COLLABORATIVE LAW IN
PROBATE, TRUST ADMINISTRATION, ELDER LAW & GUARDIANSHIP

This presentation is intended to introduce Collaborative Law to professionals who are already working in the areas of Probate, Trust Administration, Elder Law, and Guardianship. It will discuss the unique benefits and challenges of using this approach to dispute resolution in these kinds of cases. We will also discuss the work that is being done to develop the tools needed to work in this way.

WHAT IS COLLABORATIVE LAW?

Collaborative Law is a way to resolve disputes by removing the disputed matter from a litigated setting and treating the process as a way to jointly problem solve rather than to fight and win.

As part of the Collaborative Law method, both parties retain separate attorneys whose job it is to help them settle the dispute. No one may go to court. If that should occur, the Collaborative Law process terminates and both attorneys are disqualified from any further involvement in the case.

One of the biggest differences between the Collaborative Law process and traditional litigation is the recognition that emotional issues exist in many conflicts that cannot be adequately addressed by the legal system and value placed on the continuing relationship of the parties to the conflict.

Each party in the Collaborative Law process signs a contractual agreement that includes the following terms:

Disclosure of Information.
Each party agrees to disclose honestly and openly all documents and information relating to the issues. Neither spouse may take advantage of a miscalculation or an inadvertent mistake. Instead, such errors are identified and corrected.

Respect.
Each party agrees to act respectfully and avoid disparaging or vilifying any of the participants.

Sharing Experts.
The parties agree to implement outside experts where necessary in a cooperative fashion and share the costs related to those experts. (e.g. real estate appraisers, business appraisers, parenting consultants, vocational evaluators, or accountants)

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When needed a team of professionals can be assembled to help the parties understand and resolve their disputes in many different contexts. The disputes maybe legal disputes or emotional and include: mental health counselors/coaches for each party, neutral financial advisors, accountants, medical experts, and appraisers, if needed.

Win-Win Solutions.
The primary goal of the process is to work toward an amicable solution and to create a "win-win" situation for all. The process relies on interest based negotiations.

No Court.
Neither party may seek or threaten court action to resolve disputes. If the parties decide to go to court, the attorneys must withdraw and the process begins anew in the court system.

Collaborative Law began in the state of Minnesota in 1990 and has been well tested by practitioners and bar associations’ ethics boards across the county.

It has been actively practiced in Washington State since 2003, but its practice here has historically been limited almost exclusively to family law. In other parts of the country Collaborative Law has been used primarily in family law but has also been used to resolve disputes involving probate, trust administration, elder law, employment law, business disputes, landlord/tenant disputes, and insurance disputes.

As Collaborative Law has gained traction in the area of Family Law, practitioners and the public have begun to look at other areas of civil practice that might benefit form a collaborative approach. Frequently mentioned areas of law for expansion include probate, trust administration, elder law, and guardianship. The King County Collaborative Law Civil Practice Group, which focuses on expanding Collaborative Law beyond family law, has focused on these areas for the last year and plans to keep that focus for the coming year.

BENEFITS OF A COLLABORATIVE APPROACH OVER LITIGATION FOR THESE AREAS OF LAW

Probate, Trust Administration, Elder Law, and Guardianship make sense as a good area of law for collaborative practice expansion because of many of the qualities it shares 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.”

- 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 all the collaborative process. There are also a number of collaboratively training practitioners who do practice or have practiced in these areas in the past making it possible to engage in test cases without a large number of new practitioners needing to be trained.

BENEFITS OF COLLABORATIVE LAW OVER TRADITIONAL MEDIATION

Disputes that arise in these areas of law are often settled by either represented or unrepresented parties in either a traditional mediation or other form of negotiated compromise. Collaborative Law has 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 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 KINDS OF DISPUTES COULD BE ADDRESSED?

Collaborative Law 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

Collaborative Law 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

WHAT UNIQUE ETHICAL CHALLENGES COULD BE RAISED?

Elder Law cases usually involved 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

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 bring 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 family law case.

Probates and Trusts also often involve privileged information such as the deceased’s medical history and legal representation that much 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 a Collaborative Law approach 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 of levels of incapacity make it inappropriate. See RPC 1.1, RPC 1.2, RPC 1.14, and RPC 3.4

WHAT UNIQUE PRACTICAL CHALLENGES COULD BE RAISED?

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 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.
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.)

For public pay cases in the area of guardianship it is unclear if the court would allow disqualification of parties if the process failed.

The TEDRA process specifically requires mediation. To address this, the attached sample participation agreement defines the process as a collaborative mediation to comply with this statute. (Note: this raises its own ethical issues because the rules regarding mediation and collaborative process vary. We have tried to address this in the participation agreement.)

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

HAS ANYONE ACTUALLY TRIED THIS?

To our knowledge there has not been any formal Collaborative probates or trust administration cases, elder law cases, or guardianship cases in Washington State although many cases are resolved in ADR with a lot of informal collaboration.

Formal cases in Probate, Trust Administration, and Elder Law have been done in other states, such as California, Massachusetts and Texas. I have interviewed some of these practitioners and learned the following:

- The courts have been very supportive and the cases that have been attempted have all resolved well.
- The cases have primarily involved powers of attorney trusts or other property arrangements and not formal probates.
- The biggest obstacle in other states has been resistance to the approach in the probate litigation bar, which has expressed concerns that the practice will reduce profits for attorneys, result in less zealous advocacy for clients and impact on current practices involving representation of multiple parties. (It is worth noting that these states all have probate procedures that are more complex and expensive than Washington’s statute and that have no ADR requirement, which may impact the attorneys’ perspective.)
• Not a lot of formal acknowledgement of the existence of outside parties other than creditors when seeking extensions on time to pay, which the attorneys thought were more readily granted because court knew parties were in “settlement mode.” Washington appears to be ahead of the curve in terms of formally addressing these issues.
• Mediators were not used but “facilitators” were and were helpful.
• Not set team of coaches for these cases but joint experts were useful.

WHERE ARE WE IN WASHINGTON?

We are here!

The Civil Practice Group of the KCCL has created a website on Probate and Elder Law on the KCCL website and developed the attached Probate participation agreement and Elder Law participation agreement. The group plans to do similar agreements for trust administration and guardianship.

The draft participation agreement on Probate was presented at the Collaborative Law section in March and met with a very positive response with several practitioners interested in joining the practice. They are anxious to get the input of this group as well.

Next steps include drafting sample letters to clients and opposing counsel, drafting sample fee agreements and pleading to get court permission to enter into agreements and implement the appropriate tolling of statutes, and identifying appropriate coaches. If you are interested in helping, we could use extra hands and minds!

We are also working to develop a group of trained attorneys who can take these cases. If you are interested, please let us know so we can keep you in the loop and assist you in getting trained in the collaborative model. Similarly, if you have friends or colleagues who work in this area who you think would be a good fit, give us some names so we can start encouraging them to learn more and get trained.