ILLINOIS STATE BAR ASSOCIATION

DECEMBER 2019 VOL 26 NO. 4

In the Alternative

The newsletter of the Illinois State Bar Association's Section on Alternative Dispute Resolution

Using ADR in Estate Planning and Administration

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It's an all too familiar picture.

Dysfunction within a family makes administration of an estate or trust difficult after the death of the loved one who created the relevant document. Sometimes the professional advising the family on administration issues finds that the purported "loved one" was not so "loved" after all. Alternatively, it may be that it is the siblings who are the reason for the dysfunction. Whatever the challenge, the family dynamic has been what it is for a long period of time – and now has changed. And the problem is that mom and dad were the glue that kept everyone talking to one another. Now, without the benefit of their presence, the family dynamic falls apart, and…you know the rest.

As an estate planner who has also dabbled in various forms of alternative dispute resolution over the years, I have speculated as to how one might incorporate ADR techniques into the estate planning or administration process. The unfortunate reality is that the need for, say, mediation of a family dispute does not become apparent until it's too late. The trust or will being administered says nothing about dispute resolution. The order admitting a will to probate is silent as to the Court's endorsement (or requirement) of ADR as a means for resolving family squabbles. And so the parties are left to traditional methods for dealing with unresolved conflict—all without the benefit of the departed family member.

My guess is that there is not a probate judge out there who has not seen the destructive nature of traditional dispute resolution methods when applied to certain contested estate or trust matters.

To be sure, sometimes a court hearing is the only way to find solutions to difficult problems. Put the gloves on and come out of your respective corners fighting. Are there not situations, however, where a dispute resolution process that allowed a more universal ownership of solutions by all concerned would produce better results—results that might preserve or even enhance the fragile relationships that we see among some of our client families?

Some in the planning or estate and trust administration world are already working in this area. Others of us avoid opportunities that we have to encourage or mandate creative dispute resolution techniques in our work. In any event, each of us should be sharing ideas that may spark the development of new ways to address the difficulties that are sometimes caused by the challenging dynamics of family relationship as we conduct our practices. To this end, I suggest that we consider the possibilities ADR techniques create at two distinct points in the planning and administration process.

First, and easiest to influence, is the opportunity we have to insert dispute resolution language into the estate planning documents that we draft. Tailored to match the dynamic of the client's family, appropriate language might require or strongly suggest the use of mediation or even arbitration. The requirement that a trusted advisor or family friend be used as the neutral might be considered. We have the most flexibility in this area with trust documents that we create. As such documents are not necessarily before a court, the restrictions of the applicable probate law do not so directly regulate the resolution of disputes that arise. Even in the case of a will that is before a court, however, the inclusion of a requirement that disputes be submitted to non-binding mediation prior to final resolution by the court will meet with favor. As an example, the Uniform Trust Code certainly endorses the use of nonjudicial dispute resolution methods.

The scope of this article does not allow for an in-depth analysis of language used by estate planners in the drafting of dispute resolution methods in wills or trusts. The literature is replete, however, with examples of drafting techniques now being used.

Second, consideration should be given to methods that might be used to insert the use of ADR into the formal, court supervised process used in the administration of estates. Of course, many jurisdictions have included in their local rules the possibility that a court might require the use of non-binding

ADR techniques prior to submission of the question to the court. The practicing bar might also consider the inclusion of a request that probate courts require, from the outset of the administration process, that certain types of disagreements be processed through non-binding mediation before final resolution by the court. After all, the fiduciaries that we represent have a duty to administer the estate in as efficient and cost-effective manner as possible. It will be interesting to see how courts react to inclusion of such a request in our petitions to admit a will to probate.

Our profession should understand and exploit every possible method allowed under the law for solving problems. Alternatives to the court system will not always make sense, but when they do, we should enthusiastically introduce our clients to anything creative that will encourage resolution of difficulties. Particularly in the area of estate planning and administration we have the opportunity to lead in a process that not only resolves basic disputes, but does so in a way that gives the best opportunity for maintenance of healthy family relationships going forward. ■

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Vol. 26 No. 4
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