

# Mediation in Trust and Estate Disputes: An Idea Whose Time Has Come

By N. Alfred Pasternak

Lawyers and other observers agree that the coming years will see a dramatic increase in the number and complexity of trust and estate disputes. There are several reasons. First, estates are becoming larger and more complex because there are a greater number of older people with money. Second, partly as a result of do-it-yourself will and trust forms available online, there has been a proliferation of poorly drafted and incomplete wills and trusts. Third, many families remain without estate plans even as estates grow and life-spans get longer. Fourth, an increased number of nontraditional and blended households have been formed.

Historically, trust and estate matters have almost always been tried before a judge in a formal court proceeding. The cases may involve tax, real estate, business succession, family law, corporate law or estate administration issues. Generally, judges will not be familiar with all of these areas of the law. Without expertise, even the most well-meaning judge may resolve one issue only to inadvertently spark others and spur further litigation.

Mediation and arbitration are well-known alternatives to formal litigation. Mediation is much less costly than a legal proceeding. Mediation has the additional advantage for a dispute involving a trust or estate in that the process allows the parties to investigate common ground. Thus, it can help preserve family relationships.

The mediation process begins when both parties agree on a mediator with particular expertise relevant to the issues that need resolution. Sometimes the mediator will be someone who dedicates his or her practice solely to mediation. In other cases, the mediator will be an attorney who specializes in the relevant areas of the law.

The process is generally as follows. Each side will provide the mediator with a memorandum outlining the issues to be resolved. The mediator then schedules a meeting with all the parties, because often the very process of getting the parties in the same room in a neutral setting to hear the other side will begin to bridge the gap between them. The parties can agree to resolve as many issues as possible and agree to disagree on other issues. Agreeing

Managing Partner **Nancy Fax** has been elected to the Executive Committee of the Board of Regents of the American College of Trust and Estate Counsel (ACTEC) as an at-large member. ACTEC is a prestigious nonprofit lawyers group whose mission is to promote and enhance the practice of trust and estate law. Its 2,700 members are chosen in a rigorous nomination and selection process and must demonstrate the highest level of integrity, commitment, competence and experience as trust and estate counselors.

on some issues may give the parties hope that they can tackle the remaining issues and resolve them as well at a later date.

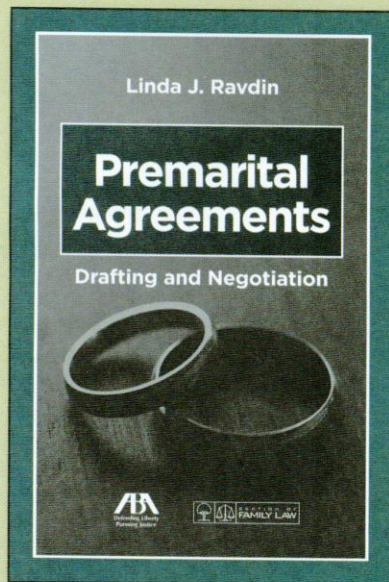
Mediators, unlike judges, are in a position to assist the parties by suggesting alternative solutions and urging each to make a small concession that will encourage the other side to do likewise.

Mediation has a surprisingly high success rate in resolving disputes, both in terms of settlement rate and participant satisfaction. Because mediation can be used early in the litigation process, there can be a significant savings in legal fees. The parties are free to create their own solution, rather than having a judge or arbitrator force a decision on them.

The mediation process is confidential so that everything that happens during the process is kept under wraps. This is often reason enough for the parties to agree to mediate their differences. Statements made in mediation cannot be used against a party if the mediation is unsuccessful and the parties end up in court.

Mediation works and is particularly well suited for trust and estate disputes.

**Alfred Pasternak** provides mediation and dispute resolution services involving trusts and estates.



In August, the American Bar Association will publish *Premarital Agreements: Drafting and Negotiation* by Divorce & Family Law Group partner **Linda Ravdin**. This primer focuses on the fundamentals of crafting a valid agreement, ethical and practical techniques for negotiating the agreement and how to draft the terms to best meet the needs of the client. Linda is a recognized national expert on premarital agreements and the co-author of the *Domestic Relations Manual for the District of Columbia* (Lexis-Nexis) as well as co-author with Estate Planning & Administration Group partner **Marcia Fidis** of *Premarital and Domestic Partnership Agreements* (MICPEL).