WHY WAIT UNTIL WE DIE? LIVING PROBATE IN A NEW LIGHT

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Alternative dispute resolution (ADR) has gained much support from the legal community as an alternative to costly litigation procedures. On the other hand, living probate has failed to gain support in the legal community. The question is: Why? ADR—more specifically mediation—and living probate have a lot in common. Alaska,[1] Arkansas,[2] North Dakota,[3] and Ohio[4] have all adopted optional living probate statutes that establish the validity of a will before the testator's death. This Note explores why only four states have embraced living probate statutes. Perhaps Americans do not want to think about death, do not want to validate a document that will be binding after their death, or do not want to damage their family connections. Whatever the reason, living probate is not a popular legal procedure.

Living probate helps avoid post-mortem will contests,[5] ensures that a judge or jury does not subjectively question the intent of the testator and reconstruct the will document,[6] and decreases the risk of evidentiary

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1. ALASKA STAT. §§ 13.12.530 to .545 (2010).
2. ARK. CODE ANN. §§ 28-40-201 to -203 (2012).
3. N.D. CENT. CODE §§ 30.1-08.1-01 to -04 (2010).
4. OHIO REV. CODE ANN. §§ 2107.081 to .085 (ORC through July 2012).
5. *See* Aloysius A. Leopold & Gerry W. Beyer, *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131, 134 (1990).
6. *Id.* at 137 ("Under the post-mortem system, judges and jurors often evaluate the testator's scheme by their own standards of what a fair and normal distribution should be." (citing Mary Louise Fellows, *The Case Against Living Probate*, 78 MICH. L. REV. 1066, 1070 (1980))).

problems by ensuring that the testator is available to the court in a living probate process.[7] Living probate should be widely accepted in the legal community to ensure that a testator's last will is carried out. If each state adopts a mediation-like living probate statute, Americans may accept living probate because of the greater flexibility and communication between the court, testator, and presumptive heirs. A mediation-like living probate statute would also decrease the evidentiary problems that courts face in post-mortem probate procedures while maintaining the testator's privacy over the disposition of the will.

I. INTRODUCTION

Imagine you are an elderly, grey-haired woman creating your last will in 1998.[8] Your presumptive or apparent legal heirs consist of thirteen nieces and nephews,[9] but you have no immediate heirs. You wish to leave your estate, valued at $372,624,[10] and memorabilia, valued at nearly $10 million,[11] to a charitable institution which you created with your lifelong friend—someone who has been by your side for years and who truly cares about you. You name your lifelong friend coexecutor and designate her to receive 90% of the royalties from the estate, and the other 10% is intended to go to your nieces and nephews.[12] In 2005, you die at age 92.[13] In 2007, your nieces and nephews, outraged at only receiving a tenth of your valuable estate, file a post-mortem will contest that challenges the validity of your will.[14] Since you resided in a state

7. *Id.* at 140.

8. *See* Danielle Mayoras & Andy Mayoras, *Rosa Parks' Final Wishes, Ignored for Years, Are Finally Restored*, FORBES (Jan. 6, 2012, 2:56 PM), http://www.forbes.com/sites/trialandheirs/2012/01/06/rosa-parks-final-wishes-ignored-for-years-are-finally-restored/. Rosa Parks is the elderly woman being discussed. Parks created her last will in 1998. *Id.*

9. *See* David Ashenfelter, *Parks Estate Returning to her Friend, Institute*, DETROIT FREE PRESS, Dec. 31, 2011, at 1A. Rosa Parks died leaving thirteen nieces and nephews. *Id.*

10. Mayoras & Mayoras, *supra* note 8.

11. Ashenfelter, *supra* note 9, at 6A.

12. Mayoras & Mayoras, *supra* note 8.

13. *Id.*

14. *Id.*; *see also In re* Estate of Parks, No. 281203, 2009 WL 726024, at *1 (Mich. Ct. App. Mar. 19, 2009) (affirming the 2007 appointment of the executors who replaced Elaine Steele and the other executor Parks chose); Chase v. Raymond & Rosa Parks Inst. for Self-Dev. (*Chase I*), 806 N.W.2d 528 (Mich. 2011) (returning Parks' estate to its original disposition and reinstating Elaine Steele as one of the executors); Chase v. Raymond & Rosa Parks Inst. for Self-Dev. (*Chase II*), 807 N.W.2d 306, 307 (Mich.

with no living probate statute, your will was not fully enforceable and was subject to a post-mortem challenge. Had your will been validated before your death in a living probate process, you would have been available to the court to explain any ambiguities in your will. You also would have been able to declare yourself mentally competent and make any declarations necessary to prove yourself free from undue influence. If your will is invalidated in the post-mortem proceeding, the judge and jury may determine the fair distribution of the estate based on their own subjective opinions of the case.[15] If your will is found valid, your disposition of property will stand and your intent will be carried out, but your estate will remain depleted due to the attorney's fees and court costs from the will contest,[16] unless the court determines that the contest was frivolous.[17]

The situation outlined above actually occurred for Rosa Parks—the African-American civil rights icon who refused to give up her seat on a bus to a white man.[18] From 2005 until 2011, the disposition of her estate was uncertain and her mental capacity was questioned.[19] The probate judge presiding over her case had the ultimate discretion to determine which party should get the power to control Rosa Parks' estate; "[t]his meant that Rosa Parks' express wishes . . . were completely changed."[20] The probate judge removed the two co-executors (one of whom was Elaine Steele, Parks' lifelong friend) from the estate and appointed two attorneys as the new executors.[21] The will contest and multiple appeals "drained the estate of nearly $243,000."[22] In addition, the attorneys representing Parks' nieces and nephews persuaded the probate judge to

2012) (denying the motion for reconsideration and restoring Parks' estate to its original form).

15. Leopold & Beyer, *supra* note 5, at 137; *see also* Fellows, *supra* note 6, at 1070.

16. Leopold & Beyer, *supra* note 5, at 135 ("Under the majority of post-mortem procedures, the plaintiff, after losing a spurious will contest, is not required to reimburse the decedent's estate for attorney's fees and court costs expended while defending the unjustified claim.").

17. *See* Dennis W. Collins, *Avoiding A Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 34 (2000); *see e.g.*, *In re* Estate of Bilsie, 302 N.W.2d 508, 511 (Wis. Ct. App. 1981).

18. Jennifer Rosenberg, *Rosa Parks Refuses to Give Up Her Bus Seat*, ABOUT.COM, http://history1900s.about.com/od/1950s/qt/RosaParks.htm (last visited Oct. 7, 2012).

19. Mayoras & Mayoras, *supra* note 8; *Chase II*, 807 N.W.2d at 306.

20. Mayoras & Mayoras, *supra* note 8.

21. *Id.*; *see also In re* Estate of Parks, No. 281203, 2009 WL 726024, at *1 (Mich. Ct. App. Mar. 19, 2009).

22. Ashenfelter, *supra* note 9, at 6A.

award them control over Parks' memorabilia,[23] which was supposed to be under the control of Elaine Steele and the Rosa and Raymond Parks Institute for Self-Development.[24] Parks' memorabilia was set for auction until the Michigan Supreme Court reversed all lower court decisions and returned Parks' estate back to its original terms.[25] Under current post-mortem procedures, estates are subject to the harsh "reality that the final wishes of someone who died are not always followed, and instead, often lead to expensive court fights."[26]

In Part II, this Note examines the background of both living probate and mediation in order to address the history, functions, and outcomes of each procedure.[27] In Part III, this Note sheds light on the similarities and differences between living probate and mediation, and it advances a new mediation-like living probate model. In doing so, this Note aims to increase support for living probate because of its potential to improve the current probate process.

II. BACKGROUND

A. Living Probate: History, Functions, and Outcomes

A will is one of "the most important document[s] executed in a person's lifetime."[28] It allows a testator—the person creating the will—to control the disposition of his or her property after death. The intentions set forth in a will can last for lifetimes. If the testator's distribution of the estate is "unfair, or unnatural, [then] the testator runs the risk of a post-death challenge in a court proceeding where the aggrieved heirs have a distinct advantage, the absence of the testator."[29] Living probate, also known as ante-mortem (pre-death) probate, "enables a testator, prior to his death, to adjudicate several legal and factual issues that might be

23. *Id.*

24. Mayoras & Mayoras, *supra* note 8.

25. *Id.*; *see also* Chase v. Raymond & Rosa Parks Inst. for Self-Dev. (*Chase I*), 806 N.W.2d 528 (Mich. 2011); Chase v. Raymond & Rosa Parks Inst. for Self-Dev. (*Chase II*), 807 N.W.2d 306 (Mich. 2012).

26. Mayoras & Mayoras, *supra* note 8.

27. For purposes of this Note, the term "ADR" refers to mediation unless otherwise specified.

28. Collins, *supra* note 17, at 7.

29. Ralph Lehman, *Determining the Validity of Wills and Trusts—Before Death*, 21 PROB. L.J. OHIO, 245, 245 (2011).

raised in a post-mortem will contest."[30] At the outset, living probate seems like a choice every testator would either engage in or at least consider when making a will; however, living probate is not widely accepted.[31]

1. History

In 1883, a Michigan statute introduced living probate to the American legal system.[32] This statute allowed for a testator to obtain a declaration of validity from the probate judge.[33] However, this statute was short-lived because the Michigan Supreme Court declared it unconstitutional in 1885.[34] In 1937, the Federal Declaratory Judgment Act rectified the constitutionality problems associated with living probate by granting courts the power to "use . . . declaratory judgments when a court [makes] a determination regarding the validity of a will."[35] Declaratory judgments "allow a testator to obtain a [final] judgment concerning his or her will, on issues ranging from formalities, such as signatures, to testamentary capacity and undue influence."[36] There were still problems with living probate[37] after the Declaratory Judgment Act solved the constitutionality problem, but four states (Alaska, Arkansas, North Dakota, and Ohio) have been able to circumvent these problems

30. Fellows, *supra* note 6, at 1066.

31. *See id.* at 1066–67.

32. Act of April 11, 1883, No. 25, 1883 Mich. Pub. Acts 17.

33. Leopold & Beyer, *supra* note 5, at 152; § 1, 1883 Mich. Pub. Acts at 17.

34. Leopold & Beyer, *supra* note 5, at 153 ("Two grounds were propounded for the statute's invalidity: (1) It enabled the testator to avoid the rights of a spouse and child; and (2) it failed to provide for finality of judgment.") (citing Lloyd v. Wayne Circuit Judge, 23 N.W. 28, 29 (1885)). For more on the overview of living probate history, see generally Tracy Costello-Norris, Note, *Is Ante-Mortem Probate a Viable Solution to the Problems Associated with Post-Mortem Procedures?*, 9 CONN. PROB. L.J. 327 (1995).

35. Leopold & Beyer, *supra* note 5, at 156. The Supreme Court held that declaratory judgments were a proper use of a court's judicial involvement and were just a procedural mechanism to deal with constitutional issues. *Id.* (citing Aetna Life Ins. Co., v. Haworth, 300 U.S. 229, 240–41 (1937)).

36. Collins, *supra* note 17, at 36.

37. *See* Leopold & Beyer, *supra* note 5, at 156. Even after declaratory judgments solved the constitutionality problem with living probate, "three other issues still needed clarification . . . 1) the requirement of 'ripeness, sufficiency and adversity of the parties'; 2) an actual concrete controversy; and 3) finality of the judgment." *Id.* (footnote omitted). When a testator requests that the court validate the will in a living probate hearing there may not be an adverse party; therefore, there are concerns that ripeness of a claim is lacking within living probate procedures. *Id.* at 156 n.131.

and enact living probate statutes.[38] These statutes grant courts specific jurisdiction to hear a living probate case.[39]

In 1946, the Model Probate Code drafters considered a living probate statute but rejected the idea because "[t]he practical advantages of such a device are not great in view of the fact that few testators would wish to encounter the publicity involved in such a proceeding."[40] In 1967, the Uniform Probate Code drafters considered using a living probate statute,[41] but ultimately the Code did not contain a trace of living probate language.[42] Living probate received further support from 1977 to 1979—when three states enacted living probate statutes[43]—and again in 2010 when Alaska passed its living probate statute.[44]

2. Functions and Outcomes

Living probate statutes vary. The three modern living probate trends developed with varying degrees of procedural difficulty.[45] However, all three trends have one common feature—to allow a testator to establish the validity of the will before death[46] without requiring an interpretation of the will's contents itself.[47] The three models are: (1) the Contest Model; (2) the Conservatorship Model; and (3) the Administrative Model.[48] This Note briefly explores each model in order to better

38. *See id.* at 157, 169.

39. *See supra* notes 1–4. When declaratory judgments were used for living probate, courts did overly rely on or utilize the statute; therefore, states created statutes to grant courts specific jurisdiction to hear living probate cases without the problem of non-justiciability. Leopold & Beyer, *supra* note 5, at 158–59. Without the living probate statutes, some states argue that no "interest or issue is present" to grant a court jurisdiction to hear a living probate case. *Id.*

40. LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE 20 (1946); *see also* Fellows, *supra* note 6, at 1066.

41. Leopold & Beyer, *supra* note 5, at 165; W.D. ROLLISON, COMMENTARY ON THE UNIFORM PROBATE CODE 25 (1970).

42. Leopold & Beyer, *supra* note 5, at 165; ROLLISON, *supra* note 41, at 26.

43. Leopold & Beyer, *supra* note 5, at 169.

44. Uniform Probate Code Act, 2010 Alaska Sess. Laws ch. 64; ALASKA STAT. §§ 13.12.530 to .545 (2010).

45. *See* Fellows, *supra* note 6, at 1067.

46. Leopold & Beyer, *supra* note 5, at 133.

47. *See* Fellows, *supra* note 6, at 1068.

48. *See id.* at 1067; Howard P. Fink, *Ante-Mortem Probate Revisited: Can an Idea Have Life After Death?*, 37 OHIO ST. L.J. 264 (1976); John H. Langbein, *Living Probate: The Conservatorship Model*, 77 MICH. L. REV. 63 (1978); Gregory S. Alexander, *The Conservatorship Model: A Modification*, 77 MICH. L. REV. 86 (1978); Gregory S. Alexander & Albert M. Pearson, *Alternative Models of Ante-Mortem Probate and*

understand the similarities between living probate and mediation in Part III.

The Contest Model is the only model currently used.[49] Created in 1976,[50] this model "places the testator and the prospective heirs in an adversarial situation which allows for a declaratory judgment"[51] on testamentary capacity, compliance with the will formalities, and the presence of undue influence or duress.[52] The statute grants standing to the testator, any heir under intestacy, or any beneficiary defined in the will.[53] A guardian ad litem represents any unascertained heirs or beneficiaries, or they can be represented by virtual representation (someone with a similar interest represents the unascertained beneficiary).[54] The presumptive takers[55] may also contest the validity of the will. The Contest Model is procedurally similar to post-mortem procedures with only one difference—it "changes only the timing of the litigation."[56] Since litigation can arise under this model, testators lose the confidentiality they have in their will's disposition because its contents become a matter of public record.[57] In addition, the testator runs the risk of family conflict depending on the disposition of property between presumptive heirs and beneficiaries.[58] Another problem with the Contest Model is that expected heirs must bear litigation costs prior to receiving any benefits from the will.[59] However, this problem protects against depletion due to a post-mortem contest because attorney's fees and court costs are only recoverable in non-frivolous lawsuits.[60] In addition, the testator could decide to change estate or property disposition in a subsequent will.[61] For example, the testator could easily change the

Procedural Due Process Limitations on Succession, 78 MICH. L. REV. 89 (1979).

49. *See* Fellows, *supra* note 6, at 1073; *see, e.g.*, ALASKA STAT. § 13.12.530.

50. Fink, *supra* note 48, at 274–77; *see also* Fellows, *supra* note 6, at 1073.

51. Leopold & Beyer, *supra* note 5, at 166.

52. Fellows, *supra* note 6, at 1073.

53. Leopold & Beyer, *supra* note 5, at 166.

54. *Id.* at 166 & n.198.

55. *See* Fellows, *supra* note 6, at 1073. Heirs under intestacy and beneficiaries named in the will are collectively referred to as "presumptive takers." *Id.* This term will be used throughout this Note to refer to these two types of takers under a will.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Collins, *supra* note 17, at 34; *see, e.g.*, *In re* Estate of Bilsie, 302 N.W.2d 508 (Wis. Ct. App. 1981).

61. Fellows, *supra* note 6, at 1074.

disposition if a presumptive taker contested the will's validity or the testator's capacity during the living probate proceeding. Although this model is highly criticized, it is the only model American statutes have adopted.[62]

The Conservatorship Model reflects the Contest Model procedurally, but it has a few differences.[63] In 1980, Professor Langbein created a variation of the Contest Model[64] to decrease the family unrest that could result from the adversarial setting of the Contest Model; he created an informal, non-adversarial judicial proceeding.[65] This model results in a declaratory judgment similar to the Contest Model, but instead of naming each presumptive taker in the suit a conservator or guardian ad litem represents the presumptive takers' interests.[66] The presumptive takers confidentially provide information to the conservator, and the conservator then conveys the information to the testator in the living probate proceeding.[67] Critics argue that this process will not maintain family harmony,[68] that the proceeding is still adversarial in nature, and that the testator may change the disposition of the will based on knowledge gained after talking with the conservator.[69] Professor Langbein defended these attacks by noting that this model allows "full development and ventilation of evidence of incapacity without requiring family members to step forward and assert that the testator lacked capacity."[70] Ultimately, the Conservatorship Model provides confidentiality in the disposition of the will and the information presented to the conservator by the presumptive takers; this model aims to preserve family harmony.

The Administrative Model is very different from the other two models. It preserves the testamentary plan and the confidentiality of the

62. *See id.* at 1073–74; *see also* Leopold & Beyer, *supra* note 5, at 166–67; Costello-Norris, *supra* note 34, at 336.

63. Fellows, *supra* note 6, at 1074 (noting that "the adversarial and adjudicative format" of the Conservatorship Model is similar to the Contest Model).

64. Langbein, *supra* note 48, at 63; *see also* Leopold & Beyer, *supra* note 5, at 167.

65. Langbein, *supra* note 48, at 77–81; *see also* Fellows, *supra* note 6, at 1075.

66. Leopold & Beyer, *supra* note 5, at 167; Fellows, *supra* note 6, at 1074.

67. Fellows, *supra* note 6, at 1074.

68. *See, e.g.*, *id.* at 1075.

69. *Id.* The testator may know which presumptive taker is challenging the will, based on information the conservator relays to the court, and proceed to treat that presumptive taker less favorably in a subsequent will.

70. Langbein, *supra* note 48, at 79; *see also* Fellows, *supra* note 6, at 1075.

testamentary scheme[71] by keeping the entire proceeding private.[72] The court appoints a guardian ad litem after the testator petitions for a "determination of the validity of the will."[73] The guardian ad litem acts not as a fiduciary of the presumptive takers but instead as an investigator for the court.[74] The guardian ad litem conducts private interviews, evaluates the capacity of the testator, and informs the court of the information discovered.[75] The court then determines the validity of the will by deciding whether or not the testator has the requisite mental capacity.[76] The presumptive takers are not given notice of the proceeding "on the pretence that prospective heirs have no constitutional right to notice" because any interest they have in the estate is "too weak."[77] Similar to the Conservatorship Model, the Administrative Model is criticized because the guardian ad litem's investigation will most likely put the presumptive takers on notice of the proceeding, cause suspicion, and result in family discord.[78] However, this model creates an administrative atmosphere instead of the adjudicative or adversarial atmospheres of the two other models.[79] The outcome is a court order declaring the validity of the will and precluding further contest.[80]

There are three main functions that living probate seeks to achieve: (1) avoid post-mortem will contest;[81] (2) ensure the testator's intent is fulfilled;[82] and (3) decrease evidentiary problems.[83] In addition, living probate "may lead to more efficient use of scarce and valuable [court] resources."[84] This holds true because "less court time is expended

71. Alexander & Pearson, *supra* note 48, at 90.

72. Costello-Norris, *supra* note 34, at 337.

73. Leopold & Beyer, *supra* note 5, at 168; Alexander & Pearson, *supra* note 48, at 112.

74. Alexander & Pearson, *supra* note 48, at 113; Leopold & Beyer, *supra* note 5, at 168.

75. Alexander & Pearson, *supra* note 48, at 113–14; Leopold & Beyer, *supra* note 5, at 168.

76. Alexander & Pearson, *supra* note 48, at 114; Fellows, *supra* note 6, at 1077.

77. Leopold & Beyer, *supra* note 5, at 169.

78. Fellows, *supra* note 6, at 1077.

79. Alexander & Pearson, *supra* note 48, at 112.

80. *Id.* at 117.

81. *See* Leopold & Beyer, *supra* note 5, at 134.

82. *See* Leopold & Beyer, *supra* note 5, at 137 ("Under the post-mortem system, judges and jurors often evaluate the testator's scheme by their own standards of what a fair and normal distribution should be.").

83. *See* Leopold & Beyer, *supra* note 5, at 138.

84. Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, PRAC. LAW., Jan. 1992, at 61, 82.

dealing with spurious will contests and few estate funds are dissipated defending those contests."[85] Also, living probate aids in avoiding intestacy.[86] When a testator creates a will, he or she is altering the intestate structure. The testator would not want his or her estate sent through intestacy because of a formality flaw that the testator would have been able to correct under a living probate proceeding.

One empirical study suggests that will contests occur in one out of every one hundred probated wills.[87] Professor Langbein, the creator of the Conservatorship Model, finds this disturbing because when "there are millions of probates per year, one-in-a-hundred litigation patterns are very serious."[88] Some scholars believe that wills are the "subject of [more] litigation than any other legal instrument."[89] The use of a living probate statute could "effectively carry out the intent of the decedent, while protecting against overcrowding the courts with unfounded litigation."[90]

Arguably, a will is the most important document a person creates in his or her lifetime.[91] This creates a strong argument that a will should not be altered after the death of the testator. Testamentary intent should be preserved at all costs because the ability to transfer property is a right every American citizen should enjoy.[92] The testator's intent can be frustrated in a will contest where only a post-mortem statute applies.[93] This could allow a court or jury to determine the testator's intent and testamentary disposition based on their subjective view of the proper disposition.[94] A living probate procedure provides the testator an opportunity to defend the testamentary disposition of the will without undermining the intent.

In a post-mortem will contest, the testator's direct testimony on the issue of intent is missing.[95] "Only indirect evidence is available to test

85. *Id.*; *see also* Collins, *supra* note 17, at 36.
86. Costello-Norris, *supra* note 34, at 328.
87. Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 613–14 (1987).
88. John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2042 n.5 (1994) (book review).
89. Leon Jaworski, *The Will Contest*, 10 BAYLOR L. REV. 87, 88 (1958).
90. Leopold & Beyer, *supra* note 5, at 135–36.
91. Collins, *supra* note 17, at 7.
92. Leopold & Beyer, *supra* note 5, at 136.
93. *Id.* at 137.
94. *Id.*
95. *Id.* at 138.

[the testator's] capacity which . . . tends to be a matter of mere speculation."[96] A living probate statute enables the testator to be present in order to verify testamentary capacity.[97] Having the testator present creates a situation that post-mortem procedures cannot offer by providing to the probate court the best evidence available. Post-mortem procedures rely on witnesses and parties that knew the testator, not the actual testator, which could ultimately subject the testator's intent and mental capacity to speculation.[98]

B. Mediation: History, Functions, and Outcomes

ADR refers to "[a]ny method of resolving disputes other than by litigation."[99] Mediation, one of the predominant forms of ADR,[100] serves as a "facilitated negotiation"[101] and offers many advantages that would be beneficial in a living probate context.

1. History

ADR gained support in the American legal system in the 1970s.[102] ADR strives to provide "efficiency, access, and justice" to resolve problems outside of the litigation setting.[103] "ADR was intended to provide more creative, particularized, flexible and participative solutions to problems than the more traditional and adversary legal system could offer."[104] Advocates for ADR pushed for its acceptance because "the courts were not meeting the needs and underlying interests of parties and

96. *Id.* at 138–39.

97. *Id.* at 140.

98. *See id*. at 139–40.

99. *Alternative Dispute Resolution*, CORNELL U. L. SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/wex/alternative_dispute_resolution (last visited Nov. 12, 2012).

100. *Id.*

101. MARK V.B. PARTRIDGE, ALTERNATIVE DISPUTE RESOLUTION: AN ESSENTIAL COMPETENCY FOR LAWYERS 89 (2009).

102. Jean R. Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 569–70 (2007); *see generally* Frank E.A. Sander, *Varieties of Dispute Processing*, *in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 65 (A. Leo Levin & Russell R. Wheeler eds., 1979).

103. Sternlight, *supra* note 102, at 570.

104. Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers from the Adversary Conception of Lawyers' Responsibilities*, 38 S. TEX. L. REV. 407, 417 (1997).

others (particularly those outside of the 'case') so that other . . . non-adversarial formats which better met the interests of parties were necessary."[105] ADR seeks to provide a simpler, cheaper, and faster alternative to the formal judicial process.[106]

Mediation provides an informal alternative to litigation, where a neutral third party brings two adverse parties together to discuss a settlement or agreement to resolve an issue.[107] The mediation process does not bind the parties; they are able to accept or reject any proposed outcome the mediator suggests.[108] A neutral mediator works to bring the two parties to an agreement before litigation occurs, but the mediator has "no authority to impose a settlement."[109] "Instead of looking to the past in order to impose a resolution, mediation looks to the future to determine how the parties can work together for their mutual benefit."[110] In the 1970s and 1980s, divorce and family proceedings began using mediation instead of litigation.[111] Currently, mediation is used in a variety of cases and matters,[112] which further supports the argument in favor of a mediation-like living probate process or procedure.

2. Functions and Outcomes

Mediation has gained widespread support in a number of areas of the law because it has many advantages.[113] Litigation is very time consuming and costly.[114] Mediation provides parties with "'their day in court' without the expense of going to court."[115] Unlike the public forum of a courtroom, mediation provides privacy; the parties discuss all matters confidentially, leading to a more open, comfortable, and flexible setting.[116] Mediation makes discussing emotional issues easier—

105. *Id.*; *see generally* Sander, *supra* note 102; ROGER FISHER & WILLIAM URY, GETTING TO YES (Bruce Patton ed., 1981).
106. KIMBERLEE K. KOVACH, MEDIATION IN A NUT SHELL 5 (West Nutshell Series, 2d ed. 2010).
107. *Alternative Dispute Resolution*, *supra* note 99.
108. *Id.*
109. *About AAA Mediation*, AM. ARB. ASS'N, http://www.aaamediation.com/faces/indexjspx (last visited Nov. 12, 2012).
110. *Id.*
111. KOVACH, *supra* note 106, at 32.
112. *Id.* at 39.
113. *Id.*
114. *Id.*
115. PARTRIDGE, *supra* note 101, at 90.
116. KOVACH, *supra* note 106, at 40.

especially family matters—because the process makes responding to each party's needs more amicable.[117]

A neutral third party conducts the mediation to achieve a "win-win" solution for the parties involved.[118] Though the mediator cannot impose a settlement, as a third-party neutral the mediator does not represent either side and can help find an outcome that both parties can agree with. The mediator, a third-party neutral, does not represent either side.[119] "Mediators are trained to look for potential mutual . . . interests, and to be considerate of the parties' desire to preserve relationships."[120] Mediation enables emotional connections to continue between parties who have a long-standing relationship by working to maintain those relationships.[121]

The parties can agree to mediation or a court can order it. Even in a court-ordered mediation the parties must agree to a proposed outcome[122] or the case will revert back to the judicial system. Normally, mediation occurs before a suit is filed or during a subsequent court proceeding.[123] State and federal statutes exist to authorize the use of mediation, both voluntary and court-ordered, in order to decrease the delay in the judicial system and the costs of litigation.[124]

Ultimately, mediation allows for: (1) the parties to control the outcome of a dispute; (2) the parties to directly engage in the negotiation process; (3) an objective third-party neutral to govern the mediation to create an unbiased setting; (4) a quicker dispute resolution than an adversarial proceeding offers; (5) the parties to save money on court costs; and (6) a viable, continued relationship between the two parties after mediation.[125]

There are three main types of mediation styles: (1) evaluative mediation; (2) facilitative mediation; and (3) transformative mediation.[126] In evaluative mediation a former judge acts as a mediator in order to assess the strengths and weaknesses of each party's claim.[127] This style

117. *See id.* at 42.
118. PARTRIDGE, *supra* note 101, at 90.
119. Menkel-Meadow, *supra* note 104, at 422.
120. KOVACH, *supra* note 106, at 43.
121. *See id.* at 42–43.
122. *Id.* at 96.
123. *Id.* at 95.
124. *Id.* at 39, 108–09.
125. *About AAA Mediation*, *supra* note 109.
126. PARTRIDGE, *supra* note 101, at 93.
127. *Id.*

of mediation evaluates the odds of success based on the merits and litigation risks of each claim.[128] This process occurs privately.[129] One problem with this style of mediation is the inability of the parties to fully rely on the mediator's determination and analysis—for example, if a party decides to go forward with litigation after the mediation.[130] "[F]acilitative mediation focuses on the interests of the parties."[131] The mediator works to discover new settlement opportunities that can account for both parties' main interests.[132] This style achieves an outcome that an adversarial process could not create because the focus is on the desired outcome and not on the merits of each party's legal claim.[133] "Transformative mediation focuses on the interpersonal relationship between the [involved] parties."[134] This style focuses on a discussion method to draw out the emotions of each party in order to reach an understanding between the two opposing sides.[135]

Mediation has many advantages. The more the public is aware of these advantages, the more likely mediation will occur in place of litigation.[136] Many parties still use the adversarial process over mediation,[137] and the goal of this Note is to show that living probate can encompass a form of mediation that will allow parties to receive more benefits than a post-mortem procedure provides.

III. INTERTWINING MEDIATION AND LIVING PROBATE

There are many similarities between living probate and mediation. However, living probate has not gained the same support that mediation has in the American legal community. This Note focuses on exploring why this is the case when living probate shares many of the same functions as mediation. This section addresses the similarities and differences between living probate and mediation, proposes a living probate statute that incorporates mediation, and discusses some policy reasons underlying living probate's failure to gain support in America.

128. *See id.*
129. *Id.*
130. *Id.* at 94.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *See id.* at 94–95.
136. KOVACH, *supra* note 106, at 39.
137. *Id.* at 95.

A. Similarities and Differences

Living probate and mediation share three main similarities: (1) cost effectiveness and faster resolutions; (2) the ability to fully embrace the parties' intent; and (3) more efficient evidentiary findings. First, living probate decreases the number of post-mortem will contests by declaring the testator's will valid before the death of the testator.[138] This function decreases the costs expended from the testator's estate in defending a post-mortem challenge.[139] In a post-mortem procedure the party challenging the validity of a will is not required to reimburse the estate for the cost of litigation unless the court finds the suit frivolous.[140] With living probate the testator can bear the cost of declaring the will valid without the estate suffering the costs after death. Similarly, mediation is a more cost-effective alternative to adversarial litigation, and it allows for a faster resolution of the case.[141] A living probate statute that encompasses mediation could have helped Rosa Parks' estate. She could have declared that her will was valid during her life, precluding her nieces and nephews from contesting her will. This could have decreased the costs against her estate and led to a faster resolution of the dispute over the validity of her will. From 2005 to 2011, Parks' nieces and nephews challenged her will.[142] Mediation could have helped speed up the process by resolving the issues associated with her testamentary scheme. In addition, under a living probate statute the parties could have avoided the will contest, time spent in court, and money spent on attorney's fees and court costs. Until the Michigan Supreme Court restored the estate to its original testamentary plan, her estate and memorabilia were set for auction where everything she worked for would be lost due to the will contest.[143] These problems occur regularly in post-mortem probate proceedings. Will contests constantly frustrate the testator's intent. Mediation and living probate together can decrease the problems associated with fulfilling the testator's intent.

Second, mediation and living probate are both designed to fully

138. Beyer, *supra* note 84, at 82; *see also* Collins, *supra* note 17, at 36.

139. *See* Lehman, *supra* note 29, at 245–47.

140. Leopold & Beyer, *supra* note 5, at 135; *In re* Estate of Bilsie, 302 N.W.2d 508, 513–14 (Wis. Ct. App. 1981).

141. PARTRIDGE, *supra* note 101, at 90.

142. Mayoras & Mayoras, *supra* note 8; Chase v. Raymond & Rosa Parks Inst. for Self-Dev. (*Chase II*), 807 N.W.2d 306, 307 (2012).

143. *See* Mayoras & Mayoras, *supra* note 8.

accommodate the intent of the parties. Living probate statutes uphold the testator's testamentary intent and scheme once the court finds the will valid.[144] Similarly, mediation allows the parties to control the outcome[145] without a judge or jury. As such, living probate avoids subjecting the testator's will to the opinions and subjective standards of a judge or jury.[146] The ability to fully embrace the testator's intent is an important function of living probate which parallels one of the functions of mediation. Almost the entire collection of memorabilia of Rosa Parks' estate was lost due to a post-mortem will contest.[147] Rosa Parks' post-mortem will contest gave the court the ability to "'destroy her legacy, bankrupt her institute, shred her estate plan and steal her very name.'"[148] Not every testator has a story like Rosa Parks', or a ten million dollar memorabilia collection, but each has worked for something for his or her entire life. Testators should be allowed to declare a will valid during their lifetime in order to ensure that the testamentary plan is carried out according to the validated will after death. A living probate statute that embraces mediation will aid in abolishing the "sad reality that the final wishes of someone who died are not always followed."[149]

Third, living probate and mediation seek to enhance evidentiary findings. A post-mortem procedure alone "does not offer a true and effective method to probate a will nor does it test the validity of the intentions expressed within it because the best evidence, the testimony of the testator, is unavailable."[150] Living probate does away with this problem. Mediation creates a more open, but confidential, setting where the parties are more at ease to discuss certain emotional issues and address the other party face-to-face.[151] Mediation and living probate strive for full disclosure of evidence. Post-mortem procedures and

144. *See* Leopold & Beyer, *supra* note 5, at 136.
145. *See* PARTRIDGE, *supra* note 101, at 90.
146. *See* Leopold & Beyer, *supra* note 5, at 137.
147. *See* Ashenfelter, *supra* note 9, at 6A. Rosa Parks' memorabilia, worth $10 million, was almost put up for auction and sold against her intent due to the will contest. *Id.* When her estate lost in multiple appeals and was forced to pay attorney fees the court gave the attorneys the rights to auction the memorabilia. *Id.*
148. *Lawyer: 'Cronies' Drained Rosa Parks' Estate*, MSNBC.COM, http://today.msnbc.msn.com/id/43841815/ns/today-today_news/t/lawyer-cronies-drained-rosa-parks-estate/#.Txb-LSM1coY (last updated July 22, 2011, 1:03 AM) (quoting court filing of Detroit attorney Stephen Cohen).
149. *See* Mayoras & Mayoras, *supra* note 8.
150. *See* Leopold & Beyer, *supra* note 5, at 137.
151. *See* KOVACH, *supra* note 106, at 42.

adversarial settings do not always allow for full disclosure. Had Rosa Parks been available to the court, she would have been able to declare herself mentally competent and free from undue influence, explain her testamentary scheme, and rid her estate from the possibility of a costly and time-consuming will contest that could alter her intent.

There are also three main differences between living probate and mediation: (1) the issue of confidentiality; (2) the possibility of family unrest; and (3) a final and binding judgment. First, current living probate statutes do not provide the testator with privacy.[152] Under the Contest Model, the testator's will becomes public knowledge because the living probate procedure is conducted in an open, adversarial forum.[153] "The testator loses the benefits of a confidential testamentary disposition during his life."[154] On the other hand, mediation is conducted in a confidential setting, with only a limited number of exceptions that do away with confidentiality.[155] Second, living probate may cause family turmoil and unrest if a testator disinherits a presumptive taker or grants that person less than the original or intestate share.[156] In contrast, mediation enables the preservation of longstanding relationships between the involved parties through confidentiality.[157] Third, living probate results in a final binding judgment of the validity of the will,[158] whereas mediation often leads to a settlement that might be binding on the parties. However, the mediator does not possess the authority to enforce the settlement.[159] Despite these main differences, a new model of living probate that invokes mediation-like qualities strikes a balance between each opposing approach.

B. A Viable New Model of Living Probate?

Current living probate statutes use the Contest Model, which serves to effectively accelerate the litigation of a will's validity.[160] In order to gain more support for the use of living probate, states should implement

152. Fellows, *supra* note 6, at 1073.
153. *Id.*
154. *Id.*
155. *See* KOVACH, *supra* note 106, at 40.
156. *See* Fellows, *supra* note 6, at 1073–74.
157. *See* KOVACH, *supra* note 106, at 42–43.
158. Lehman, *supra* note 29, at 247.
159. *About AAA Mediation*, *supra* note 109.
160. *See* Costello-Norris, *supra* note 34, at 350.

a new model that embodies the history, functions, and outcomes of mediation. This new model will not only alter the timing of litigation, but it will avoid litigation and help increase support for living probate. Since the Contest Model is adversarial and lacks confidentiality, it could lead to family unrest[161] and is therefore not viable for a new living probate model. Likewise, the Conservatorship Model is not a viable option for a new living probate model because the conservator acts as a fiduciary and not a third-party neutral.[162] However, the Administrative Model is similar to mediation and could serve as a basis for a new mediation-like living probate model.

The mediation process can be simplified into three overarching steps: (1) preliminary coordination; (2) the hearing; and (3) post-mediation activities.[163] Preliminary coordination normally includes selecting a mediator, creating a mediation agreement, and having the parties submit positional statements.[164] The hearing includes introductions, opening statements by each party, private caucuses between the mediator and each party, group discussions, mediator conferences with the parties' counsel, and conclusions.[165] Post-mediation activities vary depending on whether the mediation was court ordered or voluntary.[166] If the court orders mediation, it may require the mediator to submit a result to the court.[167] Also, the court may ask the mediator for an advisory opinion on the merits of the dispute between the two parties.[168] If the parties entered into mediation voluntarily they may decide to formalize an agreement reached during the mediation.[169] Since the mediation process is extremely flexible, this three-step process can vary based on the needs of the parties and the style of mediation employed by the mediator.[170] With the groundwork for a typical mediation procedure in place, a new mediation-like model for living probate can be explored.

161. Fellows, *supra* note 6, at 1073–74.
162. *See* Alexander & Pearson, *supra* note 48, at 113–14.
163. PARTRIDGE, *supra* note 101, at 90–92.
164. *Id.* at 90–91.
165. *Id.* at 91–92.
166. *Id.* at 92.
167. *Id.*
168. *Id.*
169. *Id.*
170. *See id.* at 92–93.

1. Commencing the New Living Probate Process

First, the testator would petition the court for a declaration of the validity of the will.[171] This initiation process is similar to the process currently used by living probate states. Then, the court would appoint a mediator to oversee the living probate process without looking over the validity of the will, the testator's capacity, or any other fundamental element of the will. This initiation process will minimize the number of will contests on the court docket, and it will save the judiciary's time. This process is similar to the Administrative Model of living probate where the court appoints a guardian ad litem to act as an investigator and not as a fiduciary.[172] The mediation-like living probate model should not resemble a negotiation because the presumptive takers are not negotiating the terms of the testator's will. Rather, the purpose of this new living probate process is to declare the will valid, determine the testator's mental capacity, and declare the testator free of any undue influence outside of the adversarial courtroom.

Once the creator of the will files the petition and the court has appointed a mediator, the presumptive takers should receive notice. This notice requirement is similar to the Conservatorship and Contest Models.[173] If the presumptive takers choose to participate in the mediation, either to challenge the validity of the will or the testator's mental capacity, they should have an opportunity to be heard in the mediation-like proceeding. The court should not disclose the contents of the will in order to keep the testator's intent and testamentary scheme confidential.[174] Keeping the testamentary scheme confidential eliminates one of the main concerns with the current Contest Model procedure.[175] Scholars believe that living probate is not widely used because testators wish to keep the information within their wills private;[176] however, with

171. Alexander & Pearson, *supra* note 48, at 112.

172. *See id.* at 113.

173. *See* Costello-Norris, *supra* note 34, at 334–37. The Contest Model requires that all presumptive heirs and beneficiaries receive notice. *Id.* at 335. This is achieved through personal service for all presumptive heirs within the state of probate, and registered mailing of the complaint to individuals outside of the state of probate. *Id.*

174. *See* Alexander & Pearson, *supra* note 48, at 94–95. Testators may want to keep the content of their will private; therefore, they choose to steer clear of current living probate procedures. *Id.*

175. *See* Fellows, *supra* note 6, at 1073. Current critics of the Contest Model argue that testator's should never lose the right to confidentiality in the testamentary scheme. *Id.*

176. *See* Collins, *supra* note 17, at 36.

the mediation-like living probate procedure the will's contents and discussion between the parties remain confidential.

This new model would give all presumptive takers notice of the mediation proceeding, but other than this notice they would not be entitled to know the testamentary scheme. This process forces presumptive takers to challenge the will's validity during the mediation proceeding based on information they have as to lack of mental capacity or undue influence. If the presumptive takers have no objections they can opt out of the mediation-like proceeding and allow the mediator to determine the outcome of the will. This process affords the presumptive takers their procedural due process rights, foreclosing the possibility of a post-mortem challenge. This new model may help to increase a testator's comfort level with a living probate proceeding because the will's contents remain confidential. In addition, greedy potential takers will not know whether they are a part of the testamentary scheme and will only be able to object to the validity of the will based on lack of capacity or lack of form.

2. Mediator's Role and Style of Mediation

A probate court could keep a list of former judges or attorneys with previous experience in probate procedures to act as mediators. From this list, the court could appoint a mediator that has the requisite skills and knowledge to deal with the mediation-like living probate proceeding to determine the validity of the will. Under the Administrative Model, the guardian ad litem acts as a court agent or investigator.[177] Similar to the investigative role, the mediator in this proceeding would act as a third-party neutral; however, instead of acting as a normal mediator in a proceeding,[178] this mediator would be working as an unbiased agent of the court in determining the validity of the will. The mediator would look over the will, make sure its form is valid, determine the mental capacity of the testator, and inform the probate judge whether the will is valid or invalid.

A hybrid evaluative-transformative mediation style best incorporates the needs and functions of living probate. The evaluative style would allow a mediator to focus on the strengths and weaknesses of the party's

177. Alexander & Pearson, *supra* note 48, at 113.

178. *See* PARTRIDGE, *supra* note 101, at 89. "The mediator's role is to assist the parties in reaching a negotiated resolution." *Id.*

claims.[179] If a presumptive taker challenges the validity of the testator's mental capacity, the mediator can evaluate the merits of the claim just as an evaluative mediator would do in a normal mediation proceeding.[180] This mediation style encompasses the requirement of confidentiality in the new suggested living probate model.[181] In addition, the living probate model can follow a transformative style in order to focus on the interpersonal relationship of the parties involved.[182] A transformative mediation style allows the involved parties to understand the opposing party's position.[183] If the presumptive taker challenges the testator's testamentary capacity, the testator has an opportunity to be heard. This does away with the evidentiary problems associated with post-mortem procedures. In addition, all presumptive takers have the opportunity to discuss the testator's mental capacity or information related to potential undue influence by another party over the testator. The facilitative style, which focuses on the interest of the parties in order to reach a settlement agreement,[184] is not responsive enough to the needs of living probate because living probate is not a negotiation leading to an agreed-upon settlement.

The mediator could follow the three common steps of mediation[185] in the new mediation-like living probate model. The mediator would allow presumptive takers to submit a statement related to the testamentary capacity of the testator. Also, the mediator would conduct private caucus meetings with each party to determine the testator's capacity and the validity of the will as to form.[186] This mediation-like living probate procedure would ensure that the testator receives a declaration of validity before death so the testamentary scheme will not be altered or questioned after the testator dies.

179. *Id.* at 93. The evaluative mediation style allows the mediator to predict the success of each party's claim.

180. *Id.*

181. *See id.*

182. *Id.* at 94–95.

183. *Id.*

184. *Id.* at 94.

185. *Id.* at 90–92.

186. *Id.* at 91–92. Allowing the mediator to conduct a hearing would enable the mediator to have a full understanding of the testator's capacity before providing information to the judge.

3. The Court's Order and the Right to Contest

One of the mediator's functions during a post-mediation activity includes summarizing the mediation in an advisory opinion to the court.[187] The mediator could draft an advisory opinion to the court after reviewing the will to determine its validity.[188] In the event that a presumptive taker challenges the testator's mental capacity but the will is valid on its face, the mediator would be able to include the presumptive taker's information, facts, and relevant testimony in the advisory opinion to the court. The judge would then review the advisory opinion and issue a final order either declaring the will valid or invalid. This process mirrors current living probate statutes. The judge's final order would include determinations as to compliance with state formalities (valid as to form), testamentary capacity, and the issue of undue influence—the goals of living probate.[189] This new procedure would aid in avoiding spurious will contests, decrease the likelihood of a jury or judge subjectively altering the testator's intent, and do away with many evidentiary problems associated with post-mortem procedures.[190] In addition, this model would foreclose any possibility of a post-mortem will contest.[191]

4. Why *This* Mediation-Like Living Probate Model?

This new living probate model does not create a "set-in-stone" format for a living probate procedure. Rather, it seeks to achieve a new theory that could better advance living probate in the American legal system. There are still many problems that could arise under this new model. Some of these problems include the exact scope of the mediator's role and the exact procedure for the mediator to follow—however, these could be determined on a state-by-state basis. In addition, there is a concern that presumptive takers lack the skill required to understand their rights under this procedure. For example, even though the presumptive takers receive notice, they may not understand that this process

187. *Id.* at 92.
188. *Id.*
189. Costello-Norris, *supra* note 34, at 335.
190. *See* Leopold & Beyer, *supra* note 5, at 134–41.
191. Alexander & Pearson, *supra* note 48, at 91 (stating that "a will that has successfully survived this [Administrative Model] proceeding is immune from post-mortem contest by anyone").

forecloses all future rights to challenge the will. This model is theory-based; it assesses living probate procedures and mediation together in order to lay the groundwork for a new view on living probate.

This new model creates a more confidential setting for determining the validity of a will. It does so through a more informal, relaxed, cheaper, and open setting. This model does not prevent presumptive takers from challenging the validity of the will, but it does prevent presumptive takers from bringing ill-founded, spurious will contests in the future. In addition, this model supports the argument for living probate by making the mediation proceeding confidential. Furthermore, it advances the basic foundations of living probate—decreasing spurious post-mortem challenges to wills, fixing evidentiary problems, and ensuring that the testator's intent is followed.

This Note is concerned with the questions of why living probate is not an option in every state and why it is not being used more frequently. There are no concrete answers to these questions. Common sense would seem to support an optional living probate procedure. Having a firm declaration of validity would be one less thing to worry about. Maybe testators fear taking the final steps required to validate their post-mortem instrument. Maybe they fear family conflict. Whatever the reasons, the important point is that this mediation-like model would allow *any* person to validate his or her will during his or her lifetime. The overwhelming benefits of living probate show that the process should be an option available to every American.

C. Mediation and Living Probate: Preserving the Family

One of the main concerns with current living probate statutes is the adversarial nature which creates family turmoil between the testator and presumptive takers.[192] To gain more support for the mediation-like living probate procedure discussed above, it is important to note a few key areas where the new model will help preserve family harmony. Mediation has been widely used in child custody, visitation, and divorce proceedings. Divorcing parties sometimes desire an "informal and cooperative, less legalistic, process."[193] With a mediation-like living probate procedure, parties will be able to resolve any issues related to the

192. *See* Fellows, *supra* note 6, at 1073–74.

193. CONNIE J.A. BECK & BRUCE D. SALES, FAMILY MEDIATION: FACTS, MYTHS, AND FUTURE PROSPECTS 3 (2001).

validity of the will. One misconception associated with living probate is the assumption that all testators desire confidentiality in disposing of their property. In reality, many testators have an amicable relationship with the presumptive takers. In these situations, a mediation-like living probate procedure would serve the parties' interests better than an adversarial system. The mediation-like setting would enable the testator and presumptive takers to maintain a relationship after the living probate proceeding.

A will contest and a family-related proceeding are quite comparable. Both can involve heavily disputed claims, tense emotions, and family conflict or turmoil. In addition, both involve the disposition, or separation, of property between parties. Since mediation has become a viable alternative to litigation of family disputes,[194] a mediation-like living probate model may aid in preserving a family unit during the living probate proceeding. A mediation-like living probate model may help decrease the level of emotion an adversarial system can create and increase the chances for preserving the family connections—even if the relations are already strained going into the proceeding.

D. Changing Our "American" Views to Accept Living Probate

Many Americans do not like to think about death, and they probably avoid living probate because they associate validating a will with facing the idea that death is inevitable. Barbara Ehrenreich's book *Bright-Sided: How the Relentless Promotion of Positive Thinking has Undermined America* discusses how positive thinking, which is "engrained in our national character,"[195] has destroyed many aspects of "American" life.[196] Living probate provides a final, binding declaration of a will's validity,[197] making death a realization. This could make some people feel that making a will is like putting one foot in the grave. Ehrenreich might agree that this feeling is un-American.[198]

Ehrenreich discusses her struggle with breast cancer and how she

194. *See* KOVACH, *supra* note 106, at 32.

195. BARBARA EHRENREICH, BRIGHT-SIDED: HOW THE RELENTLESS PROMOTION OF POSITIVE THINKING HAS UNDERMINED AMERICA 9 (2009).

196. *See generally id.* at 280–308.

197. Lehman, *supra* note 29, at 247.

198. *See generally* EHRENREICH, *supra* note 195, at 280–308 (explaining how most Americans have a sense of rampant optimism).

once was "optimistic to the point of delusion."[199] She compared the breast-cancer sentiment in America to a shopping mall, with everyone creating, making, designing, and buying pink-this and pink-that.[200] She discusses her research of breast cancer websites, message boards, and groups where everyone shared his or her "upbeat" story.[201] She began to realize there was an underlying pseudo-scientific argument being preached in the breast cancer world: "a 'positive attitude' is supposedly essential to recovery."[202] Ehrenreich seems extremely skeptical of this overly positive attitude. Maybe being positive does nothing, maybe it does not cure you, and maybe planning for your death is an okay thing to do. Ehreneich's book serves a purpose in the living probate context. It creates a framework for understanding a deeper philosophical undertone in American society; one that conflicts with living probate because this undertone is counterintuitive to planning for death. Living probate is probably not widely accepted because most people do not want to plan for or think about their own death.

Living probate and breast cancer both involve a common feature—coming to grips with the idea of death, and not just any death, your own death. Ehrenreich discusses, in the conclusion of her book, that Americans have "gone so far down this yellow brick road that 'positive' seems to us not only normal but normative—the way you *should* be."[203] If we accept this as the popular sentiment permeating through America, then living probate will never gain widespread support. Why would someone want to validate the document that will only be executed once they die before they actually die? Ehrenreich suggests that our "economic meltdown should have undone, once and for all,"[204] delusions that "happiness cures all" and that "all people can achieve anything by being positive thinkers."[205] Testators should view living probate not as the last step before death, but as a step in ensuring that their estates, legacies, and wishes continue long after they are gone and without being subjected to post-mortem will contests. Instead of viewing death as a bad thing, Americans should look past death to ensure that wills are going to be carried out according to expressed testamentary plans.

199. EHRENREICH, *supra* note 195, at 29.
200. *Id.* at 40–41.
201. *Id.* at 43.
202. *Id.* at 57.
203. *Id.* at 309.
204. *Id.* at 326–27.
205. *See id.*

VI. CONCLUSION

Death affects everyone. No one is immune from death and no one can prevent death from happening. Americans have the right to dispose of property in any manner they desire. In order to fully embrace this right, Americans need to challenge the dominance of post-mortem probate procedures and seriously commit to exploring the benefits of a mediation-like living probate statute. This will allow people to devise their property in a manner they desire, and it will ensure that their plan is followed after their death. A mediation-like model is the most effective method for producing these results. This model could increase confidentiality, aid in preserving family relationships, and avoid the problems associated with post-mortem living probate procedures.