

Top Ten Reasons to Mediate Probate & Estate and Conservatorship Matters

Clients involved in disputes over inheritances, management of estate assets, caregiving for aging parents and many other probate & estate matters, should consider the following reasons why mediation may be a wise process choice as compared to litigation.

Even when family relationships are NOT involved or there is little interest in or hope for repairing relationships:

1. **Money/Property/Other Assets.** In the vast majority of probate & estate conflicts, the unfortunate reality is that a lengthy legal battle is likely to have a significant impact on the estate assets to be distributed or that are needed to care for the aging family member. This kind of litigation can cost hundreds of thousands of dollars, depending upon the complexity of the case. The people responsible for managing the assets and overseeing the distributions are often at the center of these conflicts and usually have the ability to use estate assets in defending their actions. Estate expenses also escalate as more formal accountings are prepared, professional fiduciaries are hired and other matters are handled with court oversight in mind.

Sadly, there are many cases where there is little or nothing left. If the battle takes place before the death of the person whose estate is at issue, the expenses can seriously impact the aging person's ability to enjoy their final years and pay for appropriate care. If the dispute takes place in the wake of death, there may be little to distribute by the end of the battle, which is certainly not what the decedent would have wanted and does not best serve the interests of the beneficiaries. Even "successful" beneficiaries tend to find that their shares are minimal or that the ability to retain a beloved home has now become impossible in the face of the diminished size of the estate and the need to pay their own attorneys' fees.

Parties who reach an agreement in mediation prior to or relatively early in a legally contested matter of this type can preserve the assets they are fighting for and *ensure that there is something left for care and/or distribution!*

2. **Creativity** Judges are limited to legal remedies and are fairly constricted in terms of their ability to creatively manage all of the moving parts in an estate dispute. For example, parties may be wanting to decide if changes to a will were valid, whether and when to sell real property, whether people should have paid rent while living in real property owned by the decedent, whether caretakers should receive some financial recognition for their services, understand how decisions were made regarding placement of aging parents in assisted living, account for any mismanagement of estate assets by an

executor or trustee, or assess how best to provide for an aging parent both financially and otherwise, among many other things.

Judges are not usually able to make complex tradeoffs across all of these issues and are not going to make creative plans such as allowing a family member to rent and remodel real property while consulting with real estate experts on how to get the best value for all beneficiaries at the time of sale.

Parties who work together in mediation, even when they have no personal relationship, can create much more sophisticated and economical plans for management and distribution of an estate or care for a person who is aging and losing capacity. They can work together cooperatively to make a settlement based upon their best estimation of what the decedent might have wanted or what seems reasonable to all parties, even if the outcome is something a judge could not have considered.

3. **Time.** Probate & estate matters often take years to litigate. The parties involved lose precious time, both in terms of appearances at court hearings, depositions and trial, and in terms of the wait for the final determination at the end of trial.

A relatively early resolution through mediation can save all involved a great deal of time. Most mediations are completed in one day and are often successful even with limited formal discovery or primarily informal and efficient exchange of information between the parties.

4. **Risk Reduction.** Judges are frequently faced with making lynchpin decisions such as “the trust is valid or it is not.” They cannot “split the baby” in this situation. This means that the parties involved may be facing “all or nothing” risks. If they win the trust argument, they inherit everything. If they lose, they get nothing. Or the “successful” invalidation of a will or trust means that a prior will or trust is revived which makes distributions in ways that no longer reflect the desires of the decedent and leave all of the parties unhappy.

In mediation, the parties can and often do agree to distributions and other terms that are not reflected in the formal legal documents, without deciding whether they are valid or invalid. They can, in a sense, “rewrite” the will or trust to settle the conflict and eliminate the “all or nothing risks.” As long as the potential beneficiaries or other parties of interest receive proper notice and the opportunity to raise their concerns, the Court will generally approve these mediated agreements.

5. **Face Saving/Confidentiality.** Court proceedings are a matter of public record and many parties report that the legal allegations in probate and estate matters can be very painful. To make valid legal claims, lawyers use terms such as “waste of assets,” “elder abuse,” “undue influence,” “self-

dealing” and accusatory terms for other unsavory activities. These labels are standard in the “adversarial” system. Defending against such allegations can be quite difficult and the emotional and reputational impacts can linger even when the defense is successful.

If parties can resolve their disputes through mediation *before* attorneys file formal legal claims using these types of labels, they can avoid a great deal of pain and potential damage to reputation. Even after the legal process has begun, parties are more likely to overcome the impact of these allegations if they can resolve the matter relatively quickly and confidentially through mediation. The law provides that the discussions inside mediation are confidential.

Where family or other relationships matter (or there is a remote possibility that they might), even if the parties cannot imagine that possibility right now:

- 6. Reduced Toxicity and/or Healing.** The emotional damage caused by the allegations and accusations used in an adversarial model becomes more acute where people have or have had ongoing relationships. Families often struggle with very serious issues as a beloved person is aging and potentially losing capacity and needing more assistance. Rifts grow as the people involved try to manage estate assets, plan for care and make difficult decisions, often over geographic distances that make coordination and communication problematic. Families can also be torn apart in the wake of the death of a loved one as old sibling and other dynamics surface combined with suspicions, grief, the need to handle burdensome (and often unfamiliar) estate management tasks and deep desires to affirm that each person was cared about by the decedent.

In litigation, these already difficult tensions are exacerbated and inflamed. The adversarial model pits family members and others against each other in a toxic battle over right and wrong and who is to blame. Even where parties might have serious doubts that relationships could be restored, this process usually ensures that they will not.

In mediation, there is no guarantee that relationships will be repaired, but the process discourages the use of inflammatory labels and accusations while still helping family members and others to bring forward their grievances. Mediation focuses attention on improving communication, promoting understanding and seeking mutually acceptable outcomes that help parties overcome their differences. Parties are sometimes surprised to find that relationships they thought were irreparably broken can be restored. And even when not restored in the moment, many parties report that by ending the dispute and restoring some equilibrium with less acrimony, the family begins to heal in the wake of the mediation.

- 7. Emotions.** As described above, probate and estate matters often trigger significant tensions and correspondingly deep emotions. For example, a trust amendment that disinherits or significantly reduces the inheritance of a child can cause enormous hurt and questioning of self worth. Similarly, a person suspected of “mooching off of Mom” or “inappropriately pressuring Dad to change the will” in his favor may feel extremely defensive, angry, hurt or indignant. The court process is not designed to handle or process these emotions. While some emotions may be expressed in the litigation process, most communication takes place through attorneys or carefully guided testimony. Moreover, the Judge’s requirement to focus on what is legally relevant in making decisions does not include emotions.

Parties in mediation have much more ability to express the full range of their emotions and reactions even though mediators will guide them to be careful to do so in ways that are not damaging to each other and to the process. Emotions are often at the heart of conflict and mediators try to help the parties understand and work through these emotions with each other, to the extent the parties wish to do so. Emotions can be the key to unlocking the issues and finding resolution. If the parties do not wish to address the emotional components of the conflict in mediation, at least that is a choice they make based upon their assessment of whether it would be needed or helpful.

- 8. Personal Interests and Values.** Judges are required to make decisions based upon the law and what is legally relevant. This does not usually include consideration of the economic needs of beneficiaries, values that may have been shared in a family, informal verbal agreements between family members, sentimental attachments individuals may have to certain items of personal property, the hopes and fears of an aging parent etc.

Parties in mediation can jointly decide what interests and criteria they think are relevant to making decisions, including but not limited to the law. If they know that “Mom’s greatest wish is to spend her last days in the family home,” they can make every effort to coordinate to make that possible. If Dad made informal, undocumented loans to family members that were intended to be repaid to his estate, they can account for that. They can discuss the individual needs and values of all involved and take them into consideration if they choose to do so.

- 9. Tailored Planning.** The Courts do not have the time or the inclination to become familiar with the complex interrelationships among family members, individual talents or deficiencies, living arrangements, preferences etc. The decisions that they make will tend to be more standard and will not necessarily account for relationships.

Families working together in mediation can specifically design solutions that account for relationships, abilities and deficiencies, individual schedules, geographical considerations, personal budgets and anything else relevant to a sustainable plan. People with history and relationship usually know better than any Judge what will work for them, even when relations have become strained or broken down.

10. **Teamwork and/or Compliance.** In the wake of litigation, some of the parties may feel that the results were unjust or simply untenable. When someone else makes your choices for you, there tends to be more reaction and resistance, particularly by those who feel that they lost. And many parties report that litigated outcomes can feel “lose/lose” rather than “win/lose,” especially after accounting for the time, stress and costs of the process. Even where a party has won and is happy with the result, they may be facing difficulties with cooperation and compliance from the others involved.

Research finds that there is much higher compliance with mediated settlement agreements because the parties design these settlements and commit to them voluntarily, even when they are not satisfied with all of the terms. This becomes particularly important in probate and estate matters where families and others in relationship need to continue to coordinate in care for an aging parent, management of property and investments, distribution of bequests and so forth. Additionally, the improved teamwork and compliance makes more likely the repair of relationship and healing discussed previously.

Process Design:

As a final note, if the parties decide to mediate a probate and estate matter, they should carefully consider how to select the best mediator for their situation and how to design the process. Mediators may follow different practice models that are a better or worse fit for a particular case. For example, some mediators operate primarily through “caucus” (i.e. the parties are in separate caucus rooms and the mediator acts as a messenger between them). This model tends to reduce or eliminate the potential for improved communication and relationship, which some parties may want to explore and others may not. Contrarily, some mediators may heavily favor the use of joint sessions and exploration of emotion and deep personal needs, which some parties may find important, but might be of no interest to others. The key is to design the best process with the most appropriate mediator to maximize the potential benefits listed above for individuals involved.