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PERSPECTIVE

## Mediating estate issues around an empty chair

By Kenneth Wolf

Whenever parties in a disagreement choose to mediate their matter, they come into the process with certain expectations. They expect that the other party will be as committed as they are to finding a mutually agreeable resolution. They expect that everyone will make their best efforts to address and resolve points of contention. They expect that they will be given answers to their outstanding questions so that they can make informed decisions and finally lay their dispute to rest. In the end, they expect to be able to move on with their lives.

These are reasonable expectations. Litigants invest considerable time and money in the mediation process. Their objective is to work toward a settlement agreement that allows everyone to the finish line. But when the matter in dispute involves wills, trusts or probate, all bets may be off.

When dealing with estate matters, however, the most important party to any dispute is – inconveniently – absent. Loved ones, already dealing with the pain and grief of a loss – whether sudden and unexpected or protracted and challenging – are suddenly like boats casting about on the open sea. They are the living survivors who will have to find their way to solid land and sort through what remains of the shipwreck.

As a mediator of probate and estate matters, I am often struck by the overwhelming challenges that the parties must face. On top of the raw emotions attended to a parent's, sibling's, or cousin's death, they are now immersed in the con-



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fusion and contention of dividing up the deceased's estate.

The deceased probably knew exactly what he or she wanted to happen with the property, bank accounts, and other valuables that were left behind, but ambiguities, inconsistencies, or other hiccups are now complicating or preventing that intended distribution. Instead of being able to ask key questions, family members are looking at an empty chair and trying to read between the lines, to ferret out some hidden intent or agenda in the estate documents.

And those family members may themselves be dealing with longstanding animosities and conflicts. Suddenly left to sort things out between themselves, they need wise counsel and a lot of hand-holding. Successfully navigating those rocky

shoals sounds like a mission impossible.

The bad news is that these types of disputes come up on a fairly regular basis. The good news is that they can be satisfactorily resolved. In my many years as a mediator of estate matters, I have rarely seen a case that would not or could not settle.

It all comes down to listening. Unlike other types of legal disputes, in which there may be clear guidance – contracts or medical records or certifications – probate matters involve extra-documentary materials. Yes, there may have been a will or a trust, but how these are to be read and interpreted may depend heavily on the parties' history and relationships. The story beyond the documents may be just as important as what is written on the pages.

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When working through estate issues, it quickly becomes clear that everybody knows a piece of the story, but nobody – other than the deceased – knows the full story. Only by listening to each other – either by sitting across the table from one another or working through a mediator – can all parties learn about the critical pieces that are missing.

Imagine, for example, three siblings whose parent has died. They each expect to receive an equal share of the deceased parent's estate. They were loved equally by that parent, so why was one willed a larger share? Was it a mistake? Could the parent have been under undue influence or not compos mentis?

Yes, we've all laughed at the

Smothers Brothers' "Mom liked you best" comedy skit, but in real life it's not funny when a child feels slighted by a parent. A skilled mediator will listen to and commiserate with the two angry siblings. Then, with the knowledge and consent of the third sibling, the mediator will share that sibling's story.

It goes something like this. While the others were managing jobs, families, and lives in distant locations, the third sibling was living nearby, checking on the parent daily, running errands and managing household tasks. She was regularly taking the parent to doctors' appointments, spending her own money when needed to ensure their comfort and safety. Over the years, this sibling sacrificed both her time

and possible job prospects so that her siblings could maintain their lifestyles. The estate allocation was simply intended to rectify that inequity.

When a mediator can help parties understand and accept facts such as these, the path to settlement is usually a smooth one. But there will be times when settlement is out of reach for reasons that have nothing to do with the facts. I once mediated a case in which the issues seemed to be well addressed and on track for resolution, but one of the parties was digging her heels in and refusing to settle.

When I talked with her about this intransigence, she confessed that she genuinely didn't want the process to end. She and her sis-

ter had been estranged for many years, and she feared that once the matter was settled they would go their separate ways, never to interact again. Keeping the dispute unresolved was, to her mind, the best and only way to keep their fragile connection alive.

Clearly, resolving estate disputes calls for a high degree of empathy, as well as a willingness to listen and read between the lines. It also calls for a recognition that nobody will leave the process happy. A loved one has died, and nobody will get exactly what they want from the estate. But when the threads of that relationship cloth have been pulled out, examined, and fully appreciated the resulting tapestry can have a rich texture and depth.