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Estate and Trust Disputes: Ways to Resolve Them and the Morgan & DiSalvo Approach

By Richard M. Morgan & Loraine M. DiSalvo

In our last Newsletter, we discussed some of the most common types of estate and trust related disputes and the best ways to avoid them. In this Newsletter, we discuss various options for resolving estate or trust related disputes, and our particular approach to resolving such disputes. We have found over our many years of practice that our particular approach very frequently produces successful results.

I. The Traditional, Litigation-Based, Approach. Traditionally, resolving legal disputes over an estate or a trust often meant litigation. In many cases, when a dispute arises, the parties lack trust in the selected fiduciary, don't fully understand the estate or trust administration process, are not certain about the extent of their rights, interests, or duties, don't believe that their interests are being adequately protected, or something similar. This means that the situation is often tense or hostile even before the parties involved all start hiring lawyers. The traditional approach to legal representation often means that the lawyers brought into the situation add fuel to the fire, by taking an adversarial stance with regard to the opposing parties from the beginning of their involvement in the matter. Full-scale litigation, complete with multiple court filings, extensive discovery proceedings, depositions, and hearings, tends to be the result. Litigation is a fairly inefficient and expensive process. In addition, the courts are limited in the solutions they can craft and the relief which can be granted to a wronged party. Finally, the adversarial nature of litigation tends to result in a lot of damage to the relationships between the opposing parties. This means that a litigation based approach to dispute resolution often results in a solution which has high economic and emotional costs, but which may not actually serve the best interests of any of the parties or make any of them happy. While the litigation approach is sometimes the only viable option to resolving a dispute, alternative dispute resolution approaches do exist, and an alternative dispute resolution approach can often be a better choice than traditional litigation.

II. Alternative Dispute Resolution ("ADR") Approaches. Various alternative approaches to dispute resolution (alternative dispute resolution is often referred to as "ADR") have been developed in recent decades. ADR approaches are intended to help parties resolve disputes without having to go through the traditional litigation process and incur all of the costs it can involve. Two of the most commonly used and well-known of the ADR approaches are arbitration and mediation.

In addition, there is a newer approach, called collaborative law. We discuss each of these approaches in the following paragraphs. In addition, our August 2010 newsletter will focus in more detail on the collaborative law approach.

A. Arbitration. Arbitration effectively replaces the court system with a different system which operates in a similar, but somewhat more efficient and faster, manner. As with traditional litigation, if the dispute is not settled out of court, a third party will actually serve as the final decision maker. The third party, who is a



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specially trained person known as the arbitrator, essentially serves as a private judge, and can be chosen by the parties. The parties each present their case, along

with all evidence and expert testimony, to the arbitrator, and the arbitrator makes a binding decision. Arbitration can cost less in terms of fees and costs than traditional litigation, and it can proceed more quickly than traditional litigation. However, arbitration is still a very adversarial process which can still carry significant economic and emotional costs for the parties involved. In addition, the arbitrator's decision, which often cannot effectively be appealed, may not serve the interests of either party well or make either party happy.

B. Mediation. Mediation is a process in which a neutral third party, called a mediator, meets with the opposing parties and, sometimes, their lawyers, to try to help the opposing parties come to an agreement on how to settle their dispute. Each party is responsible for his or her own experts, and the normal litigation rules regarding producing and sharing information apply. There can be one, two, or more meetings with the mediator, although generally the goal is to have no more than two meetings. Mediators are specially trained in techniques designed to help the opposing parties find some common grounds and work out their differences. While the parties are not required to hire lawyers to participate in the mediation process, and while mediation can be used before any lawsuits have been filed, it is frequently used to try to settle a case after litigation has begun, but before a final resolution has been reached through the courts. In some cases, the judge will actually require that the parties go to mediation to attempt to settle the case before a trial or hearing will be granted. While mediation has proven to be an excellent process to aid parties in settling a dispute, it also has its drawbacks. There may not be much incentive for one or more of the parties involved to agree on a settlement, and, if so, the mediation may fail to reach any agreement. If one party does not believe that the other party has produced all relevant evidence, or if one party simply wants to hold out for their own most desirable outcome, then mediation may fail to reach a settlement. The risk of failing to reach a settlement may be particularly high in cases where the mediation is court ordered, rather than agreed to by all opposing parties, since parties who do not want to cooperate may not be willing to adopt a cooperative attitude just because the court requires them to try mediation. And, if the mediation sessions do not result in the parties reaching a settlement, then the parties and their lawyers can simply continue down the litigation path, so the incentive for the parties to really try to reach a mutually agreeable settlement may be weak.

C. Collaborative Law. The collaborative law approach is the newest ADR approach. We at Morgan & DiSalvo believe that collaborative law offers potentially greater benefits than either arbitration or mediation. Our August 2010 newsletter will discuss the collaborative law approach in more detail. To summarize, however, you should consider collaborative law as an approach where, from the outset, the goal of all of the parties is to come up with a negotiated settlement that they can all live with. Because the collaborative law approach requires a significant shift away from the traditional, litigation-oriented manner in which most attorneys are trained, lawyers who wish to practice the collaborative approach must be specially trained and certified in collaborative law. At the beginning of a collaborative matter, the parties and their lawyers all agree to certain



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rules regarding the sharing of information and documents and the manner in which all will approach negotiations and other interactions. These rules include a requirement that, if the parties are unable to reach a final agreement through the collaborative approach, they must all hire new attorneys and new experts before they will be able to proceed with litigation. These rules, and the requirement that none of the professionals involved in the collaborative process can move with the parties into a subsequent litigation, are intended to help set the appropriate tone of cooperation and openness.

During the collaborative proceedings, the parties and their attorneys, along with a third party neutral known as a facilitator, meet in order to discuss the dispute and potential resolutions. If the parties believe that advice or information from other professionals, such as appraisers, financial advisors, or CPAs, is needed, then they mutually select and hire the appropriate experts. Those experts are then also expected to serve as neutrals, to provide the needed advice or other information in as objective a manner as possible. Collaborative law sessions are similar to mediation sessions in that the goal is for everyone to work together to reach a mutually acceptable solution. They differ from mediation in that everyone in a collaborative law session should have access to all relevant information and documents, and all expert advice is provided by neutral parties, rather than each party providing his or her own experts. Collaborative law also differs from mediation in that the potential loss of all lawyers and other professionals if the process fails and litigation results can add some extra incentive for the parties to really try to reach an agreement. Also, the collaborative approach is often specifically intended to help preserve or repair the parties' ability to get along with each other. This can be especially beneficial in estate and trust disputes, where the parties are often family members who may need or want to have a continuing relationship in the future. Collaborative law approaches have been used in the family law arena for over 15 years, but were not generally used in other areas. When we at Morgan & DiSalvo learned that a number of collaborative law practitioners were trying to develop collaborative law approaches for estate and trust disputes as well as business related disputes, we leapt at the chance to be in the forefront of this expansion. Richard Morgan and Loraine DiSalvo both became certified in February 2010 in Georgia Civil Collaborative Law Practice, as part of only the second such certification class offered by the State Bar of Georgia.

III. Morgan & DiSalvo – Our Dispute Resolution Philosophy and Approach. At Morgan & DiSalvo we are passionate about everything we do, and we always want our clients to have the best overall result. This desire is reflected in our approach to helping clients resolve estate or trust related disputes. We have always believed that, while litigation may sometimes be unavoidable, the best result can most often be found when a dispute is resolved in a non-litigious manner, through discussions and negotiations between the parties (or at least through the parties lawyers). This philosophy leads us, in dispute matters, to strive to be logical and tough but reasonable, both with opposing parties and, when needed, with our own clients. We try to help our clients see the big picture and clearly understand their rights, interests, and responsibilities. We then try to help the clients and the opposing parties see a potential result which everyone can live with, and to find a way to reach that result. To live up to our philosophy, we strive to use our creative problem solving skills as well as our legal knowledge and reasoning skills. We also try to discourage both our clients and the opposing parties (through their lawyers) from behaving in ways which may make litigation impossible to avoid. We are



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often able to help the parties reach an agreed-upon solution. When necessary, however, we will resort to the courts to force a solution. In either case, our goal is for the solution to be just and reasonable.

IV. Examples of Estate and Trust Dispute Resolution Matters Morgan & DiSalvo Has Helped Resolve. The following paragraphs briefly describe some of the estate and trust related dispute cases we have handled over the past few years.

A. Bad Fiduciary Cases. We have dealt with a number of similar cases involving a fiduciary (Executor or Trustee) who was not living up to all of the duties of the fiduciary role, and where our client was a beneficiary of the estate or trust. In each of these case, we requested and received an accounting, which the beneficiaries had not been able to obtain on their own. Based on our review of the accounting, we were able to determine that problems had occurred and what those problems were. We were then able to demand that problems be corrected and not happen again, and that our client be given timely and complete accountings from then on. In some cases, where the fiduciary was actually doing a poor job or acting improperly, we were able to request and help obtain a change in the fiduciary. In cases where improper transactions occurred, we were able to have improper distributions repaid and improper transactions undone. In most of these cases, we were able to avoid the need for full blown litigation or a formal trial.

B. Death Occurs While a Couple Is Getting Divorced, But Before the Divorce Is Final. We have had a surprisingly large number of cases in recent years which involved the following situation: a couple is in the process of getting a divorce when one of them dies before the divorce was final. In several of these situations, there were children involved, and the deceased spouse had executed a Will prior to his death, under which the surviving spouse was disinherited. In another case, the couple had no children and the deceased spouse's Will left his assets to other family members, rather than the spouse. In another situation, the deceased spouse had no Will and had children from a prior marriage. In some of these situations, we have represented the fiduciary of the deceased spouse's estate, and in others, we have represented the surviving spouse. Not all of these cases involved an actual dispute, but they all involved some confusion over how the estate should be handled, what rights the surviving spouse had, and what rights any children or other family members may have. Unfortunately, most of these situations also involved some acrimony between the surviving spouse and the other family members, and a dispute resulted. In most of these cases, we have been able to help the parties determine their rights and the rights of the other parties and resolve any disputes without the need for full blown litigation. In one of these cases, we served as special tax counsel for parties who were already in full blown litigation when we were brought in, but we were able to assist the parties in reaching a mutually agreeable settlement and avoid having the court decide on a solution for them.

C. Fiduciary Needs Help Dealing With Beneficiaries. In several cases, we represented the fiduciary (Executor or Trustee) where a disgruntled beneficiary was involved (these generally have not been cases where we represented the fiduciary from the beginning of the matter, as we try to ensure that fiduciaries who receive our guidance don't end up with unhappy beneficiaries to begin with). In these situations, we have been able to advise the fiduciary on how to correct any issues that might have existed, advise the fiduciary as to what to do differently going forward, and work with the fiduciary and the beneficiary (through his or her lawyer) to



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help them both understand the terms of the will or trust and what rights and duties each has. These cases have all ended fairly well.

D. Beneficiary Needs Help Protecting His or Her Rights and Interests. We have handled a number of cases where we represented a beneficiary of an estate or trust who was concerned about whether his or her rights and interests would be properly respected by the fiduciary. In these cases, we make sure that the beneficiary's interests are being protected, the beneficiary is being treated properly, and the beneficiary is being provided with necessary information currently and on an on-going basis. We also try to help the beneficiary set appropriate expectations with regard to his or her rights and the timing which should be expected with regard to estate or trust administration matters. In most of these cases, we have been able to help resolve any beneficiary concerns. In some, we have used our creative problem solving skills to work with the various parties and develop ways to address the concerns of multiple beneficiaries in a win-win manner. Many of these cases have involved significant assets and tax issues as well as other concerns, such as where the surviving spouse is the stepparent of a decedent's children, rather than a biological or adoptive parent of the children.

If you or someone you know is involved in an estate or trust and you would like help figuring out whether things are being done correctly, or if a dispute regarding the estate or trust appears likely to arise, please feel free to contact us to schedule a consultation. Call (678) 720-0750 or e-mail info@morgandisalvo.com We are here to help with your concerns and welcome your questions.