3]

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1. Lela Porter Love directs the Kukin Program for Conflict Resolution and the Mediation Clinic. Many thanks to Susan Gary for inspiring this paper and to Patty Popov, Hope Winthrop and Isabel Miranda for their interest and thoughtful suggestions.

2. This hypothetical, developed by Professor Susan Gary, was used at the annual meeting of the A.A.L.S. on January 7, 2000, for the Joint Program of the Sections on Alternative Dispute Resolution and Donative Transfers, Fiduciaries and Estate Planning. The hypothetical is based on *Larson v. Naslund*, 700 P.2d 276 (1985).

Mediation has many advantages for resolving probate matters. Mediation is a process where a neutral third party (the mediator) helps the parties: articulate and understand the underlying perspectives, interests,[4] issues, values and feelings that each person brings to the conflict; generate and evaluate options to resolve the issues presented; and gain consensus around mutually acceptable options. In addition to avoiding the considerable costs of litigation, the benefits of mediation for probate disputes include: expressing and addressing the complex emotional issues involved in a family conflict, possibly improving the relationships and achieving family reconciliation;[5] avoiding the adversarial frame that litigation places on disputes; developing a resolution that is uniquely responsive to individual preferences and priorities and family values; having family members work together to achieve a resolution, setting a precedent for future interactions; enhancing satisfaction levels of parties who actively participate in process and durability of agreed-upon resolutions; and maintaining privacy around family matters by avoiding a public forum.[6]

Mediation has the power to bring parties to a different level of understanding about their underlying situation and about each other, to re-establish family harmony and to resolve both monetary and relationship issues that probate matters generally involve. To realize these advantages, this paper makes two suggestions. First, attorneys should urge testators to consider dispute resolution provisions in their will. Such provisions allow the testator to weigh in with a directive that the family pull together and attempt to resolve its conflicts creatively. A dispute resolution clause can also provide a vehicle to express and encourage family values connected with the way in which

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3. *See* Thomas L. Hafemeister, *End-of-Life Decision Making, Therapeutic Jurisprudence, and Preventive Law: Hierarchical v. Consensus-Based Decision-Making Model*, 41 AR. L. REV. 329, 355 (1999) (stating "excessive, uncontrolled, or unresolved conflict has the potential to create long-term rifts within family constellations.").

4. Examples of interests that can be addressed by mediation (but would not be relevant to litigation) include a desire for recognition or status within the family, an interest in the decedent's love and acceptance, the hope of family accord for future generations of the family, and so on.

5. *See* Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests*, 37 DUQUESNE L. REV. 173, 177 (1999) (citing mediation as the process most capable of achieving family reconciliation).

6. David F. Cavers notes: "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). *See generally*, for discussions about the benefits of mediation for probate matters: Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397, 423-431 (1997); Peter Y. Wolfe & Kelly R. A. Mullen, *Mediation in the Probate Court*, N.H.B.J. 34, 34 (March 2001); Chester, *supra* note 5 at 197-98.

family members communicate with each other, value each other and resolve family conflict. Second, attorneys and mediators operating in the probate arena should tap mediation's full powers to address all the negotiable issues the parties may have (not just the legal causes of action), so that mediation's full potential to resolve the entire universe of issues presented by a conflict is not constrained by the blinders that attorneys wear when they operate in an adjudicative context.[7]

CHOOSING MEDIATION: INSERTING DISPUT RESOLUTION PROVISIONS IN WILLS.

Since mediation has the capacity to foster better communication, understanding and problem-solving among family members, attorneys should urge consideration of mediation provisions in wills[8] where a testator expresses concern that his or her passing not engender tension and conflict. In fact, since most testators would not want their death to be the occasion which sparks a bitter feud in a family, the question of dispute resolution should be raised by attorneys as a matter of routine practice, since testators have the power to direct[9] through their will how such fights can be addressed after their death.

One frequently used method to prevent disputes is an *in terrorem* or "no contest" clause,[10] which essentially disinherits any beneficiary who contests

7. *See* Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 43-45 (1982) (describing how a lawyer's perspective is shaped by assumptions of adversarial parties and a rule soluble dispute, while a mediator's underlying premise is that of the possibility of a collaborative "win-win" outcome, not dictated by law or precedent).

8. The same considerations would apply to drafting trusts for donors who value family relations, harmony and the preservation of trust assets from the ravages of litigation.

9. Whether such a direction is precatory or mandatory is unclear. However, an executor who ignored such a directive might arguably be liable for wasting assets of the estate in subsequent litigation where mediation could have provided a fast and cost efficient method of dispute resolution. Even where all parties willingly participate in mediation, there will be no compulsion to come to an agreement and hence no assurance that mediation will resolve the matter. The Fulton County (Atlanta, Georgia) Probate Court, which mandates that virtually all cases go to mediation prior to litigation, has had a 65% success rate in settling cases in mediation. *See* Chester, *supra* note 5, at 1, n. 46.

10. An *in terrorem* clause is a will provision which attempts to prevent litigation by disinheriting anyone who contests the will. Such a clause, however, does not prevent litigation; it punishes the loser in litigation by disinheriting them. A "no contest" clause was used in Larson v. Naslund, 700 P.2d 276, 278-79 (1985), the case upon which the opening hypothetical is built. In that case, the clause was upheld, and the testator's child, who contested the will, received $1.00 instead of the legacy provided by the will. It is unlikely that the testator desired this result.

the will. There are several problems with this device.[11] The key problem is that, while it may prevent the wasting of family assets in a *Bleak House* type scenario,[12] it will not spark a reconciliation between the disputing parties or a resolution of the underlying issues. Mandatory mediation programs in Probate Courts are an institutional device to further values achievable by mediation.[13] If a testator, however, instead of including a directive in his will requiring mediation, relied on the existence of a mandatory mediation program in court to bring the family together, his family will lose the benefit of knowing the testator's own wishes regarding dispute resolution and having the moral persuasion power of those wishes to give mediation some momentum.

Many people, in creating an estate plan, hope to benefit the entire family as a unit and to advance individual family members. Testators and trustors who spent a lifetime accumulating assets do not want those assets wasted on expensive probate litigation. The testator or settlor is in a uniquely powerful position to require the beneficiaries to mediate a dispute prior to pursuing other avenues.[14] Parties often invoke the intent of the testator or settlor to support their position. Often, after a death of a family member, those close to the decedent are looking for ways to honor the decedent's wishes and values. Consequently, the testator's expressed desire that the beneficiaries resolve issues themselves in a manner that comports with family values and family history will be a powerful lever to generate conflict resolution and should be evidenced in the will or trust.

The instrument 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.[15] The testator's call for mediation gives legitimacy and poignancy to the mediation event insofar as

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11. Some jurisdictions do not enforce "no contest" clauses where it is shown that a will contestant has probable cause to bring a will contest. In other jurisdictions "no contest" clauses have been held to be violative of public policy and hence unenforceable. In *Larson*, *supra* note 2, the case upon which the opening hypothetical is built, the court held that the "no contest" clause was enforceable.

12. 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.

13. *See generally*, Wolfe & Mullen, *supra* note 6 (describing a Probate Court mediation program in N.H.). *See* Chester, *supra* note 5, at 199-201 (describing mandatory probate mediation programs in Georgia, Hawaii and Oregon); *see also*, Gary, *supra* note 6, at 434-436 (describing probate mediation programs in San Francisco, Hawaii and Oregon).

14. *But see supra* note 9.

15. *See* Appendix B for a sample mediation provision.

honoring the testator's plan is frequently common ground and provides a motive for grieving families to participate in good faith in the process despite their conflict. While property is a useful legacy to leave one's family, leaving values and direction is also beneficial.

MAXIMIZING MEDIATION: CONSTRUING "ISSUES" BROADLY.

What is conflict about? Depending on your theory of conflict, your profession and the dispute resolution process you are operating in, you might answer that question differently. Arbitrators, litigators and mediators would give different answers. For an arbitrator, an issue is a matter or practice that the agreement to arbitrate specified as arbitrable. For a litigator, an issue is a legal cause of action or defense. One of the strengths of mediation is its ability to address a range of issues that is far broader than the issues that can be addressed in either arbitration or litigation. Since attorneys are traditionally schooled to think of "issues" as legal causes of action, it is important to make a radical mental shift when operating in the mediation context so that "issues" can be seen in an entirely different light–not the spotlight which pinpoints legal causes of action but the more diffuse light that illuminates the entire terrain. A negotiable or mediable issue is some matter or practice that one party can control or change which is blocking or frustrating an interest of another party.[16]

In the conflict above, between a brother who received a 80% portion of his mother's will and a sister who received 20%, the "legal" issues (Did the brother exert "undue influence" on the mother? Were all will formalities complied with when the mother changed the will? Did the mother/decedent have testamentary capacity?) may be a smokescreen for other points of conflict.[17]

16. *See* Appendix A for a sampling of mediable issues.

17. *See* Gary, *supra* note 6, at 413 (stating " . . . the identifiable legal issues often cloak important emotional, personal, or familial issues. Often the hidden concerns are at the center of the dispute, yet the adversarial process either may not address those concerns or may not be able to resolve those aspects of the problem.").

The brother and sister, in the context of a discussion, may augment these issues with a far broader range of issues, such as: the way they communicate with each other; the regard their mother had for each of them; the maintenance of family traditions and events; each sibling's conduct toward the nieces and nephews; and so on. These issues, in mediation, can be treated on a par with the monetary issue that in a court would be determined by the resolution of the legal cause of action.

When operating in an adjudicatory framework, conflicts are about the resolution of a legal cause of action by the application of a rule or norm of general applicability to the given facts. The lawyer, judge, jury or arbitrator will shape their presentation or understanding of the "facts" around the elements of a cause of action or defense, wanting to demonstrate that the "case" either does or does not call for a certain outcome given the intersection of the client's story and the applicable rule. Was the testator unduly influenced by the actions of a recently named beneficiary? Was the will signed by the correct number of witnesses? Did the testator have the capacity to make a will? The judge, jury or arbitrator will answer these questions by determining whether the evidence presented satisfies the requirements of a specific rule or the specific language used in the dispositive portion of the will. But there may be other issues that will never be addressed because they do not satisfy the requirements for a legal cause of action. Those other issues not only might be critically important to the parties, but also might hold the key to a consensual resolution of the issues represented by the legal cause of action.

In the example described above, if the sister is satisfied that she was equally loved by her mother and that the brother in fact did good work that eased the last years of her mother's life, the sister may relinquish (in whole or in part) her claim to a larger portion of the estate. The brother may agree to contribute to family-building in a way that will enrich his sister's life as well as his own. Money is not always the answer even when it is presented in a lawsuit as the question or problem to be resolved.

Imagine the last serious conflict you had in your own family. Would the "issue" qualify as a legal cause of action? A few examples of issues that can fuel family conflicts include: 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.[18] Most of these issues do not constitute grounds for a court action. Nor do they disappear, however, when a court ac-

18. For a longer list of examples, *see* Appendix A.

tion is initiated because there is a legal cause of action among the issues in controversy.

In the context of negotiation and mediation, conflicts are about whatever concerns or issues parties raise and are willing and capable of addressing. Neither attorneys nor mediators should artificially limit the set of negotiable issues to the legal cause of action. To illustrate the point, imagine that an issue is being litigated concerning the allocation of items in a testator's art collection. The parties to the dispute are the children of the deceased, two brothers.

- One brother says to his attorney in an interview: "you have no idea how selfish my brother is. When he was caring for our mother he went through her house and removed every single family photo album and every picture in which he was featured." As an attorney planning for a negotiation or mediation, one should explore whether *the allocation of family photographs and photo albums* is a negotiable issue that the client would like addressed.
- One brother says in a joint session to the mediator: "My brother calls me at any time of the day or night. He expects me to drop everything to listen to his complaints. Some of us have a real life and keep regular hours." The mediator should raise and explore whether *the timing of telephone calls* is a negotiable issue that the parties would like addressed.
- One brother says in caucus to the mediator: "My brother has no respect for me and he is ruining my son. He gave my son access to his N.Y.C. apartment and allowed him to bring a girlfriend as an overnight guest. He is corrupting my son! Extramarital sex is against my religion and exposes my son to life-threatening diseases. Now you understand what an awful person my brother is!" The mediator should raise and explore whether *the son's sleeping arrangements in his uncle's apartment* is a negotiable issue the brother/father would like addressed.

Lawyers tend to shy away from "messy" issues involving "personal" matters like photo albums, communication and sleeping arrangements. Mediators operating in a court or litigation-connected context have a similar tendency to stick with or emphasize the legal cause of action that the complaint and answer highlights. That tendency should be checked when the dispute resolution process being employed is negotiation and mediation. While it is a brave invitation on the part of the mediator to ask the parties to display all the concerns they have with respect to each other, that move can reveal the true picture of what matters need to be addressed for the conflict to be resolved, and the bargaining agenda can be shaped accordingly.

Several rationales argue for inclusion of all issues the parties raise in the bargaining agenda.[19] Since negotiation and mediation can address multiple issues–broader than legal causes of action–it stands to reason that these processes should be employed to their full capacity. Furthermore, there is value in the dispute resolution process addressing what the dispute is really about, rather than merely those issues cognizable in adjudication. Since mediation, among the primary dispute resolution processes, is the only third party process where parties can raise all their concerns, its capacity to do that should be maximized.

Also, a rich mix of issues is more likely to allow for integrative and optimal resolutions. Each party may get what they value most–sometimes sacrificing very little in the process. 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. Parties can have their priority issues addressed, which may or may not be a "legal" issue. Parties frequently feel understood and respected if a meaningful accommodation is made around an issue of importance to them, which might provide momentum and motivation to tackle more difficult issues. And often multiple issues can allow for productive tradeoffs that leave each party significantly better off. Furthermore, many of the issues that lawyers fear, involving communication or interaction, are sometimes easy to resolve. Given the three examples bulleted above, it is likely (though one never knows given individual case dynamics!) that:

- The brothers might find a satisfactory allocation of family pictures and photo albums.
- The brother might agree to telephone within time frames designated by the other brother or to use some other medium to communicate (like email).
- The uncle might agree to limit his nephew's access to his apartment or specify certain sleeping arrangements when the nephew is in his apartment.

Among the advantages to a broad approach to issue identification is that each party can describe and define the conflict as they see fit. The attorney representative and the mediator must capture the issues that the parties describe. Thus the parties are "empowered" by having the real dispute that they are experiencing dealt with as the subject matter of the process. Of course, both attorneys and mediators must be trained to identify as negotiable issues matters that are not necessarily cognizable as legal causes of action. Where attorneys and mediators artificially limit the parameters of the discussion to

19. *See* Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7 (1996) (describing mediator orientations and illustrating that mediators can take a broad or narrow approach to problem identification).

legal causes of action, party autonomy,[20] important self-expression ("empowerment"), and interparty understanding or recognition may be foreclosed.[21]

As a tool for the division and distribution of an art collection or other significant family artifacts, to resolve a question about the optimal guardian for an orphaned child, to decide who can best serve as the executor or manager of property–these and other issues are ripe for mediation. The testator is in a position to ensure that the benefits he is distributing do not turn into a family curse. But rather, the crisis of family conflict might be the seed for building even more harmony than existed before the conflict where a thoughtful dispute resolution provision is in place.

The costs of litigation can be staggering. Litigation can take too long, can alienate family members from each other and polarize families into warring camps, sometimes for generations. Funds spent on lawyers can preclude there being available monies for education and fun. Charles Dickens, in *Bleak House*, commented on a successful litigant: "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." Most testators want to leave a richer legacy. It is great news that lawyers have among the panoply of available processes one that promotes understanding and can promote harmony. Chief Justice Warren Burger once said that lawyers have a traditional role as "healers of human conflict."[22] Mediation, properly used and raised as a step in the dispute resolution process, allows for a mechanism to promote that traditional function.

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20. *See* STANDARDS OF CONDUCT FOR MEDIATORS (Joint Committee of Delegates from the American Arbitration Association, the American Bar Association Sections of Dispute Resolution and Litigation, and the Society of Professionals in Dispute Resolution) (1994) (recognizing self-determination as the "fundamental principle of mediation").

21. *See* ROBERT A. BARUCH BUSH & JOSEPH FOLGER, THE PROMISE OF MEDIATION (1994) (describing empowerment and recognition as the central values of mediation).

22. Warren E. Burger, *Isn't There A Better Way*, ANNUAL REPORT ON THE STATE OF THE JUDICIARY (Jan. 24, 1982).

APPENDIX A: SAMPLING OF "MEDIABLE" ISSUES IN FAMILY DISPUTES

COMMUNICATION BETWEEN THE PARTIES
- frequency of communication
- time of day (or night) of communication
- method of communication (e-mail, telephone)
- the way the parties address each other (e.g., Jamie wants to be called James and a sibling won't honor that)
- language used in exchanges (a sibling uses four letter words in front of another sibling's child)

COMMUNICATION WITH NON-FAMILY MEMBERS ABOUT FAMILY AFFAIRS

BEHAVIOR AT FAMILY GATHERINGS
- behavior of party or party's spouse or child at family gatherings
- alcohol or drug consumption at family gatherings
- attendance at family gatherings

RELATIONSHIP/INTERACTION WITH EACH OTHER'S CHILDREN
- manner of address between adults and children
- calling parent by first name instead of title (e.g., mother, father)
- sleeping arrangements for children and their friends in another family member's house
- gifts for children

ARRANGEMENTS FOR PARENTS
- long-term care for elderly parents (nursing home v. other arrangements)
- use of parents' home, automobile or other property
- compensation of family member who cares for elderly or disabled family member

FAMILY HOME, FARM OR OTHER PROPERTY (ART, SILVER, JEWELRY, FURNITURE, PAPERS, MUSICAL INSTRUMENTS)
- disposition of, allocation of, care of, use of

HOLIDAY CELEBRATIONS
- menu at holiday gatherings
- agenda for meetings or celebrations
- attire at eventsprayer, music, performance, games, television

CONDUCT OF FAMILY BUSINESS

APPENDIX B: SAMPLE DISPUTE RESOLUTION CLAUSES IN WILLS

00.0 *Guardian for YY*

If my husband, XX, does not survive me, I appoint AA, my sister, BB, YY's godmother, and CC, my sister-in-law, to determine, in consultation with and giving deference to the wishes of YY, my daughter, which family (and designated individual) would best serve as guardian of the person of YY. If a mediator is needed to help resolve this, or any other, question arising under this Will, I would like my executor to engage MM to assist in resolving the issue.

00.0 *Dispute Resolution*

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).