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PERSPECTIVE

Mediation fosters out-of-the-box solutions in matters fraught with family discord

By Philip Barbaro, Jr.

Over my many years as a litigator handling probate, estate and trust matters, I have seen the frustration and emotional devastation that can result from a probate court proceeding. Parties dealing with the deaths of loved ones are forced to navigate the often fraught dynamics of family relationships within the strict confines of the law. I have often wondered which is more challenging: the emotional minefield of family or the mental minefield of the legal system.

When people are dealing with heart-rending life events, the judicial process is generally not the best vehicle for helping them move forward. How much better it is when parties working through a parent's death, a partner's dementia, or the competing claims of a blended family can openly express their emotions, share their wishes and fears, and find a path toward healing that also resolves highly sensitive and contentious family issues.

Mediation can be the means toward that end. When parties bring their cases to a mediator, they want nothing more than to move beyond the pain and step into the next chapter of their lives. Their attorneys, who understand both the strengths and weaknesses of their clients' cases, prepare mediation briefs that outline the family history, the basis for the asserted claims, and the monetary demands. Just as in a conventional judicial proceeding, both sides are hoping for a "win."

But mediation isn't about winners and losers; it's about finding common ground and a mutually satisfactory resolution for a difficult and divisive matter. The mediator – an experienced litigator or possibly a retired judge – isn't looking for a quick fix. He or she is fundamentally committed to getting both sides of the dispute to the finish line. To do this will require both patience and empathy.

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As a litigator, I certainly understand the competitive nature of legal disputes. But as a mediator, I see the fallacy of following that approach. I know that resolution will only happen when both parties are able to open themselves up to the process, when they are willing to compromise and concede as appropriate to settle their matter. This includes openly sharing their emotions, their fears, and their priorities with the mediator, but it also means openly listening to what the other party is asking for and considering alternative perspectives.

This is the real value of working with a mediator to resolve complex probate, trust, conservatorship or other family matters. The bottom line is that family matters are never simply about money. They're about competing interests, hurt feelings, and sometimes toxic re-

lationships. The emotions are raw, and they will fester and become cancerous unless they find an outlet.

The first thing I tell parties in a mediation is that I ask nothing from them but to be open to the process and allow it to play out. This is their one and only opportunity to say whatever is on their minds and in their hearts. I point out that much of what they want to share may not be admissible

Once the parties have found that common ground, they will – mercifully – have closure. Their wounds will be sutured, and they can move on with their lives. Unless they choose to stay connected, there will be nothing left to bind the disputing family members to each other. Instead of enduring the gut-wrenching highs and lows of litigation, parties who successfully mediate contentious family matters call their own shots as they arrive at a mutually satisfactory resolution.

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evidence in a court trial but in the confidential setting of a mediation, they can share any fact they feel is important for me to know. I will treat their stories and their emotions with care and respect and will share with the other side only those things they allow me to share.

Just the act of unburdening can be enough to change a party's view of their case and help them get over self-erected barriers to settlement. It can also be enough to help me, as the mediator, see beyond what's in the legal briefs and understand what's really at stake for both sides. As a mediator, I'm not bound by the rules that govern court proceedings, and I have latitude to think creatively in helping the parties structure a settlement that addresses their unique interests and concerns.

