THE MEDIATION OF ESTATE AND TRUST DISPUTES
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Mediation is not "snake-charming"' or voodoo. Mediation … is not a séance. Mediation is not a spiritual awakening, although resolution favorably impacts the spirit. Mediation is not 'wimpy,' 'touchy-feely,' 'or for the weak of heart.' We do not sing songs at a mediation – although if it would result in a resolution, I would play my guitar and sing. Eric Galton.[1]

Estates and Trusts Family Agreements are Enforced in Maryland

The Maryland Court of Appeals has upheld an agreement by the interested persons of an estate to distribute non-trust assets differently than provided in the will. *Brewer v. Brewer,* 386 Md. 183, 872 A.2d 48 (2005). The *Brewer* court upheld such a redistribution agreement stating that "neither the personal representative nor the court has any authority to disapprove or veto (such an agreement)." If the agreement is to be implemented as part of an Orphans' Court proceeding, however, the agreement must be attached to an account or otherwise made part of the Orphans' Court records.

Orphans' Court Mediation Rules are Effective July 1, 2018

Although court-ordered mediation has been part of general circuit court litigation practice for many years (beginning with popular use in the family law setting), only recently has court-ordered mediation become part of the Maryland Orphans' Court practice. Md. Rules 17-601 through 17-605 were adopted April 9, 2018 and became effective July 1, 2018. See Md. Rule 17-601. [Copies of these new Rules are attached as Exhibit A hereto].

The new Rules anticipate that the various Orphans' Courts shall establish alternative dispute programs in accordance with the practice outlined in those Rules. Md. Rule 17-601(b).

The Rules permit parties to be ordered to attend up to two non-binding mediation sessions not exceeding in the aggregate four hours in length. Parties may opt out of fee-for-service mediation but must attend non-fee-for-service mediation. Md. Rule 17-602.

Any agreement reached in mediation must be reduced to writing and signed by each party. Additionally, in accordance with *Brewer*, any agreement altering distributions or the allocation of liabilities must be filed with the appropriate Orphans' Court. Md. Rule 17-602(e).

The new Rules establish criteria for court-appointed mediators that must be followed unless the parties otherwise agree: the mediator must be someone having completed at least forty hours of basic mediation training, someone who is "familiar with the rules, statutes, and procedures governing wills, the administration of estates, the authority of the Orphans' Courts and Registers

[1] Mr. Galton is a Texas lawyer, law professor and experienced mediator. This quotation is taken from Chapter II, "General Overview of Mediation," MEDIATION: A HANDBOOK FOR MARYLAND LAWYERS, (Md. State Bar Assoc., Inc. 1999).

of Wills, and the mediation program operated by the Orphans' Court," such person must also complete four hours of continuing training annually and meet other requirements. Md. Rule 17-603(a). The Orphans' Court may also designate "settlement conference presiders" who is a Maryland licensed attorney and an experienced judge or retired judge. Md. Rule 17-603(b).

Types/Styles of Mediation in General

The basic type of mediation is facilitative mediation: "Facilitative mediation is a negotiation of a dispute where a neutral third-party mediator controls the process but not the outcome and facilitates the party's communication about the disputed issues in order to reach a mutually beneficial result."[2]

There are, however, two other types/styles of mediation: an evaluative mediation and a transformative mediation. The evaluative mediation is conducted by a mediator who "is an expert in the field who, after hearing both sides of the dispute, evaluates the respective parties' likelihood of success in litigation." In other words, evaluative mediation is the reality testing of how the parties would do if the case went to trial. In practice, facilitative mediation usually involves the facilitative mediator giving opinions, at least separately to each party, of the realistic outcomes if the case would go to trial.[3]

The transformative mediation is quite different: in transformative mediation, the primary goal may not necessarily be to reach an agreement. "Proponents of this mediation model generally view the true goal of the process as communication … transformative mediation, which looks toward total reconciliation of the disputed parties in order to repair relationships, is thought to be effective in family situations while preserving relationships can be important."[4] Transformative mediation borders on group therapy and may be a fairly open-ended process.

Accordingly, facilitative mediation and/or evaluative mediation are the general approaches usually utilized to resolve fiduciary litigation disputes.

Prospects for Success in Estates and Trusts Mediation

Mediation, of course, has been an important, and successful, part of the family law practice for decades. Under the Maryland Rules, however, a circuit court may order that any action be referred to an alternative dispute resolution except for limited specified matters.[5] Court-ordered mediation has become a regular part of all circuit court litigation, including trust litigation that cannot by statute be brought in the orphans' courts. Recently the Maryland Rules have been changed to extend mediation to probate matters in the orphans' courts.[6]

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[2] Roselyn L. Friedman, BEYOND KUMBAYA: WHAT EVERY TRUST AND ESTATE LAWYER NEEDS TO KNOW ABOUT MEDIATION, the View from an Estate and Trust Mediator (2014 ACTEC Annual Meeting) at seme-2-rlf.
[3] Id at seme-3-rlf.
[4] Id. at seme-3-rlf.
[5] Md. Rule 17-201. Mediation is not to be used in protective order actions under the domestic violence proceedings. Also, specific rules apply to medical malpractice and child custody cases.
[6] Md. Rules 17-601 through 17-605 (2018).

One academic sees the popularity of mediation for resolving issues attendant to divorce as a product of the "no-fault" divorce legislation[7]:

> Divorce law also differs from traditional legal disputes in that it is forward rather than backward looking in nature. Traditional legal work involves developing the facts of a past event and arguing for results based on the application of legal rules to those facts. But the issues surrounding divorce – including property distributions, alimony, and child custody – have become more exclusively forward looking in nature. Rather than being focused on what happened in the past, divorce law requires a judge to consider what solutions would work well in the future. The prospective nature of the law in this area conforms naturally with the ethos underlying mediation which assumes "(1) that all parties can't benefit through a creative solution to which each agrees; and (2) that each situation is unique and therefore not to be governed by any general principle except to the extent that parties accept it."[8]

By its nature, the no-fault divorce statutes divert the argument from focusing on fault or cause of the marital breakup to moving forward with crafting an equitable financial settlement and custody arrangement largely untethered from any issue of fault. For this reason, mediation is quite successful as an alternative method of settling family law issues. It encourages the parties to craft a solution rather than to roll the dice in a court proceeding where there will not be the bright line of causation tipping the scale.[9]

Some probate disputes may arguably be similar to the no-fault divorce pattern in that the past event is not determinative of the outcome. Thus, such issues as to the fairness or reasonableness of commissions or attorney's fees could be analogized to that of a no-fault divorce given that the right to some commissions/fees are by statute and the argument generally revolves around the amount. Most estate and trust issues, however, generally involve backward-looking to the execution of a will or to the retitling of property that is inextricably connected with fault. Will contests involve whether undue influence has been imposed upon the testator/trix, whether the testator/trix is legally incompetent or whether fraud was perpetrated on him/her. These are events requiring the tribunal to determine the facts surrounding execution of a document and applying legal rules to those facts: will disputes are distinctly legal in nature. Judicial resolution of these disputes involves a backward-looking inquiry into which judges are thought to apply clearly established rules to a set of facts. If the judge misapplies these rules, the lawyer can appeal to a

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[7] Ray D. Madoff, LURKING IN THE SHADOW: THE UNSEEN HAND OF DOCTRINE IN DISPUTE RESOLUTION, 76 So.Cal.L.R., 161 at fn. 42: "In 1969, California became the first state to eliminate fault-based grounds for divorce … by 1985 – only 16 years after California's pioneering divorce legislation – not a single American jurisdiction retained the pure fault-based system of divorce." (quoting another source).

[8] Id. at 175. Internal cites omitted.

[9] None of this is to say, of course, that the emotions arising from the events causing the marital dissolution is any way lessened. Proponents of mediation, however, argue that the process of mediation deals with the emotional dimension by permitting the airing of grievances that may have a therapeutic effect.

higher court. This is similar to many other areas of the law but is unlike divorce law which is generally perceived by lawyers to be a system in which judges apply standards, but not rules, to reach results which try to be fair, but are not necessarily right. This difference is conceived of by some lawyers involved in both divorce and will disputes not just as a qualitative difference in law, but as a distinction between legal and non-legal disputes.[10] Given this pivotal distinction between the nature of divorce under the no-fault rules and will contests, mediation to be effective in probate matters will necessarily need to involve mediators well-versed in the substantive law of wills and trusts who will take an active role in evaluating and expressing opinions as to the strength of the various parties' positions.[11]

The "Mind-Set" Issue

It is embedded in the DNA of trial lawyers that he/she owes the client zealous advocacy. What that exactly means, however, has changed over time. Canon Fifteen of the ABA Canons of Professional and Judicial Ethics (1908) described this duty as one of "warm zeal":

> The lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense.[12]

This Canon applied to the lawyer's behavior in all settings.

The ABA Model Rules of Professional Conduct, on the other hand, apply a context-sensitive variable when applying ethical standards that is more tailored to the various roles that a lawyer plays:

> In the 1970s, critics charged that the lawyer's ethical duties rested far too heavily on the concept of the lawyer as zealous advocate, bound to do anything lawful to achieve client objectives whatever

[10] Id. at 180. This distinction causes Professor Moody to conclude that it is possible to make the law governing wills to be more conducive to private resolution of disputes by diminishing the role of settlor intent, reducing the moral tone of the inquiry, and reducing the moral tone of the inquiry similar to that of the no-fault divorce. Given the importance of testator/settlor intent under the law of wills and trusts, this dog will not hunt.

[11] It is not universally held that evaluative mediation should be the "default" type of mediation for estates and trusts matters. See Friedman at III ("Why is facilitative mediation particularly well suited to trust and estate disputes?"), at seme-4-rlf (2014). This is a matter of degree. In truth, most facilitative mediation includes some evaluative conduct by the mediator and most evaluative mediation similarly involves facilitative work by the mediator. At base, however, evaluative mediation ought to be the starting point for estate and trusts disputes.

[12] *Von Moltke v. Gillies,* 332 U.S. 708, fn. 9 (1948) (Justice Hugo Black in a divided court remanding a conviction under the espionage act for an evidentiary proceeding below to determine whether a guilty plea entered under the act should be vacated because of an unknowledgeable waiver of counsel).

> the consequences for others. Insofar as the Model Rules responded to such criticism, it did so not by abandoning role ethics in favor of "ordinary morality" as some critics proposed, but by distinguishing between the roles lawyers play. There are now Model Rules focusing on the lawyer as advisor, evaluator, third-party neutral, and negotiator as well as advocate. Even within the advocate's domain, the Rules distinguish between advocacy in civil and criminal litigation, ordinary and ex parte judicial proceedings, and legislative and adjudicative proceedings. By contrast, although some Canons were litigation specific, none focused on a non-litigation role.[13]

Accordingly, the new Model Rules spell out that a lawyer has various different obligations depending on the function that lawyer is performing:

> As a representative of clients, an attorney performs various functions. As advisor, an attorney provides a client with an informed understand of the client's legal rights and obligations and explains their practical implications. As advocate, an attorney zealously asserts the client's position under the rules of the adversary system. As negotiator, an attorney seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As evaluator, an attorney acts by examining a client's legal affairs and reporting about them to the client or to others.[14]

When approaching mediation of an estates and trusts issue, the lawyer performs two separate functions: as advocate and as negotiator. Mediation, of course, is a consensual problem resolution process. Litigation, on the other hand, is a non-consensual process with the end result being one party winning and the other party losing.

Purists argue that litigators assisting clients in mediation corrupt the process by pushing the process from one originally meant to resolve disputes separate from the courts including separate from the evaluative function of the courts, to "the functional equivalent of a private judicial settlement conference."[15] One product of this supposed corruption of the process is for lawyers to choose mediators knowledgeable about the subject matter of the dispute rather than merely one well-versed in the process of mediation itself:

> A second dimension of mediation's evolution toward the zone of arbitration practice is the growing custom of mediator evaluation, a practice in which the mediator offers some type of opinion about the case. One scholar has explicitly labeled this practice "an arbitration substitute." Mediator evaluation operates on a continuum that includes a wide range of mediator opinions such as case analysis

[13] Ted Schneyer, "How Things Have Changed: Contrasting the Regularity Environments of the Canons and the Model Rules," 2008 Prof.Law. 161, 177 (2008).
[14] Md. Rule 19-301.1 preamble: An Attorney's Responsibilities at 2.
[15] Jacqueline Nolan-Haley, "Mediation: The 'New Arbitration,'" 17 Harv.Negot.L.Rev. 61 (2012).

> with assessment of strengths and weaknesses, predictions about likely court results, and recommendation of specific proposals or options for settlement. In some respects, evaluative mediation becomes an almost inevitable phenomenon when lawyers act as mediators, even when they are trained in a facilitative model. According to Kovach and Love, lawyers "revert to their default adversarial mode, analyzing the legal merits of the case in order to move towards settlement."
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> As more lawyers become involved in representing parties in mediation, they influence the mediator selection process and have a tendency to gravitate toward evaluative mediators, particularly in court-connected programs. This is not an unexpected development given the empirical findings that cases are more likely to settle when mediators offer their views regarding the merits of a case. But evaluative mediation is, in effect, a watered down version of adjudication. Lawyers know this and prepare accordingly. A leading mediation advocacy text advises lawyers: "If you know in advance that your mediator will evaluate, you should develop a plan for securing a favorable evaluation. The most likely scenario is that the lawyers' plans will include the usual strategic tactics associated with adjudication such as holding back information, appearing inflexible, or presenting positional arguments intended to influence the mediator.[16]

Although meant as a scathing rebuke of the corruption of "pure" mediation, it actually is a reasonably good description of the process.

Mediation is, of course, a negotiation. As such, it must work towards satisfying to some degree the needs of all parties. But, and this is an important quote but, it is a negotiation conducted against the backdrop of litigation risk. What motivates the parties in this negotiation is the downside cost of not settling the matter.

This is not just a financial calculus but may involve continuing harm to family ties which may be a consideration separate from the financial aspects. Indeed, estates and trusts litigation often involves deep emotions because of the family relationships involved.

The Lawyer's Role

Communicating the strengths of the client's legal position and the weakness of the opponent is one role of the lawyer in mediation. This generally means that some discovery would be needed before mediation is likely to be successful. It also means that if the case does not settle at mediation, one must be careful not to give the other party too much of a tactical insight into how

[16] Id. at 83-4. As noted above, Orphans' Court approved mediators are supposed to be trained in general mediation technique and have subject matter expertise.

you might be trying the case. This involves a balancing act: trying to be candid on the one hand, yet holding back information on the other hand, in the event the matter may go to trial.

Often, mediators will permit each lawyer to present a truncated "opening statement" in a plenary session. Its purpose is two-fold: (1) to set a framework for the mediator to reach a favorable evaluation, and (2) to present to the other litigants, unfiltered through their counsel, the strengths of your client's case.

Establishing one's position on the relative litigation risks, however, is only the beginning step in the lawyer's role at mediation. Once the lawyer establishes the strengths of the legal case, the lawyer needs to work to facilitate an agreed upon resolution. Especially with some clients, the lawyer must explain why he/she will pivot from that of an advocate to a negotiator at this stage of the proceedings and what the client should expect at mediation. [A copy of The American Bar Association, Section of Dispute Resolution, pamphlet "Preparing for Complex Civil Mediation" (2012) is attached as Exhibit B hereto. This document was developed as a guide to distribute to clients to assist them in understanding the mediation process, but may also serve as a useful primer for lawyers.]