New Jersey Law Journal

VOL. CLXXXVII– NO.6 – INDEX 416 FEBRUARY 5, 2007 ESTABLISHED 1878

Estate Planning

Mediation on the Rise

As estate disputes increase, the use of mediation and arbitration will become more frequent

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As in most litigation, the great majority of probate litigation settles before a judicial adjudication. Nonetheless, in view of the emotional complexity often at the center of probate litigation, these disputes can be difficult to resolve. The use of settlement techniques such as mediation and arbitration has increased dramatically in all types of disputes, including estate litigation. For instance, in 2004, New Jersey enacted the Uniform Mediation Act, N.J.S.A. § 2A:23C-1 et seq.

The most common and compelling impetus for mediation is the reduced cost in comparison to litigation. A party resolving a dispute in mediation can save time, effort, emotion and money. Especially in estate disputes, where different parties may have divergent goals, such steps streamline the process.

In addition, courts began invoking ADR and mediation in estate matters after realizing the success of those methods in a similar forum: family court. Since the participants in both instances know each other, and are often family members, they are likely to continue to have relationships in the future (whether they like it or not). This incentive sometimes facilitates a more viable environment for mediation, since the participants may be more cooperative. Obviously, however, when the nature of the parties' relationship is itself the root of the dispute — as is often the case in estate fights — no settlement is ever easily achieved.

Moreover, estate mediation provides the parties with an opportunity to fashion a remedy for their situation. The parties may be able to devise their own "win-win" situation without court intervention. Parties are not limited by a court and can bargain creatively.

On the other hand, some disadvantages do exist. As noted above, in those estate disputes in which the emotions override, mediation can be a waste of time and money. For example, grief and anger related to the death of a loved one may be too strong for parties to participate in mediation effectively.

Likewise, the process is usually not binding. Consequently, a party may not approach the mediation process seriously, or a party who is not fully satisfied with the result will readily disregard it. The primary means of overcoming this obstacle rests on the attorneys' ability to educate the parties about the advantages of mediation — and the disadvantages of litigation.

Finally, just as the attorneys play a key role, the quality of the mediator is immeasurable. Before undertaking the process, the parties should evaluate the training and experience of the mediator. Most states now have training programs that certify individuals as mediators. Retired judges — especially those who formerly handled probate cases — can also be effective, since the parties still have a sense of getting a "day in court" and the benefit of a judicial perspective. On the other hand, a mediator who is not effective presents an enormous disadvantage.

The New Jersey Rules of Court allow a court to "refer any…probate action to mediation for an initial three hours, which shall include an organizational telephone conference, preparation by the mediator, and the first mediation session." R. 1:40-6(a). That same rule also provides that "the parties to an action may request an order of referral to mediation and may either select the mediator or request the court to designate a mediator from the court-approved roster."

The New Jersey Court Rules do

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not, however, expressly require mediation. That may very well change as the courts embrace ADR more fully. Accordingly, a survey of how other areas of the country handle this concept is useful.

Washington State has implemented statutes that require all estate and trust cases brought to court to proceed to mediation first. Wash. Rev. Code Ann. § 11.96A.280 (West 2000). The statute provides, "[J]udicial resolution of the matter…is available only by complying with the mediation and arbitration provisions of R.C.W.A. 11.96A.260 through 11.96A.320." In support of this measure, the Washington Legislature found that this "non-judicial procedure has resulted in substantial savings of public funds by removing those disputes from the court system."

Hawaii has promulgated similar mediation rules. While not as restrictive as Washington's law requiring mediation before litigation, the Hawaii Probate Rules allow any party to a probate, trust, or guardianship matter to opt for mediation. Hi. St. Prob. Ex. A. Mediation Rule 1 (2002). However, should the court decide at any time to refer a case to mediation, the procedure becomes mandatory for the parties. While Hawaii does grant the court the power to order mandatory mediation, it allows the court some discretion in whether or not to do so. Hi. St. Prob. Rule 2.1.

Further, within some states, certain counties have promulgated their own policies on probate mediation. For example, within California, Los Angeles and San Francisco counties have enacted their own rules of court regarding probate mediation. The Los Angeles County Court Rules require mediation for contested estates, trusts, conservatorship and other matters, on the principle that these matters are uniquely appropriate for mediation. Ca. R. Los Angeles Super. Ct. Rule 10.200 (2004). The Court Rules set up a detailed framework that begins after the first hearing in the matter. San Francisco County has a voluntary mediation program for all civil matters, specifically including probate, guardianship, and conservatorship matters. Ca. R. San Francisco Super. Ct. Rule 4.2 (2005).

In the third judicial district in Oregon, Marion Circuit, the rules state that "the Court may also refer matters to mediation on the motion of one party, or on the Court's own motion." Marion County Local R. 12.175 (2005). Also, if all parties to a probate case request mediation, the court must refer the matter to mediation.

In a number of the remaining states, courts have the option to order or recommend probate mediation. The legislation in these states tends to be more permissive and flexible. In Alaska, the presiding judge may appoint a standing master to conduct probate proceedings, including ordering mediation and other alternative dispute resolution. Ak. R. Prob. Rule 2 (2005). In Michigan, Probate Court Rule 5.143 states that a court "may submit to mediation, case evaluation, or other forms of alternative dispute resolution process one or more requests for relief in any contested proceeding." M.C.R. 5.143 (2005).

Finally, on a broader level, the American Arbitration Association has enacted guidelines for both commercial mediation and arbitration.

A hot question in this area is whether the testator or settlor can require in the will or trust that future disputes must be arbitrated or mediated, by inserting a clause to this effect into the source document. In fact, the American College of Trust and Estate Counsel (ACTEC) has a task force which is formulating model statutes to allow the enforceability of arbitration clauses in wills and trusts, along with sample clauses to be used. See also "ADR in the Trusts and Estates Contexts," 21 ACTEC Notes 170 (1995); "The Use of Arbitration in Wills and Trusts," 17 ACTEC Notes 177 (1991). Such pushes by major organizations are likely to boost the use of such devices in coming years.

This is a controversial issue on which relatively few courts have ruled — and disagreement permeates the decisions that have addressed this issue.

On the one hand, the reasoning is that a beneficiary of a trust or estate accepts the terms and conditions of the will or trust, including any condition that any disputes must be submitted to binding mediation. A corollary to this rationale is that binding arbitration is increasingly accepted by society and poses certain advantages over the use of the court system. See generally E. Gary Spitko, "Gone But Not Conforming: Protecting the Abhorrent Testator From Majoritarian Cultural Norms Through Minority-Culture Arbitration," 49 Case W. Res. L. Rev. 275 (1999).

On the other hand, some courts are concerned that such clauses violate due process or are against public policy, since beneficiaries do not "negotiate" the terms of wills or trusts — those terms are thrust upon them. This approach rejects the contractual underpinnings of the first perspective. See, e.g., *In re Trust of Fellman*, 604 A.2d 263 (Pa. Super. 1992) (finding that an arbitration clause in a trust instrument was unenforceable as a matter of public policy, to the extent that the clause required arbitration of a person's capacity to revoke a trust).

Whether binding arbitration can be thus compelled will need to be resolved by the courts of each state. In any event, even if it is not binding, litigators and parties will see more frequent use of mediation and arbitration as estate disputes increase. ■