



November 18, 2014
Southwest Washington Estate Planning Council

Dr. Randall L. Kinnison, Managing Partner
Genesis Mediation, LLC
12725 SW Millikan Way, Suite 300
Beaverton, OR 97005
www.genesismediation.com
randy@genesismediation.com
503.352.9447 office

Reminder of Principle Elements of Mediation:

- Voluntary
- Non-Binding
- Confidential
- Self Determination
- Informed Consent
- Impartial Regard

Mediators are conflict “fire fighters.” We come to raging fires few people wish to enter, put out the fire, and point to other professionals to assist the wounded to move forward.

Preventive Uses of Mediation for Estate and Eldercare Professionals:

- Assisting in creating a will or trust that mitigates conflict among family members.

A mediator can assist an estate attorney or eldercare professional working with conflicted families. Situations can include prenuptial agreements when an aging parent wishes to remarry. The children can be concerned about wealth distribution when dad marries trophy wife. A mediator works with all parties and professionals to create documents to protect parties and mitigate potential future conflict.

- Clarifies a will or trust before death to avoid conflict.

A mother is concerned about the constant conflict among her children since the passing of the father. She is fearful about all out warfare once she passes. A mediator can meet with the mother and children to discuss estate issues before death.

- ☑ Assist with elder abuse accusations.

Family members or caregivers sometime fall into straight up abuse/neglect or perceived abuse/neglect. When anger flares, parties can become quick to report a potential abuse. A family caregiver may not have sufficient clarity about his/her role, responsibility and authority. If he/she does not have POA for finances or health, overstepping perceived or real boundaries may occur. If real abuse is occurring, mediation is not an option. However, in some circumstances, perceived neglect or abuse by a sibling may be leveled. A mediator can become a neutral fact finder and assist the family to clarify roles, responsibilities and authority. Mediation can resolve the abuse allegation and create new visibility and transparency for all.

- ☑ Assists business owners with succession and estate matters.

A mediator can be helpful in succession planning. Most succession fails not due to proper execution of legal agreements, but in the conflict between a father and child handoff. Too often, a great deal of retirement income and assets are wrapped around the business built by dad. Dad desires legacy with the business and a son or daughter is the first choice for succession. In this scenario, dad may fund the buyout over time. The son or daughter makes payments with an agreement in place (hopefully). The will or trust may not adequately address the buyout or death. The mediator can refer the family to an estate attorney to adequately update the will or trust. Conflict may erupt between father and child in the manner in which the business is operated or if a child defaults on any payments. A mediator may assist the family in regaining trust and peace for both the business and relationships.

Creating Peace in the Midst of Chaos

- ☑ Meeting the interests of family members of a trust or will upon distribution.

Parents believe the distribution of the trust or will is simple: equality for all children. However, one child has eyed the classic 1960 Porsche. Another child had desired it as well and requested it in the will. In the case of a family farm, the other siblings inherit land, but brother is currently farming the land. In order for the siblings to receive their inheritance, farmer brother must sale the land and subsequently retire from farming. Siblings often elect to defer inheritance until farming brother retires on his own, not forced out of the farm by sale. In some situations, the children are forced to sell the farm to pay for inheritance tax due to poor estate planning by the parents. Mediation can assist families to keep individual interests while creating equity and fairness.

Medicaid Fraud

Estate attorneys may represent the state for medicaid fraud. The personal representative may or may not be intentional about the fraud. And, in fact, fraud may not exist in some cases. Mediation can help the state resolve fraud cases alleviating a great deal of litigation expense. A mediator may be successful in producing documents from the opposing party that otherwise would take discovery. Just as the state of Oregon is using mediation to assist in foreclosure, probate, and now, adverse health, mediation could be successful in some medicaid fraud cases.

Assists the successor trustee or personal representative as a neutral third party with conflict over distribution of assets.

A personal representative has a fiduciary duty to distribute the assets of the deceased. It may come as a surprise to some family members that the will or trust is not divided equally. In some families, parents loaned money to children. The children assumed the loan was forgiven upon death and they still receive an equal distribution of assets. However, parents tracked the loans, with interest. They gave instructions in the will for the personal representative to include the loans as part of the estate and deduct the amount from inheritance. The children do not think it fair. A mediator can help the personal representative as a neutral third party in resolving the matter.

Family Mediation for Relational Reconciliation

Estranged family members.

An estate attorney or eldercare professional may know of estranged relationships of family members. These relationships with unresolved conflict are often problematic for the professional in working with the family. A mediator with a mental health background can sometimes assist a family with resolving conflict before the death of the loved one. If reconciliation occurs, the estate or other issues become more straightforward for the eldercare professional or attorney. When facing mortality, most people are not comforted by possessions or portfolios, they are comforted by family and friends. If these relationships are estranged, the greatest gift before death is a reconciled relationship with a son or daughter.

How a Mediator Proceeds with a Case

The mediator is contacted by a family member referred by the attorney or eldercare professional. The mediator may or may not offer a consultation free of charge.

- ☑ The mediator is retained by contract to assist with the conflict. Most non-attorney mediators do not require a retainer, just a mediation services agreement outlining the process and fees.
- ☑ Family members are notified a mediator will be contacting them. The mediator often conducts case development requesting pertinent information, a narrative by parties, and follow up interview.
- ☑ The mediation or mediations are scheduled with parties. Face to face meetings are best practice. Out of town family members may require video conferencing. The attorney or eldercare professional may, at some point, participate in a family mediation as appropriate and needed.
- ☑ The outcome of mediation may alter the will or estate if the party is still living, or resolve the conflict over distribution, or simply create a Family Action Plan for moving forward (not a legal document).

Case Studies Demonstrating Mediation for Estate Matters

The Lonely Mother

A 94 year old mother on the cusp of capacity has three children. One son, who is an ex-con and former meth addict, is caregiving for mom. The other two children were too busy and the son, George, could not hold down a job most of his life. He was currently unemployed when mom asked the kids for help in taking care of the farm and house. George moved in with mom about two years ago. Mom does not have much in the form of liquid assets. She receives social security and a small pension from her deceased husband. However, the family farm was appraised at 1.5 million. She is asset rich, but cash poor. The other siblings noticed George had bought a new car. They wondered how he could afford the car and payments without a job. The other brother, Joe, finally talked mom into allowing him to see her bank accounts. He discovered George had taken \$10,000 from mom's savings and was making payments from her checking account. Susie, the daughter, has noticed mom personal appearance is ragged. Her clothes were not laundered and she was losing weight. Joe told Susie about his discovery. They decided not to confront George directly, instead, they contacted Adult Services from DHS to report elder abuse. A DHS worker was assigned to the case. Joe was concerned and located the will. The will was updated to state Susie was to receive half of the estate while Joe and George would each receive twenty-five percent. Joe was furious. He then alleged elder abuse charges on Susie. Susie retaliated with abuse charges against Joe. The social worker was trying to sort it all out. In the meantime, there was a temporary no contact order for all children with the mother. She had to hire a professional caregiver to assist her. She did not know why her children could not see her and why they were fighting. The original estate attorney referred a mediator to the case. After conducting case development with all parties, the following transpired. The mediator conducted a mediation between Joe and Susie. He assisted them in resolving their dispute. Susie confessed she had taken mom to a different attorney to change the will. She was willing to follow the original directives. A mediation was held with Joe, George, Susie, the estate attorney and the mediator. George was willing to sell the car with proceeds returning to mom. Children agreed George should not be caregiving for

mom. Mom continued with the caregiver hired by a professional in home care agency. Joe allowed George to live with him until he could get a job and establish a new residence. The estate attorney updated the will returning to the original equality for the children. The estate attorney recommended a trust to avoid probate and inheritance tax. The new trust gave Joe, the personal representative, the ability to create a trust for George upon the sale of the land. This was discussed with all parties at the mediation. George realized he does not manage money well. Since he has no retirement, the proceeds from the land sale of the farm will create funds for a monthly income.

The Trust that Turned Difficult

Jennifer lived in the rental of her mom. Dad passed away last year. She wanted to live closer to mom and the rental was perfect, as well as affordable. John, the oldest brother and successor trustee, owned the trucking business that dad built. He worked in the business since a young man. He and dad made an arrangement a number of years ago how he would gain major shareholder position. The rest of the siblings still retained stock in the minority. The family had a beach house at Seaside that grandfather purchased in 1940 for \$10,000. The beach house has many family memories and appraised for \$1,000,000. Jennifer has a sister that lives in Texas and another brother on the east coast. Mom just passed away. Other assets in the trust include the personal residence appraised at \$500,000 and a money market fund with \$250,000. The rental where Jennifer lives appraised for \$250,000. The brother from Boston and the sister from Dallas each want their share of the beach house. They live too far away, and although there were many family memories, they prefer to sell the house and get their share. Jennifer loves going to the beach, but she cannot afford to help with the yearly maintenance and costs involved to keep the house. John wants to keep the house. His family used it frequently and he values the legacy. He wants to buy his siblings out of the trucking business, yet he wants to keep the beach house in the family. The mediator was called to sort it all out. How were things resolved? Jennifer retained the rental as her portion of the estate, the personal residence was sold and the money market was distributed to the other three siblings. The siblings decided to keep the beach house for two years. Everyone committed to a final family gathering at the beach at the end of two years. At that point, if John had the funds to buy out the other siblings, the beach house would be his. If not, the house would be sold and proceeds divided equally. John used his share of the trust to complete the buyout of his siblings of the business. He is hoping to raise half the amount needed for the buyout of the beach house and finance the rest. If he cannot pull it off, he is at peace with the sale of the property.

Other cases may be presented as time allows or during the Q&A period.