sample continued to experience some level of engagement with each other. They provide good evidence for theories of marital separation which place emphasis on separation as a process over time rather than a single event.

Limitations

The chapter in the main report addresses questions of limitations in the study. In particular, it must be acknowledged that the small and non-random sample may, by chance, have thrown up a group of clients who were or became positively disposed towards mediation. On the other hand, the study was not concerned with positive and negative perceptions as such. Rather, it set out to provide insights into the "inner workings" of mediation from the perspective of the client. From that perspective, it would, of course, be equally valuable to interview former spouses who were able to express why they were, or why they became, disillusioned with the mediation process. Hopefully this can form part of a future project.

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Cross-cultural Issues in Family Mediation

by

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Abstract

Before individual mediators can begin to judge whether mediation is culturally transferable or by its nature favours those of certain cultural, educational and class backgrounds; before we can agree on how to deal with cultural values or differences, key issues must be considered. They include:

1. What are the effects of decades of assimilationism on family mediators' approach to the question of culture?

2. To what extent did the shift to multiculturalism alter that view, and in what ways?

3. What might be the effect in power terms of a mediator's adherence to either the "cultural differences" approach or the "simple pluralist" model? Are mediators adopting these models as an act of conscious choice? What if they are not?

4. How is family mediation affected if the mediator adopts the so-called "broad" view of culture? In this view, the:

    > "cultural perspective seeks to provide a conceptual framework that recognises the complex diversity of a plural society while at the same time suggesting bridges of shared concern which bind culturally different persons to one another." (Pedersen, 1991).

5. What kind of support/training is available to mediators wishing to consider such questions as an ongoing quality control measure? Are mediators simply left to their own devices, or worse still, their instincts, with all the culturally learned assumptions these involve?

6. What linguistic issues arise in family mediation when the language used is the first language of the mediator and some/one of the parties, yet all elect to speak it for the purposes of the mediation?

7. How does a person socialised in a low context culture perceive someone from a high context culture, and does it matter? Should family mediators be trained in high and low context communication?

8. Will careful attention to communication on the mediator's part iron out all these difficulties, or is there more to the cross-cultural arena than communication?

Nothing is more value-laden than perceptions of appropriateness. If, like beauty, it lies in the eye of the beholder, what about two beholders, or three? How does the presence of a mediator assist or constrain perceptions by the parties of one another as respectful, polite, responsive? To what extent might a mediator's own discomfort distort these key perceptions?

Is the mediation process itself family mediators' key tool to bring about resolution and reconciliation, or do mediators' belief systems about family, about personal versus individual rights subtly influence the process and perhaps even the outcome?

How might you have responded to the mediator who argued that there is no place for private sessions in family mediation because in families there are no secrets?

Before individual family mediators can begin to judge whether mediation is culturally transferable or by its nature favours those of certain cultural, educational and class backgrounds, it is necessary first to decide whether we are qualified to make the judgment, and on what knowledge bases it is premised.

Australian attitudes to culture bear all the hallmarks of our colonial past. White Australia's denial of the Aboriginal presence and of the rights of Aboriginal people as encapsulated in the doctrine of terra nullius, only recently addressed by the High Court decision in Mabo, has left a legacy of ignorance and discomfort which lingers in countless forms.

With this belief system as a backdrop, it is little wonder that attitudes to post-war immigrants followed much the same pattern, and that a policy of assimilationism prevailed. Its guiding principle, enunciated in the White Australia policy, was that social harmony could be preserved provided that in the longer term, ethnic differences could be erased.

As mediators we are likely to have been influenced by such views, but do we recognise how pervasive they have been? What are we doing to gauge the extent to which they affect our practice, either consciously or unconsciously?

By the late 1970s, the assumptions about the relationships between immigration and social cohesion had once again been revised: the new policy of multiculturalism now emphasised the virtues of cultural diversity. (Cope, 1991)

This simple pluralist model of culture, emphasising the enrichment of Australia by the addition of different peoples to the society and exotic foods to the national diet, was promoted in the late seventies to overcome resistance to the entrenched acceptance of Australia as a monocultural (homogeneous?) society. Attractive at first glance in its encouragement of pride in one's identity, in its celebration of the diversity of Australia, it soon degenerated into a "feel good" philosophy - multiculturalism of the heart - and still

failed to address the contribution to nation-building of generations of immigrants, the status and sovereignty of Aborigines, and underlying structural issues of access to the society and equity of outcome.

Reliance on a view of culture as fixed rather than dynamic, and the tendency to stereotype whole groups by virtue of their ethnicity are the drawbacks of the simple pluralist model.

Its promotion in the late 1970s and through the 80s - a highly successful enterprise - was largely achieved via a decade of so-called "cultural awareness" training, achieved through a "cultural differences" approach. This is a process whereby one comes to understand different ethnic groups by learning how they behave, eat, celebrate, raise their children and bury their dead. All these practices are quaint, interesting or even unbelievable: ultimately, however, they serve to underline differences. This approach encouraged, even depended on for its success, the kind of generalisation that also leads to stereotyping of a negative kind.

Among its other disadvantages are the fact that this view of culture takes little account of similarities, and emphasises only differences, and that it does not allow for the consideration of in-group differences, emphasising only between-group differences, and then only on the ground of ethnicity.

It should be a matter of great concern that this model still enjoys such widespread acceptance. It goes unchallenged and largely unquestioned, most of its adherents quite unaware of its implications for maintaining the status quo in power terms. (Implication: all change/adjustment is one-way - towards the mainstream).

The simple pluralist model posits the notion that culture is reifiable, and can be described in terms which will "explain" behaviour and motivation along ethnic lines. It takes little account of what could more accurately be termed "migration behaviour" - what any of us might do in a strange situation - and seeks to explain through mainstream eyes what is actually happening. The potential for distortion is obvious, yet thousands of teachers, and I fear, mediators, share this outlook. It has been offered to them to manage the complexity of cross-cultural interactions, and indeed infers that culture and cultural differences are a complicating factor in any negotiation.

It is my experience that mediators no less than others in the community are confused about just what culture means, and what its uses are. Perhaps this is because confusion reigns about the cross-cultural dimension of negotiation, and what cross cultural training - if indeed the mediator has any - sets out to achieve. Is it to bring about: better, more persuasive communicators? An awareness of cultural diversity, the ability to perceive differences? More sensitive people, replete with knowledge about the migration process?

All these goals are admirable, but they lack one key element of cross-cultural effectiveness - the ability to adopt what is now termed as the "broad view" of culture. This is, according to Pedersen (1991):

> "to understand ourselves, and those with whom we work in a complicated social context" not just to understand the 'exotic group' with whom we interact."

In the last twenty years:

> "culture has become recognised as a powerful perspective, and has gained the status of a general theory, complementing other theories to explain human behaviour."

The "broad" view of culture has emerged over the past twenty years in countries like Australia, the U.S.A. and Canada which once competed to attract migrants to their shores in the largest planned movements of peoples in human history and must now come to terms with the outcomes of large-scale migration in socio-political as well as inter-ethnic and interpersonal terms.

The cultural perspective:

> "seeks to provide a conceptual framework that recognises the complex diversity of a plural society while at the same time suggesting bridges of shared concern which bind culturally different persons to one another." (Pedersen: 1991)

"Bridges of shared concern" are precisely what family mediators, and arguably all mediators, are trying to construct. Here is a way to explore - or assist others to explore - the common ground between them, no matter how different they appear or actually are.

> "Ethnicity and nationality are important to individual and familial identity as one sub-set of culture but culture as a construct, broadly defined, goes beyond ethnic boundaries. Persons from the same ethnic or nationality group may still experience cultural differences. No particular group is unimodal in its perspective." (Pedersen, 1991)

Suddenly there seems a place for reconciling the individualist and the group approach - for taking into consideration one person's life experiences, attitudes, views and fears - the kind of social experiences that so often appear to separate family members along generational lines, and are then treated as inter-generational conflict, whose cross-cultural ramifications go unnoticed simply because the participants share an ethnic background.

The "group" phenomenon is worthy of a moment's reflection. Along with many of you, it has long been clear to me that members of minority groups identify as groups, not just as individuals. While the powerful seek individual remedies, those affiliated with less powerful groups in society frequently seek an outcome that will benefit the group, or at least not damage their membership of it. How then, to assist a woman to make the

decision to enter a refuge if that decision were to lead to the possibility of her ostracism from the wider family and the group upon which she depends for other sources of support, and with whom she is strongly identified?

The broad view of culture suggests that now that the individual finds herself in a situation where such a complex choice is hers, the role of the mediator includes reality-testing a range of options so as to enable her to explore the familiarities of a particular decision in her life. The process of mediation is uniquely suited to handle this level of complexity, allowing for both personal and joint consideration of possibilities. For the mediator, the mediation will be an exercise in expanding his or her cross-cultural insights.

Cross-culturally effective mediators are people who recognise that an expanding set of life choices can entail cross-cultural conflict at many levels - inner, interpersonal and intergroup. Such mediators do not project their own narrow culture-bound view that this or that option is perfectly feasible. For a member of one group, the "perfectly feasible option" may have consequences unimaginable to a member of another group.

This broad perspective is perhaps the only way to avoid the pitfalls inherent in a mode of communication and interaction based on culture-specific assumptions, resulting in an "exclusionary perspective". This has been described as resulting in a form of "encapsulation" (Wrenn: 1985) and it has five basic identifying features.

> "The culturally-encapsulated person:
>
> i) defines reality according to one set of cultural assumptions and stereotypes
> ii) becomes insensitive to cultural variations among individuals and has difficulty accepting the legitimacy of other world views;
> iii) holds unreasoned assumptions which are accepted without proof and which are protected without regard to rationality [no secrets in families];
> iv) may favour professional roles which further contribute to and preserve the encapsulation: [consider how few opportunities there are for parties to give mediators feedback on their performance!]; and
> v) without the possibility of evaluating other viewpoints, the culturally-encapsulated person bears no responsibility to accommodate or interpret the behaviour of others except from the viewpoint of self-reference criteria." (Wrenn: 1985)

It follows, then, that family mediators must be provided with opportunities for just such reflection - to develop their repertoire of cross-cultural skills. One of the aims of cross-cultural training for mediators is to provide a constructive challenge to the narrow view of culture and its effects, and to identify the outcomes in explicit terms. For example:

> "By the conclusion of the program, participants will be aware of the way in which their own culturally-learned perspective predisposes them toward a particular decision or outcome."

Hence to broaden their perspective is to widen the range of available options in mediation/negotiation/problem solving.

The cultural perspective combines the extremes of same and different by explaining behaviour, both in terms of those culturally-learned perspectives which are unique to a particular group and in the search for common-ground universals which are shared across groups.

The American "melting pot" metaphor made the mistake of over-emphasising the universal common ground generalisations which are shared across cultures to the neglect of culturally unique perspectives, just as the "cultural differences" approach failed to take account of universals, including the impact of age, gender, class and education level on the behaviour of individuals within groups.

Family mediators might also recognise the advantages inherent in the broad view of culture, which:

> "provides a unique perspective where two persons can disagree without one being right and the other wrong - such as when their arguments are based on culturally different assumptions."

A mediator may successfully assist such parties to identify common ground by focussing on their expectations and ultimate goals, rather than the behaviours that arise out of their differences in approach.

A group I was training in dispute resolution techniques once demonstrated just how powerfully a focus on expectations can influence possible outcomes. A colleague and I had devised a case study which beautifully simulates neighbourhood disputes, in that a tree belonging to A invades the bathroom pipes under B's property and water from B's pipes now seeps over A's lawn. A is on his way to see B to ask him to repair the pipes . . . What usually follows is predictable. On this occasion, however, one trio appeared to role-play the case study briefly, and reach agreement quite quickly.

When the moment arrived to debrief the groups on outcome, the spokesperson for this group, a recently arrived Ethiopian migrant, stated simply that in his group there had been no conflict.

> "I told them as long as we agree that the tree is life itself, we should have no problem . . . "'

Making a universal of the tree put a speedy end to petty discussion of your tree, my fence, your pipes, my lawn. So much for the legacy of British law, and the Dividing Fences Act.

A key competence for family mediators is a high tolerance for ambivalence, the ability to see complexity as a "friend" in the search for options, not an impediment. It seems to me that in a society such as ours we need to be cognisant of the fact that different behaviours can have the same meaning, and similar behaviours different meanings: in short that you cannot project meaning from your cultural frame of reference alone.

> "Behaviour is not data until and unless the behaviour is understood in the context of the person's culturally learned expectations . . . It is important to interpret behaviours accurately in terms of the *intended* expectation. In this paradigm "cross-cultural" is defined as an interaction where two persons have the *same* expectation but *different* behaviours"' (Pedersen: 1991)

It is in the interest of family mediators and the interests of others who deal daily with Australian society in all its diversity to know how few assumptions they can make about their clients; to know what the process of acculturation entails; to recognise that those struggling to learn a new language and the ways of a new culture are in reality re-learning old skills in a new guise, and filling the silence brought about by migration with the sound of their own voices.

It is in all our interests to resist attempts to portray cross-cultural training as a simple algorithm: I believe we need to acknowledge that there is no step-by-step approach to the topic. As we search for a conceptual framework that enables complex issues of culture to be examined and understood, de-mystifying yet not over-simplifying them, I suspect we will also feel less helpless in situations which remain inscrutable if the old models of culture are applied to them.

What is needed in family mediation is awareness, not of cultures, but of culturally-learned assumptions, in particular our own. It must be offered together with knowledge about context and about the repercussions of generalising from one's own experience to the particular.

Cross-cultural communication does not have to proceed from the assumption of radical cultural relativism - that each culture is unique and different - nor from the position of cultural absolutism that assumes universal identity of psychological functions and the ways those functions relate to behaviour.

In summary, I commend the broad view of culture to family mediators on five grounds, that it allows us:

i) to be more accurate in matching parties' intended and culturally-learned expectation with their behaviour, and not to "read into" their behaviour unstated or unconscious beliefs of our own

ii) to become more aware as practitioners of how our own culturally-learned perspective predisposes us towards a particular set of decisions or outcomes

iii) to expand our awareness of the complexity in cultural identity patterns which may or may not include the obvious indicators of ethnicity and nationality

iv) to accept that what is of importance "culturally" in one situation may not be so in another, that "culture" as we have come to understand it does not exert a prime influence in all circumstances, but that an individual struggling to adjust to new social circumstances may well be moving out of one cultural world view and into another

v) to develop the communicative competencies to track and clarify what particular elements of personal experience and cultural expectation (saliencies) may at a given moment be influencing the interaction.

As mediators what other tools have we for dealing with the cross-cultural dimensions of interactions?

Hall (1959) has set out a theory of cultural context to explain not merely what divides us in cultural terms, but what we can attempt in order to bridge the gap. Like Hofstede, who focusses on the "national environment", Hall's descriptors place behaviour in the context of what might be regarded as the person's natural habitat.

How helpful this is in elucidating the cross-cultural experience is arguable, given that in a cross-cultural (rather than exclusively national) setting like Australian society, we are in long-term, open-ended contact with others who, like us, practise (remnants of) their culture in an environment other than its national setting - one where a multitude of forces acts upon us in ways both manifest and unmanifest to us.

Hall ranks national context on a continuum from low to high context, identifying the circumstances surrounding an event or interaction - such factors as tone of voice, gesture, posture, social status, history and social setting - which will be used to interpret the spoken words. In a high-context culture, the surrounding circumstances of an interaction are taken into account; in a low-context culture, these circumstances are filtered out, or do not warrant the same attention. It is important to note that no value is assigned by Hall to either high or low content. (Halverson: 1993)

Hofstede (1980) identifies four key dimensions by which the national cultures of 40 independent nations differ:

- power distance
- uncertainty avoidance
- individualism
- masculinity/femininity

Briefly, a definition of the dimensions.

Power Distance indicates the extent to which a society accepts the fact that power in institutions and organisations is distributed unequally; *Uncertainty Avoidance* the extent to which a society feels threatened by ambiguous and uncertain situations and tries to avoid them by providing formal rules (giving rise to high levels of anxiety and aggression); *Individualism* implies a loose-knit social framework in which people are supposed to take care of themselves and of their immediate families only, while its opposite, *Collectivism*, is characterised by tight social frameworks in which people distinguish between in- and out-groups, and expect their in-groups to look after them, in exchange for which they owe loyalty; *Masculinity* expresses the extent to which the dominant values in the society are "masculine" (assertiveness, the acquisition of money and things, and not caring for others, the quality of life, or people). Hofstede assures us that:

> " . . . these values were labelled masculine because in nearly all societies, men scored higher in terms of the values - even though the society as a whole might veer toward the 'feminine' pole. Interestingly, the more an entire society scores to the masculine side, the wider the gap between its men's and women's values."

Is there a similarity buried here among all these differences? Is there something in gender which binds despite culture? Hall, too, found women across a wide spectrum more high-context than men, whatever their culture. What is to be made of this?

Hofstede (1980) warns that:

> "(c)haracterising a national culture does not, of course, mean that every person in that nation has all the characteristics assigned to that culture . . . in describing national cultures we refer to the common elements within each nation - the national norm - but we are not describing individuals. This should be kept in mind when interpreting the four dimensions . . ."

If we as mediators seek a way to bridge, and perhaps even understand difference, particularly in our social setting, the Australia of the late-twentieth century, here may be some buried clues!

We are dealing - particularly in the family conflict setting - with people's individually-transacted needs. While national culture and in-culture expectations, are acting on the parties, their effects may be different, for reasons of age, personal experience, identity, gender, levels of socialisation in the new (Australian) setting. Hence to "understand" them at the level of national culture is a fallacy, and would be to draw a broad brush where fine lines are needed. The risk inherent in this approach for a mediator is that we quite literally may not hear what is intended - and cross-cultural communication is all about intended meaning - and thus compound existing problems. Indeed, the parties' assumption about "understanding" - for reasons of family, culture, in-group status - may be a root cause of conflict, and has itself to be unpacked in a safe setting, where people's strong feelings and individual needs can be aired.

Mediation provides a setting in which the expectations, not the behaviours, can successfully be explored. For me, this means that keeping order, or damping down the ventilation of strong feelings, may frequently occur because the mediator, not the parties, thinks the behaviour inappropriate. Could this be a reflection of national norms we may unwittingly be acting out, or is it individual? Whatever the case, mediators need all, in Hall's terms, to be "high context" communicators, alert to the circumstances surrounding an event or its re-telling. We need to do this not so as to interpret them ourselves or assume we can infer their significance, but as a storehouse of possibilities, questions to ask in the private session you have if you do not believe families have no secrets . . .

Mediators - and especially family mediators - work in the deeply personal world of the parties. Externalities do not suffice, nor can they pass as understanding. We must seek out opportunities for training and take advantage of all opportunities to debrief the cross-cultural perspectives of completed mediations. Ongoing training and development in this area in the Australian setting is paramount, and one of its enduring goals must be, as Pedersen puts it, not merely to understand exotic others, but to understand ourselves.

The last word on the subject is uttered, as is so often the case, by a non-expert: in this case, it is Peter Ustinov.

At a recent National Press Club luncheon, that great internationalist responded to a question about his diverse roots, his Russian-English parentage and his status as citizen-of-the-world extraordinaire, by denying being confused. Indeed, he said, his wanderings had made him ever more secure.

> "The more we understand each other, the more ourselves we become."

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Mediating Wills and Estates Family Provision Act Disputes

by

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(For confidentiality purposes, the cases referred to in this paper are a composite of typical testamentary topics which come to mediation, rather than specific cases.)

Have you made a will? Did you take care of all those who might have some expectations of being included? If not, did you document in your will why you drew your will the way you did, or why you may have benefitted one of your children more than others? If not, you may be leaving a can of worms behind you.

Of all legal documents, wills are most often the result of capricious instructions or emotionally-charged thinking. I have vivid memories of my first year as an employed solicitor spending all of January changing wills - not creating new ones, but altering existing wills because someone had got upset with a former beneficiary over the Christmas period, the season of goodwill. Make sure you visit whomever you are supposed to visit on Boxing Day, otherwise you might be putting a potential inheritance in jeopardy! It needs to be said that most wills are not contested, and usually probate goes through quite smoothly.

Whilst I think most people prepare their wills carefully and equitably, contested wills may be the result of short-term traditional, conservative or impulsive thinking. As an aside, people's reasons and motivations for wishing to draft wills in a certain manner are often amusing, enlightening, illogical and sometimes vengeful.

Potential Contests

For example, a person might wish to benefit one child to the exclusion of the other on such grounds as the other child is married to a rich spouse. This may be a genuine reason or just a rationalisation for playing favourites. It is not uncommon, though, for a parent to want to compensate a less successful or less affluent child through a will.

Other examples which have a dispute potential are where a de facto partner, usually the more "well-heeled" in a shaky relationship, drags the other along to the will-drafting exercise, to prove he or she is leaving the bulk of the estate to that particular person. What they are trying to do is preserve the relationship through those means, through the pocket. In some cases testators extend the benefits to the offspring of the de facto partner, sometimes resulting in a diminished benefit to the testator's own children.

Both contested and uncontested wills may be home-made. Home-made wills are perfectly valid, of course. A will made on the back of an envelope has been proved to be valid

because the deceased's intention was clear. However, some home-made wills may have inbuilt difficulties which might have been avoided if legal advice had been taken. For example, with the exception of life estates, some people still find it quite difficult to grasp the principle that we can't leave an asset to someone on the condition that he or she then leaves it to someone we nominate, who must then leave it to someone else we nominate. In other words, we can't dictate from the grave down the generations in order to keep an asset in the family. This was possible at one time, but there are now laws against this.

One of the first maxims we are taught at law school is you can't give what you haven't got. Some people are quite amazed to discover they can't sever a joint tenancy in a house, for example, and bequeath what they perceive to be their half-share to a third party.

In the "olden days", in the majority of cases, a will was a will was a will. So long as you made your intention clear, you could leave your loot to whomever you wished and if a close relative missed out to the Cat's Home, that was too bad. Victorian novels were rife with situations where a son or daughter was cut off without a penny. These days, the Family Provision Act may have an impact on beneficiaries under a will after we have departed this world, and we may in fact be creating trouble for those we leave behind. It is a solicitor's duty to draw to a testator's attention any situation which may attract Family Provision Act claims, and to point out the manner in which legislation appears to be applied.

Legal Position

Although the beauty of a mediated solution is that it does not have to conform with legal precedents and community standards, wills are often contested by persons who fulfil certain eligibility provisions under the Family Provision Act. Most mediated probate matters are, in fact, court-based in the sense that some legal action has commenced. A beneficiary will rarely mediate voluntarily prior to court action or threat of court action. Indeed, why should they? In theory they have nothing to gain from mediation and may have a lot to lose. It is generally only the threat of court action, or an objection to probate with its consequent delays, which will bring a beneficiary or executor to the mediation table at an early stage. Subsequently, it is the escalating costs of a court action or uncertainty of result once a court action has commenced that make the mediation forum attractive.

Various statutes impose time limits on when proceedings must be commenced in a testamentary dispute, so it is in the claimant's interests to make the claim as soon as possible.

Although the courts do not lightly alter the wishes of the deceased, undoubtedly orders made under the Family Provision Act do detract from our freedom to dispose of our assets as we may have wished.

The courts apply some general principles in regard to who can make a claim. One such general principle is that the claimant must establish that the deceased did not provide in the will for the proper maintenance, education and advancement in life of the applicant. This appears to be interpreted widely. For example, a legal representative in a matter which came to mediation maintained that his client, who had been completely ignored in a

will which benefitted his siblings equally, would in the normal course of things, have been able to expect an overseas trip from any bequest under the "advancement in life" criterion.

To make a claim under the Family Provision Act (F.P.A.), a claimant has to be what the court calls an "eligible person" under the court rules. There are four categories:

i) husband, wife or child (including adopted child or ex-nuptial child, but not step-children);
ii) de facto spouse;
iii) former spouse;
iv) other dependents (a broad category extending to all possible members of the deceased's family, including in some cases, special friends and step-children).

In category iv, all applicants must have been wholly or partially dependent on the deceased at such time. In addition, unless the applicant is a grandchild of the deceased, the applicant must also establish that he or she was a member of the household at any time that the deceased was a member of that household.)[1]

Just as we find it useful to have some background knowledge when mediating in family law matters, it can be useful to consider how the courts have decided certain cases. These factors can arise as issues for discussion in mediation, particularly where legal representatives are present. Generally, the courts will not rewrite the will. They will not say that one should not have left one's money to the Cats' Home. They will not cut out the cats simply because the judge or we ordinary citizens might think a deceased person should not have left the estate in that particular way. The courts have also said there is no need to produce an overall fair division of the estate or to put all the testator's children in an equal position. The courts will only alter the will to the extent that proper provision is made for the eligible person to whom the testator has failed in his or her moral duty. These rules have been applied where there has been estrangement between the deceased and his or her children, and even where there has been long-standing hostility between them.[2]

Although one may feel one has been hard done by at the hand of a domineering relative, these general legal principles apply in the court situation. In one case[3], the judge spoke of the tensions that operate between the idea of leaving your estate to whom you choose and making some provision for those who might be considered to have a moral claim on you. According to the judge:

> "These principles include the fact that in Australia there is the freedom of a person to leave her property in whatever way she wishes, to love whom she chooses, to hate whom she wishes and there is only when there has been a failure to comply with a moral duty to those in the community's eye

1 Hadden, Phillip and Neal, Richard (1988, 1989, 1990, 1991) "Family Provision Act Claims" - Paper presented by the Continuing Legal Education Department of the College of Law, Sydney.

2 See *Stewart v. McDougall* (unreported decision of Young J., 19 November 1987).

3 See *Pompeous v. Phillips & Ors* (unreported decision of Young J., 25 March 1988).

> she should have made proper provision for that anyone can legally complain about another person's will. Even then the court has no power to rewrite the will but can only adjust things in such a way as to, in substitution for the testatrix, fulfil her moral duty."

The courts may take into account the great impact of a claimant in building up a person's estate. This is similar to the family law issues of contribution and is often a mediation topic.

The court will usually expect, where the size of the estate permits, sufficient provision to be made for a widow to allow for adequate accommodation, income and - where appropriate - provision for other exigencies. This is very similar to family law principles. Again, as with family law matters, the courts will look at the duration of a marriage or relationship.

Mediation matters often involve cases where a widow has only been left a life estate. In one case[4] where an elderly widow had only received a life estate in the former matrimonial home, the court stated:

> "In many cases these days, a life estate will not be sufficient because it does not cover the situation of the plaintiff moving from her own home to retirement village to nursing home to hospital."

De Facto Relationships

These have to meet the threshold criteria under the De Facto Relationships Act in the sense of proving one was in a genuine de facto relationship.

Why Mediation?

Mediation is being increasingly applied to disputes concerning matters related to wills and probate. The first Settlement Weeks of the New South Wales and Queensland Law Societies showed that some 8 percent and 4.5 percent respectively of matters listed were described as "probate, testamentary and estate matters".[5] The settlement rate in New South Wales in the 1992 Settlement Week was 78 percent. Under the New South Wales Law Society's ongoing mediation program, about 20 percent of matters dealt with concern testamentary matters, estate matters or trusts.

What are the advantages, apart from the usual ones, of mediating these cases?

Costs

Some claims can be quite devastating on a relatively small estate. The legal costs of running such a matter can dissipate the estate so that at the end of the day little remains.

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4 See *Court v. Hunt* (unreported decision of Young J., 14 September 1987).

5 Boule, L. (1993) "Testing the Mettle - Queensland's First Settlement Week" 4 ADRJ 5 at 7.; Chinkin, C. and Dewdney, M. (1992) "Settlement Week in New South Wales: An Evaluation" 3 ADRJ 93 at 95.

Some matters, whatever the size of the estate, often take a minimum of two days in the court and often the cases that come to mediation are of the most complicated kind: it can take up to two and a half years for a matter to get to court, and costs are building up throughout this time. This situation can be ridiculous when, say, four people may be fighting over a relatively small sum of $60,000.

Uncertainty of Result

Although there have been some general principles established by the courts, a court result can be unpredictable in these matters. Consequently, when the mediation opportunity is canvassed, some solicitors on both sides will welcome this with alacrity: some of the claims have got out of hand or are extremely complicated; clients are difficult, positional and un-cooperative; and most of all, the court result is uncertain. Each case seems to depend on its particular circumstances. Because of the lack of certainty in a legally-imposed solution, particularly as to the amount of the benefit if it is achieved, mediation becomes attractive.

Conditional Arrangements

Another advantage of mediation is that the parties can enter into conditional arrangements upon certain contingencies occurring, a situation which may not be entertained by a court. For example, a father can agree to enter into a bond to give his grown-up children an investment property or a certain asset prior to any remarriage, should he wish to remarry, so that the children will not be disadvantaged by an inheritance claim of a new partner.

Options for Settlement

There are multiple settlement options in testamentary matters: examples include the contingency arrangement just described; instalment payments; agreements to pay grandchildren's school fees or university fees; leases; free tenancies; life estates; shares in a business; or share of a partnership. Of course, when considering options, the usual mediation principles of looking at people's underlying needs must apply.

Preservation of Family Relationships

I would like to put a question mark against this claimed benefit, and discuss it more fully later.

What are typical mediation scenarios?

Often they involve the complications of blended families, de facto relationships, second marriages and, increasingly, A.I.D.S.-related deaths where the deceased has left property to the gay or lesbian partner and the deceased's family is contesting the will (or vice versa).

Dynamics of Mediation

The dynamics surrounding mediation over wills are very complicated because the disputants are people who have not only had a close relationship with the deceased but also often with each other. There are some similarities to family mediation, but there are

added psychological complexities. In family law matters, a relationship may have ended by mutual consent or ultimately by mutual acceptance. However in these cases, disputants may have been subject to a double sudden cut-off, first by a death and secondly by estrangement based on the terms of the will. Disputants may have been very close up to that point, or at least have had a peaceful or non-contentious relationship. They may be grieving because they have lost the deceased; they may have loved the deceased dearly and are then having to cope with feelings of betrayal where it seems the deceased did not regard them as highly as they thought; they may feel the deceased has deceived them by giving assurances and promoting expectations which were not fulfilled; they may feel that a sibling has stabbed them in the back by influencing the deceased to their detriment and the forgotten or suppressed sibling rivalry of childhood is resurrected. Most devastating, perhaps, is where a beloved child is the main beneficiary of a spouse's will, and when the surviving spouse (who is usually the mother) makes a claim, that child fights the claim tooth and nail with no consideration of fairness and with apparent indifference to the surviving parent's situation.

The unique aspect of mediations in these cases is that the main player is absent: the person who could give the first-hand, and possibly the only true, account, is not there. Interestingly, although mediators often say that "All parties must be present. We can't make decisions around absent parties", here we have the classic case of the "empty chair" with all its implications.

One thing the parties in mediation cannot do openly, although they may wish to, is blame the deceased. All must claim a reciprocal intimate caring relationship with the deceased. They must diminish or trivialise the opponent's relationship with the deceased. A common mediation scenario is where all sides claim to know the deceased's true intention regardless of what the will said. They need to claim that the deceased was coerced or misled by one of the other parties.

Case of Former Spouse

In one such matter the deceased had taken a life insurance policy worth less than $100,000, in which the benefit was assigned to his then wife. In the will he left the policy to his current girlfriend. He had used the insurance policy as collateral to buy a trucking business in partnership with his girlfriend. On his death, the amount owing on a truck was equivalent to the amount of the insurance policy. The claimants in the mediation were his children from the first marriage. Although the legal position was that the wife had more claim than the girlfriend, neither of them wanted to admit at the mediation that the deceased had "conned them" both. The claim was settled at mediation with 55% going to the children and 45% to the girlfriend. A court action would have completely eaten up this asset. At the time of mediation, court action had commenced and both sides had to bear their own costs to date. Fortunately, these were not great because the lawyers had recommended mediation at an early state.

Issue of Undue Influence

Claims of undue influence, which sometimes encompass an issue of diminished responsibility, do not necessarily fall under the Family Provisions Act. An alcoholic won a huge amount on the Soccer Pools shortly before his death. He and a female neighbour suddenly became very good friends. He had been writing cheques for huge amounts in