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**1.0 Law and Legal CLE Credit – A/V approval #1024584**
Recording Date – October 12, 2016
Recording Availability – December 7, 2016

| Meeting Location | Date | Time | Topic |
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| King County Bar Association<br>1200 Fifth Avenue - Suite 700<br>Seattle, WA | **Wednesday, October 12, 2016** | 12:00 PM to 1:15 PM | ADR Approaches to Resolving Conflict in Probate, Trust, Elder Law and Guardianship Cases |

**AGENDA**

**12:00 PM** Introductions/Lunch

**12:10 PM** Presentation: 'ADR Approaches to Resolving Conflict in Probate, Trust, Elder Law and Guardianship Cases', by Jamie Clausen, Phinney Estate Law

**1:15 PM** Evaluations & Adjourn

**SPEAKER BIOGRAPHY:**

**Jamie Clausen, Phinney Estate Law -** Jamie founded Phinney Estate Law in 2007 as a way of addressing a need she saw in the community for affordable, values-based estate planning and as a way to develop a legal practice that was consistent with her own values and legal philosophy. Jamie works with our clients to develop their estate plans and heads our probate and dispute resolution practices. A leader in the alternative dispute resolution community she acts a mediator and collaborative attorney in probates, elder law disputes, and family law.

Jamie has had the opportunity to work with individuals and families in a variety of situations. She has worked with newlyweds, young families, single business owners, blending families, the terminally ill, and unmarried couple. It is her experience that each family, no matter how traditional or non-traditional, is truly unique and, once you get to know them, have unique needs.
Before founding Phinney Estate Law Jamie worked as a litigation associate at Cozen O'Connor, as an attorney advisor for the U.S. Department of Justice, and as legal intern for Northwest Immigration Rights Project and Northwest Justice Project.

# ADR APPROACHES TO RESOLVING CONFLICT IN PROBATE, TRUST, ELDER LAW & GUARDIANSHIP CASES

## WHAT KINDS OF DISPUTES COULD BE ADDRESSED?

ADR approaches can help families work together to resolve Probate and Trust Administration disputes about:

- The validity of a will or trust
- Interpretation of will or trust terms
- Disputed creditor claims
- Issues involving personal representative or trustee fees or costs
- Disagreements about the distribution of sentimental items
- Disagreements about the pace of estate settlement
- Business or Partnership succession issues
- Disputes about the value of assets or sale of property
- Accusations of PR or Trustee mismanagement of estate

ADR approaches can help families to resolve Elder Law disputes, including guardianship disputes, by helping them work together to:

- Create a care plan for a loved one who has become disabled
- Proactively plan what will happen when an aging family member needs assistance
- Resolve disputes over the use of Powers of Attorney, Advanced Health Care Directives, and Living Trusts.
- Resolve disputes over particular issues regarding guardianship, capacity and care, such as the continued ability to drive or live independently
- Resolve conflicts regarding protection from abuse or financial exploitation of vulnerable adults
- Address concerns regarding business-succession planning
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## BENEFITS OF ADR APPROACH OVER LITIGATION FOR THESE AREAS OF LAW

Probate, Trust Administration, Elder Law, and Guardianship make sense as good areas of law for ADR approaches because of many of the qualities they share with Family Law:

- The parties often have long histories and personal relationships that they want to preserve and protect as much as possible while resolving their conflict. One practitioner in Texas described Probate as “multi-party divorce.”



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- Disputes often involve a mix of legal and non-legal issues, only some of which can be addressed by litigation.
- Litigation in this area is expensive and cost prohibitive for many given the financial size of the dispute. The costs of litigation can become counterproductive to reaching a resolution that is anyone's best interests.
- Disputes often involve complicated assets or care needs where the best decisions might require a free flow of information and creative solutions and where joint experts may be very helpful.
- It is important for parties to reach durable agreements that will not be the subject for appeal or re-litigation. Studies show that when parties voluntarily enter into agreements, even agreements they do not fully like, they are less likely to attempt to circumvent or re-litigate than when the outcome is imposed by a third party.

In addition, the Trust & Estate Dispute Resolution Act (TEDRA) makes Alternative Dispute Resolution attempts mandatory for all disputes, which creates an opening for the process.

WHEN TO START THE PROCESS?

ADR usually works best the earlier it is introduced into the process.

The process of beginning an action under TEDRA in a Probate or Trust Administration matter requires the party bringing the action to make some rather bold and damaging accusations. Once those accusations have been made in a public forum, it can be hard to get clients to stay focused on issues rather than positions and easily push people to engage in litigation "out of principle" or "to be vindicated" even though they may ultimately be very dissatisfied with the outcome.

Similarly, once a guardianship action is actually filed, the court retains jurisdiction and must approve any agreement before the action can be dismissed and that may limit options for coming up with creative solutions.

Also, these cases often involve multiple parties either splitting up a relatively small pot of resources or coming up with solutions to difficult problems of elder care with limited resources. In both cases, the more that is spent on process the less there is to fund solutions and that can ultimately makes these cases harder to resolve.

While both TEDRA and the Guardianship statute require mediation once an action has begun, by the time things have gotten to that point the parties have



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often retained litigation counsel who may not be supportive of sincere ADR efforts or be so far invested emotionally and financially in the process that options are limited.

WHAT KIND OF ADR WORKS BEST?

That question ultimately depends on the conflict and the parties, but there are some general rules of thumb that I have found.

If you can get to the parties early enough before the conflict has become hardened, it can be helpful to have them use a very informal process that doesn't necessarily define the issue as conflict. In my practice, I do conflict coaching for parties and do facilitated family meetings. This work often looks very much like the kind of counseling I would give a client before they entered into pro se mediation or my working as a mediator. My family law facilitation agreement includes language that defines it as a mediation to invoke the privilege, neutrality, and other protections of the process but I don't use the term mediation otherwise. I find that parties in these cases often deny that they are in "conflict" until it is pretty heated, instead focusing on how the family is having "disagreements" or "issues" and so are resistant to the language of formal conflict resolution. Using language to define the process as healthy family decision making can actually go a long way to helping the parties continue to see themselves as a family unit rather than warring factions and keep people focused on interests rather than positions.

In cases where the parties acknowledge conflict but have entered the process early enough to be sincere about trying to resolve conflict, I find single room facilitated mediation usually works best. While parties can be resistant to this, concerned that it will be uncomfortable or heated, I find that it is really the best way to get the parties to actually exchange information and think creatively about solutions. So much gets lost in translation, even in good shuttle mediations, and the mediator isn't going to be living the solution and so may not see issues the parties will see when they are forced to work together on resolving the problem.

If you have parties come to you very far into the process in a litigation mode, I think it can be useful to ask counsel if they want a facilitative or evaluative approach. The counsel may have a better sense of whether the parties really need help working together or simply a reality check on their chances in litigation. Even if the counsel says they want to have evaluative and separate rooms, I would encourage a beginning joint session with an explanation of your approach and the message that if the parties what to change to a single room, facilitative approach as the process goes along, you can do that. Sometimes the counsel is more invested in the conflict than the parties!

## BENEFITS OF COLLABORATIVE LAW OVER MEDIATION FOR SOME CASES

Collaborative Law can have some important benefits over other forms of Alternative Dispute Resolution in these areas of law. These benefits will be more relevant to some cases than others

- The duty to affirmatively provide all parties will all relevant information makes sure 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. This is particularly important where there are parties with capacity issues or other 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. We have seen that in family law cases this express agreement about the tone and nature of the conversation has an important impact on negotiations.
- Because the parties have agreed not to litigate their dispute unless the collaborative process terminates and the waiting period has expired, counsel and parties are not required to be preparing for litigation while using ADR. Eliminating this two track approach reduces expenses and focuses attention on resolution.

## WHAT UNIQUE ETHICAL CHALLENGES COULD BE RAISED?

Elder Law cases usually involve a senior who is argued to have capacity issues that would require special protection. In Guardianships, this is always the case. Even Probates & Trusts often involve minors or disabled parties whose rights need to be protected by the courts through the appointment of GALs.

Where a GAL has already been appointed, it is likely that permission from the court would be required for a GAL to enter into a collaborative process.

In any case, special care would need to be taken to make sure that the process does not take advantage of these parties. See RPC 1.14 & RPC 3.4. They would also need to be sure that the client was able to truly understand and consent to the limited representation involved. See RPC 1.2



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In some cases, where no GAL has yet been appointed but serious concerns exist about a party being able to truly understand their own best interests, it might be necessary to consider bringing in an Elder Advocate with GAL experience to represent a neutral assessment of the best interest. This person might function much like the Child Specialist does in a collaborative family law case.

Probates and Trusts also often involve privileged information, such as the deceased's medical history and past legal representation, that must be carefully preserved in the process to not negatively impact clients if the process fails. See RPC 1.6

Elder law and Guardianship cases can raise emergency issues involving the physical safety or other issues of irreparable harm of a vulnerable adult that might require the parties to take emergency action that, if not agreed to by all parties, would terminate the process. This would need to be taken into account in drafting participation agreements and exercising candor with all parties. See RPC 3.3.

Just as many family law practitioners will not use ADR approaches in a case that involves domestic violence or child abuse, attorneys working in this area may need to decline this form of representation in cases were allegations of abuse or levels of incapacity make it inappropriate. See RPC 1.1, RPC 1.2, RPC 1.14, and RPC 3.4

<u>WHAT UNIQUE PRACTICAL CHALLENGES COULD BE RAISED?</u>

Probates & Trusts may involve virtual parties, such as unborn children whose rights might be impacted, and statutory parties, such as unknown creditors who are unlikely to be able to enter into the process, leading to a sort of two track approach which is unlike family law and would require a balancing of the needs of the process and the need to deal with outside parties in a timely fashion.

Probates, in particular, are the subject of strict statutory rules regarding timeline and statute of limitations. Care must be taken to conform with or properly toll these limits if the process is going to take time.

Capacity issues on the part of subject of an elder law dispute or guardianship may mean that it is impossible for parties to meaningfully negotiate an agreement. (What happens when a party forgets what they agreed to at the last meeting?)



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These disputes often involve a lot of unrepresented, interested parties and decisions must be made regarding their participation and the need for counsel.

LEARING THE LAW

KCBA and WSBA have a lot of good CLEs on the substantive law in these areas. If you are planning on working in the Probate area, taking an all day nuts and bolts of Probate CLE would be a good place to start. If you are interested in Guardianship and Elder Law, the KCBA's training for Title 11 GAL is a wonderful two day program with a lot of practical advice on capacity issues in addition to substantive law. KCBA also offers a 20 hour training on Collaborative Probate and Elder Law from time to time, which would be an excellent way to learn the law and good issues specific ADR tips.



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