

**RESOLUTION OF ESTATE AND TRUST DISPUTES
INVOLVING FAMILY BUSINESSES**

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As with civil litigation generally throughout the United States, lawsuits involving estates and trusts have increased dramatically over the years. Few would argue that participating in such litigation all the way through trial (and possible appeals) is the best way to resolve disputes concerning wills or trusts. Yet when such problems arise, an heir or beneficiary (or a person who believes she should be one) who possesses a potential claim may have little choice but to file suit in the absence of an early compromise.

Alternative dispute resolution, or ADR, has become quite popular in trying to resolve disputes in ways different from, or at times even during, litigation, including in estate and trust disputes. The most common alternatives to resolving disputes through traditional litigation are by arbitration or mediation. For disputes involving family businesses, mediation should be considered first as the best approach to attempt to solve the problems that divide the family.

The Disadvantages of Traditional Litigation

The many problems inherent in lawsuits, whether in the estate and trust area or otherwise, are well-known. Litigation is time-consuming, expensive, and ultimately, a result is imposed on the parties by the trier of fact. Cases often languish during extensive discovery and pre-trial proceedings, and the overwhelming majority of civil lawsuits settle, often after the parties have incurred substantial attorneys' fees and other costs. Moreover, in cases involving family businesses in the estate and trust context, the business can be harmed greatly by litigation. Litigation always generates uncertainty, and for the business, this uncertainty could be the death knell. Business opportunities and tax advantages may be lost, employees may leave, and the business simply may be unable to move forward productively during the pendency of a lawsuit.

There are also psychological or emotional factors inherent in litigation that can create further difficulties in the family business context. Someone has filed suit, which means that other people have been sued, or at least will feel they have been sued even if the case is styled as one seeking instructions from the court or similar relief. Thus, the act of filing suit could cause an irreparable breach among family members. And if that act alone does not cause such strong feelings, the discovery process certainly may, as family members face each other in conference rooms and are vigorously questioned by attorneys. Of course, lawsuits are public records, so the family's dirty laundry may well be aired for all to see. This could aid business competitors and further harm the

company. Accordingly, traditional litigation is generally a poor vehicle to solve estate and trust disputes involving family businesses.

The Flaws of Arbitration

In response to some, but certainly not all, of the negatives of litigation, arbitration has emerged as one alternative way to resolve disputes. Like litigation generally, arbitration usually involves a proceeding in which a result is imposed on the parties by a neutral trier of fact, the arbitrator. However, this is not always the case because arbitration can be binding or non-binding. Arbitration is often touted as a savior because it usually involves an expedited process, so the dispute generally will not drag on as long as those before a court. In addition, although arbitration proceedings may take many forms, generally they involve less (or even no) discovery, which is another perceived advantage. Because of the faster track and restricted discovery, arbitration is generally seen as less expensive when compared to traditional litigation, and is usually private, which is preferable to having a court file for all to see.

But arbitration also suffers from a host of flaws. In binding arbitrations, normally the parties waive any rights to challenge or appeal from the decision. Although this can be perceived as a plus because it ensures finality at an earlier stage, it can also lead to unfair (or simply wrong) decisions that cannot be reviewed.

In addition, even if the process is expedited, arbitration suffers from the same flaws as court litigation in terms of family businesses because uncertainties persist and the same emotional issues are present. Moreover, arbitration proceedings can be protracted and extremely expensive.

In the family business conflict arising out of an estate or trust matter, mediation is ideally suited as a vehicle to attempt to resolve the dispute. Traditional litigation and binding arbitration have one advantage over mediation, in that both lead to a decision and thus a resolution of the dispute. But these avenues can still be pursued if mediation is unsuccessful, and for family business disputes, mediation should be considered early and often as an option to try to bring the family together or at least resolve a dispute. Accordingly, these materials focus on mediation as the best ADR mechanism for these matters.

What is Mediation and How is it Used in Estate and Trust Disputes?

Mediation is a quite different way of resolving disputes from litigation or arbitration. In mediation, a completely neutral person, called a mediator, tries to help the parties (often aided by their lawyers or other professionals who may be involved) resolve a dispute. One key distinction from other ways to resolve disputes is that a mediator does not make any decision and thus cannot impose a result on anyone. Instead, the mediator

tries to help the parties resolve the dispute through an agreement. Because the mediator has no power to force anyone to resolve a matter, nor does she decide who "wins" the dispute, the mediator simply tries to help bring about a settlement which is agreed to by all involved.

If the parties cannot reach an agreement, the mediation ends and the matter will likely proceed towards trial or arbitration. However, often the mediator and the parties will agree to meet again soon if the parties seem close to a resolution, or even some months later after discovery or other proceedings have taken place. Mediation may also help the parties identify and separate non-legal issues from the legal issues to be resolved by arbitration or litigation, and may therefore help streamline the litigation process.

Mediation is generally a voluntary option that attorneys may propose to their clients before or after a lawsuit is filed. Increasingly, courts are recognizing the value of mediation in estate and trust disputes. Although mediation is often used in other types of litigation, it seems uniquely appropriate for contested estate and trust matters, where the parties often are related (or at least know each other) and where emotions may be especially strong. This would seem to be even more true when a family business is involved. In mediation, everyone has the chance to have his or her say, often directly to the other parties, and in a setting in which people may speak freely while trying to

understand the other parties' views, with an eye towards an overall resolution.

To ensure that the parties and any advisors speak freely in mediation, it should be agreed at the outset that everything that is said at the mediation is completely confidential and may not be referred to in any later litigation. Many jurisdictions have laws that protect the confidentiality of the mediation process, just as similar laws protect the confidentiality of settlement discussions in lawsuits.¹

In many jurisdictions, courts try to resolve cases through settlement conferences before a judicial officer.² Although such conferences often are successful in settling cases, they may have significant drawbacks. The judicial officer usually has limited time to prepare for and handle the settlement conference, and often will meet only with the attorneys and not the parties themselves. Such time constraints, and the exclusion of parties who may feel a need to express their concerns, may impede a resolution.

¹ See e.g. California Evidence Code Section 1115 *et seq.*, 1152 and 1152.5; Texas Civil Practice and Remedies Code Section 154.073; North Carolina General Statutes Section 7A-38.1; Florida Statutes Section 44.102(3).

² Most settlement conferences appear generally to be left to judicial discretion through local court rules rather than being mandated by state laws. See generally, Orange County [California] Superior Court Local Rule 448; Los Angeles County Superior Court Local Rule 7.9(b)(5).

These drawbacks have caused many probate courts to see the value in mediation as an alternative to more traditional settlement conferences. The parties and the mediator can allow sufficient time for the preparation and handling of the mediation. Moreover, because the parties participate directly in the mediation and are generally able to share their views with opposing parties and the mediator, the parties are an integral part of the process.

Texas has been among the leaders in looking for creative ways to resolve lawsuits, having established the Texas Alternative Dispute Resolution Procedures Act in 1987.³ The Texas statutory framework permits judges in all types of disputes to order the parties to participate in mediation, among other forms of alternative dispute resolution.⁴ The Probate Court in Dallas County, Texas, has been favoring mediation for years as a way to resolve contested estate and trust matters.

As another example, at least two judicial districts in California have turned to different types of mediation programs for lawsuits involving estates and trusts. The San Francisco County Superior Court has a voluntary mediation program that is being used for most estate and trust disputes.⁵ There, the Court decides on a case-by-case basis

³ Texas Civil Practice and Remedies Code Section 154.001 *et seq.*

⁴ Texas Civil Practice and Remedies Code Section 154.023.

⁵ San Francisco County Uniform Local Rule 14.16.

whether mediation is appropriate, and in practice strongly encourages the parties in most cases to try mediation. In contrast, the Los Angeles County Superior Court has a mandatory mediation program for all contested estate and trust matters before it.⁶

The Los Angeles program is particularly instructive not only because it is mandatory but also because the Court's local rules provide a court-supervised mediation framework that begins right after the first appearance by all parties in a contested matter.⁷ If necessary, this process continues with further mediation efforts just before trial.⁸ The Los Angeles program has proved to be quite successful, and the San Diego County Superior Court is considering a program modeled on it.

How Is A Mediator Chosen?

Anyone who is acceptable to all parties may serve as a mediator. There are many professional mediators throughout the country who handle a broad range of matters including civil, family and probate disputes. Similarly, many attorneys, accountants and other professionals undergo mediation training and supplement their professional practices by acting as mediators in areas within their expertise. In jurisdictions in which local courts have mediation programs, there often are panels from which mediators may be selected by the parties or appointed by the court.

⁶ Los Angeles County Superior Court Local Rule 10.200 et seq.

⁷ Id.

⁸ Los Angeles County Superior Court Local Rules 10.200 et seq.

As with other types of professionals, it is often helpful to obtain referrals from those who have used the services of particular mediators. The nature of a specific estate or trust dispute may determine whether a certain mediator is the right choice. For example, in complex matters involving accounting issues or breach of fiduciary duty claims, it may be helpful to have a mediator with a legal or accounting background in estate and trust matters, especially when tax issues arise that may help facilitate a settlement. In other matters, the stature of a retired judge serving as a mediator may be useful. Also, a mediator with specific expertise may be able to educate the parties and their advisors about the strengths and weaknesses of particular claims or defenses, in an effort to focus the parties on reasons to settle the matter.

In family business disputes, a mediator with a business background may be preferable, although there will likely be estate and trust issues as well. More and more, parties are using more than one mediator in this process. Depending upon the situation, having two mediators with different expertise and backgrounds might be the right choice for addressing all of the issues that can arise in family businesses involved in estate and trust disputes.

How Does a Mediation Work?

Once selected, the mediator will normally communicate with the parties (or their advisors) about the manner in which she conducts mediations. Mediators may have very

different procedures to follow before the actual mediation session. Some mediators require the parties to sign a mediation agreement and to provide a fee deposit, while other mediators serve as volunteers. Also, some mediators will request a short written statement from each party about the dispute, often together with key documents. Depending on the complexity of the matter, detailed legal briefs may be required, as well as damages calculations or other data.

Most mediations take place at the mediator's office, and are usually scheduled for one-half or a full day, although mediations may be scheduled for several days or continued if progress is being made. Usually, the mediator starts by meeting together with all parties and their advisors to explain the mediation process and to discuss the dispute in general terms. In addition to educating the parties about the mediation process, this meeting provides a forum for the parties to express their thoughts to each other and to acknowledge that they at least hear what the other parties are saying, even though they disagree. Some mediators may also ask attorneys who are present to give short opening statements about the case.

Facilitating communication among the parties is a key aspect of mediation, and causes mediation to be especially suited for estate and trust disputes. Because most estate and trust disputes involve parties that are related by blood or marriage, there generally has been a breakdown of communication that culminated in the dispute. Often parties

have been unaware of the terms of their relative's estate plan until after their relative's death because it is quite common for people not to discuss their estate plans with others, even close family members. Or there may have been tensions simmering because a parent had remarried, and the relationship between the new step-parent and the spouse's children has been uneasy. Moreover, usually the key person who could have answered all of the questions or addressed all issues is dead.

These issues are amplified when a family business is a key asset. Absent good estate planning, and good communication within the family, there may be great uncertainty as to which family members should be involved in the family business. And even with clear indications by the decedent of her intentions concerning that business, the surviving relatives may have widely varying views as to who should be running the company and/or handling day-to-day operations. In mediation, a chief goal for the mediator is to facilitate an open discussion so the parties can address concerns that may not even relate specifically to the underlying dispute about the family business or the disposition of assets.

Although there are many different approaches, in most mediations the parties will sometimes all be together with the mediator, while at other times each party will meet privately with the mediator. These private sessions, often referred to as "caucus" sessions, are completely confidential -- the mediator will not tell the others what one

party has said privately unless she has been given permission to do so. Often the mediator will shuttle back and forth between different rooms in trying to bring the parties closer to settlement. Most mediators insist that all parties be present at the mediation, although in special situations (such as an out-of-state resident) a mediator may agree to have a party participate by telephone.

In discussing the dispute with the parties and their advisors, the mediator tries to find common ground on which the parties agree. As the parties agree on more and more points, the mediator tries to help them to reach a complete resolution of all disputes between them.

If a resolution is reached, the terms are usually put in writing and signed by the parties (and their lawyers, if present). If possible, the terms of the resolution will be written down and signed at the mediation, although sometimes it is necessary to finish the documentation later. Both for psychological and legal reasons, it is generally preferable to have some type of written documentation of the agreement signed by the parties at the mediation; otherwise, parties who orally agree to a settlement may have second thoughts following the mediation and what had appeared to be a resolution may fall apart.

How Should Lawyers Advise Clients in Estate and Trust Mediations?

The issue of how lawyers and other professionals can best advise their clients in

preparing for and handling a mediation could easily be the topic of a lengthy article by itself. However, for the sake of brevity there is a simple rule that lawyers should follow in advising clients in an estate or trust mediation with a competent mediator -- stay out of the way! Seriously, because mediation is so geared to the participation of the parties themselves, advisors need to make sure that they do not impede the settlement process either by relegating their clients to a silent role or by denigrating a particular settlement option the client appears willing to consider.

This does not mean that lawyers should be passive in working with their clients before and during the mediation. It is important that professionals explain the mediation process fully to their clients, and provide advice about a reasonable range of settlement options. It also may be appropriate to instruct the client not to discuss certain matters, and to provide guidance on ways for the client to make her points appropriately.

However, as noted above, because one of the most significant benefits to mediation is the fact that the parties participate directly in crafting a settlement, it is a mistake in mediation for advisors to inject themselves into the process too much. The best way for a mediation to be successful is for the parties to speak their minds, especially to each other, in addition to having a frank dialogue with the mediator without the other parties present.

Could following this course lead to a settlement that the attorney believes is not acceptable from an economic standpoint? Perhaps, and it is your duty to advise your client accordingly. But there is nothing wrong with assuring your client that you understand there are emotional or other non-economic reasons why the settlement may be in the client's best interests, even though you, as a professional who must focus on the economic issues, cannot recommend it. In this way you will fulfill your professional obligations to your client, even if the client nevertheless chooses to resolve the dispute.

Conclusion

Because mediation has proved to be an effective means of resolving disputes, attorneys in the estate and trust area must be prepared to advise their clients concerning this method of alternative dispute resolution. In addition, because mediation may be mandatory for certain types of disputes, lawyers must be mindful of the benefits of mediation and be ready not only to propose it, but to be enthusiastic (and knowledgeable) about mediation as a means of resolving disputes. In disputes involving family businesses, mediation seems uniquely suited to providing an arena in which parties may speak freely, but in a private and confidential forum, to try to heal the rift and make the family business productive for all involved.

