PRESERVING THE FAMILY IN PROBATE—THE COLLABORATIVE OPTION

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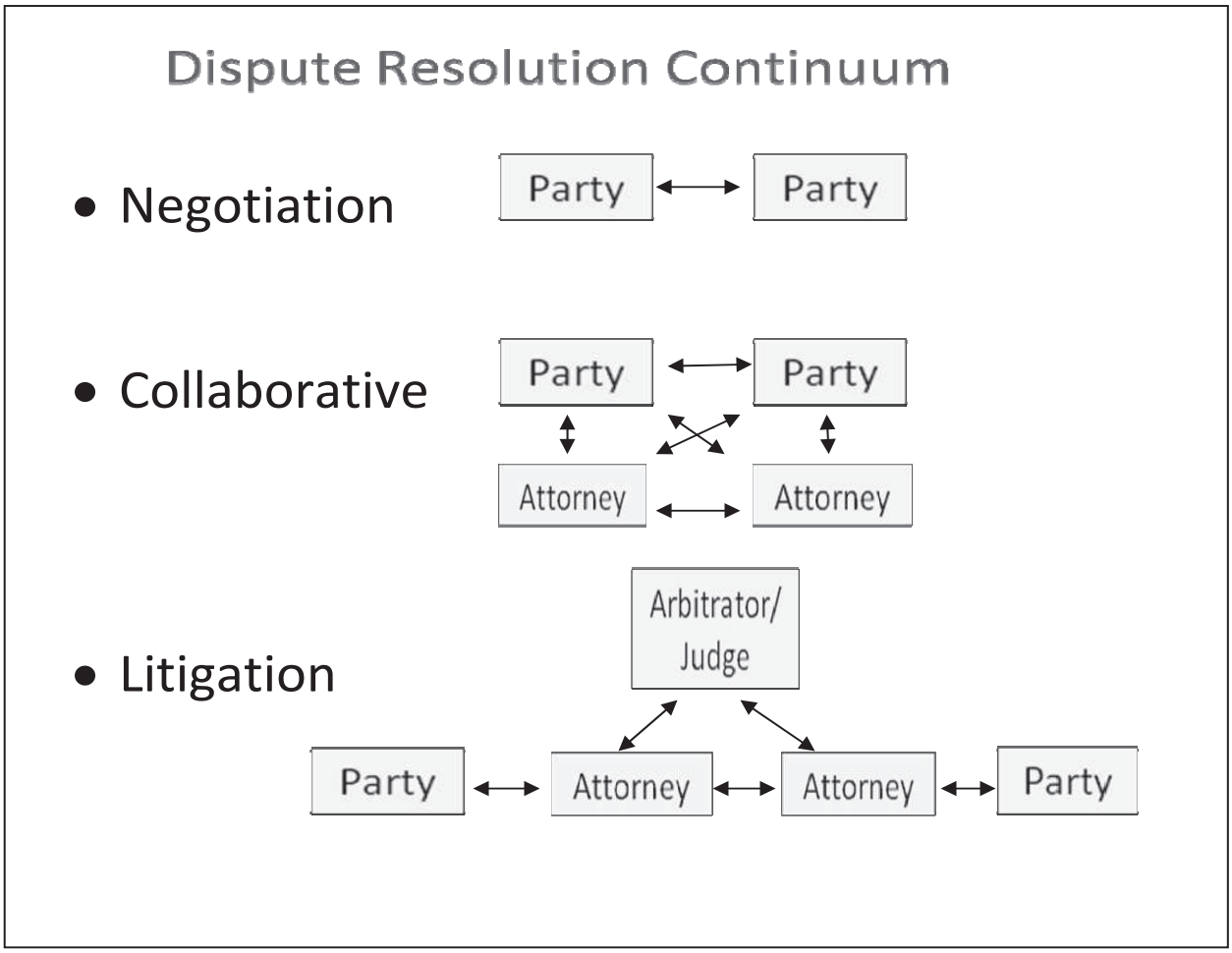
A probate case that destroyed a family started out simply—A young father (Dad) started a business with his sister (Aunt) and his mother (Grandma). Unfortunately, Dad died after only three years, leaving behind a young widow (Mom) and two children. Because the business was relatively new, it was not given much thought at the time. However, Aunt and Grandma continued to run the business, and it grew into a wildly successful venture. In fact, Mom was eventually receiving well over $100,000 in annual dividends as a passive shareholder.

Over time, Mom remarried, had another baby and her focus shifted to her new family. When Son from the first marriage graduated from high school, Mom was not interested in supporting his college plans—financially or otherwise. Aunt and Grandma were disappointed in Mom's lack of support and explained to Son that Mom had enough income from the business to pay for his college education. So, off to litigation they went.

Even though the case settled before trial, it was not before the already troubled relationship between Son and Mom was rendered irreparable and other family relationships were further estranged. Commencement of litigation may have produced a satisfactory financial settlement, but what about the damage done to this family? Litigation is an *adversarial* process, pitting one side against the other to advance entrenched positions, and imposing a narrow and often ineffective range of "solutions" over which the parties have very little control. This is neither ideal nor healthy for family relationships, but is there any alternative that could reduce the relational, emotional and financial costs of litigation?

Collaborative Law is a voluntary *nonadversarial* option that can preserve the integrity of families in conflict. In a Collaborative case, trained Collaborative counsel and their clients commit in writing to staying out of litigation and, instead, engage in private, face-to-face facilitated negotiations. Collaborative counsel guides the process, and assists the participant to identify, prioritize, and satisfy as many of their respective interests as possible. The commitment to refrain from adversarial litigation in favor of "interest-based" negotiations offers family members the opportunity to not only resolve their financial and legal issues, but to address and repair their relationships. Further, since the participants maintain control over the parameters of the ultimate resolution, a wider range of options can be considered than would be available in court. As such, a Collaborative process is more likely than litigation to produce deep durable resolution rather than just a shallow peace.

The Collaborative commitment makes possible an atmosphere of transparency where the strategy and positioning of litigation and traditional negotiations is replaced with honesty, open communication, and earnest problem-solving. In litigation and traditional negotiation, information and communication is controlled and filtered through attorneys acting in adversarial roles. Like in a game of telephone, messages can be misheard, misinterpreted, and highly subject to speculation as to motive. By comparison, in the Collaborative process, there is an agreement from the beginning to disclose all relevant information and documents. All communication flows freely between all participants and counsel. Both parties have the benefit of their own legal counsel as well as the insights and perspectives of all the other participants. The following diagram illustrates this comparison:



Even though there is a free flow of information within the Collaborative process, it is extra-judicial, so the family can maintain their privacy against the outside world. Additional benefits of the Collaborative process include:

- Mutual respect and preservation of dignity are encouraged;
- Problems are addressed in a future-focused manner rather than hanging on to past harms and hurts;
- The participants' interests and concerns are explored to identify and capitalize on areas of possible mutual interest and benefit;
- Resources of energy, time, and money are better managed;
- Participants make fully informed decisions without the pressure of time or trial;
- Resolutions may be, and frequently are, relief not available in court;
- Preservation and even healing of relationships is more likely; and
- Emotional costs of traditional adversarial litigation/negotiation are reduced or even eliminated.

All these benefits are of particular importance when dealing with Elder, Estate, and Probate matters. The Collaborative process may therefore be considered in the following situations:

- Medical treatment decisions;
- Adult guardianship;
- Residence and long term care decisions;
- Property and inheritance disputes;
- Elder's remarriage or new partner; and
- Succession planning of the family business;

A place at the table can be created for all interested parties, including the senior, adult siblings, spouses, grandchildren, concerned friends, support givers, and even caregivers. Oftentimes, additional professionals are brought into the process to provide guidance, education, and a voice for those that may not be able to speak for themselves. Advocates, advisors, and resource persons can include guardians, physicians, mental health counselors or coaches, geriatric care managers, financial advisors, valuation experts, and trust officers.

Collaborative Law was first applied to Domestic Relations cases in the early 1990s and has been widely received across the United States and the world in that area of the law. Given the benefits realized and general success in Domestic Relations law, there has been a more recent movement to apply Collaborative Law to other civil disputes where preserving relationships and privacy are vital. Local Collaborative Practice Groups raise Collaborative awareness and support Collaborative Practice in communities around the world. For more information about Collaborative Practice and our local Collaborative community, please visit the Web sites of the International Academy of Collaborative Professionals at www.collaborativepractice.com and the Cleveland Academy of Collaborative Professionals at www.collaborativepracticecleveland.com.

CASE SUMMARIES

IN RE ESTATE OF FRENCH

Citation: 2011 WL 334673.

Headnote: Dower.

Summary: Decedent died intestate survived by his wife and by daughters from both his first and his final marriage. The wife claimed dower in addition to her intestate share, though RC 2103.02 clearly bars it. There is a statutory exception to the bar for mortgaged property, and here the home was mortgaged, but the wife had waived dower in the mortgage deed. We see so few claims of dower, and the case is an example of why there are so few claims. The EPTPL Section of OSBA has been trying to get it repealed as obsolete but dangerous.

ESTATE OF BARNEY V. MANNING

Citation: 2011 WL 346293.

Headnote: Attorney malpractice.

Summary: Defendant attorney represented client in estate planning and later in administering the client's estate and becoming trustee of the client's trust. As trustee, attorney invested the trust assets of $1.25 million in his personal business enterprise, which failed. During this period attorney became an associate of law firm, but paid himself directly from the trust for his services as trustee; indeed, it appears that law firm did not know of the trust. Trust beneficiaries sued attorney and law firm, summary judgment was granted to law firm, and was affirmed on appeal. Undisputed facts indicated that attorney never acted on behalf of law firm in administering the trust, so it was not responsible as his employer.

The action is still pending against the attorney, and his malpractice insurance coverage was provided by law firm.

IN RE ESTATE OF ARTMAN

Citation: 2011 WL 497168.

Headnote: Fiduciary fees.

Summary: Administratrix filed for allowance of her fee, and the court summarily awarded her less than the statutory amount under RC 2113.35. The appellate court reversed, holding she was entitled to the statutory amount unless the court held a hearing and found fault with her administration. Entitled to the statutory amount? Is this an example of what is wrong with the probate system, that a fiduciary is entitled to fees without regard to services rendered or responsibility assumed?

UNION SECURITY INS. CO. V. BLAKELEY

Citation: 6th Cir. No. 09-4368 (2011).

Headnote: Power of Attorney.

Summary: Decedent left a life insurance policy with no beneficiary named, three children and a "cohabitant and purported fiancée." The trial court awarded the policy proceeds to the fiancée, and the appellate court remanded for more evidence. The policy required payment (with no beneficiary named) to the spouse or domestic partner, but with an nonmarital partner it required them to have exchanged powers of attorney, and the remand was to inquire of such an exchange. This suggests an entirely new reason for recommending that clients sign POAs.

ZIMMERMAN V. PATRICIA E. ZIRPOLO TRUST

Citation: 2011 WL 662699.

Headnote: Information to beneficiaries.

Summary: Grandmother left a trust for her (presumably minor) grandchildren with grandmother's nephew as trustee. Daughter (of settlor, mother of grandchildren) was disinherited. Daughter on behalf of grandchildren sued trustee for a copy of the trust instrument and for trust reports Trial court denied them, because it found that trust instrument denied information to beneficiaries (the instrument was furnished to the court under seal, and the opinion does not disclose what if any trust provisions may have attempted this) and because it found a conflict between daughter and her children that barred

