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Chancery Mediation: life and reconciliation after death

Many Chancery disputes involve a fight between the current partner of the deceased at the time of his or her death and the children of a former relationship as to how the estate should be split between them. Indeed, the reading of a will is a well-known catalyst for family schisms and even, it is said, psychological disorders.

The dispute typically rests on the perceived unsatisfactory consequences of intestacy or testamentary provisions, an ambiguity or error in the drafting of the deceased's will or the rights of family members to make a claim for a share or increased share of the estate under the Inheritance (Provision for Family and Dependents) Act 1975

Ultimately such disputes are about the way in which money and assets should be shared out. However, the family history which attaches to the acquisition of the money –it was inherited from the children's other parent – and to the form of the assets –the house has been the settled home of the deceased and the current partner for many years but is now clearly much grander than she needs – can create an emotional minefield. There may be no correlation between the actual value of an asset and its perceived worth.

Against that background the real present financial needs of the parties and the moral obligations owed by the deceased as well as the black letter legal entitlements of the parties may be constructively explored and evaluated through mediation.

The mediation process

Inevitably the dispute breeds an atmosphere of mistrust. In some cases it perpetuates and exacerbates years of ill feeling; in others dislike and suspicion have mushroomed since the death of the deceased despite previous close family connections.

Against that background it is often difficult to persuade clients, who may not have seen each other since the funeral, to participate in a round table meeting at the start of the process. However, the chairmanship of a neutral mediator provides a safe, structured environment and, at the very least, the meeting serves as a useful reminder that the other parties (and the lawyers acting for them) are human. At best, a few well chosen words can establish a constructive platform for negotiations.

Mistrust and suspicion are also a breeding ground for misunderstandings and failures to share information. The mediator can assist the parties to exchange information both about hard facts such as the value of the estate and about their different perceptions. The opportunity to explain one's position to a neutral third party can be cathartic and a neutral third party has the best chance of explaining the differing points of view and motivations to the other side. Even if explanations are not accepted, the fact that they are offered can be seen as an indication of a willingness to engage.

Another tendency of parties in dispute is to concentrate on the detail to the exclusion of the bigger picture. The mediator can help the parties move from the detail to a broader

objective on which they might agree. For example the partner might want financial security and to honour the deceased's wishes to provide for his children. The children might agree that the partner should have financial security provided they have financial recognition of their importance to the deceased.

The deceased's wishes will often have little or no relevance to the legal merits of a dispute concerning his will or the 1975 Act. However the parties' motivation for entering into litigation is often a desire to fulfil what they understand to be the deceased's wishes. A mediator will help the parties find a solution which can be reconciled to the parties' often very different interpretation of deceased's wishes - an important advantage of the mediation process over litigation in probate disputes.

Often during the course of the mediation an issue will emerge which has taken on totemic significance for the parties. Frequently this issue will have little legal or financial significance in the litigation forming the background to the mediation (for example, the issue may concern the deceased's funeral arrangements or a chattel of little financial, but enormous sentimental, value); nevertheless, identification and resolution of this issue is often a catalyst for settlement of the entire dispute. A skilled mediator can bring these issues, which often lurk beneath the issues in the litigation, to the surface so they can be resolved.

Conclusions

A skilled and experienced mediator is well-placed to help families work through and solve the property and emotional tangles left behind after a death. Although a mediator's skills are speciality neutral the parties to a probate or trust dispute will derive additional benefits from the skills of a mediator with experience in the Chancery field. If appropriate, a mediator with Chancery experience can test the parties' respective cases and help them make an informed decision whether to settle on the terms available or go to court.

Mediation can help the parties achieve an acceptable closure on a particular chapter of their life, empower them to move on to the next phase and sometimes even achieve reconciliation.

Beverly-Ann Rogers
Katherine McQuail
Tracey Angus

The authors are members of the Chancery Bar Association who have been involved together and separately in numerous Chancery mediations. A list of mediators who are members of the organisation can be found on the Association's website at www.chba.org.uk