

***Probate Mediations:  
Traveling  
“Emotional”  
Highways to  
Resolution***

**Judge Mary Thornton House,  
Retired**

Alternative Resolution Centers



# During Today's Presentation.....

- You will get insight into a mediator's needs to forge a path to a successful resolution.
- You will learn how roadblocks to resolution can be prevented.
- You will discover the different roads to resolution in cases that start off with a mutual, potentially fatal, misunderstanding.
- You will hear a mediator's insight into some 'out of the box/off the beaten highway' creative solutions.

A green sign with a white border and rounded corners, mounted on a metal pole. The sign features the word "Questions" in a large, white, sans-serif font. The background of the sign is a textured green. The sign is set against a blue sky with scattered white clouds.

Questions

**PLEASE ASK QUESTIONS THROUGHOUT!!!!**

# THE EMOTIONAL LANE VS. THE FINANCIAL LANE



- Probate is NOT “Family-Law Lite”
- Lifelong relationships are multi-layered
- Involve intricate emotional “DNA” that underly and fuel the controversies between the parties
- Unlike a personal injury, contract, or business dispute, emotions can rule and defeat resolution!

# LANGUAGE IS IMPORTANT!

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- Avoid Using Civil Litigation Jargon in Probate
- “Goals” vs. Legal Certainty
- “Proposal for Resolution” vs. Offer/Counter-Offer, Counter Demands, etc
- Avoid use of “Compromise” – it implies someone “gave in”



# The Following Hypotheticals are *Inspired* by Real Cases!

- Hypothetical #1: When There's No "Fun" in the DysFUNctional Blended Family
- Hypothetical #2: Up Against Legal Walls
- Hypothetical #3: Up Against Emotional Walls

THE POINT: How can the problems in these cases be prevented and how can the problems be fixed?





# BLENDED FAMILIES.....

We enter a ZOOM BREAKOUT ROOM:

**Mediator:** “Hello, I am Judge Mary Thornton House, your mediator, and you must be counsel for Joey Phelan, the proposed conservator for her mother, Joanna Reid. Will Ms. Phelan be appearing today on the Zoom?”

**Plaintiff’s Counsel:** “Yes, Judge, and I am her attorney, Richard Thorne. My client is available by phone today or we can hook her up to a Zoom session with us, once I get the lay of the land in terms of whether John, stepson to Joanna Reid, is willing to step down as trustee of the family trust, agree to conservatorship, and promise to not object because Joey needs to take a salary for care for her mother. I hope you read my brief about John, he’s very selfish, narcissistic, and only wants to preserve his inheritance. He thought his father “robbed the cradle” when he married Johanna!



- Joey has really stepped up to the plate, taking care of her mother – she needs 24/7 care, so Joey needs to spell the caregivers and coordinate all of Johanna’s medical appointments. She’s quit her job to do it. Now John is refusing to pay for Johanna’s care and medical treatment because he believes it’s not medically necessary!
- **Mediator:** “Yes - I read all that. What kind of monies are we talking about here?”





**Petitioner’s Counsel:** “Well, I had a long discussion with John’s counsel. The trust has about \$4 million and the house is worth \$1.8. So, there’s plenty of assets for Johanna’s caregivers and upkeep of the family home. Johanna’s the surviving spouse with 100% of the trust going to her, then upon her death, 50% goes to John and Joey each. When I spoke to John’s attorney and suggested using a PPF for the trust and estate, he said “yah, we can agree to that.” All we care about is Johanna’s continued comfort and care.

**Mediator:** “Ok, let me talk with counsel and see where we are at – I have your authority to ask John to consent to the conservatorship (P and E) with a PPF and a salary for Joey with 24/7 caregivers.

**Petitioner’s Counsel:** “Absolutely and Judge, I am counting on you to intimidate these guys into a reasonable settlement.”



## SWITCH TO ZOOM BREAKOUT ROOM

- **Mediator:** “Hello, I am Judge House, the mediator in this matter and you must be respondent’s counsel. Is your client signing on to Zoom here today?”
- **Defense Counsel:** “Well, judge, my client, John Reid, is a very busy man – he is CEO of the LLC publishing business started by his father long before he married Johanna. But if we need him, I only have to call and he’ll pop in. You are aware, that Johanna was much younger than John’s father, never worked a day in the marriage, and her daughter is a drug addict and lowlife, now just here for the money grab!
- **Mediator:** “Hmm.... Petitioner’s counsel has indicated that you advised a willingness/agreement to a PPF, which gives the PPF of the person and estate use of the trust assets for Johanna’s care.

# HOW CAN THIS BLENDED FAMILY “JUMP” IN THE MIX TO RESOLUTION?

- Pre-Mediation Discussions – Getting Your Mediator Educated
- The Importance of Mediation Briefs:

Parties and their relationships, Trust and Estate Plans – current and prior, Assets outside any Estate Plan – IRA’s Investment Accounts & how Titled, Real Property and How Held, Assessment of Probable Outcomes, Settlement discussions to date, Medical Assessments, Proposals for Resolution made to date, Proposals for Resolution at Mediation, State of Discovery, Trial Dates

**EARLY SUBMISSION OF BRIEFS!**



# CAN THIS DYSFUNCTION BE FIXED?

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- Be Prepared for the Mediator to:
  - Ask for any confirming documentation regarding discussions!
  - Inquire about defendant's personal assets – enough to exceed insurance policy limits?
  - Ask if personal assets at risk – conflict issue?
  - Inquire about your respective client's flexibility in the demands/offer?

YOU be prepared:

Don't hesitate to strategize with Mediator!

## UP AGAINST LEGAL WALLS

Henry Walls died in 2016 after being married four times. He had two kids with his first wife – Kim and Dan. Kim helped Henry run the family business while Dan lived out of state, pursuing his own business opportunities. Henry had been married over 12 years to his fourth wife, Julia, during which time a home was bought and title was taken as Henry Walls, “a married man as his sole and separate property.” Julia petitioned the probate court to have the home she and Henry lived in for over 10 years declared community property. The children object.





## Counsel Only:

**Mediator:** “Look counsel, I have you in this breakout room without your clients because, after reading your briefs, it appears that what’s at issue is the interplay between Family Code section 760 and presumption of community property and Evidence Code section form of title presumption with an overlay of Family Code section 721 – overcoming the presumption.”

**Julia’s Attorney:** “That’s right, Judge. We’re very confident that we can convince the court, in this case, that Family Code section 760 applies and not Evidence Code section 662.”

**Dan's Attorney:** "Well, judge, on this issue, I am speaking for both kids – Henry got screwed over in his three divorces and was never, ever going to share a house with another spouse, only to lose it in the divorce. Julia knew this and everything was kept separate."

**Julia's Attorney:** "Hey, that is just baloney – Julia put sweat equity into that house for years, she painted it, landscaped...."

**Mediator:** "[Interrupting] Okay, okay, I get the picture."



# RECENTLY 'SETTLED' CASE LAW HERE

- This scenario raises the issue of when Evidence Code Section 662, presumption that title is held as reflected in the deed, versus Family Code Sections 760 and 721: the presumption that property acquired during marriage is community property and there is a rebuttable presumption of undue influence.
- New case: *Estate of Wall* (2021) 68 Cal.App.5th 168
- Prior cases: *Marriage of Valli* (2014) 58 Cal.4th 1396 and *In Re Brace* (2020) 9 Cal.5th 903





# WHEN THINGS GET LEGAL.....

- Role of the Mediator When a Legal Issue Needs Resolution
- Your Role to Assist the Mediator When there's a Stalemate Regarding a Pivotal Legal Issue
- What to Expect/Ask of the Mediator?
- Assist the Mediator in Strategizing the Road to a Resolution
- The Importance of Using the Mediator to Explain the Law to Clients with a Risk Assessment as the Basis of the Discussion



# Tools To Assist the Mediator

- Provide any pleadings that explain the legal issue
- Get the Mediation Brief to Mediator at least 5 days before the hearing
- Request a pre-mediation conference
- Advise Mediator about the sophistication of their clients in understanding the legal issues
- Shepardize Seminal Cases



# The Emotional Walls: Another Roadblock to Resolution

Think this case is over? Sorry.....even though united against their “wicked stepmonster,” Dan and Kim are engaging in their own battle. Kim worked with Henry in the ‘family’ business. Dan did not, but upon returning home for his Dad’s funeral, he took a look at the business’s books. As there was no estate plan, Dan tells his sister that not only was he going to get ½ of the business, but he was also going to sue her for elder abuse for manipulating Henry and syphoning money from the business for personal expenses. To make matters worse, Kim is unrepresented, citing that she has no money to pay for an attorney.



# Mediating with the Self-Represented Litigant

**Mediator:** “I understand that there is not only the spousal petition, but that Dan has filed an 850 petition alleging elder abuse.”

**Kim:** “Oh, don’t I know it! Dan is a money-grubbing, self-centered, selfish person, who for years didn’t call our Dad or visit him. Dan left me to sort out all of the family business issues as Dad’s health declined. And, don’t get me started about my so-called stepmother and her greedy ways. Both of them, in their own way, contributed to my Dad’s death! I’m the one that should get all of the business! I worked it for years and years without even getting a steady salary. Elder abuse, my ass! Dan’s the one who abused our Dad by neglect and emotional distress because of it. I can’t afford an attorney and I just can’t believe this is happening to me. I don’t want him to get one penny!!!!!!”



# DEALING WITH AN EMOTIONAL LITIGANT

- Please, please, tell the mediator the emotional “climate” of your client and the rest of the parties
- Give the mediator your personal and *realistic* assessment of your client control and his/her motivations:
  - “It’s the Principle of the matter ....”
  - “He’s got to change....”
  - “I’m tired of giving in...”
  - “I want her to feel punished when this is all over...”
  - “I want my day in court....”
  - “It’s not about the money....”



# HOW YOUR APPROACH IS CRITICAL TO ASSIST THE MEDIATOR

- Mediations: Your mindset important!
- “Soft” Advocacy– mediations are not Law and Motion Hearings
- Willingness to Recommend Compromise to Client
- Prepare the Mediator to do a Case Evaluation for benefit of client –
  - i.e., evidentiary issues (criminal record, presumptions, judge’s discretions under 352)



THE ROAD  
TO  
RESOLUTION  
IN THE  
FUTURE?





QUESTIONS?  
COMMENTS