

Help Your Family Avoid Disputes: Add Mediation to Your Will

by Nancy Karkowsky

When it comes to inheritance issues, full and open communication before the death of a loved one can help family members avoid unnecessary conflict.

But what about stopping fights after your death?

You might want to encourage your family to continue communicating amicably — even after you pass away — by including a "mediation" provision in your will or living trust.

What Mediation Is and Is Not

What is mediation? It might be easier to begin by explaining what mediation is **not**. Mediation is not **litigation**. Litigation is a hearing in a court with formal presentation of testimony and evidence. Lawyers do a lot of the talking, and a judge's ruling is the final decision. That decision also generally becomes a matter of public record.

Mediation is also not **arbitration**. Binding arbitration is a hearing before a person who is not a judge — but almost. The presentation of testimony and evidence is less formal than in a court, but the arbitrator's ruling is final. Non-binding arbitration does not produce an enforceable decision, but gives the almost-judge arbitrator an active role in shaping the outcome of the parties' discussions.

In contrast to litigation and arbitration, mediation is much less structured. It is simply an opportunity for all interested parties to have a **conversation**. The conversation is facilitated by an objective third party called a "mediator." There is no formal presentation of evidence or proffer of testimony during a mediation session. More often than not, lawyers do not even participate.

The mediator, who may or may not be a lawyer, is not there to make a judgment or even venture a legal opinion. The mediator is simply a neutral person who assists family members in fully discussing the issues that prompted the conversation.

It may be that family members simply clarify their positions and understand each other better. Or it may be that they craft an agreement that resolves some or all of the issues that brought them together. That agreement will become enforceable only if all of them agree to it.

Benefits of Mediation

So why would someone choose mediation over litigation or arbitration?

For one thing, mediation is less costly. One or two mediators can take the place of several attorneys. A few informal mediation sessions might accomplish what an adversarial proceeding might take days to achieve.

For another, a mediation session is confidential. The discussion can be free, full and open: what's said in the session, stays in the session (with the limited exception of information pertaining to serious criminal allegations, such as child or elder abuse).

But perhaps most important, it is the family and the family alone who determine the outcome of a mediation. As a result, the people who know the situation best are controlling the process. No one — however skilled or experienced — knows what is happening in your family as well as the members of your family. And preferably, those family members, rather than lawyers or judges, should be the ones who craft a resolution to any family conflict or crisis.

Your resolution might be creative, even unique to the needs of your family. New or different options that might never arise in a more formal proceeding might blossom into an agreement that works for your family's particular circumstances. And those same family members might well be more likely to comply with the provisions of an agreement that they helped craft and willingly chose, in contrast to a court order or binding arbitration.

Even if a complete resolution of their differences is not achieved in mediation, participants should emerge clearer and more focused regarding their options. If litigation does take place after mediation, it should be less time-consuming, less costly, and, hopefully, less combative.

Perhaps most important, the lines of communication are kept open, and precious relationships are maintained. Even if the mediation concludes with all participants agreeing to disagree, everyone has had an opportunity to hear and be heard in a safe and civil forum.

Providing for Mediation in Your Will

How can you arrange for your family to mediate any inheritance disputes rather than turn to litigation or binding arbitration? Consult with your attorney about **including a mediation provision** in your will or living trust. That provision should state your desire that any disputes over inheritance matters be resolved using a mediator, and authorize your executor to pay any associated expenses from the estate.

You may also want to suggest who should participate in a mediation session (e.g., do you think having lawyers participate would be helpful or not?), and at what point you believe a mediation might be helpful or necessary.

Getting family members to sit and talk about their differences might not solve all their problems, but it might prevent some long-term damage to their relationships, adding immeasurably to your legacy.

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