

Mediation and Jury Trials as Means of Resolving Will Contests

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"In vain thy reason finer webs shall draw,
Entangle justice in her net of law."

Alexander Pope, *Epistle 3*, l. 191 (1733)

"It becomes a wise man to try everything he can do by words,
before having to resort to arms."

Terence, *EUNUCHUS*, iv., 7, 19

In the vast range of human problems that law seeks to govern, there are certain areas in which legalisms and legal thinking are not particularly useful. It is my belief that one of these areas is that of will contests,¹ in which non-lawyer dispute resolution seems particularly effective.

I begin with the premise that will contests are family disputes first and legal and financial ones second; if so understood, will contests can be properly addressed. Instead of focusing upon what is right for the family, the law has sought to govern these disputes with vague tests for undue influence² and

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1. In a will contest, the will is presumed to be legitimate if the proponent proves that the execution of the will was in compliance with the applicable statutory requirements. The contestant, on the other hand, has the ultimate burden of proof on the issue of the will's legitimacy. The contestant attempts to prove the grounds of his or her contest, often relying on the doctrine of undue influence and lack of testamentary capacity. See Kathryn Sampson, *Burden Shifting in Will Contest Cases: An Examination and a Proposal that the Arkansas Supreme Court Reconcile Arkansas Rules of Evidence Rule 301 with its Undue Influence Case Law*, 1996 ARK. L. NOTES 93, 94 (1996); see also, Jeffrey A. Schoenblum, *Will Contests- An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 647 (1987).

2. In applying this test, a court questions whether the testator's mind was controlled by another person to such an extent that his or her will is in effect the will of that person. To show that the testator's mind was under such influence, the "will substitution test" requires the contestant to prove the following four elements: opportunity, naturalness of disposition, motive and susceptibility. See Trent J. Thornley, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L. J. 513,517-518 (1996).

mental capacity³ that are aimed at determining the decedent's state of mind at the time of testation.⁴ This inquiry is fraught with uncertainty and gives the decision-maker wide latitude in deciding whether these tests are met.

It appears that probate judges exercise such discretion in quite different ways than their juries; this variance often results in different outcomes for the litigation itself. Judges tend to focus on the testator's intent, using the tests mentioned above; with remarkably few exceptions they tend to decide cases in favor of the proponents of a will.⁵ This is due to several factors, which likely include: (1) impatience with the vague tests they are asked to use to determine testator capacity; (2) the realization that, whatever guidance these tests may give, the judges are not themselves psychologists and are poorly trained for such an inquiry; and (3) a bias in favor of "moving cases along" administratively, which can be satisfied most easily by not disturbing the document in front of them. While certain probate judges may themselves try to broker a settlement between proponent and contestant, the data reveals that, should this effort fail, actual litigation before the judge is rarely successful for the contestant.⁶

Even if a testator's true state of mind could be determined with reasonable certainty by a judge, it is indisputable that the judge's "zero-sum"⁷ decision, usually in favor of the will proponent, may unnecessarily sacrifice fam-

3. As for testamentary capacity, the testator must have at the time of the execution of the will, the capacity to know and understand (1) the nature of his act; (2) the nature and extent of his property; and (3) his relation to those persons who are the natural objects of his bounty. See Michael Falkner, *Comments: A Case Against Admitting into Evidence the Dispositive Elements of a Will in a Contest Based on Testamentary Incapacity*, 2 CONN. L. REV. 616, 617 (1970). See also Michael D. Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L. J. 217, 311 (1944).

4. See generally Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996).

5. See generally JESSE DUKEMINIER & STANLEY JOHANSON, *WILLS, TRUSTS, AND ESTATES*, 158 (5th ed. 1995) and *infra* note 6.

6. Research in Davidson County, Tennessee, where jury trials may be used as an alternative to judicial decision making, revealed that ten of twelve will contests before a judge were resolved in favor of the proponent, but just seven of twelve before a jury were resolved in favor of the proponent. See Jeffrey A. Schoenblum, *Will Contests--An Empirical Study*, 22 REAL. PROP. PROB. & TR. J. 607, 626-27 (1987). In a nationwide study of will contests based on undue influence or lack of testamentary capacity whose appeals were reported from February 3, 1997 to January 27, 1998, it revealed that, when before a judge at the trial level, the contestant prevailed only five of twenty-two times; if the contestant went before a jury, the contestant prevailed six of eight times (although one of these verdicts was overturned by a judge as unsustainable at law). For further details see Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation as Means of Resolving Will Contests* 37 DUQ. L. REV. 173, 180, n. 36.

7. Roughly speaking, this concept means that if one party wins, another must lose--there is no middle ground. See, e.g., LESTER THUROW, *THE ZERO SUM SOCIETY* (1980).

ily harmony⁸ for the sake of protecting the "free testation"⁹ of a person now dead.

On the other hand, juries are much more likely than judges to decide will contests in favor of contestants.¹⁰ This fact does not sit well with many in the legal community. As a result, some states, including Massachusetts¹¹ and California¹² have statutorily barred juries from hearing will contests.¹³ Such anti-jury sentiment appears to be based chiefly on the fear that "lay emotion" has played a part in many verdicts for contestants that are contrary to law.¹⁴

Although judges certainly bring discretion and equitable decision-making to bear when adjudicating will contests, they are still more conscious of preserving the *law* of the matter than are juries: juries may focus more on fair (natural) distribution of the estate than on preservation of a deal person's (theoretical) intent. In addition, juries may not impose a stringent notion of what influence might be undue or what degree of mental weakness may rise to the level of incapacity. Instead, they may reason backward. Jurors may collectively feel that if a testator left property in an unnatural manner, he or she must have been crazy, or under undue influence, or both. Even if this is the way many such verdicts are reached, the results may well be sound. This is because good decision making in these cases should be, to paraphrase Holmes, more the product of experience than of logic.¹⁵

8. See LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD 139 (1955).

9. See Deborah A. Batis, *I Didn't Ask To Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Disinheritance*, 41 HASTINGS L. J. 1197, 1197-98, 1269 (1990).

10. See *supra* note 6.

11. MASS. STAT. Ch. 211 (1986) (repealing MASS. GEN. LAWS ANN. Ch. 215 § 16 (1986)).

12. CAL. PROB. CODE § 7200 (West 1991).

13. See Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 532 (1990). According to Athanas, the following states do not permit trial by jury in will contests: Arkansas; California; Louisiana; Oregon; South Dakota; Maine; and Kansas. Massachusetts must be added to the list.

14. See *id.* at 541. See also Estate of Fritschi, 60 Cal. 2d 367, 373, 384 P.2d 656, 659, 33 Cal Rptr. 264, 267 (1963), complaining that a "'legion' of appellate decisions have been necessary to reverse juries who invalidate wills based on nothing more than 'their own concepts of how testators should have disposed of their properties.'" Cf. Note, *Undue Influence—Judicial Implementation of Social Policy*, 1968 WIS. L. REV. 569, which finds that in Wisconsin, where the trial judge, not a jury, finds facts in will contests, appellate courts rarely reverse the trial judge's decision in undue influence cases.

15. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW I (Neill H. Alford, Jr. L. L. B.,

Even if one accepts the fact that juries favor will contestants considerably more often than do judges, and the hypothesis that they are better decision-makers in family disputes than are judges, jury trials still leave us in the realm of litigation. I think that most would agree that the win/lose (zero-sum) results of litigation are not optimal for deciding family conflicts. Indeed the best way to solve such disputes would seem to be another mechanism for bringing the non-lawyer's perspective to bear on these problems: mediation.

I contend that mediated settlement of will contests works best where the right to a jury trial is preserved, giving contestants more leverage at the mediation stage. In mediation, what is a fair distribution of the estate in light of a particular family's circumstances can be worked out by the parties. Attorneys representing the parties, who otherwise would become deeply involved in the case, can be relegated to a relatively minor role, such as approving a settlement after it is reached.

The prototype system exists. My researchers and I found it in Fulton County (Atlanta), Georgia. Between the years 1995 and 1997, of 36 will contests for undue influence and/or lack of testamentary capacity filed in the Fulton County Probate Court, 24 were settled through mediation.¹⁶ This is because the probate judge who hears such contests routinely orders the parties to try mediation first.¹⁷ Only rarely does a party convince the judge that mediation should not be attempted. If mediation is attempted and fails, the parties have a right to a jury trial.¹⁸ Although this may give contestants better leverage in the negotiating process than if no jury trial was possible, the cost and delay of litigation still provides a powerful incentive to settle.

S. S. D., et al. eds., *The Legal Classics Library* (1982).

16. Interview by Lara Zdravecky with Barbara Koll, Senior Attorney of Fulton County Probate Court, in Atlanta, GA. (July 1, 1998).

17. *See id.* In the Fulton County Probate Court, the parties are first required to make a court appearance. At this appearance, the judge may order the parties to dispose of the case through mediation. If there is an objection to the judge's order, counsel must convince the judge that attempted settlement of the case through mediation would be inappropriate. Although they are required to make an appearance and an attempt at mediation, the parties are not obligated to reach a settlement. The option of a trial, by either bench or jury is always available to the parties. Fulton County is one of the few counties in Georgia which permits parties to request jury trials in probate matters. (Counties such as neighboring Forsyth County do not allow a jury trial in probate matters, unless the case in question is tried de novo in the superior court.) If an agreement is reached during mediation, the parties are required to present the agreement to the probate judge for approval. Once the settlement agreement is approved, the parties proceed in accordance with the provisions specified in the mediation agreement.

If no agreement is reached during mediation, the parties are permitted to either request a jury trial or continue with a bench trial. Once the case goes to trial, the parties proceed just as they would in a full evidentiary trial.

18. *See id.*

Few legal professionals with whom I have spoken seem to disagree with the Atlanta approach.¹⁹ However, I am certain that some attorneys (perhaps not willing to lose business and/or learn new tricks) remain pro-litigation, or at least pro-lawyer negotiated settlement. One "settlement-minded" law professor I talked to told me that traditional lawyer-bargained settlement works well for him. He did admit, however, that if the opposing attorney is litigation-minded, traditional settlement does not work.²⁰ However, I suspect that the chief problem with instituting the Atlanta system nationwide is not professional reticence, but the lack of any compelling pressure to do so. As Jeffrey Rosenfeld has pointed out, will contests are relatively rare events.²¹ Thus, there is little incentive to incorporate mediation of these disputes into the structure of a given court system.

The rarity of will contests was brought home to me in a conversation I had some time ago with the then chief Judge of Probate for Norfolk County, Massachusetts. He told me he would "love" to hear a will contest; most of his time was consumed with divorce and separation matters.²² Still, even relatively rare types of disputes demand the best justice possible. The arguments in favor of the Atlanta approach seem strong, and I hope that symposia like this one will set the stage for its widened implementation.

19. See, e.g., telephone interview with David A. Dorfman, New York City Attorney (July 7, 1998). When questioned, the attorney made clear he would much prefer the Atlanta system of virtually automatic mediation to New York's tendency to pursue litigation in these matters. He believed that the Atlanta system would provide less expensive, quicker, and better results than the New York system.

Attorney Dominic Campisi notes that "many probate disputes involve a history of the failure of family members to express anger or resentments toward the deceased or other relatives." Consequently, he suggests that, to resolve these disputes, "one must understand the grieving process, family dynamics, the need for a forum to express resentment, refusal of family members to accept termination of the family and their preference for continued conflict rather than abandonment, and timing of settlements within these processes." Mediation, according to Campisi, addresses all of these issues. See Dominic J. Campisi, *Using ADR in Property and Probate Disputes*, PROB. & PROP., May/June 1995, at 48, 52-53.

20. Telephone conversation with Professor Bob Whitman of the University of Connecticut Law School, (Fall, 1999).

21. See Jeffrey P. Rosenfeld, *Will Contests: Legacies of Aging and Social Change*, in *INHERITANCE AND WEALTH IN AMERICA* 173, 174 (Robert K. Miller, Jr. & Stephen J. McNamee eds., Plenum Press 1998).

22. Telephone conversation of the author with James R. Lawton, Former Chief Judge of Plymouth County Probate Court, Plymouth County, MA. (probably 1990). Not incidentally, routine mediation has made greater inroads in divorce and separation matters than in will contests.

