

Chapter 27

Family Discussions, Decisions, and Dispute Resolution

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Difficult decisions must often be made as family members age. Because these decisions impact several generations and may require resources and expertise available only outside the family, they should not be put off until there is a crisis.

These decisions are usually not about legal matters and the discussions may be highly emotional. If the family cannot make decisions together or postpones the discussions until there is a crisis, legal issues can arise based on misunderstandings and the lack of communication. When should a person stop driving? How will the family pay for a family member with special needs? When should you sell the family home? Surely, these decisions should not be left to the court. Family discussions are likely to be more productive if led by a professional who can ensure that everyone can be heard and can help the family identify important legal, financial, and medical questions, and help guide the decisions to be discussed.

27-1. Family Decisions

Families can use professional mediators to help them avoid court for many reasons, both for legal disputes such as probate of wills and for non-legal matters. Some of the non-legal issues that might be resolved through alternate dispute resolution are:

- ▶ Onset of dementia — Who will care for the family member? When is it time for full-time care?
- ▶ Caregiver burdens — How will the family handle respite care for the caregiver? Is the caregiver responsible for medical, personal, and financial decisions?

- ▶ Lifestyle changes — Is it time for Mom or Dad to move? Where? Can the family hire a caregiver and allow Mom or Dad to stay at home?
- ▶ Resident disputes — What to do if the care is not what was promised? What should the family do if there is a problem with a neighbor?
- ▶ Driving — When should Mom or Dad give up the keys? How is the family going to handle the loss of independence for the family member?
- ▶ Care disputes — The care provider will not listen to the family. Now what?
- ▶ Guardianship — Is Mom or Dad incompetent, or does she or he just need some help? Who is best suited to make decisions?
- ▶ End-of-life decisions — When is it time to let Mom or Dad go? Should we use hospice? What about the hospital?
- ▶ Financial decisions — Should we use an accountant to handle the checkbook? Is there a need for a family member to account for the decisions made? Whose money is it, anyway? Could Mom or Dad be a victim of financial exploitation?
- ▶ Estate matters — What if Mom or Dad has no will or power of attorney? What should the family do if there is a dispute about the estate?

27-2. The People Involved in the Decision

All of the family members should be present at the alternate dispute resolution sessions, even if they will not be providing care. Open discussions prevent misunderstandings.

Remember that only a court can take away a person's right to make his or her own decisions. A power of attorney does not allow a person to take away an elderly or disabled person's right to decide to leave a facility, fire a caregiver, or handle financial matters. Therefore, the elderly or disabled person has to be involved in the decision-making process. Even a person with dementia is able to make some decisions at times of lucidity, and the family should not assume that the person with dementia is not capable of participating or cannot participate.

If there are decisions to be made regarding residence, health, medication, or end-of-life issues, the family should choose a doctor or health care consultant with whom they all feel comfortable. This person would be involved in the decision-making process to provide information so that everyone would be able to make an informed decision.

The family may wish to enlist the aid of a financial advisor or a geriatric care manager to provide information to the family concerning options and alternative sources of assistance for the family member in need of care.

27-3. Types of Alternate Dispute Resolution (ADR)

Disputes in elder law cases, like other cases that are filed in court, can be time-consuming and costly. In addition, the emotional toll on everyone involved often causes problems that last long after the trial, and possible appeal, have concluded.

Fortunately, you can use some well-respected services before you involve the courts or hire a lawyer. These services can spare considerable anxiety and challenges to family harmony.

The general term for this process is alternate dispute resolution (ADR). There are many types of ADR available, some of which are explained below.

Arbitration

Arbitration resembles a trial before a judge, without a jury. Generally, either a single arbitrator or a panel of three arbitrators is selected to resolve a dispute.

Arbitration usually occurs when a contract or other agreement contains a provision or clause requiring this approach. Unless one of these circumstances exists, you cannot be forced to engage in arbitration.

In elder law cases, arbitration agreements may be found in trust documents. Contracts that address a wide number of issues may contain these clauses, including contracts for the admission into assisted-living communities or long-term care facilities. If this is the case, the clause is almost always enforceable.

However, the parties may voluntarily agree to use either arbitration or to hire a retired district court judge to resolve their disputes without a contract clause or a court order (*see* C.R.S. § 13-3-111). In either situation, the parties generally pay the arbitrator or the retired judge for his or her services.

The courts have ruled that arbitration is “a favored means of dispute resolution.” Colorado’s version of the Uniform Arbitration Act (C.R.S. §§ 13-22-201, *et seq.*) provides that arbitration agreements are presumed to be “valid, enforceable and irrevocable.”

If the document requires arbitration, it may specify whether there will be one or three arbitrators. If one arbitrator is to preside, the parties must agree as to who will serve as arbitrator.

If the arbitration is to be heard by three arbitrators, each party selects one arbitrator. Those two people then select the third arbitrator. That person serves as the chairperson of the “arbitration panel.” Arbitrators are neutrals and cannot automatically vote in favor of the party who selected her or him.

Although arbitration hearings occur in a more relaxed setting than a courtroom, those who testify are placed under oath. Each side is permitted to ask questions of each witness. Exhibits are presented to the arbitrator(s) for consideration just as they would be in court.

Arbitrators’ decisions are called “awards.” The award may require someone to pay another person money, may direct that no money be paid at all, or may require one or all parties to perform certain acts. Even if no money is to be paid, the ruling is entitled an “arbitration award.”

Arbitration awards are generally final. Once the arbitrators complete their award, they usually cannot change any part of it, except for typographical or calculation errors.

If the loser at arbitration does not comply with the award, the prevailing party can file a motion in court to have the award “confirmed.” Once the award is confirmed, it has essentially the same effect as a court judgment. Unlike a court judgment, however, an arbitration award can be appealed in very limited circumstances.

If you and the other parties agree to hire a retired district court judge to resolve your dispute, the Chief Justice of the Colorado Supreme Court must approve the appointment. If that happens, you cannot change your mind and ask to return to the court to which your case had

been assigned. Decisions by a retired district judge, hired by the parties, can be appealed in the same way as the decision of any judge in Colorado, although there are some limitations.

Why would you want to arbitrate if you were not required to do so, or why would you hire a judge when you have full access to the courts?

If you use arbitration or a retired state court judge, you can be confident that the person you selected has fewer cases to decide than a currently serving state court judge. If your case is heard before a retired Colorado state court judge, it probably will be heard in that judge's offices. It might also be heard in a courtroom. In any event, the law provides that cases heard before a retired Colorado state court judge can be open to the public.

Family matters, such as elder law cases, tend to include some very personal matters. Arbitrators and judges are sensitive people and provide a professional and considerate environment for all cases.

There are a number of individuals and organizations that offer arbitration services in Colorado and throughout the country. Arbitrators in those organizations who are retired Colorado state court judges can be appointed as statutory (retired) judges. Usually, the arbitration award is issued rapidly, often within 30 days after the arbitrator closes the hearing or receives the last written argument from a party.

Arbitration is a streamlined and effective way to resolve disputes. Hearings usually are set within a few months of the parties' submitting their documents to the arbitrator. The case often ends very quickly. As a result, the cost of arbitration or service by a retired Colorado state court judge can be less than the cost of a trial.

Arbitration agreements contain very specific language. If you face the prospect of arbitration, be sure to ask an attorney to review the document and explain the specific procedures you can utilize and those that you may be required to follow.

Mediation

Mediation occurs when parties to a dispute agree to ask a neutral person to consider the case and help them reach their own settlement. If you go to court, a judge or jury will decide who prevails and, in some instances, who will have to pay for some of the costs of the case. In mediation, you have a hand in negotiating an agreement.

Mediation sessions are confidential. This means that, if your efforts at settlement are not successful, neither the judge nor the jury will know anything that was said or happened during your negotiations. This is a rule of law. It permits everyone to be completely open and candid without having to worry about what will happen in court if you do not reach an agreement. There are only four exceptions to complete confidentiality. These exceptions to confidentiality arise when (1) all parties and the mediator consent to disclosure in writing; (2) communications during mediation reveal the intent to commit a felony, inflict bodily harm, or threaten the safety of a minor; (3) a statute requires public disclosure; or (4) disclosure is necessary to address claims of misconduct of a mediator (*see* C.R.S. § 13-22-307).

Mediation is usually voluntary. In Colorado, courts may order the parties in probate matters to participate in mediation prior to setting a date for a hearing or trial. Such orders provide the opportunity to explore settlement discussions prior to incurring the financial as well as emotional costs of further litigation.

Usually, the mediator asks each party to send her or him a “confidential settlement statement” about a week before the session. If you are not represented by an attorney and you are preparing this document, you should tell the mediator about the family member (whether living or deceased) as well as everyone else in your family. Explain how the dispute arose and what is at stake. Tell the mediator what your preferred result is. And help the mediator understand how you and those with whom you disagree reached the point of going to court.

Prior to the COVID-19 pandemic, mediations were held in-person, with all parties and the mediator physically present for the session. As a result of the pandemic, mediations now may be held in-person, virtually, or a mix of the two.

At the conference, the mediator may ask all parties and their attorneys to meet in one room to review the procedures and to tell everyone there what is important to him or her. This can be an emotional time for everyone. It also lets you “get things off your chest” and move on to problem-solving with the air cleared.

After this initial meeting, the mediator may ask the parties to gather in separate rooms. She or he then will meet with each party to discuss her or his confidential statement and the comments at the joint meeting, and to learn more about the people with whom the mediator is then speaking.

Mediators may be “facilitative” or “evaluative.” Facilitative mediators often hold more joint meetings, ask each party to consider the other’s point of view in his or her presence, and try to help them move toward common ground. The mediator facilitates an agreement reached by all of the parties without evaluating the strength or weakness of the case in court.

Evaluative mediators will meet with the parties separately and offer their candid views about the “pluses and minuses” of each party’s position, the potential risks of going to trial, and the mediator’s experience with cases that are at least somewhat similar to the matter at hand. The mediator will also talk about the applicable law.

Neither facilitative nor evaluative mediation is a “better” approach. Some mediators may choose which technique is appropriate for the unique circumstances of the case. When selecting a mediator, you can ask the office where the mediator works what technique(s) the mediator uses, and request that a mediator evaluate the case after facilitating a meeting.

You and the other parties in the case have to agree who or what service will provide mediation. Usually, the mediator charges an hourly fee and asks the parties to share that cost equally. Some offices charge a non-refundable case-processing fee.

Enter mediation with an open mind. An experienced elder law mediator will be sensitive to the dynamics of a family dispute. While the mediator will not be a passive person, she or he should be respectful toward you and the dispute.

If a settlement is reached, the mediator will prepare a document often referred to as “Basic Terms of Settlement” or a “Memorandum of Understanding.” You will be asked to sign this agreement. Upon doing so, it is binding and enforceable in court in the same way that a contract would be. If an attorney is involved and/or the matter has already gone to court, the attorney will draft a formal settlement document to be filed with the court.

As discussed earlier, mediation permits people to resolve their disputes with a great deal of input. No one “wins” or “loses” every issue. In the final analysis, having a hand in the settlement

process usually makes each party feel better and permits them and their family members to move on with their lives, free from the expense and uncertainty of the courtroom.

Early Neutral Evaluation

This type of ADR involves one or two neutral evaluators who listen to both sides of the case, gather information, and then give their assessment of the case from a practical perspective.

- ▶ The goals of Early Neutral Evaluation (ENE) are to:
- ▶ Enhance direct communication between the parties about their claims and supporting evidence;
- ▶ Provide an advisory nonbinding assessment of the merits of the case by a neutral expert;
- ▶ Provide a “reality check” for clients and lawyers;
- ▶ Identify and clarify the central issues in dispute; and
- ▶ Facilitate settlement discussions, when requested by the parties.

ENE aims to position the case for early resolution, if possible. The evaluators, a team of professionals experienced in family dispute resolution, host an informal meeting of clients and counsel at which the following occurs:

- ▶ Each side presents the arguments supporting their case (without regard to the rules of evidence and without direct or cross-examination of witnesses).
- ▶ There is time for rebuttal and additional information if needed.
- ▶ The ENE evaluator or team identifies areas of agreement, gathers additional information, clarifies and focuses the issues, and encourages the parties to enter procedural and substantive stipulations.
- ▶ The ENE evaluator or team meets without the parties and their attorneys present to evaluate the case and recommendations regarding further information and settlement options.
- ▶ While the ENE evaluator or team is in caucus, the attorneys and parties have the opportunity to discuss settlement of any issues.
- ▶ The ENE evaluator or team then presents feedback and recommendations to the parties and their attorneys.
- ▶ The parties and their attorneys caucus to discuss the recommendations.
- ▶ The parties and their attorneys provide feedback to the ENE evaluator or team regarding acceptance or rejection of recommendations.
- ▶ If the parties and their attorneys request further settlement discussion, they engage in settlement discussions facilitated by the ENE evaluator or team, often in separate meetings with each side. This process follows the procedure for mediation as outlined above. ENE evaluators are often specially trained in the ENE process.

The ENE evaluator or team has no power to impose settlement and does not attempt to coerce a party to accept any proposed terms. The parties may agree to a binding settlement. If no settlement is reached, the case remains on the court’s docket.

Communications made in connection with an ENE session are treated in the same way as mediation and cannot be disclosed to anyone else not involved in the litigation, unless otherwise agreed to by all parties.

27-4. Use of Mediation in Estate Planning

While mediation is usually a tool used when a family is in court, it can also be a very effective tool in estate planning to avoid court involvement. For instance, in your will, you may want to empower your personal representative to require mediation if there is a dispute about your estate. You may want to include a clause requiring mediation before any court objection or dispute is filed with the court.

As discussed, many courts in Colorado now require mediation before a permanent hearing will be scheduled in a probate matter or a disputed guardianship. Denver Probate Court uses the Court Mediation Services for both paid and free mediation. Arapahoe, Adams, and Boulder County all have free or low-cost mediation services available to the public.

Before you litigate — mediate!

27-5. More Information

If your family needs more information regarding alternate dispute resolution, you may want to consult one of the resources located in Appendix A: Resources, Chapter 27.

