Mediating the Petty Pieces of Posterity: When They All Want Mamma's Turkey Platter!

By Gale Allison and Vale Gonzalez

I. The Path of Least Resistance

Disputes and resolutions are a common occurrence in our daily life. Whether it be a dispute between two formerly friendly Fortune 500 corporations or a will contest in probate court, disagreements can cause a significant divide, typically filled with time-consuming arguments. Arguments are taken to court for a judge to resolve based on common law concepts, federal or state law, and equitable remedies. The ways we commonly settle legal disputes are flawed due to several conditions: the unpredictable nature of lawsuits; the perceived disparity between easing emotional ill will and finding a legal solution in the law; and the inefficiency of our judicial system. Alternative dispute resolution (ADR) is more efficient and effective way to solve high-tension disagreements.

ADR is the use of various methods of resolving disputes outside of a court setting.[1] ADR affords incentives to both parties for taking part in the process. ADR is composed of several dispute resolution methods like mediation, arbitration, or old-fashioned negotiation.[2] The rate of litigation regarding estate cases will increase due to the increase in elderly population, the surge of inheritance transfers, a more litigation-oriented society, and the proliferation of new laws in estate and trust law.[3] Other areas of increasing dispute include beneficiaries challenging the legality of arbitration and 'no contest' clauses.

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[1] Robert E. Benson, §1.2 *What is Alternative Dispute Resolution?*, COCLE-ARB s 1.2, 2006 WL 6556540.

[2] Will Sleeth, *4 Estate Litigation Predictions for 2018*, Private Wealth (Feb. 14, 2018), https://www.fa-mag.com/news/4-estate-litigation-predictions-for-2018-37174.html.

[3] *Id.*

Out of all the ADR methods, one stands above the rest as being the oldest and most popular choice: mediation.[4] Mediation is known as the most versatile and flexible method of resolving disputes because it can be applied in an infinite number of ways.[5] Mediation is documented as being used for over 2000 years.[6] In 209 B.C., Greek city-states succeeded in mediating a truce between the Aetolian League and Macedonia, thus ending the First Macedonian War.[7] Obviously, the success of mediation is a tried-and-true method to resolve any magnitude of issue, including war.

Several approaches are available for mediators, so adaptability is one of the inherent advantages that come with utilizing mediation.[8] Family and emotional conflicts are particularly well suited for resolution through mediation because of the strong possibility of maintaining relationships post-dispute.[9] The nature of the judicial system is adversarial and further harms the instability already created by a family dispute.[10] For that reason, mediation is especially successful in family law, elder care issues, probate and trust law, and other family-based

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[4] Mary F. Radford, *Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 Pepp. Disp. Resol. L.J. 241 (2001).

[5] Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 Stetson L. Rev. 611 (2003) ("Mediation can be quick, flexible, inexpensive, convenient, humane, and empowering").

[6] Molly M. Melin, *When States Mediate*, 2 Penn St. J.L. & Int'l Aff. 78, 78 (2013).

[7] *Id.*

[8] See generally Kenneth F. Dunham, *Practical Considerations in Mediation Training: Should Mediators be Trained to Adapt to the Circumstances of Each Case?*, 11 Appalachian J. L. 185 (analyzing different methods of mediation and the current popularity with each type in practice).

[9] *See* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397, 398 (1997).

[10] *See* William J. Howe, III and Elizabeth Potter Scully, *Redesigning the Family Law System to Promote Healthy Families*, 53 Fam. Ct. Rev. 361, 362 (2015).

conflicts.[11] In Oklahoma and many other states, mediation has become a consistent, judicially-required step in solving trust and estate disputes prior to trial.[12]

II. Variety is the Spice of Life

The pliable nature of mediation makes it probably the most suitable method for helping parties resolve disputes in all issues regarding estate and trust law. A plethora of benefits exist for engaging in mediation and, significantly, these are not solely reserved for use by parties already involved in litigation. Since litigators are not required for mediation, seizing the opportunity to mediate situations prior to involving any litigation attorneys is entirely possible and sometimes preferable. Many people wrongly believe mediation is considered only after a petition is filed--nothing could be further from the truth. Estate administration attorneys, CPAs, and other financial advisors are usually the first to recognize growing conflict. These advisors can easily bring parties to mediate without either party ever filing a single document in court. When parties engage in mediation without the pressures of litigation and court filings, there is a strong possibility that the mediation will be not only successful but also will save the often, huge loss suffered by the estate or trust from the cost of the conflict. However, mediating disputes that require copious discovery might best be handled after the discovery has been completed through the traditional litigation process.

So, mediation might be considered at almost any time during a dispute, but the financial and emotional incentives for both parties would indicate that earlier is better. Since trials are

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[11] Susan N. Gary, *Mediation for Estate Planners, Managing Family Conflict* (2016).

[12] Bette B. Epstein, *The Use of Mediation in Addressing Estate Planning Issues and Resolving Trust and Estate Administration Disputes*, 2013 WL 6118563, at *1.

expensive and unpredictable[13], introducing mediation soon after the dispute emerges is in the best interest of all involved. The creation of a rift between parties followed by an aggressive lawsuit will likely lead to a rupture, both in the client's wallet and family life. In general, most clients would rather agree to receive a precise solution agreement (whether it be for money or action by the other party) than risk it all at the hands of a judge. Nobody wants to jump into litigation without having an idea of the outcome. By mediating, control is reserved by the parties and for the parties.

Most people are less interested in their day in court than in the quick conclusion of the matter. Although trials address the issues through the letter of the law, a trial does not take into consideration principles of humanity, emotions, and relationships. Further, the solution ordered by the court most often is void of constructive creativity and will totally ignore tax ramifications. Where courts falter, mediation thrives like no other solution. In court, the structured resolution established by the judge is not made based on much input from the parties beyond the stark legal precedent. Once the judge is given control, the parties abandon their power to choose a mutual decision. With mediation, the parties retain control and change the environment from an adversarial system into a collaborative and communicative process, which is capable of preserving the relationships and ties amongst the family members.[14]

In the context of estate and trust administration disputes, often there are feelings of guilt, grief, injustice, and prior resentment among family members, which all cloud the minds of the parties as to what they hope to achieve in settling the dispute. Rather than not addressing those

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[13] *See* Robert A. Patterson, Comment, *Reviving the Civil Jury Trial: Implementing Short, Summary, and Expedited Trial Programs*, 2014 B.Y.U.L. Rev. 951, 953 (examining the history of civil trials and its decline, advantages and disadvantages of civil trials, and the proposition for a short, summary, and expedited "SSE" jury trial program.

[14] *Id.*

feelings (as frequently occurs with judicial resolutions), feelings can be expressed during mediation conferences and resolved with the rest of the dispute. Mediated resolutions can, and many do include apologies! Knowing how courts are notoriously slow at deciding an issue and that many disputes can take years to resolve, mediation obviously expedites the process. It can take as little as a few hours to mediate a reasonable solution for many different types of cases. Expeditious resolution coupled with an emotionally supportive and flexible agreement that is a win-win solution makes mediation an attractive method of problem-solving.

III. Combining Trust and Estate Conflicts with Mediation = Satisfaction For All

Not only do parties receive the overall benefits mediation presents, but also trust and estate conflicts are especially amenable to the process because the affected parties are generally more motivated to save relationships. Mediation can be perfectly tailored to the issues of this all-too-emotional forum, since the advent of alternative styles of mediation.[15] Mediators utilize three main mediation styles: facilitative, evaluative, and transformative. Facilitative mediators focus on developing communication between the parties and do not evaluate the strengths and weaknesses of a case or provide an opinion from a legal standpoint. Evaluative mediation introduces a pragmatic view of the parties' situations. Evaluative mediators are skilled in the subject matter the parties are disputing and use their evaluation of the strengths and weaknesses each of them hold to move the parties to settlement. The newest style of mediation is called transformative and mediators using it focus on "transforming" the parties' approaches through empowerment and recognition. The focus allows parties to take control of both the process of mediation and the outcome by having them agree to be more open, attentive, and responsive to the other party's views. Transformative mediation resolves the immediate problem and it also helps the parties generate a relationship that is better capable of handling disputes in the future.

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[15] Epstein, *supra,* note 12.

This is most useful in resolving elder care disputes. Successful mediators do not hold themselves hostage to any one mediation style. A mediator well versed in all three styles is most effective since family disputes may require all three methods to achieve agreement and resolution.

A. Tangible Personal Property Disputes

Injustice and resentment are common emotions when personal effects are at issue. It may be surprising to some, but tangible personal property divisions create some of the most emotional and destructive disputes that happen in a family. Disputed items can vary from expensive family heirlooms all the way down to Mamma's turkey platter. Nothing is safe from disagreement over its distribution regardless of its value if, for no other reason than that these items are rarely sold. Of course, that is due to the fact that a personal effect is usually more valuable emotionally than from an intrinsic valuation. We all have observed family members willing to fight tooth and nail for items that carry almost no monetary value, yet have an incalculable amount of emotional attachment. Nevertheless, there can also be major conflicts arising from disputes where there is no real emotional attachment to the thing. Tons of sibling rivalries between parties to disputes harken back to childhood jealousies or competitions for attention or control that, in the present, cause the 'tug of war' over the thing. This added layer of raw emotion further complicates conflict situations. Siblings who grew up arguing and fighting are not new to strife and 'when push comes to shove' those feelings come right up once more. Many times, when emotional attachments and sibling rivalries are combined, no reason or logic, and certainly no law can calm the parties. The lack of monetary value of the thing and the cost of settling the dispute seem never to be part of the thought process of the parties. Getting the resolution he or she "deserves" is the number one priority. Most lawyers attempt to get their clients to abandon these conflicts because they are not economically justifiable to dispute; however, these types of conflicts are

ripe for mediation partially for that very reason: they are *not* a reasonable use of our court system. Mediation is often the only way to solve these disputes, because clearly, it is the only emotionally and economically responsible way to resolve such disputes. .

B. Mediating Trustee/Beneficiary Issues

The following topics are common disputes beneficiaries have with trustees.

1. Trustee Compensation Disputes

Beneficiaries may not agree with the amount of compensation the trustee is receiving to manage the trust estate. Although language such as "reasonable compensation" is usually included in the trust instrument, nobody really knows what "reasonable" means except the judge who will be reviewing the case. "Reasonable" is a qualitative, rather than a quantitative term and, as such, is always subjective. Some trustees will push as far as possible in regards to the amount of compensation they can receive, while beneficiaries will invariably want it as low as possible. Typically, disputes in this area alone do not rise to the level of litigation. You most often see them as ancillary issues to larger drivers of the litigation. In general, when a judge decides the outcome for the parties, two consequences are likely to occur: 1) Animosity between the parties is insured; 2) Communication between the parties is not enhanced. A bonus from mediating these disputes while settling the parties' differences is creating a mutually acceptable agreement or process to eliminate future issues involving the compensation.

2. Trust Construction Issues

The settlor's intent controls the meaning of the words used in all trusts or wills. This most fundamental rule of construction is the ultimate deciding factor on how a trust or will is to be interpreted. Such intent is paramount and enforceable unless the intent conflicts with

"established principles of law".[16] However, Oklahoma's (and most other state's) laws are difficult on the specific evidence that can be used to determine this intent.[17] In ascertaining the application of an uncertain provision in a will, the testator's intention must be discerned "from the words of the will, taking into view the circumstances under which it was made, *exclusive of his oral declarations*."[18]

However, when no ambiguity exists and the language in the trust or will is considered "clear and plainly susceptible [of] only one construction," so the provisions as stated must determine the meaning.[19] *If the words at issue are not ambiguous,* the proper construction can "be gathered from the terms of the instrument as a whole."[20] When beneficiaries and trustees are arguing over construction issues, it is sometimes hard to keep a straight face while insisting that the words are not ambiguous. However, in the end, it is generally simply better to never agree that anything in a will or trust is ambiguous. By that, at least, you only look at the four corners of the document for relief. These are notoriously difficult cases to try.

Mediation is particularly unsurpassed for resolving the difficult legal case, and a construction case is one of the most difficult in the trust and estate area. A mediator may hear the parties talk about what the settlor said and what he meant. These frank discussions can lead to acceptable mediation resolutions. This adds a completely new dimension to the settlement possibilities.

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16 *Dunnett v. First Nat. Bank & Tr. Co. of Tulsa*, 1938 OK 608, 85 P.2d 281 (Okla. 1938).

17 See, e.g., Shoemaker v. Estate of Freeman, 1998 OK 17, 967 P.2d 871 (allowing reformation of a trust to reflect the Settlor's intent or to what the Settlor's intent should have been absent a mistake).

18 Okla. Stat. Ann. tit. 84, § 152.

19 *House of Realty Inc. v. City of Midwest City*, 2004 OK 97, ¶ 36, 109 P.3d 314, 325.

20 *Dani v. Miller*, 2016 OK 35, ¶ 18, 374 P.3d 779, 789.

Judicial resolutions, by their nature, are not as tailored to the parties in conflict. The fact that a judge must always take into account many legal issues with which the affected parties are not individually concerned, like judicial precedent. A judge can breathe life in a word in the disputed language which could leave both sides unhappy. No estate and trust litigator lives through his or her career without encountering the unfortunate application of the law to a particular case. This does not happen in mediation.

3. Trustee Management of Trust Assets

Settlors/testators often choose individual fiduciaries who are often ill-equipped to properly administer a trust. Individual trustees often make colossal mistakes while managing trust assets such as not keeping assets separate from their own, keeping incorrect records, and using funds for personal expenses. These all-too-common occurrences easily lead to litigation. Removing a trustee is expensive and the judicial removal of a trustee is an intensive process in time and legal fees. There can be adverse tax consequences and other problems that are best served by the more immediate action that only mediation can provide.

IV. "Dad Can't Take Care of Himself Anymore, What Do We Do?"

Alzheimer's disease and related disorders or dementias (ADRD) are characterized as conditions that "impair memory, thought processes, and functioning, primarily among older adults."[21] Due to the nature of ADRDs and the ever-increasing costs of healthcare,[22] it is not surprising that more than 15 million Americans provided unpaid healthcare to ADRD-affected

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[21] WHAT IS ALZHEIMER'S DISEASE AND RELATED DEMENTIAS, https://aspe.hhs.gov/what-alzheimers-disease-and-related-dementias.

[22]Robin A. Cohen, Ph.D., and Whitney K. Kirzinger, M.P.H., *Financial Burden of Medical Care: A Family Perspective* (2014), https://www.cdc.gov/nchs/data/databriefs/db142.pdf (finding that "1 in 5 persons was in a family having problems paying medical bills, and 1 in 10 persons was in a family with medical bills that they were unable to pay at all").

individuals. This accounts for 18.2 billion hours of care valued at over $230 billion dollars.[23] It does not come as a surprise that once mental illness begins manifesting in a parent, many families become completely dysfunctional. On top of all the other roles they already have, adult children become stressed from the sheer challenge of juggling new responsibilities for their parents. Add to the mix observing the mental deterioration in their loved one, frequent resurrection of past, unresolved sibling discontent, and expenses (both in time and money) associated with caring for their parent, and this is a toll the majority of families are not able to handle without significant strife. Of course, it is true that, with proper estate planning, many of the issues could completely disappear; however, these family tragedies often elicit passionate emotions that are hard to draft around even for the most adept estate planner.

Elder care disputes are particularly suited to mediation without adversarial lawyers or litigation. Discovery is often not necessary and families are motivated to solve the problem expeditiously, at a low cost. Many times, a non-litigation lawyer or other family advisor is presented with the family problems. That advisor can serve as an independent resource for the family to explain things like the guardianship process or financial aspects and can assist during the mediation on a neutral basis, resolving the family strife. This enables the advisor to be part of the solution rather than one who must choose a "side".

V. Mediation Clauses in Wills and Trusts

Including a mediation clause in a trust or will is always in the best interest of the beneficiaries. The clause has the potential for saving inheritances and relationships from destruction due to the legal costs associated with resolving disagreements through litigation. It can slow down any 'knee jerk' reactions of the parties to litigate, which destroys assets and

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[23] ALZHEIMER'S ASS'N, 2017 ALZHEIMER'S DISEASE FACTS AND FIGURES 22, https://www.alz.org/facts/overview.asp.

relationships. There are several ways of drafting clauses for optimum results. However, a mediation clause that simply states that it is the settlor's or testator's wish for mediation to take place to resolve any disputes is flawed if there is no specific requirement or repercussion to result should the party contesting not follow through with the request. Such a clause is the least desirable type for the obvious reason that it may not accomplish its goal. Requiring a good faith effort by both parties to engage and participate in mediation of disputes should be a minimum requirement of such clauses. The following mediation clause is an example of a provision to consider:

A. Actions Contesting The Agreement Of Trust Or Against Any Fiduciary Acting Hereunder.

To the extent not prohibited by applicable law, if any beneficiary under this Agreement wishes to challenge the validity, construction or effect of all or any provision of this Agreement, or wishes to commence an action against any fiduciary acting hereunder, such individual shall proceed as set forth in this **Paragraph A** or shall forfeit his or her interest hereunder as specified in **Paragraph B** hereof. Such beneficiary is hereinafter referred to as the "challenger." The challenger shall agree in writing with the fiduciary acting under this Agreement to participate in good faith in the mediation. Any fiduciary or challenger who refuses to so agree in writing shall cease to be a fiduciary and/or a beneficiary hereunder. Such good faith mediation shall be conducted until agreed upon resolution or _____ hours of effort has been conducted with no resolution. All other persons whose interests hereunder reasonably could be affected by such action shall also agree to participate in such good faith mediation and/or to be bound by any agreement arising from such mediation.

B. Forfeiture For Failure To Participate In Good Faith Mediation Or For Making A Frivolous Or Bad Faith Claim.

For any other than a good faith claim, the conditions are herein specified to mean:

1. In the event that:

   (a) the challenger without mediation, as set forth in **Paragraph A** above, commences an action in any court (whether or not it is determined that such court had jurisdiction over the matter in dispute) with respect to any matter relating to the validity, construction, or effect of this Agreement or complaint against any fiduciary acting hereunder; and/or

(b) the mediator determines, in his or her sole discretion, that the challenger did not participate in the mediation in good faith; and/or

(c) the mediator determines, in his or her sole discretion, that the challenger made a challenge that was frivolous or in bad faith,

then the challenger and all his descendants shall forfeit and cease to have any right or interest whatsoever under this Agreement; and

2. In the event that the mediator determines, in his or her sole discretion, that the fiduciary did not participate in the mediation in good faith, then the fiduciary will cease to be a fiduciary under this Agreement; and

3. In the event that any person whose interests reasonably could be affected by the mediation and should not agree to participate in such mediation in good faith and agree to be bound by such mediated agreement, shall forfeit all benefits hereunder.

C. Enforceability.

If the foregoing provisions contained in this Article are held by a court of competent jurisdiction to be invalid, ineffective or otherwise unenforceable, in whole or in part, such provisions shall be enforced to the extent not held to be invalid, ineffective or otherwise unenforceable, and it is intended that:

1. The fiduciary with discretion to make distributions to beneficiaries hereunder shall not exercise such discretion in favor of any challenger or in favor of any of his or her descendants; and

2. Notwithstanding any other provisions hereunder, the fiduciary who does not participate in the mediation in good faith will be immediately terminated from service hereunder and shall forfeit all compensation and have no legal fees paid from this trust with regard to any defense of the fiduciary upon further action by a challenger; and

3. Any person whose interests reasonably could be affected by the action who did not agree to participate in such mediation in good faith and to be bound by such mediated agreement shall forfeit all benefits hereunder.

D. Notice.

The fiduciary hereunder shall provide all beneficiaries and any person whose interests are reasonably affected by any action to be taken pursuant to this Article with a copy of the trust and will direct such person's attention to the terms of this Article should a dispute arise.

E. Evidence.

All beneficiaries hereunder are entitled to all of the financial and other records of the trust and the fiduciary shall comply with all requests for information in a timely manner. Only well proven extenuating circumstances will relieve the fiduciary from providing all requested records within sixty (60) days. If the fiduciary fails to produce records pursuant to the terms of this Article, said fiduciary shall be terminated from further service hereunder, shall forfeit its compensation and shall not have its attorneys paid for any defenses of any action that may thereafter occur.

F. Costs.

If an agreed upon settlement is reached the legal fees and all costs of the mediation will be paid as an administrative expense of the trust.

VI. The Certainty of Death and Taxes

The new Tax Cuts and Jobs Act of 2017 and the $22,400,000 per couple unified credit (at least until 2025), will lead to less fussing over death taxes. However, many people will pass away with antiquated documents that create a host of *income tax* issues. Judges cannot solve disputes with tax solutions, but the right mediator trained in tax issues can create tax solutions that can resolve these disputes.

VII. When Your Client Has Zero Law

An agreement to mediate is a fundamental understanding that generally the parties seek compromise and both sides will give up something. However, it is possible to use mediation to obtain results that the law would never support. Conflicts do arise with clear losers from the beginning. Despite that, mediation is amazingly successful at getting people with zero law on their side (but who have a lot of 'chutzpah') obtain an economic resolution to which they are not entitled. It is often a relentless party who is willing to pay serious legal fees to stand on the principle of the position rather than for any legal possibility of winning through law or evidence. Mediation will find a solution largely designed to simply conclude the matter. What does the

person with the law on his or her side obtain? The end of the conflict sooner rather than later and most often with less to pay out in legal fees.

VIII. Conclusion

By using good faith mediation to perform dispute resolutions in estate, trust, and elder matters, the parties involved will always benefit. Sharing the costs of mediating the issues, maintaining relationships, having an effective and timely resolution, and providing an emotional and private forum for expression are what make the possibilities of mediation exceptional. Regardless of the dispute, creative and private mediated agreements will always be the gold standard of dispute resolutions.

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