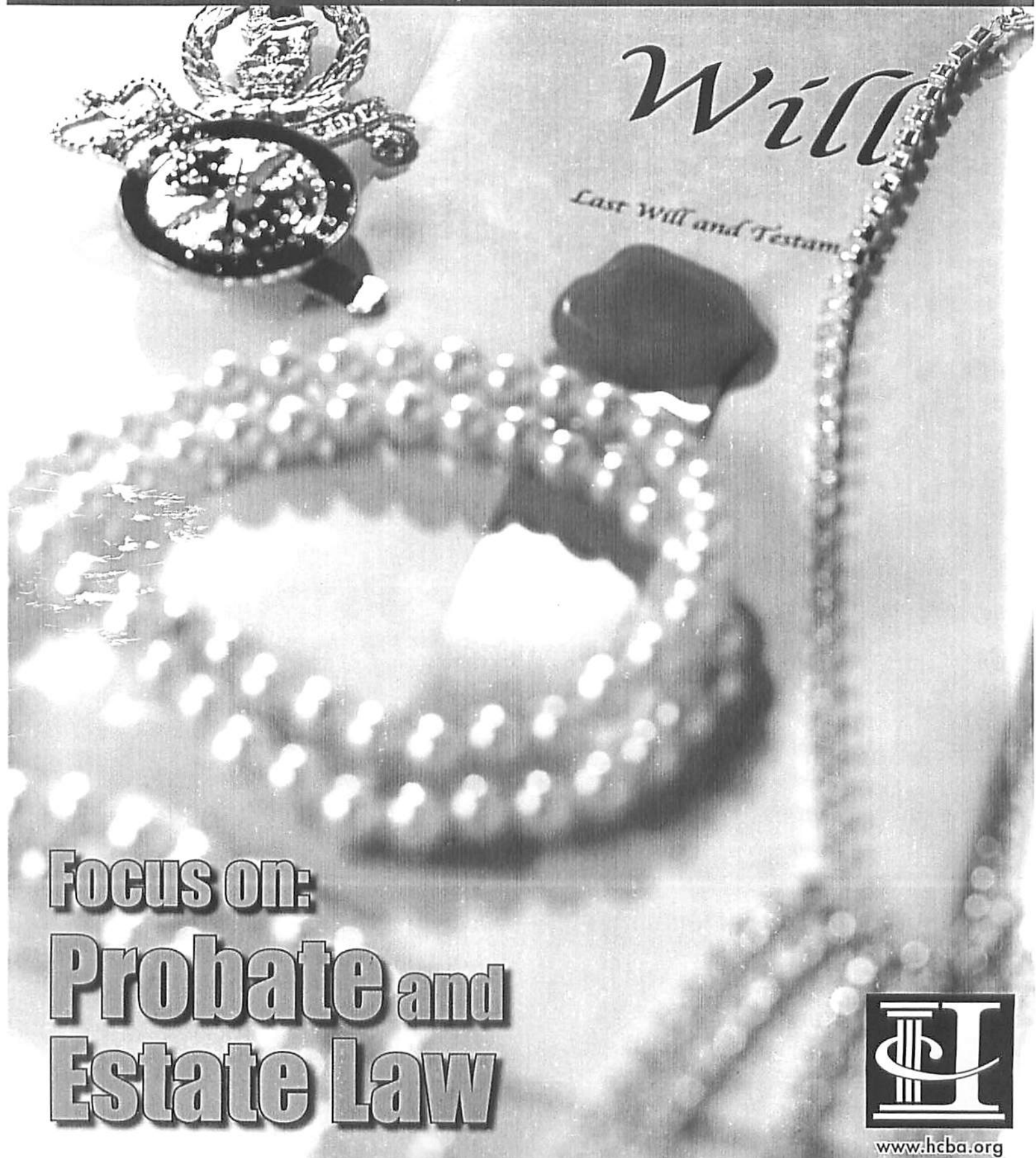
Hennepin LAWYER

Official Publication of the Hennepin County Bar Association • November 2008 • Volume 77 • Number 10



Focus on: Probate and Estate Law

www.hcba.org

Mediating Probate Disputes

In recent years, probate court disputes have increased in number and legal expense. Probate disputes can be factually intensive cases. They can involve numerous witnesses and multiple parties, and present several issues for determination. The amount of money at issue can often exceed the verdict sought in personal injury or commercial litigation proceedings. A contested will can take a week or more of the court's time. While mediation is not required by District Court Rules in probate matters, it should be considered by parties and encouraged by judges in larger cases.[1] This article provides an overview of probate mediation.

An Increase in Probate Litigation

There may be several reasons the number of contested probate cases has increased. Assets left by frugal post-depression era parents can be significant. They saved their money and saw their homes skyrocket in value. As a result, the estate "pie" is bigger and their children want full slices.

In addition, family dynamics have changed. Families are no longer as close as they used to be. Siblings move out of their neighborhoods, across town or even out of state. It is easier to fight with a family member they have not seen in years. Similarly, more people are willing to do battle with a deceased parent's surviving second spouse or second set of children.

Lastly, for too many people, an inheritance has become the cornerstone of their retirement plan. They need it, count on it, and will fight for it.

Probate Contests

While some contested probate matters can be heard and determined within an hour of the court's time, others require days of testimony. Parties seek to declare a will or trust void under a variety of theories including undue influence, lack of capacity, or a technical flaw in its execution. Other contests involve ambiguities in the will or trust, a dispute as to valuation of assets, or even whether an asset should be included in the estate. As most of these questions turn on the facts, summary judgment is rarely sought or granted.

The Mediation Process

By now, most attorneys are familiar with the mechanics of a mediation. Consequently, this will not be reviewed here in detail. However, most probate mediation participants expect the process to be completed in a day or less. As time is of the essence, this author favors short written submissions of party positions before the day of mediation, staggered arrival time for participants, the elimination of joint sessions/opening statements, segregation of parties, and breakout meetings with lawyers.[2] Many parties prefer not to interact with other participants.

Benefits of Probate Mediation

1. Early Resolution

Probate matters are now litigated like most other civil matters. There are pretrial conferences, scheduling orders, protracted discovery (usually followed by a request for additional time to complete discovery), expert witnesses, and numerous trial exhibits. While most probate court proceedings are jury free, they have still become bloated and time consuming.

For many participants, probate disputes are their first and only exposure to the legal system. They are not used to day-to-day contact with lawyers. They do not realize their case will be a part-time job assisting the lawyer in answering discovery or preparing for trial. Mediation offers an opportunity for an early resolution of an otherwise life-disrupting process.[3]

2. Avoids Expensive Trial

Probate litigation is as expensive as any other type of civil litigation.[4] A probate attorney who litigates infrequently may even surprise himself or herself with the

James Crist
Contributing Author

Mr. Crist is a partner with Steinhagen & Crist. He is a qualified neutral under Rule 114 of Minnesota General Rules of Practice and works primarily in the area of probate and trust litigation.

time spent preparing for trial and the fees that are generated. The cases are factually intensive and require significant client and witness preparation. Often, the cases require a thorough review of financial records and medical records. The clients, in such personal matters, can be high maintenance. One-day mediation, if successful, can avoid a hundred hours of trial and trial preparation.

3. Potential for Creative Solutions

Mediation opens the door to creative solutions not available to the court.[5] A will contest may result in an all-or-nothing determination by the court. A mediation can result in a division of assets without rigid adherence to the terms of the prevailing will or the laws of intestacy. Assets in dispute can be diverted to a charity favored by both litigants, or other family members not provided for in the will. Real estate can be divided in ways not previously contemplated by the parties. Tax issues may be considered. Mediation can craft clever resolutions participants will accept.

4. Family Harmony

For many families, trial is the point of no return. Fighting with your brother in court is different than fighting with your brother in the backyard or over the kitchen table. Trials often make a family disagreement a permanent dispute, in part because somebody wins and somebody loses. Somebody was right and somebody was wrong. Mediation allows litigants to privately save face, to pretend the dispute never happened, or to rationalize in their own minds that they won and the other guy lost. Mediations are by their nature agreements to disagree. They leave open the possibility of reconciliation and future family harmony.[6]

5. Privacy

Almost all probate proceedings are in open court. Mediation, if successful, can avoid a public record of family discord or embarrassment.

6. Benefits to Attorneys

Probate disputes are unique in that they often begin as routine probate proceedings. Then, sometimes without warning, an objection is filed and an estate administration turns into ugly estate litigation. Even if the probate attorney has the appetite for the litigation, it can be terribly disruptive to his or her practice. Mediation allows the probate attorney who typically does not litigate to participate in the resolution of a dispute on behalf of his or her client.

Even assuming the matter is not resolved before litigation, mediation provides value to the attorney. It is essentially free discovery. The trading of offers in mediation is usually accompanied by an opponent's rationale for why he or she is right and you are wrong. That rationale becomes more defined throughout the day and by the end of the day, both parties have essentially disclosed their theory of the case. The information obtained is generally superior to information contained in formal discovery responses. In addition, a participant's case theory undergoes an attack from the opposing counsel, and in most cases, a thoughtful and objective review by the mediator. Weaknesses exposed in mediation provide a valuable insight into trial preparation, even if the mediation is unsuccessful.

Special Benefits of Mediation to the Probate Court

A Hennepin County Probate Court judge or referee can hear 15 to 20 routine probate matters on a single day. A contested matter concerning a single family can take several days of the court's time. Some disputes go on for weeks or even months, as the court is forced to schedule prolonged trials around its routine, uncontested probate court proceedings. Mediation has the potential to save hours of court time as well as taxpayer money. Moreover, it sometimes seems like the judicial officer is not enjoying his or her job by day two of the contested probate case requiring protracted testimony over ownership or division of personal property. Perhaps a mediator could more efficiently assist the parties in dividing old tools, knick knacks, and jewelry. The court would still have plenty of other business.

What Is Important to Participants?

1. Being Heard

Most participants want to convince the mediator of the merits of their case. The discussion may expose frustration or hurt feelings. As probate matters are personal in nature, there can be crying and even fist pounding. Topics often include who (1) did more for a parent, (2) disappointed a parent, or (3) was loved more by a parent. While much of what was said would not be relevant at trial, such conversations (venting) can be critical to a participant's willingness to settle the dispute. If a participant feels as if he or she has been heard and understood, mediations can often be a satisfactory substitute for a party's "day in court."

2. Understanding the Weaknesses of Their Case

Participants may have to be convinced as to why they should compromise and settle. The same facts often suggest different conclusions. For example, the child cut out of the will may argue that the favored child spent hours unduly influencing the parent. The child favored in the will claims she was rewarded for hours she spent cleaning the parents' home, making them dinner, buying them groceries, or taking them to the doctor's office. An evaluative approach to mediation seems more likely to result in a resolution. A credible evaluation of a participant's case requires that the mediator have knowledge of the law, probate trial experience, and an understanding of how a judge will likely view the situation. There are almost always risks and the participants generally embrace compromise once they see their case is not perfect or there are other compelling reasons to settle.

3. Finality and Understanding the Agreement

Most participants want to be sure that a mediation agreement is a "done deal." They want to be assured of what they are going to get, when they are going to get it, and what happens if the other side attempts to not honor the deal. Settlement is often sold by the participants' attorneys as a way for them to get on with their lives and to resolve all disputes. If family members are involved, there is the fear a grudge will persist leading to another court battle. Consequently, finality represents an important benefit of the bargain.

Moreover, participants must understand their rights and obligations under the mediated

settlement. If they do not, arguably there has been no agreement. Mediated probate settlements can be simple or complex.They often address real estate, cash, and personal property. An ambiguous agreement is worse than no agreement at all.

Special Challenges in Probate Mediation

1. Decedent Cannot Participate[7]

Wouldn't it be nice if the mediator could check the voracity of the participant's story with the decedent. As this is not possible, the mediator hears from one participant that Dad promised to split his estate five ways, and hears from another participant that Dad gave him a bigger piece of the pie because he mowed Dad's lawn. Some participants can be more convincing telling a lie than others are at telling the truth. Without the decedent's participation, the truth is sometimes impossible to determine.

2. Emotional Participants

Most estate disputes occur while participants are still grieving the loss of a family member or friend. Many disputes involve a disproportionate division of assets among family members. While mediators are not psychologists, it may seem like the participants are equating their share of the estate with their share of Mom's or Dad's love. Other participants use an estate dispute as a new reason to fight old fights.

3. Multiple Parties

Probate disputes can involve multiple parties. A mediator must know enough about the case prior to the mediation to ensure all of the parties necessary for an agreement will be present or available by telephone. Multiple parties make settlement difficult because a serious, thoughtful proposal can be effectively vetoed by one unreasonable party. In fact, it is not unusual for the "difficult" participant to carve out a larger share of an estate, simply because he or she is willing to block a multiparty deal.

4. Lack of Information

Ideally, mediation would resolve a dispute prior to the completion of an expensive course of discovery. However, the mediation process can stall when important information has not been provided or cannot be documented as of the date of the mediation. It is important for the mediator to encourage the parties to exchange whatever information they believe they may need to make an informed decision regarding settlement. It is the responsibility of the participants' attorneys to identify such information prior to the mediation and make an informal request if discovery has not been completed. It is astounding how often the assets of the estate have not been fully determined by the parties as of the date of the mediation.

5. Tax Considerations

A mediated settlement can have tax consequences. Few mediators would offer themselves as experts on the tax ramifications of a settlement. Most mediators defer to the participants' tax experts. Many probate attorneys do not possess the tax knowledge and experience necessary to advise their clients at a mediation. If they do not, they should meet with a qualified

accountant prior to the mediation and warn the accountant that he or she may receive a call during the mediation.

6. In-Laws

At the beginning of the mediation process, participants will often say that their spouse is present to provide "support." Too often, the spouse is there to project a total unwillingness to compromise, make outrageous allegations, or second-guess the participant's difficult decision to reach settlement. A probate mediator must be firm when dealing with the "In-law."

7. Lack of Preparation

Probate mediation can address a variety of issues. The participants should prepare for the mediation by identifying the issues they want to be governed by a mediation agreement. Some issues may not be part of the pending court proceedings, but are related to nonprobate assets or personal property. Regardless, each party should identify the important issues and have an opening position for negotiations at the beginning of the session.

Summary

Probate case mediation can offer great benefit to prepared participants, their attorneys, and the court if handled thoughtfully by mediators with experience in contested probate proceedings. Attorneys should consider mediating every contested probate case.

[1] Probate disputes are not currently subject to alternative dispute resolution under Rule 114.01, Rules of Practice-District Court. However, the idea has been discussed. *See* Andrew Stimmel, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 Ohio St. J. on Disp. Resol. 197, 223 (2002).

[2] There are many approaches to the mediation process. *See* Ronald Chester, *Less Law, But More Justice?; Jury Trials and Mediation as Means of Resolving Will Contests*. 37 Duq. L. Rev. 173 (1999).

[3] Some scholars suggest certain resolution in lieu of trial by adding an arbitration component. *See* Yolanda C. Vorys, *The Best of Both Worlds: The Use of MED-ARB for Resolving Will Disputes*, 22 Ohio St. J. on Disp. Resol. 871 (2007).

[4] *See In re* Estate of Gosnell, A05-1879, Court of Appeals of Minnesota, 2006 Minn. App. Unpub. Aug. 15, 2006 ($465,000 in attorney fees sought from estate of $1.9 million).

[5] It is remarkable how closed-minded participants are going into mediation. However, most participants will embrace a creative solution if they contributed to the process. For further discussion, *see* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance*, 32 Wake Forest L. Rev. 397, 429-31 (1997).

[6] There is also a movement to avoid the conflict upfront with estate planning designed to preserve family harmony. *Family Harmony: An All Too Frequent Casualty of the Estate Planning Process*, 8 Marq. Elder's Advisor 253 (2007).

[7] Actually decedents can influence the process by encouraging or requiring mediation. *See* Lela P. Love and Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 Wash. & Lee L. Rev. 539 (2008).