

Using Mediation to Resolve a Will Contest (Maybe Even Before It Happens)

by Harriette M. Steinberg and Elizabeth P. Donlon

To get an idea of how much litigation is taking place in the Nassau County Surrogate's Court, one might take a look at the Court's monthly caseload activity reports. For the period August 2014 through July 2015, these reports reflect that Surrogate Edward W. McCarty III commenced 271 trials or hearings, with all but 33 cases being uncontested. The more telling statistic is that 119 pending disputes cases were reported as having been settled during that same 12-month time period.

Although it is clear from the compiled data that many, if not most, Surrogate's Court disputes are settled before trial, the statistics do not reveal *how* or *when* a pending case is settled. Practitioners know that a will contest almost always ends with the attorneys for the proponent and the objectant negotiating a compromise agreement, usually after years of extensive motion practice and discovery, and probably at the pre-trial conference on the eve of a trial. Sometimes a settlement is reached, simply because one or both sides have run out of money or "steam."

This article is intended to explain how litigators can use an alternative dispute resolution (ADR) process – mediation – in settling such a dispute. It also suggests that transactional counsel consider mediation as an estate planning tool in resolving a potential conflict before a will contest ensues.

Mediation Focuses on Interests, Not Positions

There's a common notion that the court attorney assigned to the case acts as a mediator during court conferences. So what is the benefit of seeking outside mediation to help settle a will contest?

Nassau County Surrogate's Court Chief Court Attorney Andrew L. Martin explains that, although conferences with a court attorney or law secretary share some characteristics of mediation, court personnel could never devote the same time and attention as a mediator in helping to resolve a dispute. Also, a court attorney's method is usually evaluative. As Mr. Martin explains:

“In the evaluative process, similar to the adjudicative process, the parties and their attorneys prepare and present a case, though typically much more informally, to a third party neutral. Unlike an arbitration proceeding,

however, the neutral does not render a binding decision determining the winner. Rather, the neutral will evaluate the strength and weaknesses in each party's case and may offer an assessment of the respective parties' likelihood of success at trial. This is most like the pretrial conference with a court attorney with which many Surrogate's Court practitioners are familiar...."

Unlike court attorneys, mediators in Surrogate's Court disputes are more likely to use a *facilitative* approach in the mediation process. In order to understand the legal dispute, the mediator will often ask the parties' attorneys to provide the pleadings and a confidential mediation statement in which they brief their positions.

But the focus in mediation is not on the legal arguments. Instead, the emphasis is on the parties' interests and how those interests can be integrated into an agreement that both sides can live with. As Mr. Martin puts it, "with the help and encouragement of the neutral, the resolution of the dispute is determined by the parties, not by a judge, jury, or arbitrator. There is no winner or loser. This is mediation."

Settling a Will Contest Through Mediation

Will contests often involve the subjective perspectives of the parties, which are sometimes distorted by such emotional underpinnings as anger, jealousy, frustration and sibling rivalry. When tested against the evidentiary standards of a formal court proceeding, these perspectives may get in the way of what is required to support the contestants' claims.

A recent Nassau County Surrogate's decision illustrates the dynamics of such a dispute. The decedent, a 69-year old attorney, excluded his two adult children of his first marriage and left his entire estate to his second wife and their then four-year-old daughter. The adult son and daughter raised the usual objections: improper execution, lack of testamentary capacity, undue influence, and fraud. The proponent moved for summary judgment, and was successful. The Court's decision is instructive as to the necessary evidentiary levels needed to defeat the proffered Will, and is equally instructive as to how both sides may very well have reached a better outcome – through the mediation process.

The bases for the objectants' claims, although real to them, were found to be insufficient as a matter of law to defeat the testator's estate plan. Undoubtedly, the decedent's adult children experienced strong emotional reactions to their father's decision to eliminate them from sharing in his estate. While it could be said that engaging in litigation "legitimized" the children's perspectives by allowing them to proceed for a time as

objectants in a will contest, their legal arguments and their case failed, along with whatever possibility there may have been for a relationship between the decedent's "first family" and his "second family."

It is far more sensible to use a mediation process in such situations. Rather than promoting distorted realities, as litigation sometimes does, mediation allows the parties to express their feelings, and often assists the parties in understanding the other side's point of view. This aspect of conflict resolution is a unique feature of mediation. The experience of sharing one's perspective and "feeling heard" can often help people bring closure and move toward settlement. The process also allows parties' real interests to be identified and channeled constructively toward resolution of their conflict. In short, the participants in the mediation process have an opportunity to "speak their piece" and, maybe for the first time in many years, to hear and to listen to what the other side has to say.

In a Surrogate's Court dispute, where the emotional components regularly surpass the financial aspects of the case, mediation is particularly appropriate. Aside from the chance to resolve a dispute before the parties exhaust their resources and their mental health, the mediation process provides for an added dimension: it gives the *parties* an opportunity to express themselves in a neutral setting.

Although the mediator is not a judge and the mediation session does not take place in a courtroom, sometimes the parties feel that mediation gives them what is akin to their "day in court." This opportunity also extends to counsel for the parties, who have a unique opportunity to present their case directly to the "other side." Through the mediation process, the participants may even learn that, when all is said and done, they have similar interests and objectives or, at the very least, that there's room for further discussion.

Creative resolutions cannot be obtained when the parties and their attorneys are strictly in "litigation mode." Although, stripped of its emotional underpinnings, the conflict in many Will contests *is* about the money, resolution of the dispute need not be just about a "redistribution" of the decedent's estate. Rather than starting the discussion with estimates of the costs of continued litigation or of the likelihood of success at trial, mediation offers a forum for the parties and their counsel to have an opportunity to formulate their own resolution of the conflict. A mediated settlement can take a myriad of forms – from an actual division of assets to the creation of future interests, and may include non-pecuniary considerations, which may be of significant value to the parties.

Mediation During the Planning Process

The facts of the *Sanger* case also suggest an important overlooked opportunity. As noted in the Court's decision, a draft of the Will was inadvertently sent to the decedent's son who, in response, wrote a letter to his father in which he expressed his concern that the documents did not actually reflect his father's wishes. In addition, the decedent's wife had admitted in her deposition that she had not agreed with her husband's decision to exclude his adult children.

Had someone raised the possibility of mediation to deal with what was sure to escalate into a post-mortem legal conflict during the estate planning process, the parties may have had an opportunity to address the adult children's interests and the testator's concerns for the financial security of his spouse and young child without incurring the cost of permanent familial discord, which undoubtedly was the ultimate price paid by the parties in this case.

In *Sanger*, the disclosure of the testator's testamentary plans – although unintentional – could have been used as the linchpin for conflict resolution. Indeed, the Court itself entertained this idea: "If the decedent, arguendo, felt at all pressured to take Stacie and Warren Jr. out of his estate planning, this entreaty from his son a few months post-execution would afford the perfect opportunity for reflection and change."

Certainly, the testator would have wanted to spare his second family the financial and emotional burdens of litigation. Addressing the conflict by using a professional trained in this area could have provided the testator with the tools to create such an opportunity for his entire family. This approach may be new for estate planning counsel, but it is one that should not be overlooked.

Mediating Disputes: Do It Early and Often

Mediation represents a growing legal and social change that should be embraced by attorneys to serve their client's interests. As this article demonstrates, using the mediation process to attempt to resolve a potential conflict before it "ripens" into a will contest or, at least, early on in a post-mortem legal dispute, is far better than enduring what may be years of litigation only to eventually settle anyway.

The Nassau County Bar Association has a low-cost mediation program with qualified mediators with subject matter experience and expertise in various areas, including Surrogate's Court proceedings. For more information on how you can arrange for mediation of an estate-related conflict before it occurs or of a pending Surrogate's Court case (or other type of legal dispute), whether in Nassau County or elsewhere, please

contact the ADR Administrator Demi Tsioplelas at 516.747.4070 or at dtsiopelas@nassaubar.org.

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Nassau County Surrogate's Court's caseload activity reports for August 2014 through July 2015, courtesy of Chief Clerk Michael Murphy.

Calendar Clerk Kathy Moran reports that the vast majority are uncontested SCPA Article 17A guardianship hearings.

Although there's no space to enter them on the official OCA reporting form (USC 150), the Calendar Clerk also keeps tracks and reports to the Court on how many contested matters are settled.

Andrew L. Martin, "Mediating Disputes in the Surrogate's Court," Warren's Heaton, Legislative and Case Digest, June 2014.

Id.

In re Will of Sanger, 45 Misc.3d 246, 991, N.Y.S.2d 251.

The evidence indicates that the attorney-draftsman suggested that the son speak to his father directly, but there is no indication that the son did so. Instead, the situation festered for almost seven years.