

## Free to Choose: Collaborative Resolution of Probate Disputes

By Adrienne Keith Wills

You've done it. As an individual over 18 years of age and of sound mind you've exercised your freedom to create a will you're proud of.

Perhaps, in that process, you entertained visions of what that estate planning would do: Create a personal legacy, help future generations or steer the actions of your beloved beneficiaries. Motivations be what they may, you've exercised your freedom to transmit your property in light of the two great certainties in life: death and taxes.

Now the time has come to administer your estate. Under the law, the intent that you freely exercised in the creation of your will should govern. RCW 11.12.230 states, "Courts and others concerned in the execution of last wills shall have due regard to the direction of the will, and the true intent and meaning of the testator, in all matters brought before them."

Of course, your wishes will be carried out by the personal representative (PR) you named. Your trusty PR values professional input and a smooth administration of the probate, and so she has hired counsel to represent her in her fiduciary capacity. It's a good thing, too, because a dispute has arisen in the probate of your estate. Whether it's a will contest or an inventory challenge, there's now a legal conflict with which your PR must deal.

Your PR now must make a choice: How will he or she deal with this conflict? In some instances, particularly where there are legitimate or novel legal questions and/or an extremely high level of conflict, the best next step may be to hire experienced probate litigation counsel. There are many such individuals in our fine state.

However, because conflicts in probate can arise from family emotional/relational dynamics that the court is not well equipped to address, alternative dispute resolution (ADR) techniques have a lot to offer. In Washington, the Trust and Estate Dispute Resolution Act (TEDRA) sets forth the statutory provisions for resolution of "disputes and other matters" involving estates.<sup>1</sup>

TEDRA's stated purpose is to "provide nonjudicial methods for the resolution of matters, such as mediation, arbitration, and agreement."<sup>2</sup> The scope of TEDRA is broad: The court is granted the power to administer and settle "[a]ll matters concerning the estates and assets of ... deceased persons."<sup>3</sup>

Nonjudicial resolution of probate conflicts can be beneficial for many reasons:

- The parties often have long histories and personal relationships that they want to preserve and protect as much as possible while resolving their conflict.
- Disputes often involve a mix of legal and non-legal issues, only some of which can be addressed by litigation.
- Litigation can be expensive and cost prohibitive for many, given the financial size of the dispute.

- Disputes often involve complicated assets where the best decisions might require a free flow of information and creative solutions, and where joint experts may be helpful.<sup>4</sup>

TEDRA specifies how mediation, the initial ADR process under the statute, should proceed.<sup>5</sup> However, as is true in many areas of law, the mediation is a flexible process. At a minimum, though, unless mediation is waived by court order, it should take up to three hours unless the matter is resolved earlier.<sup>6</sup>

Collaborative law practitioners in King County have developed a hybrid process that melds TEDRA's purpose and requirements with the principles of collaborative law. Collaborative probate as a dispute resolution method requires that all parties be represented by counsel.

Parties and counsel indicate their informed consent and acceptance of the process by signing a "Probate Collaborative Law Mediation Agreement." This binding agreement adds clarity and accountability to the dispute resolution process by stating: the voluntary nature of participation; agreed parameters for communication; terms of confidentiality; the parties' affirmative duty to disclose information; the preservation of privilege; the requirement of good faith negotiations; participation with integrity; no court intervention/tolling of statute of limitations; and termination of the collaborative process, if required.

The collaborative resolution of a dispute under TEDRA may be the right way to go if the parties desire honest and open disclosure of information, explicit agreements to act respectfully, cooperative use (and payment) of experts, beneficial resolution for all, and avoiding the threat of a trip to court. Here, are some specific, unique characteristics of the collaborative approach:

- The duty to affirmatively provide all parties with all relevant information ensures that all parties have equal access to the real facts and are not basing their decisions on speculation, while the protections of the mediation privilege and the collaborative law agreement give a safe harbor for this information to be shared.
- All parties have the benefit of a legal advocate who can educate them about their rights, make sure they are aware of all options, and assist them in communicating and being "heard" by all parties (particularly important where there are inequalities between the parties).
- All parties have affirmatively agreed to settle their dispute outside the courtroom and to do so in the spirit of good faith and mutual respect.
- Because the parties have agreed not to litigate their dispute unless the collaborative process terminates and the agreed-upon waiting period for litigation has expired, counsel and parties are not required to prepare for litigation while using ADR.<sup>7</sup>

Collaborative law offers practitioners and parties another dispute resolution "tool." As with any tool, it's critical to keep in mind what the case requires and what your client needs.

If you are interested in learning more about specific case applications of collaborative probate principles and ways to save clients the expense and heartache of invoking a polarizing process, there is a growing community of practitioners. For more information, visit the "Probate & Trust Disputes" page of King County Collaborative Law.<sup>8</sup> Training plans are under way, as well.

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1 RCW 11.96A.010.

2 Id.

3 RCW 11.96A.020.

4 Jamie Clausen, "Collaborative Process: Probate & Trust Administration" (Mar. 21, 2011) (printed materials distributed at the King County Bar Association Collaborative Law Section meeting).

5 RCW 11.96A.300.

6 Id.

7 Jamie Clausen, "Collaborative Law in Probate, Trust Administration, Elder Law & Guardianship" (Oct. 13, 2011) (printed materials distributed at the King County Bar Association Alternative Dispute Resolution Section meeting).

8 See <http://kingcountycollab.org/about-collaborative-law/in-other-civil-cases/probate-trust-law/>.

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