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THE RECORDER

FAMILY LAW

Mediation of familial disputes

In many instances, private resolution of disputes between spouses or family members can be the preferred choice to litigation

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Family Law

Mediation has successfully resolved thousands of disputes in all areas of the law including those that involve a wide array of financial stakes and emotional interests. However, no other subject matter regularly evokes such deep and varied emotional considerations as do family law and family wealth matters.

WHY MEDIATION?

As the California Legislature has already espoused, mediation is very beneficial in family law cases, where custody and children's visitation arrangements are in dispute. There is a growing trend to utilize alternative dispute resolution tools in dissolution actions involving individuals with somewhat greater wealth. However, these tools have been less widely used to resolve the thorny and sometimes very emotional issues surrounding the identification and distribution of community property, quasicommunity property, separate property, etc., in lower total value dissolution matters.

Yet these issues lend themselves particularly well to mediation. They are often extremely personal, and most parties do not want private family disagreements and the value of their estates discussed and explored in an open courtroom and then possibly reported on the evening news. And if the family wealth involves an operating business, there is real risk of damage to the business if the family problems are publicly aired. Mediation alleviates all of these privacy concerns. It also allows family members to make their own settlement decisions rather than leaving those decisions to disinterested third party adjudicators.

Mediation also reduces the amount of time it takes to resolve highly contested property and family wealth disputes. For example, in a trial, property issues such as tracing, commingling and transmutation can voraciously consume decreasingly available court time. The mediation process avoids delays, providing the parties the opportunity to resolve these complex and emotional issues in a more consistent and compact time frame. Further, mediation's relative lack of time constraints, as opposed to the traditional courtroom, allows for active and productive negotiation, reflection and more reasoned decision making.

Mediation has also often proven a less expensive option to the courtroom. In mediation, attorneys no longer have to prepare for numerous scattered days of court proceedings. Instead, they can consolidate their preparation time (and thus, their costs) into a more limited time period.

Probate and trust matters also often involve strong emotions and complicated familial relationships. Whether the estate passes by intestacy or by the most carefully crafted estate plan, when humans and money are in the same room, problems can and most often will arise.

For example, imagine a person who, against all odds, creates a world-class business venture in a short period of time. For reasons unknown (e.g., personal, emotional, tax), that person established an estate plan that left her heirs less than what they believed was their fair share. When that person ultimately passes away, the litigation games among the heirs begin.

Some heirs may feel betrayed and wronged by the disposition of the estate, and they each begin arguing and fighting for the portion of the estate they believe they deserve. A daughter may wonder why her brother received the Hawaii home from dad instead of her; or a son may wonder why mom left any part of the family business and fortune to a distant cousin. Because of the emotions tied to these complex familial relationships, careful and reasoned consideration of the issues is particularly difficult.

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Mediation suits these contentious situations particularly well because they can generally be resolved more quickly with less financial and emotional costs, and statements made during the mediation are protected by the mediation privilege. Further, the setting for family law wealth mediation is much less overwhelming and intimidating than the formal courtroom. Mediators can be essentially "on call" to assist the parties after the mediation session.

PRE-SESSION CONFERENCE WITH MEDIATOR

It is often said that mediation is not an event but a process. Thus, once the decision to mediate has been made, it is essential for counsel and client to prepare, and be fully prepared, in order to enjoy the full benefits of the process. This preparation includes pre-mediation contact with the mediator because such contact is important to the ultimate success of the endeavor.

Pre-mediation conferences are generally held by telephone, either joint or *ex parte*, and they serve to familiarize and focus the mediator on the following issues:

- Who will be present at the mediation?
- Will the parties engage in a joint opening session?
- What is the settlement history, if any, of the matter?
- A description of the present posture of the underlying case (e.g., has a petition or a lawsuit been filed, what discovery has occurred, have preliminary or final family law declarations of disclosure been exchanged, has a probate or trust inventory been prepared, are there any time constraints such as a pending OSC or trial dates, etc.).
- What should be the scope, contents and timing of any mediation briefs, and will the briefs be exchanged and shared between/among the parties?
- Preparation for specific language in any settlement agreement, including terms of a promissory note or confidentiality provisions.
- Other matters that may be informative to the mediator, such as active hostility among parties, flight schedules of parties or counsel that cannot be changed, etc.

Strong consideration should be given to the question of whether to engage in a joint opening session. Often, due to the complex and dynamic family relationships involved, more damage may be done in a joint opening session than any benefit that may be conferred. Sometimes such damage can prevent the mediation from moving forward, instead leaving the remainder of the first day to damage control.

PREPARATION FOR MEDIATION

In anticipation of the mediation, the attorney must have full command of the facts. This requires multiple detailed discussions with the client and witnesses, probing inquiries and follow-up "fact checking" questions and investigation. The attorney must advise the client of the need to know everything about the case and must ask the client to respond candidly and completely, without value judgments as to what is or is not important. It is in no one's interest for an attorney to be surprised at mediation.

The client should be apprised of what may occur during the mediation. If a joint opening session and opening statements are to be used, discussion of and perhaps practice for these exercises may be helpful. A broad outline of how to begin the negotiation, how to respond to proposals, and how to successfully reach agreement should also be discussed.

Counsel should also determine who the client really is and what actually drives him. Counsel should ask about the client's motivation and stated or hidden agendas, and should ascertain the client's ultimate goals. Counsel should also try to learn what the client may fear or expect if no compromise is reached. Efforts to determine the client's emotional situation and economic realities are vital to success.

In dissolutions, will contests, trust accountings, requests for instructions or similar family wealth litigation, clearly determining the client's motivations and expectations is one of counsel's most difficult tasks. As one experienced litigator has described, when preparing for mediation, he finds it important to make clear to the client that he is being hired to get the best possible results. These results are often measured by the amount of money that the attorney obtains, not by the amount of times the attorney punishes or humiliates the other side to make right the slights and disrespect the client believes other family members have shown.

CONCLUSION

Mediation is an attractive and proven process that litigants and counsel should consider in order to resolve disputes in the emotional areas of family law and the distribution of family wealth. Compelling reasons to mediate include a shortened time to resolution; increased privacy and confidentiality; potentially less cost; the freedom to choose a mediator with skills and experience appropriate to the case; and the freedom to decide for themselves the outcome of the dispute.