DON'T LET YOUR CLIENT'S BEQUEST BE A LAWSUIT

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Traditionally, estate planning lawyers have zealously guarded their clients' right to do as they please with their assets upon their death, while testators generally have been unwilling to discuss or have anyone question their testamentary choices. Increasingly, however, the idea that whatever happens after the testator's death is none of his or her concern is seen as outdated and potentially destructive. When heirs are kept ignorant of the contents of testamentary instruments until after the testator's death, the odds increase that there will be disputes or even litigation between the beneficiaries over any number of issues.

This article advocates bringing in a mediator or co-mediators at the beginning of the estate planning process to facilitate potentially difficult conversations between the testator and the beneficiaries, as well as among married testators and among the beneficiaries, to avoid later disputes. Such discussions, while potentially challenging, increase the likelihood of resolving actual or potential disputes while the relevant people are still alive, heading off the kinds of family-rending fights that probate litigators so often see.

Mediation has long proved to be an appropriate and effective process for resolving contested inheritance disputes *postmortem*. It's well known that a skillful mediator can provide a safe space for airing even long-standing grievances, can explore options not always available through litigation, and can help reach emotional and relational closure even where reconciliation might not be on the agenda. But why wait that long? Why spend the emotional and financial capital? Why risk a devastation — such as a permanent rupture of relationships — that could have been averted? As scary or challenging as having frank conversations about death, money, and family relationships can be for both testators and their counsel, it's better to have them before the testator's demise, when there is a chance of putting things right, rather than playing it safe and avoiding potentially difficult conversations with the result that testators end up bequeathing a lawsuit to their heirs.

At the heart of most contested inheritance disputes lies a failure of communication, and communication is exactly what a mediator is trained to facilitate. Skilled mediators can facilitate open and constructive discussions about seemingly taboo topics — including the testator's eventual passing, the distribution of property, who will be the executor or trustee, and distributions to spouses and children from second marriages. They can also help create collaborative working relationships and leverage the desire for family harmony into consensual agreements. By attending to the unique feelings, interests, histories, and values of individual family members, as well as spotting and addressing

dysfunctional relational conflicts within the family, mediators are in an optimal position to help both estate planners and testators clarify the actual interests, needs, and concerns of the parents and adult children, as well as unearth all relevant information, increasing the odds that everyone will be comfortable and satisfied with the estate plan that results. Given the profound role that family dynamics often plays in such conversations, it can be a huge advantage to hire co-mediators: one with experience in estate planning and probate litigation, the other with experience in psychology and family systems and dynamics. Doing so also frees the estate planning attorney from disabling concerns about who is the client and obligations to keep confidences. Mediators bring with them an umbrella of confidentiality that protects everyone and that the estate planning lawyer does not enjoy. This mediation confidentiality can be waived post planning if all agree.

There is no question that it is easier to discuss and harmonize the various family members' plans, agendas, hopes, desires, and fears *before* a dispute has exploded than it is to do so *after* conflict has arisen in the midst of the intense feelings that usually occur after the testator's death. Even if the final estate plan does not satisfy 100% of everyone's interests, the opportunity given to each family member to express themselves and to feel genuinely heard greatly reduces the odds of conflict after the testator's passing. On the other hand, when beneficiaries are excluded from the estate planning process — and later feel deceived or cheated by the will or trust — hurt, anger, and resentment are much more likely to arise, and litigation is much more likely to ensue. Almost every estate planning lawyer has felt the sinking feeling of best-laid plans exploding in the minefield of family dynamics. For an experienced mediator, however, such an impasse is a challenge and a welcome opportunity.

Even if conflict does not arise after the testator's death, the heirs are more likely to be satisfied with the results of the estate plan if they had a voice in its formation. In this regard, David Gage and John Gromala, in their seminal article, *Mediation in Estate Planning: A Strategy for Everyone's Benefit* (2012) 4 Marquette Elder's Advisor 23, share the following story: "Months after the aunt and uncle died, all the nieces and nephews received generous checks along with the completed relevant tax forms. Although they were happy to receive their windfall shares in the two estates, most of them reported having an empty feeling as well. The personal element, the 'contact,' was missing. They wished that they could have thanked their aunt and uncle in person, before they died. They explained that it would have been a very different and much 'richer' experience for them than simply receiving the check and tax forms in the mail months later." (*Id.* at p. 24.) This story illustrates what should be obvious but often is not: Adult children feel respected and even honored when their parents talk openly with them about family succession issues. Gage and Gromala conclude: "because the decisions that parents make about their estates affect their children so directly, it is very helpful for adult children to know what they might expect. Estate planning is often looked at as something that parents should do on their own, but it is really a family transition and one that affects children in many ways. [¶] . . . [¶] . . . Adult children appreciate being included, and that can go a long way toward assuaging hurt feelings." (*Id.* at p. 31.) And of course such open conversations, in addition to fostering respect and inclusion, also lower the odds of conflict and litigation among the beneficiaries after the parents have passed.

Up to this point, we've been talking in terms of a single testator. But often married couples create joint estate plans, and the spouses are not always on the same page. Sometimes what we call a "missing conversation" needs to take place between the two of them, which they have been unwilling or unable to have on their own and which the mediator can facilitate. Moreover, some couples may not feel comfortable sharing their true feelings and concerns with their joint estate planning lawyer. Private conversations put the lawyer in a conflict-of-interest situation, possibly obligating him or her to share the substance of that private conversation with the other spouse. Potential conflicts arise by definition whenever dealing with joint clients — a problem that disappears when the professional facilitating the conversation is a mediator.

It's important to note that estate-related conflicts are not solely about distribution of property. Other potential disputes that can be addressed and hopefully resolved include will contests, undue influence, lack of capacity, and the choice of executor or trustee. For example, old-fashioned attitudes may persuade the parents to leave management of the family business to the son. But what if no one asked the son if he was interested in taking on that obligation, and he *wasn't* interested?

Although usually not a goal of estate planning, mediation, reconciliation, and healing of long-fractured relationships are often an incidental result of these discussions. Mediators can help the parties to address

painful family issues that often have been festering (and avoided) for years, facilitating missing conversations among family members and potentially healing what often have been lifelong hurts. These conversations can be and often are challenging. But the price of ignoring or delaying them is usually not worth paying.

On a technical note, Probate Code section 21700 provides that a promise to insert certain provisions into a will or trust (or a promise not to) is enforceable where, among other circumstances, the promise is in writing. It therefore follows that any decisions made in the estate planning mediation can be incorporated into an agreement that should endure through changed circumstances. Of course, circumstances do change, and people do change their minds. In that event, it's time to call the mediator again.

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