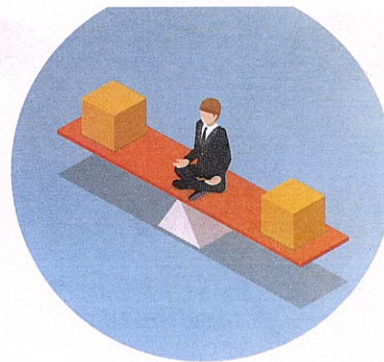

HOW TO STRIKE THE RIGHT BALANCE

Mediating testator's family maintenance disputes requires special skills.

When involved in the mediation of a testator's family maintenance (TFM) dispute, lawyers and mediators will no doubt be aware of the subtle, and sometimes not so subtle, differences between a commercial and a TFM dispute, the latter, like a matrimonial dispute, requiring some special skills.

Part IV of the *Administration and Probate Act 1958* (Vic) was amended by the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014)* (Act), to allow for claims by an "eligible person" who may bring a claim where there is a dependency (wholly or partly) on the deceased for the person's proper maintenance and support, and where at the time of death the deceased had a moral duty to provide for that person, and the distribution of the deceased's estate failed to make such provision.[1] The amendments have been in operation for more than three years.

In the column "When is the best time to mediate?" (*LIJ* April 2017) I noted that early mediation can engender a spirit of cooperation between lawyers and obviate entrenched and polarised positions as opposed to the situation when significant amounts have been spent on legal fees, making the challenge much greater.

A consequence of the amended Act is that costs will now be left to be determined by a court on the basis that the unsuccessful plaintiff may likely be ordered to pay costs, rather than the costs being paid from the pool of estate assets, previously the usual order. Cost considerations will now be a significant incentive for the plaintiff to consider embarking upon early mediation rather than risk a costs order in the event of an unsuccessful claim.

A variety of factors might influence a plaintiff to suggest early mediation. Some are:

- that there are certain new provisions contained in s91A[2] of the Act that the Court must have regard to in making a family provision order
- where a defendant beneficiary is old and/or seriously ill it may be prudent to arrange mediation at an early stage rather than risk having to deal with that beneficiary's executor in Court proceedings
- where it's not just about the money, the underlying interests of the parties (eg, repairing relationships) may need to be considered.

Professor Jay Folberg[3] dean emeritus at the University of San Francisco School of Law and a highly experienced ADR practitioner noted that: "Brothers and sisters may fight over partnership property, but they are really sorting out old issues of sibling rivalry and dominance . . . .Disputes surface that are usually less about malevolence than about conflicting feelings, misunderstandings of intent, divergent expectations, and resistance to change or unspoken fears."

- where other stakeholders may need to be part of the solution, such as creditors, co-shareholders or business partners.

Ultimately, serious consideration should be given by the parties to the flexibility of the mediation process, which could promote reaching early agreement rather than the court process where there will be winners and losers – and likely irreparably fractured relationships.

What then are the considerations and techniques that might be employed by mediators in TFM mediations? Mediators need to sense the mood of the dispute, often relying on their "gut feel", and so adapt the process to suit the circumstances. The prospect of a good outcome may depend on flexibility of process.

Even though some time may have elapsed since the death of the testator, grief may not yet have been overcome, and may again be stirred up through the mediation process. Using emotional intelligence in these circumstances is essential.

Juvenile confrontations which do little to promote an outcome can often arise – but can explain how the relationships became fractured. Intervention when the time is right to encourage the parties to focus on the future is critical.

Striking the right balance between allowing the parties to "vent" and then refocusing on the financial and other demands is important. The challenge is to be able to understand what the money actually means to the parties, without the mediator being a party to damaging the relationships further.

A party may often be accompanied by a support person. I have often encountered a support person attempting to discourage a party (whose best interests might be to settle) from resolving the dispute for unjustified, selfish and illogical reasons. In these circumstances the mediator may be well advised to meet with the party alone, with or without their legal representative.

Undoubtedly practitioners and mediators will acknowledge that parties in TFM disputes can be especially emotional and volatile, so to create an atmosphere for resolution takes patience, resilience and perseverance. Unfortunately that effort may all be wasted if the root cause of conflict is so deep seated that only a court determination will satisfy the parties' needs. For some mediators this may be hard to cope with, having invested so much energy in an attempt to reach an outcome. ■

Jonathan Kaplan is chair of the LIV (Litigation Lawyers Section) ADR Committee and is an LIV accredited specialist in mediation. He also practises as a commercial lawyer (www.kaplanlaw.com.au).

1 Section 91(2) of the *Administration and Probate Act 1958* No. 6191 of 1958 (as amended).

2 In making a family provision order, the Court must have regard to: (a) the deceased's will, if any; and (b) any evidence of the deceased's reasons for making the dispositions in the deceased's will (if any); and (c) any other evidence of the deceased's intentions in relation to providing for the eligible person.

3 "Mediating Family Property and Estate Conflicts: Keeping the Peace and Preserving Family Wealth" - originally published in *JAMS Dispute Resolution ALERT*, vol. 9, no 2, 2009 and subsequently on www.mediate.com.

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