

TRUSTS AND ESTATES LAW

Expert Analysis

The Future of Mediation In Trusts and Estates

Throughout years past, it was common in Surrogate's Court for petitions to be filed in various proceedings and for decisions and orders to be rendered fairly quickly. Typically, the parties would not appear in front of the court again, except in connection with New York estate tax motions. The few matters that were contested by the parties would very often be resolved by settlement or a court determination after a motion, trial or a hearing. However, the growing population of New York combined with the down-sizing of the court's staff has caused this process to become a slower version of itself. As highlighted in the article published in the *New York Law Journal*, titled "Mediation as an Alternative to Estate Litigation" by C. Raymond Radigan and Moira Jabir, mediation and arbitration can offer many benefits to trusts and estates matters. As such, an initiative has

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Historically, there were very few matters that remained in Surrogate's Court for long. For instance, Nassau County probated about 3,800 wills a year and handled less than 1,000 administration proceedings in the 1980s and 1990s. Jurisdiction would be promptly obtained over all necessary parties and matters completed quickly. There was even

a joke throughout the courthouse to this effect—your relative could pass away on a Friday, the petition be filed on Monday, the will would be admitted to probate, letters would be issued and distributions would be made on Tuesday, and the children could go buy a new vehicle and go to the funeral in style on Wednesday. Although a bit exaggerated, the reality of the courts at that time was if everyone cooperated, which they usually did, there would be no delays and matters could be finalized expeditiously. Only relatively few matters were delayed, either because infants were involved or there was a disagreement among family members resulting in litigation.

However, the growing population of people in New York, along with a down-sizing of the court staff, has caused the process of probating a will, or any matter in Surrogate's Court, to become significantly longer than the "weekend probate" as joked about above. To help combat this, the Office of Court Administration instituted standards and goals across all courts, which require the courts to account for the status of

all matters that have been filed, and to attempt to complete them within a certain time frame. The Surrogate, the Law Department and staff have done their best to move matters along as required under standards and goals; however, this requires additional work for the court staff. Since the court's staff has diminished considerably in the last 10 to 20 years, they could not keep the matters flowing, so another ultimate means of resolution had to be implemented. One of the ultimate means is mediation.

As part of the Chief Judge's Excellence Initiative, on May 14, 2019, Chief Judge DiFiore and Chief Administrative Judge Lawrence K. Marks issued a press release announcing a system wide mediation initiative. This initiative will refer all civil cases, except appropriate exceptions, to mediation or some other form of alternative dispute resolution as the first step in the case proceeding in court. The Administrative Judges "will formulate plans tailored to local conditions and circumstances," enabling each court to implement and interpret the initiative according to their needs. See New York State Unified Court System Press Release, Court System to Implement Presumptive, Early Alternative Dispute Resolution for Civil Cases, at p. 2, May 14, 2019. The initiative took effect in September 2019, and is constantly evolving.

Across New York, counties have begun to implement mediation in the courtroom, expanding the historical meaning of "mediation" to a more

inclusive definition. This new view of mediation is helping litigants, and the courts, to resolve matters quickly, and with great results. Chief Administrative Judge Marks stated that mediation "has a proven record of success, with high settlement rates and strong user satisfaction among litigants and lawyers." *Id.* at p. 3.

Many of the Surrogates are utilizing retired Surrogates and judges familiar with trusts and estates matters as mediators. There is also training available for attorneys to become mediators. Some counties provide that the mediator will serve pro bono to determine the issues, spending about an hour and a half with the attorneys and parties in an attempt to see if the matter can be resolved through mediation. If not, the parties have the option to continue with mediation, with an agreed upon compensation for the mediator to be shared by the parties. If the mediation fails and the matter has to be tried, the mediator may be authorized to explore whether the parties may agree for the mediator to supervise disclosure to ensure that the parties are ready for trial, either by the court, or perhaps the mediator as referee. Similar procedures are being explored in the various Surrogate's Court in order for the Surrogates to be able to comply with the standards and goals of the initiative. As the program progresses, it will be fine-tuned as necessary.

The success thus far, and the ability of the courts to create their own methods for mediation, has opened

the door to discussions of implementing mediation in different parts of the process. There have even been offerings of mediation before a Will is drafted, as part of the estate planning process. For example, if Son knew Mother was leaving the family business to Son, but Son has no interest in the family business, and wants the family home left to Daughter, mediation before Mother passes could help resolve this. Mediation as part of the estate planning process can help prevent litigation down the line, keeping the matter out of the courts, and proving further how mediation can benefit all.

This new mediation initiative is helping to resolve the logjam within the courts. Practitioners should be aware of this plan, and the ways it may help their clients resolve family disputes in a more efficient manner. Mediation provides an avenue for clients to be heard, matters to be resolved quickly, and court and estate resources to be preserved.