Applying Collaborative Procedures to Will, Probate, Trust, and Guardianship Disputes

By Harry L. Munsinger

Introduction

Collaborative procedures offer a way to settle will, probate, trust, or guardianship disputes through cooperation rather than litigation. During the collaborative process, parties agree to voluntarily produce discovery and cooperate to reach a fair settlement. The collaborative attorneys are required to withdraw if the case isn’t settled. Only about 4% of collaborative divorce cases end in litigation. The goal of collaborative law is to guide the parties toward an agreement that meets their important goals and furthers their interests with minimal financial and emotional damage.

THE COLLABORATIVE PROCESS SHOULD WORK WELL FOR ESTATE DISPUTES

The collaborative process is working effectively for many divorcing couples in Texas. Because parties involved in collaborative divorces share many characteristics with those involved in will, probate, trust, or guardianship disputes, the collaborative process should be effective in resolving estate disputes as well. Both groups are generally well-educated, middle-aged, and enjoy a large personal estate. The settlement rate among well-educated, middle-aged, and wealthy collaborative divorce clients in Texas is about 96%. Since parties in estate disputes often share similar characteristics with collaborative divorcing couples, it is likely that they will enjoy a similar settlement rate and benefit from the shorter time to resolution, generally lower cost, more creative settlement solutions, and the higher compliance rates of the collaborative process. As in collaborative divorce cases, certain difficulties could interfere with the settlement of some will, probate, trust, or guardianship cases. For example, if mental illness, lack of empathy, mistrust, or unrealistic expectations are present in one or both parties, the collaborative process is less likely to work.

THE COLLABORATIVE CASE IS MANAGED BY A TEAM

In Texas, most collaborative cases are managed by a team of two attorneys, a neutral financial professional, and a neutral mental health professional. The collaborative process has at least nine other features that differentiate it from litigation:

- The parties and their attorneys agree in advance in writing that they won’t take any issue to court while involved in the collaborative process.
- The collaborative process is totally private and confidential.
- The collaborative process is open and transparent to all participants. Privileges exist, but everyone agrees to exchange relevant information and answer difficult questions truthfully.
- Scheduling meetings is flexible, to accommodate the parties’ and professionals’ calendars.


• Collaborative cases generally settle in approximately six months, compared with over a year for the typical litigation case.3
• The mental health and financial professionals work for both parties and remain neutral. This arrangement saves money and promotes a fairer outcome.
• The mental health professional helps the parties develop better communication skills and encourages them to follow the rules of proper conduct to develop a sense of security.
• Agreements are reached through “interest-based” negotiations, where everyone cooperates, as opposed to confrontational negotiations where the parties are antagonistic.
• Settlement agreements can be tailored to meet the unique goals and interests of the parties.

THE UNIFORM COLLABORATIVE LAW ACT

The National Conference of Commissioners on Uniform State Laws proposed a Uniform Collaborative Law Act (“UCLA”) in 2009 to meet the need for a statute covering the practice of collaborative law in the United States. The UCLA was drafted to protect parties, give ethical guidance to attorneys, govern the voluntary disclosure of information, and establish protections for privacy and confidentiality within the collaborative process. The UCLA sets out minimum requirements for a collaborative agreement, a description of how the collaborative process works, and a method of designating attorneys involved in the collaborative case.4 Currently, there is an effort to pass the UCLA in Texas.

Applications of the Collaborative Process to Estate Disputes

Parties involved in will, probate, trust, or guardianship disputes are good candidates for the collaborative process because they typically are middle-aged, well-educated, and affluent. Moreover, they usually prefer to preserve family relationships, if possible, and wish to avoid the stress and increased cost of litigation. The collaborative process should be an effective way to resolve disputes concerning a deceased person’s estate.

**WILL CONTESTS**

Will contests most often occur when an elderly testator drafts a new will changing the disposition of his estate, when a surviving spouse disagrees with her stepchildren about the proper disposition of a decedent’s estate, or when a testator drafts an ambiguous will.

1. **Grounds for Contesting a Will.** Any interested person may contest a will on the grounds that a later valid will has been found, the testator lacked capacity when he executed the will, or the testator was subjected to undue influence or was fraudulently induced to execute the disputed will. Interested persons might include the heirs at law of the testator, the beneficiaries under a prior will, the independent executor named in a disputed will that has been admitted to probate, or, in some circumstances, an alternate beneficiary of an insurance policy.

2. **Testamentary Capacity Is Often Disputed.** “Testamentary capacity” means a testator “must have been capable of understanding the business he was engaged in, the nature and extent of his property, the persons to whom he meant to devise and bequeath it, the persons dependent upon his bounty, and the mode of distribution among them; that he must have had memory sufficient to collect in his mind the elements of the business to be transacted, and to hold them long enough to perceive, at least, their obvious relation to each other, and be able to form a reasonable judgment as to them.” When an elderly person drafts a new will that changes the disposition of his estate, the relatives who receive a reduced share are often quick to claim lack of testamentary capacity.

3. **Contesting a Will Based on a Claim of Undue Influence.** Another basis for challenging a will is to allege undue influence. To prove undue influence, an interested party must show both the existence and exertion of influence on the testator. Showing undue influence involves providing evidence that there was an opportunity to exert influence, the testator was in a weakened mental state, the testator’s mind was likely overpowered by another, and the disposition of the testator’s estate expresses the desires of the person exerting influence on the testator rather than the testator’s own desires. The critical element in proving undue influence is to show that the influence operated to “subvert or overpower” the testator’s mind.\(^5\)

4. **Applying the Collaborative Process to Will Contests.** The collaborative process is suited to resolving will disputes because often the interested person must continue to work with other family members. The evidence offered to prove undue influence is usually in the form of materials written by or about the testator, testimony from individuals who knew the testator around the time the will was executed, and medical records that contain notations concerning the mental status of the testator around the time the will was executed. In a collaborative setting, an outside expert can offer guidance concerning how the court would view the available evidence, and the attorneys can better serve the interests of their parties by open settlement discussions rather than adversarial negotiation or litigation. The outcome of the collaborative process can be an agreed settlement and a continued relationship rather than a broken family.

5. **The Benefits of Informal Discovery in a Will Contest.** If an alleged later valid will has been found, the parties in the collaborative process can informally, without expensive discovery, learn the location of the alleged later will and the circumstances of its execution, and can examine it for authenticity. They may examine the signature themselves or submit the alleged later will and known samples of the testator’s signature to an expert for comparison. Also, they may informally collect evidence from witnesses who were present around the time the alleged later will was executed or who knew the testator and saw her at that time. Generally, once the parties have viewed the available evidence and listened to informal testimony, they will know whether to continue the will contest or settle the matter through collaborative negotiation. In any case, the issues will be clarified, and the parties may avoid unnecessary escalation of the dispute.

**PROBATE DISPUTES**

Disputes about the distribution of a decedent’s assets can produce nasty and expensive litigation. The issues may reactivate old family disputes and trigger fights over emotionally significant property. There are a number of areas where disputes can occur during a probate proceeding or during the independent administration of an estate. For example, the parties may object to the executor named in the will. Most often, however, the parties squabble about how to share estate assets, especially when the executor is given significant discretion about who will receive specific personal or real property or who gets a larger amount of the estate. Family members may also squabble about the way the estate is being administered, arguing that they should receive their money sooner and should not have to pay so many expenses.

1. **Objecting to the Named Executor.** The collaborative process can save parties time and expense in a probate

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\(^5\) *Prather v. McClelland*, 13 S.W. 543, 546 (Tex. 1890).

dispute by disclosure of how difficult it is to challenge an executor named in a will. Generally, unless a named executor is disqualified by incapacity or is a convicted felon, the court will follow the decedent’s wishes and appoint the named person executor of the estate. In Texas, it does not even matter if the executor has a known bias against beneficiaries of the estate or if the executor and the beneficiaries disagree about the ownership of assets. The collaborative process can educate parties, by open discussion and informal discovery, that it is almost impossible to disqualify an executor named in a will.

2. Disputes About Executor Discretion.
Once a will is admitted to probate and letters testamentary issued, probate disputes often involve disagreements about how the executor exercised her discretion in determining who gets significant personal property or who gets more of the total estate. For example, a dispute can occur when a widow files for a family allowance to be paid prior to making distributions to other beneficiaries. The other beneficiaries may argue that the widow has sufficient property of her own to support herself and her children and that there is no need to pay a family allowance.

The collaborative process is also well suited to resolving disputes among family members over who receives emotionally significant personal property and other assets from the decedent’s estate. The collaborative team of two attorneys, a mental health professional, and a financial professional can guide the family toward uncovering their hidden emotional issues, developing constructive settlement options, and finding common interests that produce a family settlement satisfactory to all. For example, suppose the dispute involves who receives family heirlooms, who gets to live in the family home, and how much money each surviving family member takes from the decedent’s estate. If the parties enter litigation, the animosities are likely to grow as each party testifies about the bad actions of the other family members in an attempt to persuade the court to award them important personal property, the house, or other estate assets.

On the other hand, if the parties agree to settle their dispute collaboratively, they can openly discuss their individual interests, discover common grounds for a settlement, and often salvage their family relationships. The results of a collaborative agreement are generally more satisfactory to the parties and a mutually agreed settlement will often allow the parties to maintain their family relationships after the dispute is resolved.

3. Disputes About the Meaning of an Ambiguous Will. If the testator gave his attorney ambiguous instructions about the disposition of his property, or if the attorney was not careful when he drafted the will, the courts may find that the will is open to differing interpretations. When this unfortunate event happens, the parties have two options: they can hire litigation attorneys and spend a substantial portion of the decedent’s estate litigating the meaning of the ambiguous will, or they can enter the collaborative process and cooperatively negotiate a family settlement that conforms to the most likely plan intended by the decedent.
based on their knowledge of his assets, his family, and his stated preferences. The advantages of the collaborative process include lower cost, less stress, and a more satisfactory outcome that conforms to the decedent’s intent.

**TRUST DISPUTES**

Trust disputes may occur because of a trustee’s alleged negligence or alleged fraudulent administration. Typically, a trust is drafted to give the trustee discretion to distribute income and even to invade principal to meet a beneficiary’s needs for health, education, maintenance and support. Often the beneficiary may disagree with the trustee’s assessment of her needs, alleging that the trustee is not distributing adequate funds to maintain her “historical or expected” lifestyle. A dispute is even more likely if the trustee determines that one among several beneficiaries has a greater need for funds than the others and favors that beneficiary with more generous distributions. Finally, if there are two generations of beneficiaries named in a trust, the current income beneficiaries and the later remainder beneficiaries have a potential conflict of interest in regard to trust investments and may argue about the allocation of receipts between current income and principal.

1. **Allegations of Trustee Negligence or Fraud.** One major source of trust disputes is an allegation that the trustee neglected his duties. Another even more serious source of trust disputes occurs when there is an allegation that the trustee embezzled funds from the trust for his own benefit, rather than using the trust assets as they were intended for the benefit of the named beneficiaries. The first step in correcting the actions of a negligent trustee is to demand an accounting. Once the accounting is produced, it is relatively easy to see if the trustee has performed his duties diligently. If a trustee has not collected trust assets, has not invested the trust assets to preserve the value of funds against inflation, has not kept proper records, or has not distributed income or principal according to the trust terms, the accounting documents will speak for themselves. It is then relatively easy to have the trustee removed and a competent successor appointed. If there is an allegation of fraud, the situation becomes much more serious because the beneficiaries need to prove there has been fraud, have the trustee removed, and, most importantly, recover the embezzled assets or collect damages from the guilty trustee.

Cases of alleged negligence can be handled easily within the collaborative process, and generally a negligent trustee will agree to resign. However, the collaborative process is not always appropriate for cases of alleged fraud. If the trustee who has allegedly committed fraud is a member of the family, family members should consider using the collaborative process to preserve family relationships. If the trustee has sufficient personal assets to make restitution, the collaborative process can be an effective way to handle trustee fraud by a family member. On the other hand, if the fraudulent trustee is not a member of the family, or if the fraudulent trustee has few personal assets, it is usually better to file allegations of fiduciary fraud in court to force proper discovery and a reasonable remedy.

2. **Disagreements About the Size of Distributions.** The collaborative process is well suited for resolving disputes among trust beneficiaries over how much each beneficiary needs for his health, education, support, and maintenance, and in finding a middle ground between a life estate beneficiary and remainder beneficiaries. The collaborative team can often guide the family toward uncovering their true interests, discovering how much should be distributed to maintain the long-term integrity of the trust principal, and finding a family settlement satisfactory to all parties. For example, in the case of a dispute between a trustee and a trust beneficiary about the distributions needed for her health, education, support, and maintenance, the collaborative team can explore and educate both parties about the short-term interests of the beneficiary and the longer-term duties of the trustee to preserve assets for the future.

3. **Disagreements Between Income and Remainder Beneficiaries.** A trust dispute may also occur when the beneficiary of a life estate and the remainder beneficiaries disagree about how trust assets should be invested. Often a settlor will establish a trust for the life of his spouse with the remainder to his children or grandchildren. A dispute is likely if some of the remainder beneficiaries are children from a prior marriage and the trustee is the surviving second spouse. If the trustee has invested most of the trust assets in securities that produce generous income, but little appreciation, the remainder beneficiaries may rightly object. In this case, the remainder beneficiaries will likely feel they are being cheated of their legacy and file suit to force a more equitable allocation of trust assets to income production and to appreciation.

On the flip side, the settlor may name another party as trustee of his
trust, and the life estate beneficiary may feel that the trustee has allocated too large a portion of the trust assets to investments, such as real estate, that produce little or no current income but have the potential for long-term appreciation. Under these circumstances, the life estate beneficiary may ask the court to order a reallocation of trust assets into more productive securities. In all these cases, the potential for destructive litigation is high, and the best way to preserve the relationships between the surviving spouse and the children is through the collaborative settlement process.

GUARDIANSHIP DISPUTES

Some of the most contentious disputes can occur when family members disagree about the mental capacity of an elderly family member. When some of the children see a need for a guardian to manage the financial or personal affairs of an elderly mother, for example, while other children believe she is perfectly capable of managing her own personal and financial affairs, the resulting dispute can be catastrophic to a family. Family members may also disagree about who should serve as guardian. These issues can also be a subject of conflict between the alleged incapacitated adult and the other family members.

A difficult guardianship dispute can occur when an adult family member appears to be deteriorating mentally but does not want to be controlled by her family. For example, if the elderly person begins to make poor financial decisions or neglects her health, family members may feel they need to manage her financial or personal affairs. In particular, if she begins to neglect her personal health, nutrition, and appearance, the family may feel their mother needs a guardian of the person to monitor and maintain her health and well-being. However, the elderly adult may feel she is perfectly capable of managing her own affairs and not appreciate interference in her personal life by her children.

This situation can create difficult choices for family members. If they force their mother to accept a guardianship through a court order, she is likely to be resentful and uncooperative. If they do nothing, she may face financial ruin or endanger herself or others by neglecting her health or by driving after she has lost the capacity to drive safely. The best solution to this dilemma in a collaborative context could be to discuss the situation with the elderly adult or a court-appointed guardian ad litem and get agreement on a collaborative approach to deciding about a guardianship. Texas public policy favors limiting the nature of a guardianship to the minimally intrusive powers required to protect the person and her assets. The collaborative process is ideally suited to creating a minimally intrusive guardianship for a failing elderly parent.

Benefits of the Collaborative Process

Several benefits may be derived from using the collaborative process to resolve estate disputes. For example, the collaborative process promotes honesty, cooperation, and civil dialogue among the parties concerning their interests and allows them to avoid making nonnegotiable demands during negotiation. As a result, the parties are usually able to resolve disputes with dignity and avoid permanently alienating members of their family. The flexibility and privacy of the collaborative process encourages parties to communicate more openly and freely compared with adversarial litigation, making a long-lasting and mutually beneficial solution to their dispute more likely. Moreover, the collaborative process often results in disputes being resolved more quickly and at lower cost compared with litigation. Texas attorneys and their clients should consider using the collaborative process to resolve probate, trust, or guardianship disputes before they progress to litigation with the resulting emotional and financial harm to the family and the individuals involved.

Editor’s Note: Kim M. Munsinger’s article regarding the use of collaborative law in divorces and other family law matters, “Have You Heard About Collaborative Law?” appeared in the 2010 September-October edition of San Antonio Lawyer.

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