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Message from the Outgoing Chair

Edna Sussman

As my term draws to a close it is hard to select which of the past year's activities to highlight and impossible to thank all those who made all the fine work of the Dispute Resolution Section possible. So I will just say a word of thanks to all of those who labored hard on so many committees and projects which were brought to a successful conclusion and to the NYSBA staff for all of their superb support. None of the Section's accomplishments would have been possible without the efforts of so many. Thank you.

In this special issue of the *New York Dispute Resolution Lawyer* we highlight the many ways in which the flexible processes of arbitration, mediation and collaboration can serve to maximize results in many different areas of the law. Each area has its own special needs and circumstances. The ability to tailor the process to meet those needs makes these mechanisms for dispute resolution the optimal choice for many situations. Tools can be adapted to adjudicate, conciliate, or engender a broad based collaborative process to achieve long lasting resolutions, often crafted in ways that could not be achieved by a court applying the law to the facts. We hope our readers will find it informative and useful in helping them recognize and employ where appropriate the adaptable mechanisms available to them.

Promoting New York

The trend that has developed over the last decades, with the law becoming more and more of a business, has swept over to the world of arbitration. Arbitration venues around the world, from Stockholm, Paris and Vienna to Singapore and Hong Kong, are now aggressively marketing themselves as the ideal choice for arbitrations. The UK Ministry of Justice and Ministry of Trade & Investment recently released a Plan for Growth Promoting UK's Legal

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Trusts and Estates Law Section

The following are the observations of four experienced trusts and estates lawyers who are presently involved in mediation and other forms of dispute resolution.

By Kevin Murphy, Esq.
Law Clerk, Westchester County Surrogate's Court

The views expressed herein are the views of the author personally and do not in any way reflect the views of the New York State Bar Association or the Surrogate's Court.

Mediation as a method of dispute resolution in trusts and estates law presents the same potential benefits as it does in other practice areas—reduced financial and emotional costs to the litigants; expedited, certain and confidential results; and the empowerment of the litigants to participate in achieving a self-directed result. It is clear, however, that these potential benefits apply particularly to trusts and estates law for a number of reasons.

Most trusts and estates litigation involves a dispute among family members and / or outsiders over who is entitled to share in a decedent's estate. Most are family disputes—siblings vs. siblings, or children of a first marriage vs. a second spouse. More recently, an increasing number of disputes involve family members vs. non-family member caregivers (e.g., home healthcare aides). Most often, such disputes initially come before the court in the context of a contested probate proceeding or a contested administration proceeding. Although the legal issues are generally discrete, long-standing unresolved emotional issues between the parties, which courts are ill-equipped to resolve, usually drive the litigation.

Surrogate's Court has its own set of procedures, and many attorneys who do not regularly practice there often struggle to master the procedural differences between Surrogate's Court and other courts. They attempt to file procedurally infirm papers which the court must reject, sometimes several times.

When the issue is finally joined and discovery commences, the parties exchange allegations of misconduct or wrongdoing, and each litigant takes the allegations extremely personally. They become resentful of and indignant in their denial of allegations against them, and respond with vitriolic counter-allegations. Each side becomes entrenched in their respective positions, insisting that they must carry out the decedent's wishes "as a matter of principle." This results in a breakdown in whatever communication existed between the parties, or it extinguishes any hope of communication if there was none. Motion practice and extended litigation ensue, depleting the assets of the estate and increasing each party's attorney's fees. Consequently, each party demands a higher settlement during negotiations to offset the increased costs of litigation.

Unfortunately, the litigants often fail to realize or appreciate that the initial contested proceeding can be merely the first step in a series of contested, and therefore expensive, proceedings and appeals. As the emotional and financial costs and delay in finality increase, so does the litigants' disillusionment with their attorneys and the judicial system. Meanwhile, their inheritances decrease.

With the assistance of willing parties and attorneys, a skilled mediator can successfully avoid the pitfalls common in trust and estates litigation. Litigants in Surrogate's Court proceedings often want to explain their position—whether it is to make allegations of wrongdoing against their adversary or refute allegations of wrongdoing made against them—to a neutral party. A skilled mediator can allow the parties to do so in a way which does not jeopardize the possibility of a settlement. Starting mediation early in the process can result in significant savings of time, money and stress to the parties.

While some attorneys believe that the Surrogate or the court staff should act as mediator, courts are faced with increased caseloads and, especially in the present economic conditions, are asked to do more with less. Many courts, particularly those in which the Surrogate serves as a judge in other courts, simply lack the necessary resources, time, staff, experience and / or training to act as mediator in every contested case. Mediation offers a viable alternative in which the mediator can give a dispute the individual attention it deserves.

Consistent with this, Part 146 of the Rules of the Chief Administrative Judge allows the administrative judge of each judicial district to "compile rosters in his or her judicial district of [mediators and neutral evaluators] who are qualified to receive referrals from the court" (22 NYCRR § 146.3 [a]). It also provides requirements for qualifications and training of (§ 146.4) and continuing education for (§ 146.5) mediators and neutral evaluators serving on court rosters, and the approval of training programs (§ 146.6). This indicates that the Chief Administrative Judge supports the use of court supervised mediation to resolve disputes which otherwise would have to be resolved through litigation.

By Jill Teitel, Esq.
Private practice; previously, Law Department, Kings County Surrogate's Court

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A skillful mediator can be useful in the resolution of contested trust and estate proceedings. A trained mediator

will be able to deal with the issues at hand and anticipate ones to come. Issues may arise at the inception of a Surrogate's Court proceeding which may challenge a mediator's skill in identifying all of the problems, such as who will be the designated administrator or temporary administrator of the estate, how to recover property improperly taken from the estate, which debts are chargeable against the estate, how to construe an ambiguous provision in a will, and how to invest trust assets (to maximize return for the present beneficiaries, or those having future interests, or the creator if he or she retains an interest in the trust). These issues may beget a host of other issues and conflicts, which, if unresolved, may cause years of family squabbling. Such issues may be a spouse's—whether first, second, or third spouse—right to a statutory elective share, or the rights of half-siblings. Familial strife, having lain dormant for years, is often unearthed and, absent skillful resolution, may explode.

Take, for instance, a party who needs letters of administration to marshal the assets of an estate. The petitioner appears in court, having duly served notice of the proceeding on all necessary persons requesting that the parties appear in court or consent to the petitioner's request to be named administrator. At the return date of the citation, the petitioner is suddenly confronted with an adversarial sibling or step-parent who may have priority or equal priority to obtain letters.

This unexpected challenge may lead petitioner to bring in counsel armed with damaging information and exacerbate the conflict and therefore make settlement even less likely. This strategy oftentimes creates an undesirable situation for the beneficiaries of the estate who must finance the legal battle. As bad as this is in substantial matters, it can be the death knell to more modest estates or trusts. Mediation, if successful, brings about a prompt and mutually agreed-upon settlement, resulting in reduced legal fees. Furthermore, the mediator can go beyond the matters formally before the Court and help the parties to resolve personal issues that would otherwise stand in the way of a settlement. This is an option not available to the Court, which can only deal with the matters formally before it.

The following is an example of a common controversy, an iteration of which is frequently seen in Surrogate's Court, whether it be in the context of a probate, administration or accounting proceeding.

A sibling vs. sibling estate dispute creates the perfect storm. In one instance, such a dispute arose in a jurisdiction which recommended mediation in some of the more difficult estate proceedings. The issues were multifaceted, but all emanated from a sibling relationship gone awry decades earlier. The decedent had named his son as sole executor and left his son the profitable family business. The daughter was left a less profitable investment business. The daughter felt slighted and the son behaved as though the estate's coffers were available for his personal endeavors without having to account to anyone. The daughter brought a proceeding to remove her brother as executor. In the midst of the removal proceeding, the brother resigned as executor and a neutral third party administrator, c.t.a. was appointed. Resolved? Not really. The son stymied the distribution of the estate by bringing various claims against his sister to punish her for disgracing him before the community when she exposed his less than fiduciary behavior over a period of ten years. He also prevented disclosure of necessary business records and disparaged his sister so that her investment business suffered and her life was all but taken up by the strife. Further proceedings ensued: depositions of accountants of the decedent's businesses, expert witness testimony regarding suspect accounting procedures, and the prosecution of forgery allegations which required the retention of handwriting experts.

The mediator, a local and well-revered attorney and former judge, caucused the matter, met with each party individually and allowed the parties to voice their feelings, particularly about the past, and their disappointment with their attorneys and the concomitant waste of legal fees. The mediator permitted the parties to "present their cases" to him and to each other. Over the span of three sessions the mediator heard their stories and complaints concerning the length of the court proceedings, which at that point was well over three years. The intensity of the siblings' emotions did not dissipate and the parties did not transform into loving siblings, but they were able to gain their voices and be heard, if not by the other, at least by the mediator. The siblings settled their case for much less than it would have cost either of them to pay his or her attorney to proceed to a final accounting.

By Leona Beane, Esq.
Private Practice

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One of the first significant uses of ADR in this country was George Washington's will, which provided that if there were any disputes relating to his will, the dispute would be resolved by arbitration with three arbitrators. Now, I am sure we all agree that George Washington was a very wise man.

Currently, arbitration of a will dispute may still be useful in certain instances, but I believe that most trusts and estates attorneys would prefer mediation rather than arbitration. In mediation, the parties maintain control over the process and outcome.

Both arbitration and mediation have many uses in resolving trusts and estate disputes. One key benefit of utilizing either method is that the proceeding is private, which may be important to the parties. They can avoid the need for allegations and counter-allegations to be set

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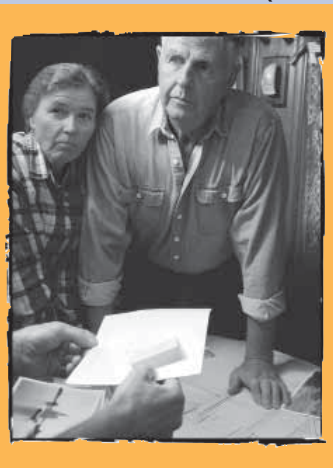

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