

USE OF MEDIATION IN PROBATE AND TRUST DISPUTES

Mediation is particularly well suited for probate and trust disputes for several reasons.

First, mediation often results in the prevention of expensive litigation. An essential aspect of a well managed probate or trust is control of unnecessary costs.

Second, many probate and trust disputes are a result of emotion driven family dynamics. The grieving process often intensifies longstanding sibling rivalries and perceptions of unequal or unfair parental treatment. A well-facilitated mediation will allow those emotions to be aired in a controlled environment where civility is maintained and promoted, and the parties encouraged to look for business like resolutions to their differences regarding assets. Mediation is more likely than litigation to leave some familial relationship in place and allow for future reconciliation. Litigation often irrevocably damages familial relationships.

There is merit in the “talking therapy” first introduced by Sigmund Freud over 100 years ago. Sometimes the feelings of anger and frustration must be verbalized before the business matters involved can be rationally discussed.

Discussing the probable cost of litigating the disputes can be an effective motivation for the parties to set aside unresolved emotional disputes and focus on the proper management and distribution of the assets involved.

Third, the litigation generated by those emotion driven family dynamics many times are not limited to the beneficiaries or heirs in dispute. Trustees and personal representatives often become defendants and sometimes accused of showing favor to one group of beneficiaries or heirs. A well-facilitated mediation can help the beneficiaries or heirs identify the conflicts and clarify that they are really between the beneficiaries or the heirs, not with the trustee or personal representative. Mediation provides a dispute resolution process where the trustee or personal representative does not have to take a position regarding the dispute between the beneficiaries or heirs, which many times is the proper position for them to take, unless one of the beneficiaries or heirs has engaged in, or is engaging in, improper activity harmful to the trust or probate. A skilled mediator can assist the beneficiaries or heirs in understanding whether it is appropriate for the trustee or personal representative to take a position regarding the dispute in light of the facts of the dispute.

Fourth, mediation is based upon the concept of “client self-determination”. Mediation allows the persons in dispute to remain in control of the dispute, while litigation puts the attorneys and decision maker in control of the dispute. Often, persons who have lost a love one feel a significant loss of control and want to control what happens to the assets of the loved one. This need to control results in

emotional value being placed on parcels of real estate and items of personal property that is greater than the parcel or item's actual fair market value.

Particularly in probates, where distribution of personal property items can be a source of dispute between the heirs, a skilled mediator can sometimes get the parties to agree to use various approaches to the distribution of personal property, such as each heir gets to select one item of personal property beginning with the oldest (or youngest) heir and then each heir in succession according to age gets to select one item of personal property, with any remaining personal property after the first selection being subject to the same rotation. Or, a private auction conducted by the mediator where each heir is given X number of fake-bid-dollars to bid on items and, once the bid dollars are gone, the items are distributed by rotation. Or, each item is given a number and numbers selected from a hat by the heirs in rotation until all the items are distributed.

Sometimes the mediator can convince the heirs to explain to the other heirs, as they select or receive items of personal property, why that item is important to them or what memory of the loved one it evokes, thereby reminding the heirs they probably have much more in common than they have in dispute.

Those kinds of informal and possibly relationship restorative processes are not available in a courtroom.

When farmland is involved the question often arises as to whether the land should be sold or held as an income-producing asset. A skilled mediator can help the heirs or beneficiaries identify the needs of each individual and whether sale or rental is the best option for them. When there is no unanimity on the answer to the question, the mediator can facilitate a discussion of how those wanting to keep the farmland can purchase the interest of those not wanting to keep the farmland at a fair price for cash or on an amortized basis.

Fifth, mediation is confidential and private. Few families would prefer to air their differences in a public courtroom rather than in a private conference room.

SDCL 19-13A-4 creates an evidentiary privilege, just like an attorney client privilege, that prohibits any mediator or party in a mediation from later testifying in legal proceeding as to what was said in a mediation session. This allows the parties in dispute the freedom to express their feelings and opinions or suggest different ways to resolve a dispute. That is not available in litigation.