

# Retribution or Resolution: Wherefore Art Thou in Probate Mediation?

By Hon. John H. Sugiyama (Ret.)

Those embroiled in probate litigation should be asked two questions before any mediation: What do you want? What do you really want? Although these inquiries seem obvious, people may have myriad unexpressed concerns. Inequity evident in an estate plan may be objectively described. Anguish caused by such inequitable treatment may be less easily explained.

Perceptions of mistreatment may lead people to pursue probate litigation more for emotional than monetary relief. As attorneys will attest, clients often express variations of two pointed sentiments: “Mom and Dad liked brother more. Now that they’re gone, I want to get even.” Thus, if they have not ascertained what their clients truly hope to accomplish and have not guided them to a realistic understanding of what may be reasonably achieved, attorneys may find mediations to be daunting exercises in futility.

The management of expectations is especially critical because probate litigation, based on in *rem* jurisprudence, has many singular elements. The subject of a proceeding, the *res*, is often an estate or a trust. Claims about the *res*

may be alleged in a single or in multiple petitions. All petitions need not be decided together in one trial. The single final judgment rule does not constrain the discretion of the probate court.

Due to these procedural features, litigants, unable to resolve their disputes through mediation, may not obtain their desired relief through trial either. An unfavorable decision may be rendered. Or a decision may be deferred to a separate trial. If the latter, the costs associated with further trial preparation will mount.

Compounding these procedural complexities, the disposition of the wealth accumulated by “Mom and Dad” (identified collectively hereinafter as “decedent”) may have many facets. Some may relate to money in the form of financial accounts and real property holdings. Others may not readily be subject to monetary quantification, such as heirlooms and personal possessions. The nature of each facet will determine the kinds of issues to be addressed. Their resolution may rest on different facts and principles. They may be independently significant, not dependent upon sequential determination.



Of course, litigation involving the disposition of a decedent’s accumulated wealth can be detached somewhat from the emotional states of the litigants. A litigant may assert that decedent executed her estate plan while she lacked mental capacity or was subjected to undue influence. The litigant may further assert that decedent otherwise would have executed an estate plan that had different dispositive provisions.

These assertions require proof, with the evidence substantiating each having different weight depending upon circumstance. Decedent may have lacked the capacity to execute certain, but not all, estate-related documents. Influence, although exerted, may

not have unduly induced decedent to execute a different estate plan from what she otherwise intended. Depending upon the nature of the evidence pertaining to a lack of the “requisite” capacity or of “undue” influence, a challenged estate plan may or may not be invalidated.

By the time of mediation, the evidence relevant to these issues will likely have been discovered. But in view of the unique nature of any decedent’s capacity and susceptibility to influence, the weight to be accorded to the evidence will likely not have been determined with any certainty.

Despite evidentiary ambiguities, mediations involving these kinds of disputes can progress in linear fashion if emotions can be held sufficiently in abeyance for meaningful negotiations to occur. Before that may happen, however, attorneys must be attuned to helping their clients grasp that a favorable trial outcome cannot be promised and that closure on personally acceptable terms may be more beneficial, especially if emotional turmoil is mitigated as a result of settlement. Attorneys consequently must ensure that their clients comprehend the limitations of what can be achieved through either mediation or trial.

Probate mediations, however, can become infinitely more complex when the disposition of non-financial assets is also an issue. These situations may arise when the beneficiaries of an estate plan are a surviving spouse from

decedent’s most recent marriage and children of an earlier marriage, when the beneficiaries are children from multiple marriages or when the beneficiaries include decedent’s siblings.

Concerns may arise about the disposition of assets not specifically listed in an estate plan. Issues may involve the treatment of prized heirlooms, the disposition of family photographs or the preservation of digital records. Any disagreements over their distribution, however, need not be approached as a zero-sum game, with only winners and losers. Conflict need not be interpreted as the prelude to more aggressive plans of acquisition. Instead, processes can be developed for the equitable distribution of personal possessions that incorporate the oversight of a neutral party. The latter can ensure that all beneficiaries are treated fairly without interference by others.

Lastly, beneficiaries may have misgivings about the person designated by decedent to administer her estate plan. Again, the dispositive plan itself may not be in dispute. Rather, doubts could be held about the administrator’s ability to carry out decedent’s wishes fairly. The substitution of a professional fiduciary to manage the estate could perhaps be suggested as a mutually beneficial alternative to minimize rancor among the beneficiaries.

Whether conflict impedes settlement thus will depend upon how matters are presented. If revenge

has not been earlier acknowledged as a motivation and constitutes the manifested objective of litigation, settlement will fail. But if revenge has been addressed and supplanted by more realistically achievable litigation objectives, settlement will remain possible. The distraction of accusation-laden digressions will be avoided. Attention may be focused instead on meaningful discourse over competing proposals. Thy name may therefore be resolution, not retribution.

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