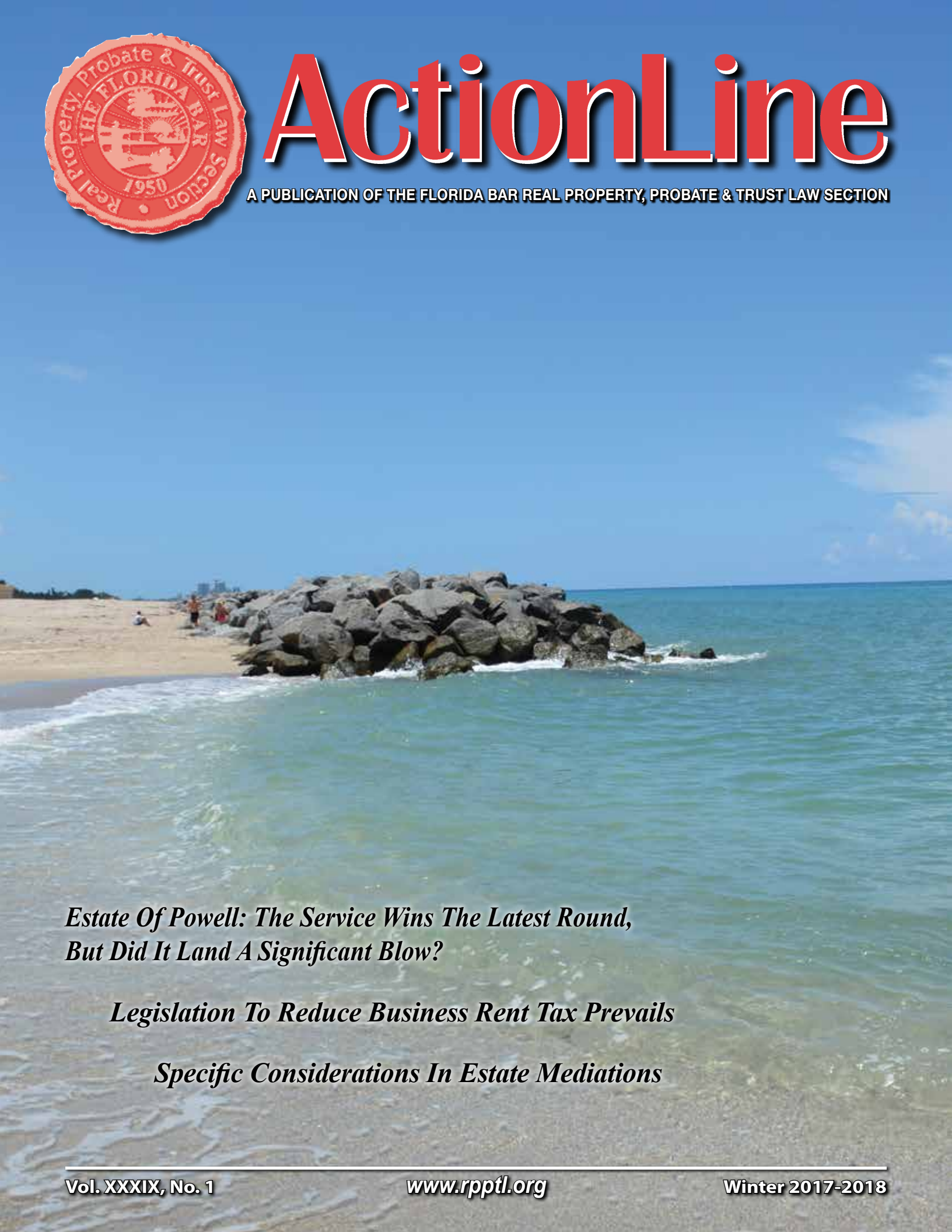
ActionLine

A PUBLICATION OF THE FLORIDA BAR REAL PROPERTY, PROBATE & TRUST LAW SECTION



Estate Of Powell: The Service Wins The Latest Round, But Did It Land A Significant Blow?

Legislation To Reduce Business Rent Tax Prevails

Specific Considerations In Estate Mediations

Vol. XXXIX, No. 1 www.rpptl.org Winter 2017-2018

This magazine is prepared and published by the Real Property, Probate & Trust Law Section of The Florida Bar as a service to the membership.

IN THIS ISSUE:

Get Included In *ActionLine!*

Readers are invited to submit material for publication concerning real estate, probate, estate planning, estate and gift tax, guardianship, and Section members' accomplishments.

ARTICLES: Forward any proposed article or news of note to Wm. Cary Wright at cwright@carltonfields.com. Deadlines for all submissions are as follows:

ISSUE	DEADLINE
Spring	January 15
Summer	April 15
Fall	July 15
Winter	October 15

ADVERTISING: For information on advertising, please contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

PHOTO SUBMISSIONS: If you have a photo that you'd like to have considered for the cover, please send it to the photo editor, Jeff Baskies at jane@emeraldgreenconsulting.com.

GENERAL INQUIRIES: For inquiries about the RPPTL Section, contact Mary Ann Obos at The Florida Bar at 800-342-8060 extension 5626, or at mobos@flabar.org.

Mary Ann can help with most everything, such as membership, the Section's website, committee meeting schedules, and CLE seminars.

Specific Considerations In Trust And Estate Mediations

By Amy B. Beller, Esq., Beller Smith Attorneys at Law, Boca Raton, Florida

It is a widely accepted belief that trust and estate matters are highly specialized and clients are best served by experienced trust and estate counsel with in-depth knowledge of the substantive law. This premise applies equally to mediation of trust and estate matters. Mediators with substantive trust and estate knowledge are a great asset in efforts to resolve a case. To maximize the potential of reaching resolution, the participating professionals should give due attention to the special considerations involved in preparing for and conducting mediation in this niche area. This article will identify some of these considerations and will provide some practical recommendations for mediations of trust and estate disputes.

Choice of Mediator

"The role of the mediator is to reduce obstacles to communication, assist in the identification of issues and exploration of alternatives, and otherwise facilitate voluntary agreements resolving the dispute." Florida Rules for Certified and Court-Appointed Mediators, Rule 10.220.[1] While selection of a mediator should be deliberate and with forethought, picking a mediator in a trust or estate litigation is of particular importance when the emotional temperature is running high and when the matter involves complex tax matters or substantive issues of law.

Many estate and trust cases involve personal and emotional issues, and it is sometimes those issues which actually drive litigation. In such matters, having a mediator with excellent people skills is essential. The mediator must be able to connect and earn the litigant's trust. He or she must be a great listener, and must be able to make the litigant believe they were heard and understood. Sometimes a shared cultural or geographical background, similar age, or even a shared hobby, can be helpful. Gender may also play a factor: since about half of the litigants in these matters are women, consideration should be given as to whether a female mediator might more easily establish a rapport with a female party. If the litigant prides him or herself on a prestigious academic background, choosing a mediator with a similar background could be wise. Of course, there are those litigants for whom a retired judge or similarly-seasoned and established mediator with a premier resume may be the best choice.

It is also important that the mediator has the essential knowledge base and skill set. Under Rule 10.370(c), a mediator shall not offer a personal or professional opinion intended to coerce the parties, unduly influence the parties, decide the dispute, or direct a resolution of any issue. Ironically, it is the certified mediator's statutory prohibition against rendering an opinion on the matter that sometimes causes advocates to prefer a non-certified mediator.[2] However, a mediator may provide relevant information, raise issues, and discuss strengths and weaknesses of positions underlying the dispute. Experience with similar cases is also important. The mediator can then credibly speak to his or her own history in helping the client explore what might occur with continued litigation.

A mediator may also help the parties evaluate resolution options, draft settlement proposals, and "may call upon their own qualifications and experience to supply information and options."[3] Thus, while the mediator will not be called upon to make decisions, a mediator's experience in trust and estate law remains an essential component of a successful mediation.

It is also very helpful if the mediator can identify problems and solutions which may arise in connection with a settlement. In some trust and estate mediations, the mediator's familiarity with estate and trust administration or tax issues may be essential in achieving a settlement, at least one which does not later turn into additional litigation. A mediator without a sufficient background will not be able to assess whether a party's concerns about a particular issue are justified (e.g., that there may be an estate tax liability), whether there are additional steps which will need to be taken (e.g., obtaining a Private Letter Ruling or noticing other interested persons with a motion for court approval of a settlement), or whether a provision contemplated as part of a settlement may be a non-starter (e.g., the decedent's friend who is not a Florida resident wants to serve as Personal Representative). While it is not the mediator's job to provide legal advice to anyone, a knowledgeable and experienced trust and estate mediator may prove to be an invaluable asset.

Non-Party Participants

Often a party attending a trust or estate mediation will want to bring a spouse, adult child, friend, or other confidante. The other party, or other party's lawyer, may initially react in a

continued, page 15

knee-jerk fashion and seek to block the non-party's attendance. The better approach, however, is to determine whether the non-party is likely to assist in achieving a settlement. If the non-party's attendance is likely to be a positive factor, or at minimum it will not be an impediment, then it may be useful to have such person attend and participate.

Consider for example a dispute involving a surviving second spouse litigating against adult children by an earlier marriage of the decedent. The surviving spouse may be elderly, vulnerable, insecure, or unsophisticated. Perhaps the party's relationship with his or her own lawyer is not strong, and he or she would be very hesitant to enter into any settlement without the advice and approval of his or her own adult child. In that case, having the adult child present at mediation may be useful or even necessary to resolving the case.

If, on the other hand, the non-party's attendance is likely to increase the level of hostility, or that person may be unreasonable, then the other party's counsel may wish to exclude the non-party from attending. This decision, which should be communicated by the mediator if possible, may start the mediation off on a bad foot, as the party being denied will at best be irked and, at worst, may resolve not to settle. It may be best if counsel determines in advance whether a non-party's attendance will be permitted, so as to avoid the possibility of increasing tension on the actual day of mediation.

A middle ground may be to allow the non-party to sit with the accompanying party during private caucus sessions or at least during those periods where the mediator is working with other parties.

A non-party who attends and participates in mediation is a mediation participant under Fla. Stat. §44.403(2) even though he may not be a mediation party under Fla. Stat. §44.403(3). A mediation participant shall not disclose a mediation communication to any other person other than another mediation participant or a participant's counsel. Fla. Stat. §44.405(1). Such mediation participant should be informed of the rules regarding confidentiality set forth in the Mediation Confidentiality and Privilege Act, Fla. Stat. §44.401 et seq., and that he or she is bound thereby. The mediator may wish to have this confirmed in writing.

Preparation for Mediation

Attorneys know that it is important to provide the mediator with a summary of the case and important pleadings and documents. In trust and estate litigation, the operative testamentary documents should be summarized and provided with the mediation summary. If there are multiple competing instruments, the mediator will appreciate a chart or other summary of the differences among the instruments.

It is also helpful in a trust and estate mediation for the parties to provide a chart or list of all assets at issue, including current values. Account statements for estate and trust accounts or other assets in dispute should be available at least online. For real estate and tangible personal property, valuations may be essential. The parties should, at a minimum, have informal estimates of the value of assets obtained through internet research or other means. Do not wait until a settlement agreement is being inked to start looking on Zillow or ebay to determine the value of a disputed asset. The parties expecting to receive items to be shipped should also have estimates of shipping costs.

Attorneys often prepare for mediation but fail to prepare for settlement. In an estate litigation, a settlement may require a party to sign a document to be filed in the probate, such as a waiver of service of a petition for discharge of a Personal Representative, or a Satisfaction of Claim.

Attorneys are often reluctant to provide the mediator a candid assessment of the weaknesses or problems in that party's case. A mediator is not a decision-maker, and it is not the job of an attorney for a party going to mediation to convince the mediator that he or she will prevail. Rather, the mediator's task requires that he or she is armed with the negative aspects of the case so that he or she can assist the parties in making a sound decision on settlement. For that reason, a confidential mediation summary should include brief discussions concerning evidentiary issues, credibility problems, financial concerns and other factors which will have an impact on the case.

A mediation summary should also include a summary of prior settlement discussions. While the parties are not bound to pick up where they left off, it does help the mediator to know the context of such prior discussions. In addition, the parties' counsel should know the amount of fees and costs incurred if there is going to be any chance of payment from an estate or trust or any fee-shifting.

Preparation for Settlement

Attorneys often prepare for mediation but fail to prepare for settlement. In an estate litigation, a settlement may require a party to sign a document to be filed in the probate, such as a waiver of service of a petition for discharge of a Personal Representative, or a Satisfaction of Claim. Having such documents ready to be signed at the mediation is very helpful, and sometimes essential. Counsel must determine in advance of mediation what documents and instruments may be needed to wind up administration or accomplish some other task, such as transfer of real property or ownership of accounts. If there are small items in dispute which may have to change hands,

continued, page 16

such as keys to a house or a photograph album, it makes sense to have the client bring those items to the mediation.

If a settlement may require a successor fiduciary, a lawyer should come to mediation with suggestions for such appointment. If appropriate, fee schedules, resumes or CV's, or other information about potential fiduciaries should be available to provide to the other parties.

While not specific to trust and estate mediation, it is worth mentioning that counsel for parties going to mediation must be prepared with at least a shell settlement agreement and a means for revising, printing, and executing that agreement.[4] Attorneys would not go to court on a motion without having an order granting the relief being requested, because if the judge is deciding in your favor, you want the judge to sign the order on the spot. This same logic applies to mediation. Once an agreement is reached, you will want the parties to sign an agreement as soon as possible. Lawyers who are not prepared with a draft settlement agreement may cost their client money as the lawyers begin drafting something from scratch on the spot, or worse yet, may jeopardize finalizing an agreement altogether.

Settlement of a trust and estate matter may require the joinder or consent of other individuals who are not present. The mediator is to promote awareness by the parties of the interests of persons affected by actual or potential agreements who are not represented at the mediation.[5] It is wise for attorneys at mediation to have a contact list including cell numbers and email addresses for all persons who may need to be consulted about settlement or who may need to sign an agreement.

Finally, if there will be tasks required after mediation in order to implement a settlement, such as moving for court approval or filing a final accounting, counsel should be aware of those tasks in advance, think through who can accomplish the tasks most efficiently, and have an idea of what it will cost to get to the finish line.

***Amy B. Beller** is a founding partner of Beller Smith, PL, a trust and estate boutique firm in Boca Raton. She has been a Florida Supreme Court Certified Circuit Civil Mediator since 2008. Amy is also Board Certified in Wills, Trusts and Estates, is a Fellow of the American College of Trust and Estate Counsel, and is on the Executive Council of the Real Property, Probate and Trust Law Section of the Florida Bar.*

Endnotes

1 All references in this article to "Rules" are referenced to the Florida Rules for Certified and Court-Appointed Mediators.

2 Although perhaps it is a biased view, in this certified mediator's experience, being unable to render "an opinion" on the merits or likely outcome of a case during mediation has never impeded the ability to get a case settled. The approach has a little more finesse – it involves the power of identification and trust more than coercion – but for a skilled and experienced mediator, the desired outcome is just as achievable. For an interesting analysis relating to this issue, see Mediator Ethics Advisory Committee ("MEAC") Opinion 2010-006 (October 12, 2010).

3 Rule 10.370, Committee Notes, 2000 Revision.

4 See Rule 10.420(c)(the mediator shall cause the terms of any agreement reached to be memorialized appropriately).

5 Rule 10.320.