

FROM CONFLICT TO RESOLUTION: THE ADVANTAGES OF MEDIATION IN ESTATE
PLANNING

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Estate planning involves advanced planning for managing and distributing one's assets following their passing.¹ It entails identifying inheritors among individuals or entities and establishing measures to ensure the seamless execution of these wishes, aiming to minimize future complications.² Estate planning documents often used to distribute assets after one's passing are wills, trusts, and other legal documents.³ While these documents may serve as a roadmap for asset distribution, they may not invariably preclude disputes or conflicts among beneficiaries or family members.

The probate court assumes jurisdiction over matters including the administration of wills, adjudication of contested wills, and the allocation of assets for individuals who died intestate.⁴ It finds itself flooded with various types of litigation, from conflicts among beneficiaries to accusations of breaches of fiduciary duties.⁵

Specifically in drafting a will, an individual's hope likely involves ensuring their beneficiaries carry out their will according to their wishes. However, the prevalence of ongoing probate litigation reveals that achieving this goal is often more complex than anticipated. When conflicts arise, individuals frequently opt to litigate rather than explore opportunities to utilize

¹ *What is Estate Planning?*, EST. PLAN. (Nov. 25, 2020), <https://www.estateplanning.com/what-is-estate-planning> [<https://perma.cc/E64A-PWJ5>].

² *Id.*

³ Laura Jackson, *Estate Planning Guide and Checklist for 2024*, NAT'L COUNCIL AGING (Aug. 21, 2023), <https://www.ncoa.org/adviser/estate-planning/estate-planning-guide-checklist/#:~:text=Common%20estate%20planning%20documents%20are,estate%20or%20simple%20their%20wishes> [<https://perma.cc/HRV2-57NN>].

⁴ Julia Kagan, *Probate Court: Definition and What Goes Through Probate*, INVESTOPEDIA (Apr. 19, 2023), <https://www.investopedia.com/terms/p/probate-court.asp> [<https://perma.cc/J6MW-MF8Z>].

⁵ *Common Cause of Probate Litigation*, BUNDREN L. FIRM (May 18, 2022), <https://www.bundrenlaw.com/blog/2022/may/common-causes-of-probate-litigation/#:~:text=1.,someone%20discover%20a%20newer%20will> [<https://perma.cc/45JE-JDR3>].

Alternative Dispute Resolution (ADR). Mediation is a form of ADR that may resolve such matters effectively. Mediation is when parties in conflict meet with an unbiased, neutral third-party.⁶ Unlike a judge, the mediator fosters constructive dialogue, identifies key issues, enhances communication, and steers parties away from confrontation, ultimately guiding them toward a mutually agreeable resolution.⁷

Testators should consider including a mediation clause in their estate plans, as it can be an invaluable addition. A mandatory mediation clause entails a provision within the estate plan mandating that any disputes arising from it must initially undergo mediation before pursuing litigation. This clause can be tailored to match the testator's family dynamic.⁸ Importantly, beneficiaries who violate this mediation provision face immediate removal from the estate plan, effectively treating them as if they were deceased.⁹

There are several reasons why mediation stands out as the preferred approach over litigation in estate disputes. Firstly, mediation is known for its cost-effectiveness, efficiency, and expediency compared to the often lengthy and costly nature of litigation.¹⁰ Lengthy legal battles usually result in escalating attorney fees and court expenses,¹¹ which can significantly deplete an

⁶ *Mediation Defined: What is Mediation?* JAMS MEDIATION SERVS., <https://www.jamsadr.com/mediation-defined/> [<https://perma.cc/Q2K7-PLE3>] (last visited Mar. 2, 2024).

⁷ *The Guide to Mediation of Estate Disputes*, RMO LAWS., <https://rmolawyers.com/the-guide-to-mediation-of-estate-disputes/#:~:text=Mediation%20is%20a%20collaborative%20form,reach%20a%20mutually%20acceptable%20agreement> (explaining that the mediator in estate mediation is often times a retired probate judge) [<https://perma.cc/X793-VMD2>] (last visited Mar. 3, 2024).

⁸ David C. Thies, *In the Alternative: Using ADR in Estate Planning and Administration*, ILL. ST. BAR ASS'N (Dec. 2019), <https://dta0yqvfnusiq.cloudfront.net/webbe14046313/2020/01/Using-ADR-in-Estate-Planning-and-Administration-5e1ce40ef19e6.pdf> [<https://perma.cc/F59V-LBRU>].

⁹ Rick Durfee, *Resolving Disputes in Estates with ADR*, DURFEE L. GRP., <https://durfeelawgroup.com/resolving-disputes-in-estates-with-adr/> [<https://perma.cc/QY82-9AAG>] (last visited Mar. 2, 2024).

¹⁰ *Id.*

¹¹ *When to Litigate and When to Settle*, DENTON PETERSON DUNN, <https://arizonabusinesslawyeraz.com/when-to-litigate-and-when-to-settle/> [<https://perma.cc/394W-LE7X>] (last visited Mar. 2, 2024).

estate's value.¹² In contrast, mediation typically demands fewer resources and less time, making it a more financially prudent option.¹³

Moreover, mediation fosters an environment conducive to open dialogue and constructive problem-solving.¹⁴ The parties have the opportunity to express their needs and desires, actively collaborating towards mutually beneficial resolutions. This empowers participants with a sense of control over the outcomes of their dispute,¹⁵ an aspect notably absent in the litigation process, where the final decision rests with the judge, potentially leading to feelings of resentment or bitterness among the parties.

Additionally, mediation offers the invaluable benefit of confidentiality.¹⁶ Unlike court proceedings, which are a matter of public record,¹⁷ mediation sessions safeguard sensitive information from public scrutiny.¹⁸ Participants can freely discuss their concerns and go through mediation in confidence, mitigating the risk of unwarranted exposure.

Incorporating a mediation clause within estate planning documents can be a proactive approach to preempting conflicts among beneficiaries and family members. Mediation offers a practical alternative to costly and adversarial litigation by prioritizing open communication, cooperation, and compromise. As families navigate the complexities of estate administration,

¹² Lela P. Love & Stewart E. Sterk, *Leaving More Than Money: Mediation Clauses in Estate Planning Documents*, 65 WASH & LEE L. REV. 539, 552 (2008).

¹³ *The Impact of Mediation on the Legal System: Evaluating Cost Efficiency and Judicial Outcomes*, THE MEDIATION GRP., <https://themediationgroupinc.com/mediation-legal-system-impact-efficiency-outcomes/#:~:text=Mediation%20often%20presents%20a%20cost,expenses%2C%20and%20associated%20administrative%20fees> [https://perma.cc/8ZP9-3SZH] (last visited Mar. 2, 2024).

¹⁴ Brian Douglas, *The Benefits of Using Mediation in Probate*, BRIAN M. DOUGLAS (July 27, 2022), <https://www.atlantagaestateplanning.com/blog/2022/07/27/the-benefits-of-using-mediation-in-probate/> [https://perma.cc/F4NP-GWGR].

¹⁵ *Arbitration vs. Mediation: Exploring Conflict Resolution Methods*, FASTER CAP. (Dec. 22, 2023), <https://fastercapital.com/content/Arbitration-vs--Mediation--Exploring-Conflict-Resolution-Methods.html> [https://perma.cc/3QVE-4SFP].

¹⁶ Love & Sterk, *supra* note 12, at 554.

¹⁷ *Court Records and Proceedings: What is Public and Why?*, CONNOR REPORTING, <https://connorreporting.com/court-records-proceedings-public/> [https://perma.cc/4JLN-KUDK] (last visited Mar. 2, 2024).

¹⁸ Love & Sterk, *supra* note 12.

embracing mediation can lay the foundation for preserving relationships and honoring the testator's wishes.