

MEDIATION IN PROBATE LITIGATION MATTERS

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In probate litigation cases, as with other general litigation matters, most cases settle. The reasons for settlement in any given case are of course case specific but undoubtedly a common thread is the uncertainty of litigation and trial. In the New Hampshire Probate Courts, our court system encourages settlement through its mediation program. Indeed, Administrative Order 11 provides that probate court cases may be mediated by agreement of the parties or by order of the court.

What is Mediation?

Mediation is an informal process where parties seek to resolve their dispute by reaching a settlement agreement. At mediation, the parties meet in a private and confidential setting with a court-approved and/or trained mediator, whose job is to facilitate discussion among the parties in an attempt to reach a global resolution. A mediation can be held at any time during the litigation process (before any court pleading is filed, after a pleading is filed but before significant discovery is undertaken, or during or after discovery). The mediator does not provide any ruling or finding regarding the merits of the parties' claims or defenses. Instead, the mediator works with the parties and their counsel to encourage them to compromise their positions and agree to a settlement. It is a process that allows the parties to "take ownership" of their case without putting it into the hands of a probate court judge, who may not rule as the parties hope.

Should I Settle?

Whether settlement makes sense in a given case depends on many factors, but some issues that any party in a probate litigation matter should consider include the following:

Cost of Litigation

Litigation is expensive. Complicated will contest cases or challenges to trust documents can involve substantial discovery and may require extensive testimony from fact witnesses and from expert witnesses. Fees may include not only attorneys' fees but also expert witness fees, deposition stenographer

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charges, and other costs. As such, any party to a probate litigation matter must ask the basic question - - strictly from a financial perspective - - is it worth it? This economic cost benefit analysis is critical in determining whether settlement might be appropriate. If the amount at stake is \$75,000, does it make sense to spend over \$50,000 to get there?

Strength of Your Case

Your lawyer certainly should provide a legal analysis of the strength of your claim or defense and a competent lawyer will be able to provide some guidance as to the potential outcomes. However, litigation is an uncertain endeavor and no attorney should ever absolutely guarantee a projected outcome. There are simply too many variables in litigation. The probate court judge may have a very different impression of the witnesses than you do. Indeed, part of the judge's role (there are no jury trials in probate court) is to ascertain the credibility of witnesses. Although a litigant may want to get to the truth, that often does not and cannot happen at trial. Evidence may be conflicting, witnesses recollections may be conflicting, trust or will documents may be drafted ambiguously and, at times, judges simply get it wrong. In short, there is no certainty in litigation or at trial and there cannot be certainty in a trial outcome. Mediation provides an opportunity for the parties themselves to define with certainty the outcome of the case through an agreed-upon resolution. Although a settlement (which by definition requires all parties to compromise their positions) may not provide the complete result hoped for, it does provide the certainty that a trial cannot.

Emotional Toll of Litigation

As litigation goes, probate litigation is somewhat unique in that the quarreling parties are often family members. Protracted litigation can irrevocably destroy these familial relationships. The adversarial and hostile nature of litigation and trial will take an emotional toll. Although some parties feel the need to have their "story" heard at trial, more often than not, the pain and emotional turmoil of dealing with a loss of a loved one, or re-hashing old conflicts between family members, can be debilitating. There is a real value in bringing such emotional turmoil to an end and reaching some finality through a negotiated settlement agreement.

Our system of justice and the New Hampshire Probate Court system provides parties with the opportunity to have their disputes resolved by a judge, a third party neutral. However, it is an imperfect system. If you find yourself as a party to a probate litigation matter, mediation is a good alternative and may provide the best opportunity to resolve the case outside of the courtroom. Simply put, mediation works.

The Devine, Millimet & Branch Probate Litigation Practice Group offers this free periodic newsletter service to provide information regarding probate litigation news and other probate-related topics. Our Probate Litigation Practice Group has broad litigation experience, as well as expertise in areas of trusts, guardianships, and powers of attorney. If you have any questions about this e-mail, or if you know of others who may be interested in receiving this newsletter, please send us an e-mail at probate@devinemillimet.com.

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