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PERSPECTIVE

The limits of logical analysis in estate and trust mediations

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Every mediation involving contested estate or trust assets will be based in part on an unproven, and ultimately unprovable, conjecture or, more likely, a series of conjectures. These conjectures are essentially guesses. Calculations about the financial implications of various options may reduce uncertainty about some elements of a settlement. But uncertainty about other elements of the settlement will remain. Analysis based solely on logical considerations will not, and cannot, ultimately guide the outcome of a mediation.

An established theorem, to be discussed later in this article, confirms the validity of the latter observation.

In preparation for mediations, attorneys may attempt to anticipate possible results based on their opinions about various facets of the negotiation process. These surmises need not be addressed in any order, but together they must include most of the factors to be addressed in reaching a decision to settle or not. One involves an assessment of the probable proposals that the parties may make. A second entails a quantification in financial terms of those possibilities. A third requires a perception of the limits of what the parties may be willing to offer or accept during negotiations. A fourth encompasses a calculation of what the parties are likely to achieve if they proceed to trial as the alternative. A fifth covers an estimation of the fees and costs that may be incurred through trial rather than mediation.

Some of these facets of negotiation will not be subject to logical analysis, even when only two parties are seeking an equitable division of assets. Such analysis will be rendered more complex when the assets subject to negotiation are each of a different kind. Additional complexities will be introduced when dis proportionately valued bequests may be in dispute.

In a relatively simple mediation, the distribution of assets comparable to silver dollars could theoretically be in dispute. Coins of the same denomination may be stacked neatly. The size of the stacks may be changed easily. The stacks may be organized in piles of nearly unlimited configuration. The parties, able to make accurate comparisons, must decide only how many coins, or stacks, or piles for each of them will be sufficient in order to achieve settlement.

More often, however, a mediation will involve the division of assets that may not be readily subject to comparison. In addition to the silver dollars, a ring, constituting a prized family heirloom, or a deed of trust, signifying ownership of a family vacation home, may be in dispute. To the financial valuation of these kinds of assets, some assessment of their emotional, subjective value to the parties must somehow also be added.

The mediation may be rendered even more complex when, as often occurs in estate or trust litigation, unequal distribution schemes are questioned. The proverbial example of one party receiving 90% (or some disproportionately high amount) of the assets and the others dividing the remaining 10% epitomizes these kinds of disputes. As the frequent grounds for challenge, a claim may be advanced that the testator or settlor lacked requisite capacity when she executed her will or trust or did so subject to impermissible undue influence. Negotiations then will center on either how much the gap between the disproportionate bequests may be reduced or how

the divide may be bridged in order to be grudgingly satisfactory to the parties. Such negotiations will occur while debate will be waged over the relative weight of the evidence pertaining to capacity and undue influence.

Given these kinds of circumstances, involving assets both different in kind and disproportionately bequeathed, the parties, faced with countless ways to make comparisons, may find themselves unable to make any kind of decision that could lead to settlement. Myriad alternatives, at times too many, may be contemplated. The most favorable choice among them may not be evident.

A simple example illuminates the different ways the parties may analyze their options. Assets, such as pieces of real property, are to be divided between Abel and Mabel. If the assets consist of X, Y and Z, how may that odd number be divided between Abel and Mabel?

In a classic simulation noted in game theory, Abel divides X, Y and Z into two groups of supposedly equal value. Mabel then gets to choose one of the two groups for herself.

A variation of this approach was featured in several scenes in "Follow That Dream," a 1962 movie starring Elvis Presley and Canadian-born actress Anne Helm. The plot revolves around a vagabond family of sorts with a few informally adopted children. Among the latter are two young brothers. In various scenes, the two are given a single candy bar as a treat. One boy, Eddy, breaks the candy bar in half, compares the two pieces, and bites off the larger piece to make it equal in size to the other. Then, while swallowing the bitten-off piece, Eddy hands one of the two now-equal sized pieces to his brother. In that way, Eddy manages to maximize his return while giving the appearance of providing an equitable division of the candy bar. Eddy repeats this gesture of seeming fairness throughout the movie. But just before the happy ending, the other brother, finally having caught on to the grift, grabs the candy bar to bite off his own equalizing portion.

Attorneys, perhaps removed by age from their years as gullible children like Eddy's brother, seem disinclined to contemplate this kind of process-oriented resolution. Instead, they will work through the various permutations until both Abel and Mabel are willing to accept one of the possible outcomes: X Y + Z or X + Y Z or X + Z Y. Of course, in exploring these possibilities, they will also need to factor in the variable of including fractional values of X, Y and Z. Furthermore, as signified by the "" sign, they will be required to determine whether the allocations are not necessarily objectively equal in value but instead are subjectively acceptable to the parties.

Since X, Y and Z may not have precisely ascertainable values, Abel and Mabel may seek the advice of counsel about which combination should be pursued, in order of optimum preference. The attorneys may respond that each choice is personal, that ultimately Abel or Mabel must make a subjective decision about which option is preferred. The attorneys may add, somewhat gratuitously, that each subjective decision may not necessarily have a monetary correlate.

Here, the refrain that comes readily to mind derives from a collection of ads unveiled by Mastercard in 1997. The advertising campaign highlighted the concept that some possessions and certain experiences are "priceless." The ads are breathlessly imprinted in popular culture with the tagline: "There are some things money can't buy; for everything else, there's Mastercard."

By emphasizing the subjective nature of certain decisions, attorneys will be correct in their advice. They may intuit the conceptual reasons for their advice. Yet perhaps unbeknownst to some, their intuition rests on firmly established logical principles.

In the early part of the 20th century, David Hilbert, at that time perhaps the undisputed leader of mathematics in the German-speaking world, listed 10 important unsolved problems in mathematics. He later expanded the list to 23 problems. Desirous of placing mathematics on a rigorous, firm foundation, he sought to prove the consistency of mathematical systems, that they contain no contradictions. He endeavored to find a comprehensive set of axioms capable of being proved for all of mathematics.

In 1931, Kurt Gödel shattered that vision. In one theorem, Gödel proved that every mathematical system contains propositions that must be accepted as true but are never provable. In a second theorem, Gödel proved that such a mathematical system cannot demonstrate its own consistency, meaning that its propositions cannot be used to prove their own validity. These two theorems are known as Gödel's incompleteness theorems.

In an interesting aside, as the threat of war loomed throughout Europe, Gödel fortunately found both personal safety and intellectual sanctuary at the Institute for Advanced Study (IAS) in Princeton, New Jersey. There, casual observers daily could see the carefully dressed Gödel and the disheveled Albert Einstein walking together from their respective dwellings to their offices at the IAS in the morning and returning home in the evening, all the while engaged in conversation that, as suspected by others in the academic community, the two geniuses alone could grasp.

In the years since Gödel's magisterial feat in pure logic, his theorem has taken on a romantic aura, captivating many with the notion that certain truths cannot be proved. Theologians and popular philosophers have casually invoked the theorem to prove everything, including, among many ephemeral notions, the existence of God, the nature of free will and the certainty of eternity.

In the realm of mediation advocacy, Gödel's theorem, although not directly applicable, may casually guide parties to a less lofty form of analysis that is nevertheless critical to the participants. In addressing the division of estate and trust assets, not everything is subject to quantification. And even when assets are given financial valuations, their perceived worth may vary from party to party. Negotiations inevitably will be based on assessments that can never be analyzed completely. Decisions can never be shown to be indisputably optimum or absolutely the best for any given party. Furthermore, valuations for the same assets will inevitably be subject to change with the passage of time.

Logical analysis may give structure to estate or trust negotiations. But each dispute will be based on factors that cannot consistently be evaluated and weighed against others. As a result, acceptance of settlement will be based on multiple assessments, the validity of many of which will not be subject to proof in any objective way. Attorneys and parties ultimately will be compelled to make decisions based on their capacity to accept their own subjective determinations of what they truly want and of how closely settlement proposals may meet their amorphous, potentially ever-changing expectations.

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