



PREMIUM PODCASTS FOR THE 21ST CENTURY

Masters of Dispute Resolution

A CARING WIDOW AND HER STEPSONS

This is Masters of Dispute Resolution on PodClips.io.

Masters of Dispute Resolution is designed to provide those involved in the mediation process with the views and insights of the most experienced and accomplished mediators in the profession. We'll share the stories of conflict and lessons learned from mediating challenging and intriguing disputes. You'll hear stories about how conflict affected the lives of those involved in the conflict, and how resolution of disputes through mediation provided them with the ability to move forward unburdened by an ongoing dispute. Through our discussions, you will gain insight in how to address and overcome difficult issues and achieve more satisfying results in mediation, whether you're a mediator, attorney, or have been, or contemplate being involved in mediation.

Your host is Len Levy, mediator and arbiter with ADR Services, Inc. A leading alternative dispute resolution provider, Len litigated complex cases for more than 30 years and has been a mediator since 1998. Joining ADR Services on its panel of neutrals in 2008, he has been recognized as a Super Lawyer in alternative dispute resolution, beginning in 2014. And now your host, Len Levy.

Thank you, Darrell. Welcome everyone and thank you for joining us for Season 5 of Masters of Dispute Resolution, a podcast which will add tools to your mediation toolbox. We're brought to you by ADR Services and the American Institute of Mediation. In each podcast episode of the Masters of Dispute Resolution, you hear the story of a conflict, the impact that that conflict had on the lives of the parties involved, how resolution was reached, and lessons to be taken from that conflict and its resolution. Many of the details of the story you're about to hear have been modified to preserve the confidentiality, which is essential to mediation, while also conveying the essence of the conflict and its resolution.

Today, we are going to be joined by our guest Bette Epstein. Bette is, she is just an extraordinary mediator and has been mediating trust and estate disputes since the year 2000. And this is following an absolutely remarkable career as a trust and estate litigator. And following that career, she turned her focus to alternative dispute resolution and has been helping parties settle their disputes ever since. She's now available as a full-time mediator and discovery referee and is on the panel of ADR Services, Inc. as I am.

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And Bette is highly regarded as one of the Bay area's leading probate specialists. And she spent nearly three decades handling trust and estate disputes and a variety of disputes, including contested conservatorship, elder abuse claims, and serving as an expert witness in conservatorship, trust, and estate litigation proceedings. She's represented individuals, banks, and private professional fiduciaries, and she has a feel for what is going on. And what are the concerns of all parties who are involved in this type and other types of mediation? So, Bette, welcome to Masters of Dispute Resolution. And today, actually, Bette is going to be conveying a story that I'm going to let her tell you about. OK, Bette, take it away.

Thank you, Len. So, this is a dispute that involves the deceased husband of a woman named Sarah and his two sons by a prior marriage. So the kind of typical trust and estate dispute is either siblings who are in disagreement, or stepchildren and stepparents. So in this case, Sam, the Decedent, died five years ago at the age of 85, leaving his wife of 15 years, Sarah, who is 20 years younger. And he also left two sons from a prior marriage, Max, who was age 62 at the time, and Ethan, age 60. Sam was quite ill during the last five years of his life, and Sarah provided full-time care for him as he did not want "strangers in the house" providing care. And during this time, the sons rarely visited. And when they did, it was just to stop by for a brief period of time, and then they were gone.

So Sam was very generous to his sons during his lifetime, paid for their college education, helped them buy their first homes, and was really, quite generous as a parent at that time. But he wanted to make sure that Sarah was provided for after he died. So he created an estate plan that resulted in what's called a Q-tip Trust for Sarah's lifetime, meaning that Sarah was the income beneficiary during her lifetime, and the two sons were the remainder beneficiaries after she died. The trust was funded with the family home, which was Sam's prior to his marriage to Sarah, that was valued at \$3 million and was free and clear of any encumbrances, so there was no mortgage, and then \$5 million in cash and invested assets. And Sam also left an instruction in his estate plan that, in addition to the standard Health, Education, Welfare, and Maintenance Standard, what we call the HEMS standard, that he directed that Sarah was to be provided sufficient funds, income, and, if necessary, principal, to allow her to enjoy the same standard of living that they had enjoyed during their marriage.

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So that included maintaining the house, travel, entertainment, buying designer clothes, a very affluent lifestyle. And the sons were the co-trustees of the Q-Tip Trust, so they were responsible for managing these assets and making the distributions to Sarah as the income beneficiary. While the \$5 million generated income of approximately \$150,000 annually before payment of income taxes, that was not sufficient to allow Sarah to enjoy the lifestyle she believed that she was entitled to, and the sons, who were the co-trustees, refused to invade principal on her behalf. So she filed a petition with the probate court seeking to have them removed, and instead have a private professional fiduciary appointed as the trustee of the trust. The sons objected, as you might expect, and the court ordered the parties to mediation. So that's when the engagement begins.

Okay, so a couple of questions come to mind, first of all, how long had it been since Sam passed, by the time you received that dispute?

He had died about five years earlier. So they'd had five years of having this business relationship, which Sarah clearly was not happy about.

Also, it seems to me that this concept of maintaining the lifestyle, it can be somewhat fluid and somewhat difficult to pin down by any objective standard. And this is not an unusual type of situation, right? So how does that lifestyle bar get established in litigation or in mediation?

Well, in a well-functioning trust administration, there would be discussion about what are her needs and she would probably be asked to create a budget so that they can do planning to try and accommodate her as well as they could. In this case, when it's trying to kind of continue on what had previously been enjoyed, they might want to go back and get records. Trying to determine what their expenditures had been. And probably prior to his illness. I would assume that during his illness, they didn't do much in the way of socializing or traveling, so they would go back further. And that's part of where the dispute comes in, is to what was the lifestyle that they enjoyed that she wants to continue with.

So that is a major bone of contention here with the sons, and the problem that she's having also is, it would seem, is, during his lifetime, was there another source of income, or how was that working?

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Well, he, I think early in the marriage may have still worked sometime, but mostly they lived off investments and he had done well financially. But he'd also been very generous to his sons. So earlier in the marriage, there would have been more money available to both Sam and Sarah had he not been so generous.

So the generosity came back to haunt Sarah, in a sense, because it means you give the sons a lot of money during their lifetime, less left over.

Right, exactly.

And I'm also gathering that the sons being the co-trustees, Sarah was not a trustee as well, was she?

No, no.

So she's at their mercy, so to speak,

She is. And of course, there's a direct conflict of interest right in terms of their fiduciary obligations to her, as well as they have obligations to themselves as remainder beneficiaries.

Okay, so conflicts abound on this case. And were there contentious discussions between the two of them, or between the three of them, I should say?

Mostly through counsel. Sarah and the two sons were not able to kind of sit down together and have a business-like conversation. Most of it was done through counsel.

Now we have communication issues, we have problems of conflicts of interest. And essentially, a tangled plate of spaghetti that you are trying to help the parties untangle.

Right.

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So when you get the facts, how did you get the facts? And what did you do to follow up on, maybe a brief or a letter that you received?

So I ask that I receive mediation briefs a week before the mediation is scheduled, and that can be in the form of a letter, brief, a pleading, whatever information people want me to have. I don't always get them as early as I would like, but I try and make sure that there's enough time for me to read both briefs and then have pre-mediation calls with counsel prior to the mediation session.

We are going to take a break now and we're going to be talking about those pre-mediation calls in our next segment. I'm Len Levy and we're talking with Bette Epstein, who is telling us a fairly typical but fascinating story of conflicts in the trust world.

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Welcome back to Masters of Dispute Resolution. I'm Len Levy and we're chatting with Bette Epstein, who is going to now tell us about, well, what do you do before the mediation starts?

All right. So thank you, Len. So, prior to virtually every mediation session that I do, I try and make contact with the attorneys to both hear from them, kind of what they didn't include in their mediation briefs that they may want me to know. And also to ask them for some guidance as to what they think may be helpful coming from me as the mediator to assist them in preparing their client to make a binding decision at the mediation session that they are going to be able to live with. So, in this case, I had a chance to speak to Sarah's attorney and learn that

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she was really very resentful. That Sam's sons were so inattentive to their father the last years of his life, and yet they still wanted his money, that they showed no appreciation for all the care that she provided during his illness, and also for the money that was saved by not having full-time caregivers. Full-time care, if you really need round-the-clock care, can be hundreds of thousands of dollars a year. And because Sam refused, then all of that fell onto Sarah, and from her perspective, his sons had no appreciation. So it became clear to me that one of the things I was going to need to be doing at the mediation session was really listening to her and being very empathetic as to what her circumstances were, particularly during her husband's illness.

And then when I spoke to the sons' counsel, I learned that they were resentful that Sarah refused to sell the house and make it productive. Apparently it was a 5,000-square-foot house that she was living in alone. But instead of selling the house, reinvesting in a much smaller residence that they thought would be more appropriate, she wanted distributions from the securities account, so principal distributions. They were also concerned they didn't want Sarah to accumulate money that she could then leave to her daughter from a prior marriage. They knew that this money was intended for Sarah, but not for her daughter. In addition, they were very unhappy about all the attorney's fees that were being paid to both administer the trust. And now to defend against her petition.

Lastly, they were also really concerned that because Sarah was only a few months older than they were, that there was a good chance she would outlive them. And then neither of them would enjoy the inheritance from their father, one of the sons did not have children, so if he predeceased Sarah, then his share would go to the brother, and if the brother died first, then it would go to the brother's children. So the idea that Sarah could outlive them, of course, which nobody knew what was going to happen, was really, really troublesome to them. Because they clearly wanted to enjoy the benefits of their inheritance during their lifetime.

So the very fact that she's living creates a resentment that they had about Sarah. That's incredible.

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It sounds like it might be the usual thing, but it is, it's absolutely incredible. One of the things as a neutral, one of the things we're trying to do is we're trying to maintain that neutrality, the appearance of that neutrality. But you're telling me some things that have to be somewhat disturbing in terms of the two brothers' attitudes.

Right, right, but you reserve judgment. Part of the advantage that I have is that prior to going to law school, I was a psychotherapist, so I was trained to listen empathetically, without judgment. Because certainly, some of the conduct of my therapy clients was not one that I could condone. Now, as a mediator in particular, I see people behaving in a way that is totally contrary to what I think is appropriate, given the dynamics of the circumstances. But again, I reserve judgment. This isn't for me to say anybody's right or wrong.

So your approach is not like a, I've heard some retired judges say, okay, well, this is how I would decide the case, so why don't you all go along with that? Your approach is much different from that.

It is much different, and what I try and do is give them a sense of reality, both for them personally as well as how the court is likely to handle this situation. We don't know for sure what any judge is going to do. And trust and estate disputes are almost exclusively court trials, so you've got a judge who's going to be making a decision. But one of the things I do is, and I did this actually just in a mediation yesterday, is talk to a man about how this was interfering with his life. This is a man who's in his late 80s, and if the case didn't get resolved, it was going to be at least two years before there was finally a trial. And how does he want to spend his time in the last any number of years of his life? In that case, the money was not going to change his life one way or the other. He was a wealthy man and he was just going to get wealthier if he prevailed, but it certainly would interfere with the quality of his life. And so I talk about the realities of not only the case, but being a litigant, and what that experience may be like.

Was this pre-pandemic in person, or was this via Zoom, or how was this conducted?

Well, actually, this case was in person. Yesterday was also in person, when I mediated. I'm getting more requests for in-person mediations. I know some neutrals really only still want to work on Zoom, which I find absolutely excellent. I really enjoy the flexibility that you have with

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Zoom in terms of moving people in and out of breakout rooms. But I'm getting more requests for in-person mediations and I'm willing to do that.

And this particular one with Sarah and the two stepsons, this was an in-person mediation?

Yes.

And so the conversations that you had with counsel led you to believe, what? In terms of having people together, not together?

I almost never have joint sessions, it's very rare in my practice, either in person or in Zoom. I don't find that they're productive. The only times that I can recall having joint sessions is where there is an interest in, say, talking to a third-party expert. Let's say they're interested in selling real estate and they want to interview potential brokers, so bring everybody together. If it's in a Zoom session, get them on Zoom so they can answer all the questions, or if it's in person, get them on the phone. So a neutral person that's just trying to provide information.

So, in this particular case, you had to start with one of the parties you mentioned earlier that you had to listen to Sarah, and you anticipated getting her thoughts on this? Did you also anticipate and follow through with talking to the two brothers?

Oh, absolutely. So, let me tell you kind of what my intro is. I think that might be of interest in terms of the way I start each session. So the parties are in separate rooms, whether it's breakout or in person. And I provide information about my experience as both a litigator and a mediator, and also tell them my thoughts about why I believe mediation works. And here's what I tell them. That there's three reasons, the first being it avoids the risk and uncertainty of decisions being made by the person I refer to as the "Stranger in the Black Robe", the judge. What we know is, judges have their own life experience, their own biases, and you never know how they're going to view your circumstances. And that seems to really resonate with people.

The second reason is it really minimizes the expense, that oftentimes, the mediation is prior to all of the discovery, if any, being completed. Sometimes there hasn't even been a petition filed with the court yet, and they decide early on to go to mediation. And so, particularly in view of

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how inefficient the court process seems to be. You can save a considerable amount in fees if you can resolve it through mediation.

And lastly, they can get it done that day. So I tell them that my goal as the mediator is to end the session with the settlement agreement signed by the parties. I really try and avoid term sheets being done. So what I do in my pre-mediation call is I ask one of the lawyers to draft a settlement agreement, a pro forma settlement agreement that's got the recitals and the boilerplate. And all we have to do is plug in the terms of the agreement, and even that can take hours.

And having that actually injects a sense of optimism that, yeah, we're going to do this.

I tell them that I am the eternal optimist because I see how things change over the course of the day, right? And it may look hopeless at 2 o'clock in the afternoon and all of a sudden by 4:30, we're really close.

Great.

And the other thing and we can talk about it is mediator proposals.

Okay, well, we're going to take a break now, and when we get back. What we'll be talking about is what happened at the session and how the obstacles were overcome. Okay, so this is Len Levy. I'm talking with Bette Epstein on Masters of Dispute Resolution.

We hope you're enjoying another fascinating episode of Masters of Dispute resolution. Has the show ever made you think about becoming a mediator or doing the work these experts are discussing? Are you thinking about it now? Imagine a career where you're working to help people in conflict find movement solutions. The sense of purpose you'll feel can easily be heard in the voices of our guests on the show and its host, expert mediator Len Levy. Or maybe you're a mediator already and you're looking to add your toolbox and pull off some of the brilliant out-of-the-box solutions these guests are talking about? That's where we come in, we're the American Institute of Mediation, we train mediators of all levels. We're the place you want to come to learn the basics of mediation or to raise your game in the field. Our slogan is "World

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Thank you for listening to Masters of Dispute Resolution, and joining us today is Bette Epstein. I'm Len Levy. We are now going to get into what happened at the mediation. What obstacles did Bette have to overcome? What were the solutions that were reached? Bette, take it away.

I heard from both sides what their concerns were, keeping in mind that Sarah wanted a neutral private professional fiduciary to take over management of the trust. In speaking to the sons about that, their biggest concern was that person would be sympathetic to their stepmother and would distribute more principal than they thought was appropriate. We talked about if they wouldn't go along with what she was seeking, what the alternatives were. We talked about whether they would agree to go back and really take a closer look at her lifestyle and set up a budget and a schedule for distribution to her. Also, to make sure that there was money available at the end of the day to meet their needs. In talking with Sarah, of course, she was not wanting to continue to be in this business relationship with her stepsons. In her mind, it was not working at all. So, sometimes the mediators come up with good ideas.

I've heard about that.

What I explored with both sides is the opportunity to terminate this trust. There is a formula that's readily available to determine the percentage interest of the life beneficiary versus the remainder beneficiaries. And it's based on the interest rate at the Internal Revenue Code Section 7520 and life expectancy tables. What we went through and looked at that formula. And at Sarah's age of then 70, her interest in the trust would be approximately 60% and the sons' interest 40%. So, we explored if the assets could be divided accordingly. What that would mean for them is they didn't have to wait until she died to get any benefit out of this trust. What we know is money now is better than money later, so that they could then invest it as they see fit. They agreed that they wanted to use this approach.

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And then the issue was determining the value of the house that needed to be appraised. They knew how much the account was worth, but figure out how to give her the house, which is what she really wanted, she'd been there now for 20 years, and some cash, she could always borrow against the house, she could sell the house. She would have complete flexibility as to what she wanted to do with the residence, and also income from the investments. Or she could just use the investments to meet her needs. That was the general approach to resolving this dispute.

The stepsons had no problem with that?

They're going to want to make the house a higher value so that she gets more house and less securities. But, in this case, what we did was we suspended the mediation to arrange for an appraisal and to see if the lawyers could negotiate how the assets would be split. It was going to take a court order, they would petition the court for approval of the agreement. And then either reconvene for another session if the lawyers couldn't sort this out on their own. There's always one last thing to argue about, I can't go without mentioning that when all else fails, you can argue about tangible personal property. The sons did raise the issue of where was their father's watch, where was his military memorabilia, where were the family photos that they had never received? All those kinds of things.

Oh boy. How long did it take to work out those kinds of things?

It actually worked out in pretty short order. Because once she realized she was going to get the house and some other assets on her own, with never having to see them again, she gladly gave up any of the tangible personal property that they wanted, they wanted some furniture, they wanted his chair, whatever they wanted was fine.

That's great, the interest-based approach that you took and satisfying everyone's interest, and coming up with a creative solution, which, I will tell you, is born of a great deal of experience on your part. Not every mediator is going to come up with solutions that specific and that effective.

Well, thank you. I try and look at what all the alternatives are, and just because someone's filed a petition doesn't mean that's the answer to the problem. Some lawyers are better at creative

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thinking. But oftentimes, the resolution is something very different from what a court might do if it was put to the judge to make a decision.

Well, the judge is, correct me if I'm wrong, but the judge's decision is going to be based not on satisfying people's interests, as much as what does the law say I should do?

Exactly. And it's going to be either grant a petition or deny it, right, okay? Although some judges, I might say, experienced probate judges, sometimes may raise the issue, have you considered alternatives before rendering a decision?

An experienced probate judge might also think about what the options are, other than what's directly put before them.

Did the attorneys in this case help or hinder?

Well, part of the problem was one of the attorneys was very seasoned and sophisticated. And the sons' attorney was a relatively young, inexperienced attorney. And so he needed to be educated, and so it took some time for him to get a grasp of this concept.

So one of the educators in this case would be you, correct?

I can help, yes. And I encouraged him if there was someone in his office or another professional colleague that he needed to talk to, to confirm that this was appropriate, that he do so. But do it then, let's not wait, go take an hour, make some calls. Consult with people who you respect. Because I think it's important that the lawyer is comfortable in giving advice to his or her counsel that this is an appropriate course of action.

Right. And the idea of making certain that, if you're an attorney representing a party, that you have the answers or the means of acquiring those answers going into a mediation. In other words, as Clint Eastwood said once, man's got to know his limitations, right?

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Yes, yes. And I find that, unfortunately, lawyers haven't done their homework and they don't have all the information that would be appropriate to really address all of the issues. And they come to mediations not as prepared as I would like them to be.

And what about the sharing of information? Because one of the things that a hallmark, so to speak, of someone inexperienced is, I don't know if I should share that with the other side.

Right, right, and I encourage sharing. I encourage that mediation briefs be shared. It isn't always done, or at least parts of the brief be shared so that you're educating the other side. But one of the reasons that mediations work is with its confidential nature, I think the parties are more inclined to be forthcoming and share what information they have that might not come out otherwise. I mean, presumably whatever information is there is going to come out in discovery if you ask the right questions. But I think people do feel some protection with the mediation privilege, that if the case doesn't settle, it's not going to come back to hurt them.

Right? And as far as the result of this mediation, it seems to me, and just my philosophy is, you can settle a lawsuit, or you can settle a lawsuit and end a conflict. And in this particular case, your solution, which was born of a great deal of experience, not only settled the lawsuit, but resolved the conflict.

Exactly. What was clear from both sides is they did not want to be in business together. And they were in business together involuntarily. So the idea of not having to deal with each other ever again, I think, had a lot of appeal on both sides.

So the mediation went from a gosh, you might outlive us, which is going to cost us money, to oh yeah, we can actually get something out of this and not have to deal with this situation ever again.

Exactly.

I will tell you that in terms of solutions, it sounds like you hit upon the exact right solution for this situation. Is there anything else that an attorney or these attorneys should have done that

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would have made things easier or should not have done, which posed to be an impediment at all?

Well, I think if one of them had come up with this solution earlier, even as part of their mediation brief, saying Here's something to consider. It would have taken less time to get through this process. And sometimes attorneys, I think, too much black and white here. I've got a petition, I'm seeking this relief, and this is what I want, or I'm opposing this petition, and no matter what, I don't want the court to order that relief. I mean, her approach in seeking a professional fiduciary, oftentimes, is the right approach, if everybody can agree, because they serve, professional fiduciaries serve a great purpose.

Well, one of the things, Bette, that you have illustrated here to me is the idea that a negotiation does not have to be a competitive type of approach. Negotiations can be problem-solving, and your approach to this mediation, and pretty much I think your approach generally as a mediator, is problem-solving.

Absolutely,

Let's help people solve their problems.

Absolutely. I mean, these people are oftentimes they're grieving the loss of a family member. Typically, and oftentimes, what I hear is I haven't even had time to grieve, because they're engaged in litigation and they want to get on with their lives.

Right.

And so it does require solving the problem in a way that everybody can live with the resolution and then move on.

Bette, thank you for solving this problem and sharing it with us. And before we break, how would people get in contact with you to book you for a mediation?

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So a couple of ways. I'm at ADR Services, and so you can log on to ADR Services and my email address is bepstein@adrservices. Also, I have a website that's www.betteepstein.com, and it's Bette, B-e-t-t-e, epstein.com. And so that gives some information about my background. Thank you so much for this conversation and I hope I can have you back as a guest.

It would be my pleasure. Thank you Len.

Thank you and thank you Darrell Wayne, my engineer and producer. I'm your host, Len Levy. And this is Masters of Dispute Resolution on podclips.io, Powered by Infogen Labs, Inc. I hope you will continue to enjoy the stories we bring you and in the meantime, stay well, keep listening, and remember, peace of mind is enhanced when conflicts are resolved.

If you wish to contact Len Levy, you can reach him through his email at lslevy@adrservices.com, through Len's website, lenlevymediate.com, telephone him at 818-903-5562, or contact his case manager at ADR Services, 213-683-1600.

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