- # HOW MEDIATION CAN HELP FAMILIES RESOLVE DISPUTES ABOUT WILLS AND TRUSTS

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There are few things more emotional – and, often, traumatic – than the death of a family member. Unresolved issues may bubble up to the surface, especially when it is a parent who has passed away. Sibling rivalry, long forgotten, suddenly arises anew. Emotions come to a boil as perceived slights and unfair treatment come to the fore. These feelings may be transferred into litigation concerning how an heir is treated under a will or trust.

When the dispute among family members lingers, the resulting delay can cause the wounds to fester and familial relationships to be damaged. Delays often are caused when litigation is pursued. Legal fees also can increase dramatically. Turning these family matters into courtroom battles may not be the best solution for two reasons: the price of litigation may be too costly for the heirs and estate; family relationships may become unsalvageable as the lawsuit allegations are tossed around. Sometimes the litigants may have unequal assets to fund litigation expense, turning the litigation into trench warfare that has as its goal just wearing the other side out.

This is why mediation should be considered as a first step of a dispute regarding an estate, trust or will. Even before lawsuits are filed mediation can be used to resolve the financial and emotional sides of the disputes. But, even if litigation has been commenced, mediation is available at any stage. Consideration of using it earlier can be important because, too often, parties are reluctant to settle after having "invested" in litigation, or, worse yet, when the litigation has hardened positions or taken its emotional toll.

For this reason mediation can (and should) be used at a very early stage. It is uniquely suited to address the *real* dispute: perceived slights and favoritism, allegations of

manipulation, power, second marriages, disparate treatment, and trying to find terms for resolving a dispute which salvages relationships (or at least does not make matters worse).

Disputes often arise where a child or grandchild (or sibling) is disinherited; or where an heir believes that he is not being treated the same as another; or where there is a belief that one heir or beneficiary has had undue influence over the decedent. Another type of dispute arises where the heirs cannot agree on the future of a business (where the shares are inherited) or whether to sell or retain a piece of real property. These circumstances can be exacerbated when children or grandchildren are not treated identically in a will or trust, or when the parties cannot agree on how to split up an estate (including when there is no will). For example, a will might just indicate that the heirs should divide the tangible assets of an estate "equally" and the heirs cannot agree as to how to accomplish this division, or dispute value, or each wish to possess a particular asset.

Family disputes can turn into corporate litigation where one child works at the Company and other children do not, but all inherit its shares, or where a parent has selected one child to the run the Company and the other children (or spouse) do not agree either on the choice or the decision-making.

Another common situation that leads to disputes is the second marriage. The children of the first and second marriages may be treated differently, or they may perceive that there is disparate treatment; disputes between the children of the first marriage and the second spouse can arise, too. In these scenarios a family member may be primed to sue.

So often the lawsuits are seeking more than money: a child may be looking to establish his or her spot in the pecking order; or may be showing muscle so that he or she is out from under the thumb of an older sibling; or the emotions of being treated differently are the only reason to sue (rather than the likelihood that the lawsuit will prevail).

Mediation can be used early on (or even just before or during a trial) to settle these cases. A mediator will help the parties (and counsel) evaluate the strengths and weaknesses of a case, the various alternatives that can be accomplished through mediation, and to try to bridge the gap between the parties by finding their common interests and addressing outcomes. In choosing a lawyer, a party should consider – and ask counsel – what the lawyer's view is of mediation and early resolution of litigation.

Does a party want to expend resources and years trying to establish his or her rights? These lengthy battles are costly on three fronts: emotionally, financially, and to family relationships. Importantly, using mediation to resolve these disputes can also achieve results that are unavailable to a judge, including, by using the settlement agreement to re-allocate assets, how to divide assets, choose executors or trustees (or co-executors or trustees), to modify terms, and, most importantly, to create a dialogue and try to salvage relationships.

One important opportunity presented by mediation is that it provides a forum for the family members to vent and speak about the (perceived) unfairness that brought them to

the litigation. Finding alternatives other than endless litigation is its goal. By choosing mediation, valuable estate and personal assets can be saved, and relationships salvaged.