New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 261—NO. 4
MONDAY, JANUARY 7, 2019

TRUSTS AND ESTATES LAW

Expert Opinion

Mediation as an Alternative To Estate Litigation

By **C. Raymond Radigan**

And **Moira A. Jabir**

Litigation of Surrogate Court matters can be personal. Often, the resentment and indignation of the allegations exchanged is only outdone by the vitriolic counter allegations. The result can be protracted series of contested and expensive proceedings that feed the disillusionment of lawyers and the judicial system. If instead, sometimes mediation was utilized in this arena, one may reduce the court workload while providing voices to the parties' positions without jeopardizing settlement positions.

Trust and estate matters can often be resolved through a mechanism of dispute resolution because usually the litigated issues are simply hiding unresolved emotional issues brought to the surface by the death of a loved one. In addition, these long-standing hidden emotional issues usually drive the process, making litigation, which is often a lengthy and expensive proposition, the final straw that destroys the relationship. Robert D. Steele, et al., *The Benefits of Mediation and Arbitration for Dispute Resolution in Trusts and Estate Law*, p. 2 (*The Benefits of Mediation*). While many view the Surrogate or the court staff as the individuals whose role should be to curb the entrenched position of the parties and act as a mediator, there is often not enough time, training, or resources to fulfill this role. Id. at p. 3

Trust and estate matters can often be resolved through a mechanism of dispute resolution because usually the litigated issues are simply hiding unresolved emotional issues brought to the surface by the death of a loved one.

Moreover, while arbitration and mediation are useful means of resolving trust and estate matters, they are different beasts, selection of which is situation dependent. Mediation is the process in which parties engage a neutral third party, with no authoritative decision making power, whose role is to facilitate communication between the parties, assist in identifying issues and help analyze and explore solutions that will promote a mutually acceptable agreement. The benefit of mediation is that it often allows the parties to retain greater control over their matter, it provides the flexibility to tailor solutions, it is conducted in a less confrontational setting, preserves relationships and most significantly, results in a win/win versus a win/lose scenario.

Mediation differs significantly from arbitration. Arbitration is a hearing before a neutral arbitrator or panel of arbitrators who will conduct an evidentiary hearing on the matter, where usually someone wins, someone loses. The arbitrator will render an award in connection with the dispute and its decision is final and binding on the parties. With the finality of arbitration, there arises the potentiality of a party to the matter feeling that control was once more wrested from their hands; the goal with mediation (albeit with a skilled mediator) is the return of control to the parties.

The collaborative backbone of mediation lends itself to probate matters. This is particularly true when the matter is not simply a legal

RAYMOND RADIGAN *is a former Surrogate of Nassau County and of counsel to Ruskin Moscou Faltischek, P.C. He also chaired the Advisory Committee to the Legislature on Estates, Powers and Trusts Law and the Surrogate's Court Procedure Act.* MOIRA A. JABIR *is of counsel in the firm's trusts and estate department.*

dispute but also involves ongoing relationships, such as testamentary and non-testamentary issues, trustee and beneficiary disputes, guardianships and conservatorships and other protective proceedings as well as estate planning. Susan D. Hartman and Susan J. Butterwick, *Mediation in Probate and Estate Cases*, State Bar of Michigan Probate and Estates Section Journal (May 2010). Our experience is that a skillful mediator can go beyond the matters formally before the court and look to resolve personal matters that hinder settlements. *The Benefits of Mediation*, at p. 4.

The reason mediation works best for disputes of this nature, is again the emotional component to the dispute. Mediation allows for a venue by which one can vent one's anger and frustration. Mediation, and not the courthouse or an arbitration setting, is the proper vehicle for this "venting." Id. at p. 5. Traditional litigation does little to address these issues and after spending large sums in this traditional process, regardless of the outcome, the litigant can be left without the true result she or he seeks: closure.

The benefit of mediation is that it is the parties, not the lawyers and their legalese alone, that participate. By giving voice to the tangible manifestation of the "hidden" family dispute, i.e., sibling rivalry, perceived favoritism, jealousy, disapproval, second wife or children or both, one can finally achieve the emotional result—maybe an apology but usually just the ability to vent. Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust and Guardianship Matters*, Pepperdine Digital Commons, 241-54 (*Advantages and Disadvantages*).

That is the key, the ability to "vent." Whether it is advising clients in their estate planning, estate or trust administration or guardianship, ultimately it is family, however that term is defined, that is impacted. Prolonged litigation of matters that arise in the context of probate, trust and guardianship can shatter the familial relationship. Id. at 244. The reality outside the vitriolic litigation papers is that relationships need preservation because any one of the parties involved may remain dependent on another for financial, physical or emotional support.

Mediation provides this option because it gives the parties in mediation control as to both the procedure and the outcome. Id. at 245. The parties chose the mediator by learning his or her process and style. The parties determine the roles they themselves, and their attorneys, will play and whether the mediator's particular process will work for the issues in their particular case. (In some situations where power imbalances exist, such as with elderly family members or minors, it will be essential to determine if the facts lend themselves better to a more formal process. Again, the choice of mediation is fact determined.) In probate, trust and guardianship matters, it is important to resolve in advance of the mediation not just the issues that will be mediated but also who will be present and permitted to voice their positions, which may include individuals who were not originally noticed in the underlying matter. *Mediation in Probate and Estate Cases*, supra. Frequently, in matters involving complex family relations, there will be a need to speak with all the relevant "parties," as determined by the parties' to the mediation, in advance of a joint session. Id.

Another aspect of mediation is the flexibility found within this mechanism of resolution. Unlike litigation, which is restricted by the concept of winning within the confines of strict legal borders (such as Dead Man's Statute (CPLR 4519)), mediation opens the door to creative solutions that step outside the strict confines of legal principals. *Advantages and Disadvantages*, supra at 247. In his article, *Fairness and Mediation*, 13 Ohio St. J. on Disp. Resol. 909, 910 (1998), Prof. Joseph B. Stulberg posited that mediation should promote fairness and not work within the confines of the legal system's preconceived concept of right. By constructing the resolution to their matter, parties to mediation may feel greater satisfaction then what would be achieved with a more formalistic process. In addition, since mediation is not necessarily limited to the issues presented in the papers, mediation may assist in resolving issues that would have caused future litigation.

Over 22 years ago, mediation in estate planning was described as "in its infancy." John A. Gromala, *The Use of Mediation in Estate Planning, A Preemptive Strike Against Potential Litigatio*n, Ca. Tr. & Est. Q., at 31 (Fall 1996). During the subsequent 22 years, mediation has continued to be an underutilized vehicle in resolution of disputes already entangled in litigation or headed in that direction. The ability to tackle these issues in advance of irreparable harm to the family relationship is the key to eliminating traditional litigation's hold on trust and estate matters. It is the key to providing closure in an area of law replete with emotion.