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Mediation in Inheritance Disputes

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The current opinion is that mediation is particularly suitable in the field of family disputes. Inheritance disputes are both emotionally and financially sensitive family law matters with high emotional conflict escalation level equivalent to divorce disputes. Some authors suggest that legal disputes should be described as particular disagreement in opinions, in which the claim of one party related to a legal right or a legal fact is being rejected by the other party of the dispute. The common feature of succession disputes is that these conflicts arise and are dealt with within a family circle. The concept of an extended family includes divorced people, their new and pre-existing families, registered and non-registered partnerships, children born in marriages as well as born in unregistered partnerships. Mediation is quicker than court proceedings, it is easier to appoint and hold meetings, and decisions are made faster. It is worth to emphasize that even if a peaceful agreement is not achieved, mediation can have a tremendous positive effect and benefit for both parties by opening the eyes of both the lawyer and the client to understand the core reasons of the dispute.

The last few decades has brought great changes in society, its social and economic life. The acceleration of our daily life, the desire to limit the financial costs, the willingness to resolve disputes effectively and to regulate the workload of courts has brought changes to the legal system. As a consequence, mediation as a new dispute resolution tool has spread in some countries, while in others it has become stronger. The policy of the European Union has also had a great impact and encouraged the spread of mediation in Europe as several legal acts were adopted such as Recommendation (98) 1 on Family Mediation adopted by the Committee of Ministers.[1]

The prevailing opinion is that mediation is particularly suitable in the field of family disputes. Inheritance disputes – similarly to divorce disputes – are both emotionally and financially sensitive family law matters with a high level of emotional conflict. Almost all the legal practitioners analyzing the problems arising in inheritance disputes highlight not only the economic, but also the psychological damage and destructive impact of these disputes on family relationships. Inheritance disputes require special attention not because of their large number, but because of the negative effect on the family environment. Mediation, being much more informal and flexible than the judicial process, allows for the possibility of proper attention to deal with not only the legal but also the psycho-emotional aspects of the dispute. Mediation in inheritance disputes requires the involvement of a highly qualified specialist who is knowledgeable not only in legal, but also in psychological and emotional dispute management. Therefore mediation can be considered not only as a model for peaceful dispute resolution, but also as a means of family care, which has significance beyond its economic gains.

1 *Committee's of Ministers of the Council of Europe Recommendation No. R (98) 1 on Family Mediation.*

Background for Applying Mediation in Inheritance Disputes

The Dualistic Nature and Specifics of Inheritance Disputes

Some authors[2] suggest that legal disputes should be described as a particular disagreement in opinions, in which the claim of one party concerning a legal right or a legal fact is rejected by the other party of the dispute. However, the analysis of inheritance disputes indicates that this generalized approach is not sufficient enough to reveal the complexity and dualistic nature of inheritance disputes. Their two aspects – legal and emotional – show the core essence of these disputes and form their dualistic nature. The dualistic nature of inheritance disputes causes their complexity: on the one hand they are property disputes and therefore they belong to the sphere of civil law regulation, on the other hand inheritance disputes are about emotional family relationships and kinship ties and in this respect they belong to the field of psychology or sociology. Because of the reasons mentioned above, these disputes require a family expert who is both knowledgeable in family dynamics and in the legal aspects of inheritance disputes.

The Specifics of Mediation in Inheritance Disputes

Firstly, it should be said that the common feature of succession disputes is that these conflicts arise and are dealt with within a family circle. Some authors[3] are of the opinion that frequent divorces result in an increasing number of inheritance disputes because the risk of disagreement is higher when extended families are involved. The concept of extended family includes divorced people, their new and pre-existing families, registered and non-registered partnerships, children born in marriages as well as born in unregistered partnerships.[4] Another specific aspect of succession disputes is its previously mentioned dualism, which requires not only legal knowledge and competence from the mediator. As emphasized in the literature, "the dual trained family and civil/commercial mediator may offer a model of mediation in inheritance disputes that is sensitive and responsive to the intense emotions between estranged family members, while also providing the lawyer-assisted financial negotiation characteristic of civil mediation."[5]

It is worth mentioning that succession disputes often have a very personal and emotional background and involve inner conflicts as well as hidden grievances. Therefore the mediator must be well familiar with these specifics and constantly employ reality checks to make sure that the parties are arguing about the real issue and they are not producing a defensive reaction or perhaps even concealed aggression. This would not be necessary in court disputes but in the process of mediation revising "alternative versions" is essential. It is also important to mention that family disputes are unique

2 Kaminskienė (2011) 35–36.
3 Vorys (2007) 890.
4 Paplauskaitė (2014)
5 Parkinson (2011) 250.

with a tendency of third parties taking part in their escalation and in the decision making process. That means that the husband may take part in his wife's conflict with her siblings over the succession, or perhaps even his parents may want to give their opinion. Of course, such a third-party involvement does not facilitate the solution of the problem, and often makes it even more difficult.

It should be noted that disputes over inheritance are among the most sensitive and painful ones. And it is not only because these disagreements are closely connected with the death of a family member or a friend. These situations often involve family secrets and sometimes reveal a hostile attitude towards other family members. There may be several reasons for conflict over inheritance: relatives may be dissatisfied with the decedent's estate plan, family members may have different views of fair distribution, grief creates tension and a lawsuit may be caused by a misdirected anger over the death of a loved one. It may also be a conflict over family relations and not over property.[6] But it is very important to remember that the emotional context of a dispute should never be underestimated[7] because in many cases the hidden conflict (sibling rivalry, jealousy, the pursuit of priority, etc.) have even bigger significance for the disputing parties than the estate or money and parties must solve different disagreements, only small part of which have a legal nature.[8] There is no place and time for emotional analysis in court hearings and therefore "the proceeding may not be the best solution because of the types of concerns that arise in probate".[9]

Disputes over property often involve high emotional stress and pain due to death and loss, mourning and the accompanying feelings of guilt. In such cases it is essential that the mediation should not commence too early, when the pain still has not subsided and the parties have not regained their emotional balance. It should be noted that mediation is different from formal court proceedings, where the parties' emotional-psychological characteristics are not taken into account during the hearing. It is very important not to start the mediation process too early because when emotions calm down the parties may want to reconsider the decision taken during the mediation and consequently they may choose not to follow the agreement. Therefore, it is the task of the mediator to assess the psychological state of the disputing parties and to decide whether it is the appropriate time for them to participate in mediation and, if necessary, to allow them time for mourning. Mediating inheritance disputes is believed to be difficult because the most important and relevant person to the matter (the testator) is dead and cannot participate in the mediation.[10] In this case, it is much more difficult to ascertain the true will of the testator, not to violate it, and at the same time to defend the legitimate interest of the parties. In these cases it often helps to evaluate some important nuances and to analyze the overall situation by explaining the relevant circumstances.

6 Gary (1999) 11.
7 Radford (2000) 647.
8 Vorys (2007) 877. Primary source: Madoff (2002) 161–163.
9 Gary (1997) 416.
10 Madoff (2004) 698.

Benefits of Mediation in Inheritance Disputes

Although mediation will not provide a solution in every dispute, in most cases this method will bridge the gap between different views and will help to find a better solution than the judicial decision would.

The key advantages of mediation in succession disputes are:

- Privacy and confidentiality. It is one of the most commonly indicated advantages. Judicial proceedings are generally open and documented, and inheritance cases are often associated with family secrets and shameful disagreements. Privacy will be particularly valuable in those cases where the disclosure of unpleasant private family affairs are important. It is assumed that the mediation process will give the possibility to feel free and talk much more openly. Therefore it is much easier to discover the true reasons of disagreement.
- Preservation and continuity of good family relationships. Mediation seeks to reduce conflict and increase harmony.[11] According to S. N. Gary,[12] a protracted succession dispute and litigation could irreparably destroy family relationships in most cases, while mediation can repair, maintain or improve ongoing relationships. In order to settle the conflict the parties must cooperate and jointly find a solution, this helps them build communication and problem-solving skills and that will help them in the future.
- Making it easier to resolve the emotional aspect of the dispute over succession. It is especially important in disputes involving family members. Both the informality and confidentiality of the mediation helps in this case. Disputes over inheritance are often caused by long-repressed family problems. The parties often seek a certain emotional outcome only: perhaps an apology or they just vent the anger about the situation, which is considered unfair. The mediation process leads to a better understanding between the parties providing an opportunity to express their views and be heard. The court will not investigate personal issues, only legal rights and legally significant facts. According to R. D. Madoff,[13] sometimes mere communication helps to regulate some of the disputes. Thus it is possible to accept the view that the main purpose of mediation is not always to seek for a mutually acceptable agreement. Mutual understanding achieved among the parties can be just as important.
- Mediation gives an opportunity for the parties to create an individual dispute solution. The mediation process encourages parties to take responsibility for their future lives, gives them control over settlement procedures and conditions of the final agreement. Such an autonomous final dispute resolution is considered to be a guarantee that the parties will follow this agreement voluntarily, and deem the agreement honest. This flexibility is an important advantage of

11 Murphy (2011) 672.
12 Gary (1999) 12.
13 Madoff (2004) 710.

mediation. There are two major disadvantages in the judicial process. Most importantly, the court's decision is favorable to only one party and the other becomes unsuccessful. Secondly, in a litigation process the outcome of the dispute is strictly limited to legal alternatives. Mediation eliminates these disadvantages of the judicial process and allows the parties to decide what final solution is acceptable to both of them and meets their needs.

– The possibility to find a solution that will be considered fair by all parties. The decision will be more satisfactory than a formal court resolution because it will be consistent with the parties' values and will take into account the non-legislative, emotional side of the dispute. It should be noted that the recognition of fair decision is very important, because, as S. N. Gary[14] notes a lot of legal actions are taken to the court not because the plaintiff believes that the testator was incompetent or because he was unlawfully influenced, but because the testamentary distribution opposes the applicant's understanding of what is fair. It is worth to note, that the principle of good faith is a fundamental principle of law recognized by the courts: "the law requires diligence, honesty, parties' cooperation, informing each other, taking into account the legitimate and reasonable interests of the other party".[15] In some cases, recognition of bad faith in legal relations implies invalidity of the transaction. Family disputes are not necessarily associated with dishonesty related to a law, but rather are internal, subjective emotional responses to the situation that does not comply with the imaginary ideal. Thus, the testament may be absolutely correct in terms of legality and nevertheless be considered unfair by the beneficiary (e. g., all the assets can be divided in equal parts and left to the testator's two children, but the beneficiary, who took care of the deceased prior to his death, can feel that he or she should receive greater heritage than the other one). It is obvious that the beliefs of the parties influence their behavior and decisions significantly, so it is crucial to keep in mind that legal rules and judicial practice may have very little importance and inner beliefs might lead to further decisions.
– Efficiency is presented as another advantage of mediation. Efficiency is usually associated with reduced legal dispute resolution costs and shortened duration of the dispute resolution process.[16] Mediation is quicker than court proceedings; it is easier to appoint and hold meetings, and decisions are made faster. It might even be possible to reach a mutually acceptable agreement in one session.[17] Of course, the operative decision making is reflected in reduced legal costs, which is especially important in cases where costs can become disproportionately high compared with the value of the estate.

14 Gary (1997) 416–417.
15 Lithuanian Court of Appeal, Civil Division College's decision of February 12th, 2008 in civil matter R.P. v. UAB "Bonapriksas", No. 2A-127/2008.
16 Radford (2000) 642.
17 Chester (1999) 182.

– Another advantage of mediation is its convenience.[18] It may be important to those who work long hours or are disabled and therefore of a reduced mobility. As the mediation process is not limited to a specific location, date and time, and serve for the needs of the parties alone, it can be determined by the free consent of participants.
– It can be noted, that mediation in inheritance disputes is positively estimated for many reasons, ranging from the social peace and the preservation of family relationships and ending with the economic efficiency criterion. However, it is worth to emphasize that even if a peaceful agreement is not achieved, mediation can have a tremendous positive value and benefit for both parties in opening the eyes of both the lawyer and the client to understand the core reasons of the dispute. In this way, the perception of the situation is expanded, which is likely to lead closer to the resolution of the dispute.

Disadvantages of Mediation in Inheritance Disputes

Practitioners of mediation can perceive only a few drawbacks to this method. According to S. M. Murphy, mediation is a good instrument to prevent conflict, but, if unsuccessful, it is a waste of time and money.[19] Mediation suits best if the primary goal is to preserve the relationship and to reduce conflict. However, if time and money is considered mediation can become a disappointment. This can happen if the parties become so entrenched in their positions that they will not compromise or the emotional conflict escalates to such a degree that the parties become unable or unwilling to communicate.

Secondly, mediation is difficult when many parties are involved in the conflict and many interests must be taken into consideration. In these cases mediation is less likely to reach its goals and also tends to be quite expensive. Mediation becomes costly, time and money wise, because in cases where many parties have different interests the mediator has to divide and group those issues. This division is essential because separate parties may be involved or may be concerned with absolutely different issues and a joint mediation session would be absolutely inappropriate or even damaging. As a result, several separate mediation sessions must be arranged with a purpose to handle different interests. The mediation process becomes less cost efficient in cases when parties refer for help to specialists of a certain field, e.g. lawyers, tax planning advisors, etc.

We can conclude from the above mentioned that mediation has much less drawbacks than benefits. Of course, in each and every case the mediator has to assess the potential and suitability of mediation as a dispute solving method, as there might be specific cases where the disadvantages outweigh the advantages and mediation cannot be applied effectively.

18 Radford (2000) 639.
19 Murphy (2011) 672.

Conditions for Proper Implementation of Mediation in Inheritance Disputes

The Cases of Inheritance Disputes in which Mediation is not Recommended

Although mediation is appropriate in most cases of inheritance disputes, there are some circumstances in which mediation may be considered to be complicated or even harmful.

One of the detrimental cases mentioned above is the situation with potential power imbalance. In these cases the mediator must be ready to analyze the situation and dismiss common stereotypes. E.g. an aging matriarch may emotionally control her family, which contradicts the common stereotype that elderly people are weaker and unable to assert their own interests.[20] Mediation should not be considered appropriate when one party lacks legal capacity because of different reasons – mental illness, age (elderly, minors or unborn beneficiaries are involved),[21] etc. These people might be intimidated by other family members, their participation in the mediation process may cause frustration or they might suffer due to the lack of proper legal representation.

"Grief and the ways in which the parties deal with their grief will also affect the parties' abilities to mediate".[22] Therefore the mediation process should be delayed giving parties time to deal with their emotions and be able better represent their interests in a later negotiation process. Therefore the mediator should always take into consideration the emotional effect of mourning and be patient with the mediation schedule. A long-term dispute, especially if it "has been ongoing in a family for a number of years before the death of the decedent",[23] may also be a reason to consider the suitability of mediation. Although "early mediation of disputes also allows the parties a non-confrontational forum to discuss a variety of matters that may otherwise fester",[24] late mediation may bring no benefit: "the more entrenched the parties are in their positions, the less likely it will be that mediation will be successful".[25]

One more reason not to apply mediation in succession disputes is the need for a precedent establishment for its use in subsequent cases. Although the possibility of this kind of demand is low in succession disputes, "that will be the factor in weighting the merits of litigation versus mediation".[26]

So we can see that mediation is not recommended in all inheritance disputes and in some situations it is even strongly advised not to use this method. Each case should be considered individually and both individual and family interests must be taken into consideration, as well as the possibility of a legal agreement and a tendency to compromise.

20 Radford (2000) 638–639.
21 Gary (1997) 399.
22 Ibid. 432.
23 Chester (1999) 202.
24 Radford (2000) 665.
25 Gary (1997) 433.
26 Gary (1999) 13.

Proper Mediation Style in Inheritance Disputes

Despite their neutrality, the mediator is not a passive party and plays a variety of roles, including facilitator, communicator, educator, resource expander, reality check and devil's advocate, guardian of the details, interpreter and reconciliatory.[27] Every mediator has a different education, professional and personal experience, employs different skills and techniques and this strongly affects the mediation process and style. The majority of the practitioners debate between two styles of efficient mediation – evaluative and facilitative. In broad terms, an evaluative mediator focuses on solution, assesses the strengths and weaknesses of the parties and predicts court judgment.[28] Facilitative mediation concentrates on the parties abilities to solve the dispute on their own and also seeks to educate the parties to avoid conflict in the future. Each of these styles has different advantages and disadvantages.

As N. Kauffman and B. Davis notes[29] that the aim of mediation determines the choice of both the mediator and mediation style. Nevertheless, in the ongoing debate between mediators regarding the appropriateness and suitability of the two mediation styles in family disputes facilitative mediation seems to be scoring the points. This mediation style is said to be the best especially in family matters when the conflict involves existing and future relations among parties, when future communication is important and when common and complementary interests exist.[30] "Facilitative mediation will be particularly attractive to a testator who expects and wants his family to have continuing relationship with one another, even if some members are less than happy about the dispositive provisions of his will."[31] Facilitative mediation promotes harmony. On the other hand, evaluative mediation is better when financial matters are involved, the object of the dispute (e. g. money) can be easily divided, there is no interest in continuing relationship, and no confidence between parties exists.

Despite all the advantages of facilitative mediation, it should not be the number one style in all probate matters. In some probate disputes the parties may not intend to preserve or need to maintain a relationship after the solution of their dispute and therefore the facilitative mediator, who spends too much time trying to save the parties' relationship and not enough time reaching a relevant solution, may not be as effective as an evaluative mediator.[32] Consequently, focusing only on the solution may effectively and quickly solve the dispute itself, but may also lay the groundwork for bigger dissention in the future.[33] Therefore we could agree to the reasoned opinion of C. C. Camp: "a more measured approach to this debate, however, is to acknowledge the variability of styles that exist within the field of mediation while recognizing that not

27 Radford (2000) 622.
28 Ibid. 623.
29 Kauffman–Davis (1998) 10.
30 Amadei–Lehrburger (1996) 64.
31 Love–Sterk (2008) 572–573.
32 Radford (2000) 622–623.
33 Ibid. 623.

all styles or behaviors are appropriate or effective for all cases."[34] It seems absolutely reasonable that an approach called "situational mediation" developed. According to O. Ross, the key is to adapt to the nature of the dispute and the parties involved.[35] We can see that either the evaluative or the facilitative mediation (or even the combination of both) may be absolutely suitable in certain probate situation but the biggest responsibility falls on the shoulders of the mediator – they are the ones who determine the style applied and their choice reveals their competence, qualification and experience.

Who are the Mediators?

Mediators of different background (e. g. judges, lawyers, psychologists, social workers, teachers, etc.) can be recommended for different types of disputes. Some experts suggest that the mediator need not necessarily be a lawyer,[36] while others hold the opposite point of view suggesting that "subtle legal issues often are involved, and a resolution of those legal issues more likely than not would be beyond the training, experience or understanding of non-lawyer".[37] Therefore we are going to focus on the legally trained professionals as mediators.

Judges as Mediators

In Lithuania judicial mediation was authorized in 2005 when the pilot judicial mediation project was approved. This project enabled the parties of civil proceedings (hence including inheritance cases) to seek for a peaceful agreement with the help of mediators – specially trained judges, judicial assistants or other professionals of relevant qualification. However, this project has showed very modest results so far. According to the statistical data,[38] in 2005–2012 only 53 legal cases were referred to mediation and only 14 of them (that accounts for only 29 percent) were successful and concluded in legal agreements. It is noteworthy that the legal regulation[39] in Lithuania allows a judge to conduct mediation only within the framework of judicial mediation, and only retired judges can participate in mediation as a participant of the mediation market.

There are very divergent opinions expressed regarding judges as mediators. Some sources associate judge mediators with inefficiency while others highlight their benefits. In most cases a judge mediator receives positive evaluation because clients appreciate their extensive judicial experience. A judge mediator makes a great impression on the parties; it is believed that the judge's opinion carries more weight; the experience and participation of the judge itself is very important.[40] Other sources express the view

34 Camp (2012) 202.
35 Fazzi (2004) 86.
36 Radford (2000) 621.
37 Morel (2005) 1.
38 Kaminskienė (2010) 58.; National Court Administration (2013)
39 Law on Courts of the Republic of Lithuania.
40 Morel (2005) 1–2.

that judges should lead in becoming mediators for the respect that people feel for the judicial system.[41] It is also believed that a former judge could properly predict the outcome of the case and provide a realistic assessment of positions as a basis for further negotiations.[42] Former judges in particular are preferred as mediators by those who give priority to evaluative mediation, because judges tend to promote this particular style.

However, some experts argue that judges are not effective mediators because they often use forcing techniques, which are more efficient in negotiating binding agreements in mandatory sessions, but completely unproductive in mediation.[43] It is also believed that judges are bad mediators because they are used to achieving their goal using the strength they have on their side as their advantage,[44] are quick to criticize[45] and are also categorical.[46] It should be noted that in disputes over inheritance the stringency of a judge may make the parties of the dispute feel bad, especially if they are still in the stage of mourning and are sensitive to the environment. Despite the contradiction in opinions regarding judges as mediators, the study conducted by J. A. Wall and D. E. Rude confirmed that judicial mediation is considered to be effective. However, it should be also assumed that this type of mediation is not necessarily appropriate in absolutely all the cases. It must be taken into consideration that it might be difficult for a judge to "switch" from solutions based on legal rights to concentrating on the more latent but fundamental interest of the parties. As a result, the mediator should not be chosen solely on their legal authority. The basic interests of the parties must be evaluated in the first place.

Attorneys as Mediators

On July 2nd, 2013 the Lithuanian Parliament approved the changes to the Law on the Bar and granted the lawyers the opportunity to carry out mediation in all civil disputes (and thus inheritance disputes) without limitation. In a mediation process lawyers can perform two roles – they can act as legal representatives and they can also work as mediators.[47] It should be noted that these two functions performed by a lawyer in the mediation process must be clearly separated, otherwise doubts concerning the mediator's neutrality and impartiality may arise.

Despite the fact that both the European Code of Conduct for Mediators and the European Parliament and Council Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters recommend to all Member States to prepare specific codes of conduct for mediators adapted to their legal environment, Lithuania still follows the Law on Conciliatory Mediation in Civil Disputes according to which mediators

41 Joshua (2011) 13.
42 Goldberg–Sander (2007) 40–41.
43 Morel (2005) 1–2.
44 Ibid. 1–2.
45 Hoare (2006) 3.
46 Wall–Rude (1991) 55.
47 Zaleniene–Tvaronaviciene (2010) 233.

are obliged to follow the ethical principles laid down in the European Code of Conduct for Mediators. Therefore, the risk of ethical violation is high.

However, sometimes there are views that lawyers are not suitable to act as mediators and not necessarily because of ethical issues. There are opinions that lawyers tend to choose the evaluative mediation style, they "are used to retaining control over outcome, giving advice, advocating for positions and having their suggestions heeded".[48] Lawyers are also criticized for trying to resolve disputes in accordance with the legislation and through negotiation techniques, while the resolution of the dispute through mediation focuses on the parties' interests, rather than their legal positions.[49] Attorneys also receive a lot of critique for excessive confidence in predicting court decisions in legal disputes. It is said that they are used to emphasizing the legal aspects of the case compared to the personal and often emotional issues which promotes opposition, consequently too much time and money is invested in the dispute.[50]

However, compared to judges, attorneys are recognized to be more suitable as mediators because they are "the best persuades, as they have become good listeners".[51] According to this author, "lawyers approach mediation from a 'counseling' perspective" and "don't view themselves as ones who can demand a particular settlement, such as judges are used to doing".[52] It is assumed that in the disputes over succession such flexibility and the ability to listen carefully will be a great advantage, compared with judicial severity. We can also presume that an attorney acting in the role of mediator will not be as intimidating as a former judge.

Notaries as Mediators

In Lithuania the possibility for notaries to conduct mediation is not yet institutionalized. Although the Law on Conciliatory Mediation in Civil Disputes provides the right to all individuals to carry out this alternative method of dispute resolution, Lithuanian Law on Notary prevents notaries from exercising it. Despite the unfavorable legal framework, it is clear that the notaries of Lithuania believe that they already *de facto* perform mediation and notaries are ready for proper application of this alternative method of dispute resolution. According to M. Stračkaitis, President of the Chamber of Notaries, notaries engaged in daily practice apply mediation confirming the validity of almost every transaction – being impartial, combining different intentions and interests.[53] This view is shared by the former president of the Chamber of Notaries D. Lukaševičiūtė-Binkulienė: "The notary is a listener, counselor. He is the mediator for both parties harmonizing several points of view, different interests."[54] Legal scien-

48 Amadei–Lehrburger (1996) 64.
49 Štaraitė-Barsulienė (2012a) 30.
50 Wade: *Preparing for Mediation and Negotiation in Succession Disputes*.
51 Morel (2005) 1.
52 Ibid. 1.
53 The Lithuanian Chamber of the Notaries (2008) 7.
54 The Lithuanian Chamber of the Notaries (2012) 35.

tists[55] also are of the positive opinion regarding granting the right to notaries to conduct mediation. A notary is said to be not only "preventive judge", but an intermediary and a mediator as well, and already preparing and approving transactions he or she has to find out the true intentions of the parties. So it is obvious that notaries are seen as suitable mediators especially because unlike attorneys, who represent their clients in contracts, notaries do not represent one party in the transaction, and must reconcile the different interests of both parties impartially.

There is a trend not only in Lithuania but also worldwide that notaries become officers engaged in conflict prevention and alternative ways of dealing with conflicts. That is one of the priorities of the International Union of Notaries' policy in the social context – to develop the Notary Office's contribution to society in decreasing the amount of judicial actions in legal conflicts. If this objective is achieved a notary will have a double role: preventing conflicts by inspection before signing the agreement in order to avoid disputes and solving conflicts in alternative ways by arbitration, conciliation and mediation.[56]

G. Štaraitė-Barsulienė comments that "notaries are legal professionals, compared to lawyers and judges, the most appropriate to deal with inheritance disputes through mediation."[57] She lists the benefits of notaries as mediators in inheritance disputes:

1. A notary by profession is impartial, disinterested in the outcome of the dispute, a third person, who is particularly suited to be a mediator.
2. The daily routine of notaries involves reconciling the different positions of the parties, so a notary is capable of determining the true intentions of the parties and as a result becomes part of the mediation process.
3. The same professional requirements apply to mediators and notaries: neutrality, impartiality, independence and confidentiality.
4. One of the frequent fields where mediation is applied – the resolution of succession disputes. Notarial activities involve not only the validation of legal documents in inheritance relationships, but also counseling the heirs in order to avoid the dispute being transferred to court. Notaries are experts in inheritance matters.
5. Interest-driven negotiations are part of the notary's daily routine – notaries are capable of advising both on property division issues as well as on future-oriented solutions.

There are two types of mediation carried out by a notary – contractual mediation and conflict mediation. Contract mediation starts when the parties appeal to the notary for advice on a contract and they have differences in opinion related to the final text of the legal document. A notary in this case acts as an official who has the responsibility to merge the opinions, revealing conflicts of interest and helping to find an optimal combination of both parties' interests. Contract mediation is part of the estate

55 Nekrošius (2007) 20.
56 The Lithuanian Chamber of the Notaries (2013) 6–8.
57 Štaraitė-Barsulienė (2012a) 49.; (2012b) 302.

planning process, which has a preventive effect and is carried out while the testator is still alive. Its goal is to arrange a peaceful property division and avoid possible conflicts between the heirs in the future. The second type of mediation is conflict mediation. In this case the parties come to the notary in the event of a conflict. The notary acts as an active mediator and motivates the parties to seek for a peaceful agreement. Inheritance disputes are the most common types of disputes in which the notary acts as a mediator. Mediation as a more flexible procedure than a judicial process gives the parties the opportunity to effectively determine assets assigned to each heir.

Summarizing, we can see that notaries are legal professionals who deal with estate planning and handle difference in opinions on a daily basis. Presumably, as experts in their field, notaries could properly carry out mediation in inheritance disputes, especially if such disputes arise in the process of estate planning, as it is likely that the parties at this stage will be more inclined to seek for the amicable handling of the succession dispute.

Mediation-Arbitration in the Disputes over Inheritance

Mediation-Arbitration hybrid (also referred to as arb-med, med-arbitration) is a relatively new alternative dispute resolution method known since the 1970s. It is argued that this method combines the advantages of both mediation and arbitration and eliminates most of their disadvantages.[58] In recent years a lot of variations of mediation and arbitration applied together appeared: at first mediation, if unsuccessful, then arbitration; arbitration begins but certain degree of mediation is allowed; mediation is applied to deal with particular issues, arbitration with others; mediation begins, then arbitration is applied to the issues on which agreement has not been reached, then mediation re-applied; the mediation is carried out and if it fails, the mediator is asked for an "advisory opinion", which is mandatory, unless one of the parties vetoes it within a period of time.[59]

Med-arbitration, as we have seen from the above, combines many possible variations and is a quite flexible procedure. In principle, both methods of alternative dispute resolution (mediation and arbitration) in terms of sequence and procedural specificities depend on the will and general consensus of the parties as well as on the selected mediator's practice. This controversial hybrid method combines the ultimate decision-making guarantee (this is achieved through arbitration), and the subtle management of delicate family issues, which is ensured by mediation. Basically med-arbitration eliminates the biggest disadvantage of mediation – the final decision is guaranteed and there is no need to litigate.

It should be noted that arbitration, if used alone, is not considered to be appropriate to deal with succession disputes, but in combination with mediation, is thought

58 Vorys (2007) 885.
59 Oghigian (2003) 76. Cited primary source: Elliott (1996)

to be a functional tool helping families to solve their disagreements.[60] The major disadvantages of arbitration in inheritance disputes are its judicial nature and the lack of efficiency. The main advantages of med-arbitration are time and cost efficiency.[61] The reason for a cheaper procedure is the med-arbiter's double role. It is argued that because the med-arbiter performs both the role of mediator and arbiter, it saves time and money for the parties. Despite the fact, that med-arbitration is a relatively new phenomenon, it gets a lot of criticism and is not used often. Some authors argue that this method is avoided without reason, and should not be ignored because of its potential and flexibility.[62]

In summary, med-arbitration is a controversial method, because it may have different pluses and minuses depending on the characteristics of the dispute and on the competence of the selected mediator. However, this "dual" process actually requires the mediator to have a particularly high level of legal expertise and knowledge but also the knowledge and experience in two different procedures – mediation and arbitration. As we can see, the possibilities to use mediation in the disputes over inheritance are quite wide and creative. The parties can choose the style of mediation, a mediator with different educational background according to the parties' goals, even additional methods of alternative dispute resolution (arbitration combined with mediation) might be employed to seek for the best result. Most importantly, mediation in these kind of disputes can be seen as a "user friendly" method helping to preserve ongoing family relations while also providing an efficient method for solving legal issues.

Conclusions

1. Mediation is a family friendly method for solving inheritance disputes. It helps to consider both psycho-emotional and financial reasons of the dispute and also helps to preserve the peaceful long term relations within the family circle.
2. A mediator dealing with inheritance disputes must be highly qualified not only in the mediation process itself, but he must also be knowledgeable in family dynamics, psychological aspects of the dispute as well as in the legal side of the dispute.
3. The decision concerning the appropriate style and process of the mediation will mostly depend upon the knowledge and the strategy of the mediator. However, the parties of the dispute can also influence the course of the mediation and therefore they should consider what outcomes they expect prior to choosing the mediator – are they willing to preserve relations with the other party of the dispute or perhaps they are only willing to solve the financial part of the dispute, do they wish to work with flexible or with authoritarian kind of people. The decision will help to choose between different legal professionals.

60 Vorys (2007) 884.
61 Ibid. 884.
62 Ibid. 893.

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SUMMARY

A mediáció szerepe az örökösödési vitákban

KAMINSKIENĖ, Natalija – PAPLAUSKAITĖ, Viktorija

A tanulmány a mediációnak, ennek az egyre több területen alkalmazott, viszonylag új és eredményes módszernek a sajátosságait, előnyeit és buktatóit járja körül. Rávilágít, hogy ezen eljárás nemcsak a családon belüli problémák békés megoldását jelenti, hanem egyfajta családsegítő és -gondozó kultúrát is képvisel. Egyszerre próbálja megoldani a felmerülő anyagi problémákat, és megőrizni a jó kapcsolatot a felek között, hiszen például a gyermekek válás utáni elhelyezésének kérdése késhegyig menő, parázs vitákhoz, erőszakos megnyilvánulásokhoz, akár rendőri beavatkozásokhoz is vezethet. Az egyeztető eljárás során a mediátor – aki lehet bíró, ügyvéd vagy jegyző, de akár egy választott bírói testület is – személyének megválasztása az egyik legfontosabb tényező, hiszen az ő felelősségük a legnagyobb. Ők azok, akik képzettségük, kompetenciájuk, gyakorlottságuk folytán meghatározzák az egész folyamatot. Még ha nem is születik azonnal mindenkit kielégítő megegyezés, és nem lehet lezárni a vitát, el kell tudni magyarázni a feleknek, hogy a békés megoldás mindnyájuk érdekeit szolgálja. A legfontosabb megértetni és elfogadtatni velük, hogy a mediáció olyan „felhasználóbarát" problémamegoldási lehetőség, amely segít megőrizni, illetve fenntartani a családi kapcsolatokat, miközben eredményes módszert kínál a konfliktusok kezelésére.