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When families fight

THE BEST MEDIATION PRACTICES IN THE BURGEONING FIELD OF CIVIL FINANCIAL ELDER-ABUSE ALLEGATIONS

This article addresses the unique elements of resolving disputes among family members in the context of trust-and-estate litigation generally, and specifically, within cases involving the Civil Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) ("Financial Elder-Abuse Litigation.") In these disputes, someone (called "the Settlor"), to whom all the litigants are connected, has died or is dying.

Each family member possesses their own history and experiences with the Settlor. As a result, each has their own unique perspective on a number of matters, including the Settlor's care, management of the Settlor's assets, and most often, how the Settlor wanted her assets to be distributed upon her death.

Family disputes

What drives disputes is often a Settlor's plan for the disposition of assets upon their death ("Who gets what?"). As a matter of law, disposition of assets follows *the intention of the Settlor* as interpreted from the estate plan. Thus, "who gets what" is necessarily founded upon an explanation – an answer to "Why did the Settlor make a gift favoring one person but not another?"

The most common (and disputed) assumptive answers are that a person who receives more assets *was loved more than* those who receive fewer assets. And a person who is nominated to be in charge of the Settlor's assets is assumed to reflect that the Settlor had *more trust in their judgment than* other persons (often from the same filial class).

An estate plan is not just words on paper. It is a last statement of belief by the Settlor of his or her family and loved ones. Thus, the estate plan imbues subjective value and meaning into assets and control that have nothing to do with the objective value of these same things. ("The money has meaning.")

These cases are complicated because the Settlor is either deceased or incapacitated and is not available to explain what they intended their words to mean. In the place of the Settlor, there are other people who each claim to have "known the Settlor best," "spent the most time with" the Settlor, and/or communicated explicitly with the Settlor about "what she really wanted" as to her final intentions.

I hear now the reader protesting by quietly uttering, "But doesn't the estate plan state what the Settlor's intention was?" Yes, but in trust, estate, and financial elder-abuse cases, there is often an assertion that since the words of the estate plan do not match the perspective of the aggrieved person, the estate plan "must be wrong." However, merely asserting that the estate plan is wrong is not enough to have a court overturn it. Instead, there must be provable allegations that the proffered estate plan is inaccurate because of the Settlor's mental incapacity and/or it was obtained through undue influence, fraud, threat, or coercion by someone.

A disgruntled heir's lawsuit

If the distributive plan differs significantly from a family member's understanding of the Settlor's "true" intention, that family member will likely consult a probate attorney. Unless otherwise provided between the parties by contract or statute, each side in a probate dispute bears its own attorney's fees and costs. And in trust and estate litigation, the expenses can easily run between $200,000 and $500,000 (on average). (See *In Re Bevelle's Estate* (1947) 81 Cal.App.2d 720; Code of Civil Procedure section 1021.)

Certain statutes provide for fee-shifting and penalties, including the Elder and Dependent Adult Civil Financial Protection Act (Welf. & Inst. Code, § 15657.5, subd. (a)), as well as Probate Code Section 859 (recovery of an asset held, converted, taken unreasonably and in bad faith). Thus, to give voice to a client's "perspective" of the facts and provide the greatest opportunity for recovery, the trust and estate litigator will allege that the estate plan is invalid. Usually, the basis for the claim is that one or more persons (usually another family member) engaged in financial elder abuse, and there is a wrongful and bad faith taking of an asset (through the estate plan).

Thus, we arrive at a circumstance where a loved one has passed. Deep disappointment is felt because the disclosed estate plan differs from what one or more family members believe were the Settlor's true intentions. And legal counsel has filed and personally served a lawsuit accusing other family members of committing financial elder abuse and wrongful taking.

The family member defendants face liability for punitive damages, attorney's fees, costs, and disinheritance through the lawsuit. The emotional mushroom cloud created by such a lawsuit usually results in an immediate outrage in those (and their spouses, partners, and children) named defendants. They feel deeply (based on their perspectives) that the allegations against them are outrageous, contrary to the Settlor's intentions, and only confirm the "character" of the petitioning family member.

Given the depth of feelings, it is rare that such cases resolve early in the litigation process. Instead, lawyers invest substantial amounts of time and money in the discovery phase of the litigation, subpoenaing and reviewing medical, hospice, legal and financial records, preparing written discovery, and taking depositions.

The time for mediation

Usually, after the depositions of the parties are completed, counsel and their clients have gathered enough information to evaluate the viability of the pleadings. They are now ready to make a sober assessment of the strengths and weaknesses of each other's positions. And at that moment, when the parties and counsel have sufficient information and have expended enough resources to begin to appreciate the value of life without litigation, mediation is a very, very appropriate method for resolving these disputes.

Once counsel is authorized to explore mediation with their opposing counsel, their first step is to agree upon an

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appropriate mediator. For trust, estate, and financial elder abuse mediations, what is *not* needed is a neutral whose strength lies in making decisions. Instead, the ideal mediator for trust, estate, and financial elder abuse cases is someone with an extensive appreciation of the feelings both sets of clients are experiencing to help disarm those feelings by effectively communicating empathy. Additionally, the ideal mediator has sufficient substantive expertise and depth in the world of trusts, estates, and financial elder abuse cases to help the parties appreciate each others' perspectives, the opportunities for resolution, and potential legal and economic (i.e., tax) advantages and pitfalls.

The mediator's initial task is to help the clients and their counsel shift their energies from the engagement of a deeply personal, aggressive, expensive fight steeped in decades of family dynamics and the loss of a loved one to a more collaborative process. Thereby, counsel and parties effectively work together (through the mediator). The mediator assists each in learning what they need to do to move past the fight and how to structure an outcome. To achieve this shift, the mediator must gently and effectively move counsel and parties to "listen for understanding" rather than for reaction and counterpoint, even though at least one side profoundly believes the other party disrespected and violated the desires and intentions of the Settlor.

Given the personal nature of the claims in these matters, it is common by the time of mediation for aggressive litigators to have convinced themselves that their position is the only correct position. For this reason, a mediator should strongly encourage the attorneys to exchange briefs in advance of the mediation so that they may be exposed to an alternate explanation of the facts and/or law. In addition, the mediator should spend time with counsel at the outset of the mediation to re-position and re-orient them from holding adversarial poses to stepping into a more collaborative footing.

Further, an accomplished mediator conducts brief but early exercises with the parties (separately). For example, the mediator will underscore how two people viewing the same thing simultaneously can view "the thing" and describe it differently. Yet both parties are experiencing "the truth" of "the thing" from their perspectives, and both parties can find the other's description false (when in fact, the alternate description is *also true*).

Once the parties and their counsel have indicated that they "understand" (but do not agree with) the other party's perspective and needs, the process of "working together" begins (aka negotiating) to structure an outcome that addresses what each side needs from a settlement.

Eventually, a resolution is reached near the end of the day, and a settlement agreement is drafted, circulated, and signed. As a decades-long trust and estate practitioner, I always offer the benefit of my thoughts on the terms and processes contemplated in the agreement to facilitate the parties' mutual intentions.

The settlement agreement

Mediators and litigators should be mindful of two points of law when reviewing settlement agreement drafts regarding financial elder abuse claims: (1) the parties to the settlement should be made aware of the reporting requirements (Welf. & Inst. Code, § 15657.8.); and (2) confidential settlement agreements involving Civil Financial Elder Abuse claims are generally disfavored. (Code Civ. Proc. § 2017.310, subd. (a).)

Court approval

Once the settlement agreement is signed, it is generally subject to court approval (Prob. Code, §§ 17200 & 17206), which most often is a formality. Upon court approval, the fight is over. Assets are divided and distributed. And, time begins to flow over the family that has endured a battle that collectively cost hundreds of thousands of dollars, sleepless nights, stomach-lining ailments, significant pain, frustration, separation, and sadness. However, with the fight over, all parties may finally complete the grieving process for the deceased Settlor. Over time, the family may begin to heal from its deep wounds, thanks in part to a successful mediation process.

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