THE SPOTLIGHT

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WEALTH PLANNING, ADMINISTRATION, AND DISPUTES GROUP

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THE ALTERNATIVE DISPUTE RESOLUTION ISSUE

ROBINS KAPLAN LLP®

REWRITING THE ODDS

WELCOME TO THE SPOTLIGHT

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The Spotlight is the result of ongoing collaboration between our national trial practice and estate planning groups, with the goal of providing a forum to discuss the latest news and other issues impacting the trusts and estates community. Whether you are a trustee, beneficiary, trust officer, attorney, financial advisor, or other professional in this area, we hope that you will find this newsletter interesting, informative, and perhaps at times even a bit entertaining.

As leaders and teachers in the field of wealth planning and administration, our attorneys have built a reputation for excellence in meeting the needs of individuals and organizations from basic to complex testamentary planning. We counsel individuals and business owners in all aspects of estate planning and business succession, providing them with peace of mind and reassurance that their legacy is in the best of hands.

Furthermore, should a conflict arise, our wealth disputes attorneys are well positioned to resolve the matter with thoughtfulness, creativity, and compassion. Our national reputation for litigation excellence includes wins in the fiduciary arena for trustees and fiduciaries, personal representatives, beneficiaries, guardians, and conservators. Whether litigating fiduciary matters, inheritance issues, or contested charitable donations, we help clients cut through confusion to find a path to resolution.

– Denise S. Rahne and Steve A. Brand

To learn more about our wealth planning, administration, and disputes attorneys and the services we provide, contact one of our experienced partners:

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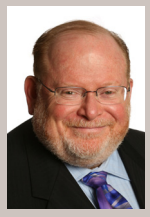

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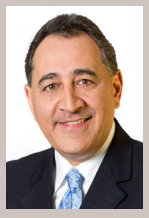

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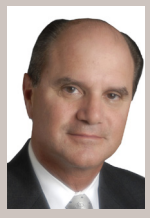

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INSIDE THIS ISSUE

THOUGHTS ON MEDIATION FROM TWO EXPERIENCED T&E LITIGATORS WHO HAVE SEEN A FEW THINGS

BY DENISE S. RAHNE

Recently, *The Spotlight* was fortunate to spend time with two respected T&E litigators on the topic of mediation. Larry Farese, a partner in Robins Kaplan LLP's Naples, Florida, office, and Rod Mason of Mason & Helmers in St. Paul, Minnesota, collectively have more than 80 years of legal experience. Both have extensive experience as advocates of mediation in conflict resolution. Recently, Farese has begun applying his experience and wisdom by serving as a mediator himself, and Mason intends to do so in the near future.

RAHNE: ARE T&E DISPUTES DIFFERENT FROM OTHER DISPUTES WITH REGARD TO THE ROLE OF MEDIATION?

Farese: Unlike business litigation, T&E disputes often have emotional obstacles that must be overcome before the parties can think rationally about resolution. In this respect, they are similar to family law matters.

Mason: I agree—and like family law matters, these cases have motivations that are not present in all types of disputes. Besides financial or monetary aspects, parties are also motivated in varying degrees by love and hate, the desire for control vs. autonomy, and the desire to settle old scores on grievances that can go back many decades.

Farese: Yes, and this makes it hard for the parties involved to resolve the conflict on their own, making mediation before a neutral and compassionate mediator an extremely valuable and effective tool in achieving resolution.

Mason: If you can get them past thinking that someone—my sibling, by stepparent, etc.—is "getting away with something!" Unfortunately, the focus is often on perceptions about what a sibling or other relative will gain from the dispute.

RAHNE: WHAT ARE UNIQUE CHALLENGES WITH T&E DISPUTES FOR WHICH A MEDIATOR NEEDS TO BE PREPARED?

Mason: Identifying underlying motivations and then attempting to bring each of the parties back to the practicalities of what will likely happen in court. The emotional and psychological overtones frequently overtake rational considerations, and the mediator needs to recognize and deal with that effectively.

Farese: And because of that emotional dimension, these parties need to tell their story, and the mediator must be patient and listen so that the person can get it off his or her chest. The mediator will not persuade the parties that they are wrong in their perceptions, and it is pointless to try. The mediator must understand and accept how the parties feel and then move them away from emotions and toward a business resolution.

RAHNE: WHAT HAS INFLUENCED YOUR MOST FRUSTRATING MEDIATIONS, AND WHAT MADE THAT THE CASE?

Farese: Greed and stubborn insistence on "winning." No one "wins" the argument at mediation, and no one gets everything they wish for or think they deserve. Generally, personal attacks and lack of flexibility are also frustrating and can lead to an early impasse.

Mason: It's true that some parties are more interested in the fight than the result, and that's frustrating and can doom a mediation. Division of tangible personal property also presents real problems. Sentimental attachments and personal memories are not always neatly divisible, and contention easily arises and overtakes the potential for a rational process.

RAHNE: WHAT ARE THE INGREDIENTS FOR A SUCCESSFUL MEDIATION IN T&E DISPUTES?

Mason: Knowing and adapting to the right approach, given the particular situation. Some parties respond to authority and others rebel. These issues are something that I discuss ahead of time with opposing counsel, and it is a factor in selection of a mediator.

Farese: Three keys: (1) lawyers who understand the issues and the litigation and trial risks; (2) getting over the emotional hurdles we've discussed so the parties can assess their situation rationally and realistically; (3) the parties must give something and get something in the mediation agreement so that the result is not one-sided. As one of my favorite mediators likes to say, "A good settlement is one in which both sides walk away mutually unhappy."

Mason: Also on the attorneys, it is essential for each attorney to send the mediator a frank, confidential assessment of the boundaries of the dispute along with a description of optimum outcomes.

RAHNE: WHAT ARE YOUR THOUGHTS ON TIMING FOR MEDIATION WITHIN THE CASE?

Farese: In my mind, it is never too early to try mediation. Even pre-suit mediation is worth a try. Unlike red wine, a lawsuit does not get better with age. If the parties wait until discovery is complete, they may be too financially invested to give up on anything. On the other hand, human nature being what it is, sometimes parties have to engage in some "litigation therapy" (i.e., paying several monthly bills to their favorite litigator) before they are ready to put an end to the battle. So the lawyer needs to judge when the time is right for their client on a case by case basis.

Mason: What Larry says is right. There is no one-size-fits-all approach. If large expenses have been incurred all around, that can make resolution far less likely. On the other hand, parties should not be expected to decide in a vacuum.

A final thought from our interviewees: "Estate litigation is like back surgery: expensive, painful, and uncertain in outcome. A successful mediation can reduce all of those issues." Quote by Mr. Rod Mason, endorsed by Mr. Larry Farese. Thanks to both of these wise and experienced litigators!

MAPPING YOUR PATH TO JUSTICE: ALTERNATIVES TO TRADITIONAL MEDIATION

BY REBECCA M. VACCARIELLO AND PETER N. FOUNDAS

Many clients, and even many attorneys, are unfamiliar with all the options litigators have at their disposal to aid with case resolution. Collaborative models of resolving disputes, as well as abbreviated alternatives to the traditional litigation process, have greatly evolved in the last 20 years. While this article focuses on options for civil litigation, collaborative models for criminal sentencing have been adapted from tribal customs in multiple states for non-violent crimes, with Minnesota being the first state to conduct a pilot program in 1996.

While there may be many reasons—including complex legal issues, ingrained factual disputes, or difficult personalities—that can make traditional mediation seem unlikely to succeed, practitioners should prepare to advise clients about other potential options for dispute resolution, some of which are detailed below.

ARBITRATION

Arbitration is likely the first alternative to traditional mediation that comes to many people's minds, and this avenue is often a requirement set forth in contracts. Parties considering the arbitration avenue can choose from voluntary binding and non-binding options, but should simultaneously weigh those options' limitations and pitfalls. For example, binding arbitration raises due-process concerns, since few paths of appeal exist when an arbitrator fails to follow evidentiary rules or misapplies the law. In addition, arbitration is not always cheaper or faster, especially if extensive discovery is required or permitted.

On the plus side, arbitration can benefit both parties by giving them the answer to an issue upon which they fundamentally disagree, without running through the entire litigation process. Even under non-binding arbitration, the losing side may agree to abide by an award, because the process confirmed that a trial would likely result in the same determination. Yet, while arbitration sometimes resolves cases faster and more cost-effectively for the parties, practitioners should ensure they select a well-qualified arbitrator and move forward only after reviewing all limitations of the arbitration process with the client.

EXPEDITED AND ABBREVIATED TRIAL OPTIONS

Some states' statutory procedures allow for expedited and abbreviated trial options. In New York, a statutory summary jury trial procedure provides parties with an abbreviated one-day jury trial with relaxed rules of evidence, similar to arbitration. Under this procedure, parties may not move for a directed verdict, may not move to set aside the verdict, and may not appeal. In Florida, voluntary trial resolution is similar to arbitration, but the statute requires the trier of fact to be a Florida Bar member and permits an appeal on broader grounds than in an arbitration.

In any state and in almost any civil case, the parties can stipulate, and the court can enter an order, to permit a summary trial procedure. The parties can agree to the terms, including the amount of discovery to be conducted and the appeal options.

PRE-SUIT MEDIATION / EARLY NEUTRAL EVALUATION

For cases with monetary values lower than the cost of litigating the case to trial, pre-suit mediation can be a good option to keep the attorney's fees in check and from getting in the way of a resolution. Many mediators report that this option is not utilized to the extent that it could be. For smaller cases where both sides recognize the cost-benefit analysis of forgoing litigation, this voluntary option can quickly and efficiently bring the matter to a close with the assistance of a neutral party.

Parties can also pursue an early neutral evaluation process after a case commences but prior to the start of discovery. This option is included in Minnesota Rules of Practice for parties to consider and can be pursued in any state. The process involves a neutral party assessing each side's case, with the goal of facilitating settlement.

UNDERSTAND YOUR ALTERNATIVES TO MAP YOUR PATH

Various alternatives can aid clients who are convinced that neither litigation nor traditional mediation makes sense for their situation. Many clients, for multiple reasons not necessarily related to their financial means, are adverse to the thought of going through a trial. The length, uncertainty, and stress of the traditional litigation process can deter some clients from choosing litigation, and traditional mediation may not always be a feasible option, or the best option, given the nature of the dispute and the parties involved. Experienced litigators should counsel clients on all the options available to them for their particular situation, and in some cases, those options may even preclude the need for litigation.

ALTERNATIVE DISPUTE RESOLUTION CLAUSES IN ESTATE PLANNING DOCUMENTS

BY MATTHEW FRERICHS

Although the applicability of the mandatory mediation rules to probate and trust disputes in Minnesota is unclear, what about adding an alternative dispute resolution (ADR) clause in a testamentary document? Estate planning documents don't often include such provisions, likely due in part to questions regarding enforceability. That uncertainty notwithstanding, there may be instances where practitioners could, and should, consider including dispute resolution provisions in estate planning documents.

In general, ADR provisions in a will or trust are either an arbitration or a mediation clause. Although an ADR provision has multiple purposes and could cover many controversies, the provision would most likely relate to 1) the performance of the personal representative or trustee in the administration of an estate or trust; 2) the interpretation of a provision in a testamentary document; 3) conditioning a gift or devise on the devisee or beneficiary agreeing to resolve any disputes through ADR; 4) the validity of a will or trust; or 5) a "blanket" ADR provision covering any controversy related to the document. A cautionary note with respect to the latter two items: A provision mandating ADR for a claim that a will or trust is invalid, or the use of a "blanket" provision, could be considered tantamount to a penalty clause. Under Minnesota Statutes § 524.2-517 (2017), "a provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." If § 524.2-517 or a similar statute applies, the ADR clause would be unenforceable.

In addition to statutes related to no-contest clauses, some case law exists regarding the enforcement of ADR provisions in testamentary documents. Practitioners considering using an ADR provision must review the relevant law and then draft the provision broadly enough to further a client's objectives, but not so broadly it renders the provision unenforceable. Attempting to strike that balance, the American Arbitration Association has developed suggested arbitration provisions to include in testamentary documents.[1]

Assuming that an ADR clause can be effectively enforced, the advantages of including one in a will or trust are similar to any matter where litigation is a possibility. Commonly cited benefits of ADR include the following: ADR is often less expensive than traditional court proceedings; it is usually more streamlined; it is confidential, not public in court proceedings of most states; it usually results in a quicker final resolution; and, more broadly, ADR eases the load on an overly burdened court system. Conversely, ADR provisions in a will or trust have possible drawbacks: In the case of binding arbitration, there is limited or no ability to appeal a decision; a shortened timeline can mean less of a chance to discover relevant evidence; in some cases, the process can be expensive and proceed more slowly than hoped; and there always exists the possibility that a party may feel that the process was unfair—that there was no chance to argue the matter in open court and, where appropriate, in front of a jury. Enforceability aside, chances are that, in most cases, an ADR clause in a testamentary document would seem appealing to the testator/testatrix or settlor, but not so appealing to the devisee or beneficiary.

In light of the general move toward ADR in recent years, inclusion of ADR provisions in wills and trusts may gain more traction in the future. However, while this area of estate planning law is developing, practitioners might hesitate to incorporate ADR clauses into documents until the law is more settled. But for clients wanting any disputes related to their estate plan resolved through ADR, attorneys searching for alternatives to a mediation or arbitration clause could recommend precatory language clearly stating the testator's/testatrix's/settlor's strong desire to resolve conflicts via ADR. While not binding on fiduciaries, beneficiaries, or devisees, this language may facilitate future dispute resolution by encouraging parties to resolve conflicts through ADR.

1. https://www.adr.org/sites/default/files/Wills%20and%20Trusts%20Arbitration%20Rules%20Jun%2001%2C%202009.pdf

MEET OUR ISSUE EDITOR:

MANLEEN SINGH

A member of Robins Kaplan LLP's Wealth Planning, Administration, and Disputes Group, Manleen Singh represents fiduciaries in a wide variety of wealth disputes, including claims for breaches of fiduciary duty, negligence, and accounting. Understanding that powerful emotions, such as love and deeply held grievances, may also be at play, Manleen represents her clients with compassion and thoughtfulness as she works collaboratively towards efficient dispute resolution. In addition to wealth disputes, Manleen also focuses her practice on business disputes and transactions, representing large and small companies in a variety of sectors involving litigation and business relationships. Her goal is to help her clients achieve their business goals, such as moving into a new space, creating a joint venture, or expanding market reach. Manleen can be reached at MSingh@RobinsKaplan.com.

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