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COLUMN

Probate mediations: Balancing law, facts and emotion

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Probate mediation stands apart from typical litigation because deeply personal emotions—grief, family conflict, and perceived favoritism—must be addressed alongside the financial and legal issues before any meaningful resolution can be reached.

All litigation involves conflict, but matters charged with strong emotions require a different approach. Most civil disputes, such as personal injury, malpractice or business litigation, incorporate some emotional components; they may involve pain and suffering, inconvenience and loss of income or benefits. All of these can be life changing. However, settlements in civil cases focus primarily on compensation: strong emotions usually take a backseat to the money.

Probate mediations are unique

In probate cases (trusts, wills, intestacy), money is at stake, but the parties are driven by who gets mom's pearl earrings, dad's stamp collection, and did they really love one sibling more than the other?

Thus, family heirlooms, issues of favoritism, and unresolved grief can present roadblocks to a resolution. As a result, balancing the emotions with the facts and law must precede a resolution.

Mediation dynamics in probate cases

Probate mediations commonly involve family members—often from blended families—who arrive with longstanding grievances, resentment, and feelings of betrayal. The participants are caught up in litigation that has halted the natural grieving process. The participants are hurting. It doesn't take a psychologist to know that when someone is hurting, their emotional distress creates a disconnect between what is communicated by counsel or the mediator and what they can process. They may appear to be attentive, but often the emotions cloud their ability to understand and process.

As a result, a probate mediator's challenge is to apply admissible facts and law to parties who may not yet be prepared to receive them. I often describe the process as a two-lane highway: one lane is the emotions lane and the other is the financial/legal lane. Allowing the parties to freely express their emotions is essential. It is important for those grieving the death of a loved one and wrestling with interfamily rivalries to be able to vent and let off steam. It creates the space necessary for them to engage meaningfully in the legal and financial realities of the case.

Often, this is the first time that the litigants have had an opportunity to feel they have been heard by someone other than their lawyer or therapist. It also gives a mediator insight into what the real priorities are and to evaluate the factual strengths of the case at trial. While it is important to give parties this space, the mediator's role must make it clear that resolution will come from travel in the financial lane.

The lawyer's role

Probate attorneys routinely explain the facts and governing law at the outset of representation, but emotional barriers often limit client receptivity. Repetition is therefore critical. Hearing the same analysis from a neutral mediator—particularly one who has acknowledged the client's emotions—can reinforce understanding and acceptance.

Both attorneys and mediators can also help parties realistically assess litigation risks by explaining how the law may be applied at trial and by focusing on financial consequences rather than emotional grievances. With crowded court calendars, probate trials are often delayed, increasing costs and reducing economic efficiency. Input from financial advisors regarding lost investment opportunities, as well as guidance from accountants on tax implications, can further encourage settlement.

In a majority of cases, it is not advisable to exchange mediation briefs; written accusations tend to inflame emotions rather than facilitate resolution. Hostility exchanged before or during mediation can significantly impede progress. In that same vein, it is never advisable to treat a mediation as a mini trial; lawyers who advocate in-

stead of educate in this setting only fuel the emotions of their clients, compounding the emotional roadblocks to resolution.

The mediator's role

An effective mediator acknowledges emotions without judgment and then guides the parties toward a practical resolution. Identifying sub-goals early—such as the distribution of personal property with emotional significance—can reduce tension and allow parties to focus on broader financial issues.

Financial analysis is pivotal. By methodically outlining the value of the estate, deducting fees, costs, specific bequests, administrative expenses, and projected litigation costs, the mediator can present a clear picture of the economic impact of continued conflict. Probate litigation is costly, particularly in cases involving capacity or undue influence, which frequently exceed $150,000 or more per party. With crowded probate calendars, a resolution can be a year or more away. Investment opportunities can be lost as expenses increase. Seeing these figures in concrete terms can be a powerful motivator. This exercise further serves to attach a cost to the sentiment "it's the principle" of the issue at stake.

Another cost that is rarely addressed is the stress factor of litigation. I advise parties that the top five stressors in life are the loss of a child, the loss of a spouse, the loss of a parent, selling a house and litigation. There's a "cost" to litigation-generated stress that has a personal price tag—perhaps not in dollar figures, but definitely in quality-of-life considerations. Parties will often speak about how shabbily they have been treated by a sibling or stepparent; resolution at mediation ends that treatment. Such an approach often tips the balance between emotions, facts and law in a mediation.

Finally, mediators should address evidentiary misconceptions. Parties often overestimate the admissibility or effectiveness of certain evidence. Probate trials are document-driven, and evidence must comply with strict rules governing admissibility. Understanding these limitations—heretofore unknown by the legally unsophisticated litigant—can significantly recalibrate expectations. It is not uncommon for me to hear an emotional tirade by a party and then advise them that even though I understand what they are saying, it is highly unlikely that the information they have so emotionally imparted will be admissible at trial.

Conclusion

Because of their complexity and emotional intensity, probate mediations typically require a full day. Initial settlement proposals often emerge only after extensive discussion, typically in the afternoon. By acknowledging emotions while steadily redirecting focus to financial and legal realities, mediators and counsel can help parties move toward a successful resolution.

Mary Thornton House *is a neutral at Alternative Resolution Centers (ARC). House served 22 years on the Los Angeles Superior Court, where she presided over countless jury and court trials in the Civil and Probate departments. Prior to her retirement in 2018, she presided over probate matters for eight years in the Pasadena and Mosk courthouses.*